



Military Law Review

THE TWENTIETH ANNUAL KENNETH J. HODSON
LECTURE: MILITARY JUSTICE FOR THE
1990's — A LEGAL SYSTEM LOOKING
FOR RESPECT

David A. Schlueter

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BOOK REVIEWS

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MILITARY LAW REVIEW

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THE TWENTIETH ANNUAL KENNETH J. HODSON LECTURE: MILITARY JUSTICE FOR THE 1990'S— A LEGAL SYSTEM LOOKING FOR RESPECT

by David A. Schlueter
Professor of Law, St. Mary's University

The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on June 24, 1971. The chair was named after Major General Hodson, who served as The Judge Advocate General from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty. During that time, he was active in the American and Federal Bar Associations, and he authored much of the military justice legislation existing today. He was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Corps.

On March 28, 1991, Professor Schlueter delivered the twentieth Kenneth J. Hodson lecture. Professor Schlueter received his B.A. from Texas A & M University in 1969, his J.D. from Baylor University School of Law in 1971, and an LL.M. from the University of Virginia School of Law in 1981. He served on active duty as a judge advocate from 1972 to 1981. Professor Schlueter is a Lieutenant Colonel in the United States Army Reserve and is an individual mobilization augmentee to The Judge Advocate General's School. He has published numerous books and law review articles on criminal law topics, and is currently the Reporter for the Federal Rules Advisory Committee on the Rules of Criminal Procedure. In addition, Professor Schlueter has held several prominent positions in professional legal organizations and currently is the Chairman of the ABA Standing Committee on Military Law.

I. INTRODUCTION

It is a double honor to be this year's Hodson lecturer. First, I have the highest regard for General Hodson. I always have respected General Hodson and his contributions to the JAG Corps and the legal profession in general. As some of you may be aware, he has been

very active in the American Bar Association. I regret that he is not able to be with us today. Second, being here today brings back pleasant and warm memories. In many ways the School is my second home, and it is always good to be back among friends.

In some respects I have been preparing my remarks for this occasion for almost twenty years. In the process of writing and talking about military justice, I have had numerous opportunities to think about, or as Justice Holmes wrote, “brood” about the law. Events such as the annual Hodson Lecture are good for the system because they provide an opportunity to step aside from the everyday hustle and bustle of the practice of law, and to think for a moment about the larger picture. Today, that larger picture is “Military Justice for the 1990’s” and its search for a little respect.

I have the highest respect for the military justice system. In my view, it has many features that should be adopted by the civilian criminal justice system. For example, features such as broad criminal discovery, speedy trial provisions, and worldwide access to witnesses and counsel have led people like F. Lee Bailey, a noted criminal defense lawyer, to observe the value and benefits of military justice.

But the object of my time with you this morning is not to praise the military justice system. I am sure you already know that the system is sound. Rather, I would like to discuss with you what seems to me to be a lack of respect for the system by the public and the legal profession generally.

Because I have high regard for the system, and because it has been a large part of my legal career, I am disturbed when I hear from those who have no respect for the system.

How much have you heard about military justice from those outside the system? I know that my exposure to the criticisms of military justice was extremely limited in the early years of my service on active duty. I was too wrapped up in the day-to-day grind of writing appellate briefs, post-trial reviews, and trying cases to really spend too much time thinking about the system. My first real exposure was in my third year on active duty when I heard that a writer had compared military justice to military music. At about the same time I became aware that my staff judge advocate at Fort Belvoir, Lieutenant Colonel Robert Poydasheff, was co-authoring an article with Lieutenant Colonel Bill Suter for the Tulane Law Review on the merits of the military justice system.⁴

⁴Poydasheff & Suter, *Military Justice?—Definitely!*, 49 Tul. L. Rev. 588 (1975).

My perspective is broader now and is based not only upon my years of active duty in the Judge Advocate General's Corps, but also on my experiences as a civilian who has talked with many individuals over the last twenty years about military justice. I have had countless contacts with the media, military personnel, law students, and ordinary citizens—including my barber, who asked me the other day whether I thought the military justice system was fair.

11. LOOKING FOR RESPECT: NEGATIVE SOUND BITES

A. IN GENERAL

In the process of working within the system, several attempts have been made to increase the stature and prestige of the military justice system. For example, some have suggested that the names of the military appellate courts be changed to the Army, Air Force, and Navy Court of (Military) Appeals. This change is an attempt to increase the stature of military appellate courts. In the case of the United States Court of Military Appeals, some have suggested that it be changed from an article I to an article III court. Indeed, a few years ago the name of the Court of Military Appeals was changed by Congress by adding the words "United States" to make it clear that it was a federal court and not simply a military court of appeals.

Why the search for respect? For increased prestige? In part, it is an attempt to overcome the negative image that sometimes is attached to military justice. You are no doubt aware of the use of what have become known as "sound bites," media jargon for those short, pithy, and catchy phrases that will stick with the public—those phrases that seem to say it all.

Consider the following examples of bites regarding military justice. Perhaps you have heard some of them:

"Military justice is to justice as military music is to music."²

"Courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."³

²J. Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970). Mr. Sherrill presents a highly critical view of military justice. The title is a quote from Clemeceau.

³*O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (determining that only service-connected offenses were subject to court-martial jurisdiction).

“The court-martial is not yet an independent instrument of justice.”⁴

“Military justice is an oxymoron.”⁵

“Military Tribunals have not been and probably never can be constituted in such a way that they have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”⁶

Is this the same military justice system that I have been connected with for almost twenty years and the system that you have been studying? Note that these negative bites or criticisms are about a worldwide legal system that affects directly and indirectly literally millions of United States citizens. True, there are negative impressions about civilian criminal justice systems as well. My sense, however, is that they do not run as deep as those associated with military justice.

B. IDENTIFYING THE CRITICS

Who are the critics and why are they saying negative things about military justice? Perhaps we could cut this presentation short by simply dismissing the negative sound bites as those of individuals who have no knowledge about justice generally or have nothing good to say about any system of criminal justice. Perhaps they are only quotes from a bitter parent upon learning that a son or daughter has been sentenced to prison for not following what was obviously an illegal order or for being just a little late for chow. No such luck. They are statements by commentators who have read the cases, by counsel who have worked within the system, and yes, they include statements by Supreme Court justices.

C. BREADTH OF THE CRITICISM

The true depth and breadth of the “negative bites” is unknown. As far as I know, no recent national surveys have been conducted among the citizenry about their perceptions or feelings about military justice. Nevertheless, I do feel safe in believing that a broad cross-section of intelligent people either know very little about military justice or, if they do know something about the system, they believe

⁴*Id.*

⁵Spak, *Military Justice: The Oxymoron of the 1980's*, 20 Cal. W.L. Rev. 436 (1984).

⁶*Toth v. Quarles*, 350 U.S. 11, 17 (1955).

that it is still in the dark ages, void of any full legal recognition, and certainly not deserving of a full membership in the family of enlightened jurisprudence. Clearly, it does not deserve “respect.”

D. REASONS FOR THE CRITICISM

1. In General

Why the negative bites? Why the criticism? What has the military justice system done or failed to do that evokes such criticism? I believe a number of possible reasons exist for the negative impressions that many people have about military justice. Rightly or wrongly, they believe the system is unfair and inept. Some of these reasons overlap and are not the result of any poll or survey. Rather, they are the observations of one who has played on the field from time to time and has sat next to the fans in the stands to hear what they have to say about how the game is being played.

2. Reason One: Lack of Information

Even the best intentioned individuals do not have all the information. This is perhaps the easiest to address because many people simply have no reason to come in contact with military justice. Presumably, once these individuals have accurate information about the system, they will be less likely to criticize it summarily.

3. Reason Two: Reliance on Old Data

Some misconceptions and criticisms are based upon outdated information about the way it once was—the days when a convening authority could order a court-martial to reconsider its sentence with the hope of raising the punishment, the days when a single counsel served as both prosecutor and defense counsel, the days when the prosecutor and the defense counsel both worked for the same person, the days when judges were not present in the courtroom and the president of the court-martial was the presiding officer. As noted by Judge Cox of the Court of Military Appeals, the military justice system has evolved a great deal since that time.⁷ Judge Kenneth Ripple, a former Navy JAGC officer who now sits on the Federal Court of Appeals for the Seventh Circuit, believes that military justice is a more “mature” system of justice.”

⁷See Cox, *The Army, The Courts, and the Constitution: Evolution of Military Justice*, 118 Mil. L. Rev. 1, 18 (1987).

“Ripple, *Foreword* to D. Schlueter, *Military Criminal Justice: Practice and Procedure* at xxiii (2d ed. 1987) (“A new maturity has come to military law”).

My first real exposure to the historical and changing roots of military justice began in a legal history course offered at the University of Virginia in the late 70's when, in fulfillment of a paper requirement, I worked my way through yellowed leaves of old codes and old treatises on military justice. I was impressed with several aspects. First, despite the fact that some features have not changed, many aspects of military justice had changed dramatically. Second, the element of "due process" had continued to expand in the military setting, and in some cases set the pace for like changes in the civilian setting.

The "unification" of military justice in the 1951 Uniform Code of Military Justice, which replaced the Articles of War, was clearly a major step forward. In the 1960's, through the efforts of individuals such as General Hodson, the system was "judicialized" by the addition of judges in the courtroom. Decisions of the Court of Military Appeals in the 1970's continued to strengthen the role of the judge. The 1980's brought what some have termed the "civilianization of military justice"—with the 1983 Military Justice Act and the 1984 Manual for Courts-Martial. Now, we might be entering a period of what I call the "legitimization" of military justice.

The system has changed—it has been improved upon in the sense that the system is fairer. Checks have been provided to ensure fairer and more just results. For many, however, the system used in the late 60's, especially in Vietnam, is the system they remember—and detest.

4. Reason Three: Relying on False Data or Assumptions

Some critics simply do not have any real frame of reference to military justice. They know only what they see on television or read in the papers. For example, consider a recent episode of the popular TV series, "LA Law."

A young Army officer was charged with disobeying an order to fire an artillery barrage on some buildings during the invasion of Panama. His reason for not firing was that he had seen civilians in the area. One of the law firm's lawyers was asked to represent him. When he was asked why he simply did not use the services of his military defense counsel, he said something to the effect that his lawyer was good, but, ". . . he wore a green uniform"—the implication being that only a civilian lawyer could see that justice was done. He was convicted and received a heavy sentence.

Without belaboring the legal points, the scenario contained several

inaccuracies, and the public was left with an incomplete and misleading picture of military justice.

5. Reason Four: The Experience Factor

Some of the critics of military justice have been involved with the system. Recently, the following letter appeared on the editorial page of the San Antonio Light, in a city where the military generally is held in high regard:

*Nothing Mitigates Punishment
in Military Justice Systemz*

Regarding the trial and sentencing of Sgt Meeks: My heart goes out to him and to his family. In July 1988, I was in the same spot. Military justice is an oxymoron—there is no justice. Once you are identified as an offender, absolutely nothing will deter the military law office from doing what it wants to do. It does not matter how good a person you are, how well you performed, the qualities of your job skills, or the number of letters of recommendation (or who wrote them). They do not care about your family circumstances.

Appeals and clemency appeals are your right but commanders and courts will not alter one thing. Why? the military law center continues to oppose you. They brand everything you say as a lie. Whatever they recommend is always approved by the commander because he will riot, does not, or cannot take the time to personally give the matter proper consideration.

But there is life after the service as long as you don't let it get you down.

RONALD TAYLOR
San Antonio⁹

As the Air Force Court of Military Review recently observed, "No man goes to the gallows with a good impression of the law."¹⁰ Clearly, that young man does not have a good impression of military justice. Whether he is right or wrong is irrelevant. Anyone reading that letter to the editor was exposed to military justice for one brief "negative bite" moment.

⁹San Antonio Light, Mar. 21, 1991, at B6.

¹⁰United States v. Sloan, 30 M.J. 741, 748 (A.F.C.M.R. 1990) (quoting an 18th Century commentator on the English justice system).

6. Reason Five: *The Rub-Off Factor*

Some critics approach military justice with the attitude that if it belongs to, or is run by, the military then it must to be unfair. “Isn’t this the same system that serves SOS and MREs?” “Military justice. Isn’t that the system run by folks with military minds?” “Isn’t that the system that discriminates against homosexuals?” You get the picture. I have no doubt that the negative feelings toward the military that resulted from Vietnam had a direct impact on the public’s perception of military justice. Perhaps the recent military successes in the Middle East, which have enhanced the public’s view of the military in general, also will benefit military justice.

7. Reason Six: *The Other Alternative*

Another possibility exists. Perhaps there is some truth in what the critics see and what they say. In day-to-day JAG Corps life, it is easy to become complacent, to fail to see the forest because of the trees. We are doing what a former JAG urged us to do: “Just cut the wood that is put in front of you.” It was mentioned in the context of not worrying about getting the right assignments, working for the right people, etc. But while you are cutting the wood, it is important to examine it, to measure it, to test its worth.

11. RESPONSES TO THE CRITICISMS: CLOSE SCRUTINY

A. *IN GENERAL*

There is a simple saying that when you are right, ignore the criticism. When you are wrong, listen to the criticism. Let us assume, for the purposes of argument, that some of the criticisms of the military justice system are valid. That is, if the critics are right, what should our response be?

These are not purely questions of academics. They are pragmatic questions, and any suggested solutions should have utility. Changes should not be made simply for the sake of change. Nor should changes be made simply to silence the critics, or to increase or decrease the conviction rate.

I have high regard for military justice. In my view, its benefits greatly outweigh whatever faults it may possess. Although one commen-

tator has labelled me as a “defender” of military justice,” I always have assumed that the military justice system is not perfect, that there is room for change—for improvement. I also have assumed that listening to, and thinking about, the “negative bites” is the first step to improving the system. For example, I often have pondered about what led Justice Douglas in 1960 to write that military courts are singularly inept at dealing with constitutional questions.

B. WHY LISTEN TO THE CRITICS?

Why should the military justice system pay any attention to what the critics say? Is not the system currently providing ample due process? These questions were put to me several years ago by a military judge in an audience I was addressing. Why should we care? Why should we in the military care about what a federal district judge sitting in Minnesota or Texas thinks about military justice? Let me offer several reasons why the critics may deserve our ear.

1. Always Subject to Scrutiny: Someone Will Listen

First, even assuming the system is separate, it is always subject to scrutiny—either internally or externally—in Congress, in the media, or perhaps even in a federal court. It is important to remember that the greatest time of change in the military justice system usually has occurred immediately following a major war or conflict. This was particularly true after World War I, World War II, and to some extent during and after Vietnam. Granted, the federal courts today are for the most part extremely deferential on military justice matters—probably due in large part to the fact that the services are composed of voluntary enlistees. But I become concerned when I hear individuals within the system register utter disdain for civilian control of the system and suggest that civilian courts have no business second-guessing military justice. Like it or not, the system is constantly subject to scrutiny.

2. Not Entirely Separate From Society

Second, although the military justice system is a “separate system of justice,” it is not entirely separate from the rest of society. It is ultimately accountable to the civilian community—not simply civilian legal review. The recent war in the Gulf pointed that out. The armed forces consist of many citizen service members—mothers, fathers, and children. That is particularly true of the reservists and National

¹¹Spak, *supra* note 5, at 464 n.179.

Guard members. One day they were plowing fields, pulling teeth, or teaching classes, and the next day they were stuck in a desert far from home. They all have a potential interest in the military justice system, and it seems appropriate that the public have confidence in the system. Many of you are, or will be, active within the civilian community as Little League coaches, PTA officers, leaders in your religious organization, or members of the local bar associations. You are not entirely separate from society simply because you wear a uniform.

3. It Is the Right Thing to Do

Third, like eating oatmeal, it is the right thing to do. Criticisms should not be ignored simply because they irritate or annoy us. If we are wrong, then we should listen. Those participating in any legal system have a professional and moral responsibility for policing the system. Those who are within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be “proactive,” not simply “reactive.”

111. FEATURES OF MILITARY JUSTICE THAT DESERVE SCRUTINY

Assuming that we decide to heed at least some of the criticisms, where would we begin? What is a legitimate problem or issue? A number of features of the system seem most vulnerable. They are as follows:

- A. The Purpose of Military Justice
- B. The Concept of “Military Due Process”
- C. Constitutional Protections
- D. The Role of the Commander
- E. The Role of the Military Judiciary
- F. An Independent Court of Military Appeals
- G. The Role of the Legal Profession

These points are listed in no particular order or hierarchy. Although other issues may be equally important, these should serve as a good starting point.

A. THE PURPOSE OF MILITARY JUSTICE: JUSTICE OR DISCIPLINE?

In its earliest forms, the military justice system was designed to

be an instrument of discipline. Military leaders could count on the system to enforce the articles of war and their personal orders. The system was at times rough by contemporary standards of due process. It would be difficult to say that, in its early forms, the military justice system was an “independent” tool of justice—that is, a system designed to determine if a person was guilty of a particular crime.

The debate over the two concepts has continued for years and will certainly not be resolved by anything said here. I do not see the two terms as being inconsistent. There should be no doubt, however, that if military justice is to be viewed as a legitimate system of criminal justice in today’s society, it must be viewed primarily as a tool of justice.

Consider the following excerpt from a report made thirty years ago, the 1960 Powell Report—a study of the military justice system by high-ranking Army officers in a report to the Secretary of the Army on the status of the UCMJ:

Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.

Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.¹²

This excerpt from the report represents a sound balance. The distinctions between “justice” and “discipline” are subtle, but crucial to whatever follows.

It seems to me that at the heart of the controversy is this ques-

¹²The Powell Report, at 11, 12 (1960).

tion: What is the purpose of the military justice system? In any given case either “justice” or “discipline” may rise to the surface as the predominant feature.

Consider the hypothetical case of Private Doakes, who is charged with possession of drugs. What is the purpose of his court-martial? What impact would his conviction and sentence have on his unit? What impact would an acquittal have on his unit? On the installation? On the armed forces? Would your answers change if he was charged with willful disobedience of his commanding officer’s order, inciting a riot, throwing butter on the mess hall ceiling, shouting insults at his first sergeant, refusing to board a plane for Saudi Arabia, or child abuse? For the most part, all of these crimes potentially affect “discipline.” In some of the charges, however, that would be less apparent.

Left unchecked, those crimes also would affect the community in which Doakes lived, but in varying degrees. If Doakes is punished for crimes involving drugs, his punishment probably will be viewed the same way as in a civilian community. “Don’t do drugs.” The same would be true for child abuse. But what about the purely military crimes, such as willful disobedience of an order? Does the military justice system work in the same way? Does it have the same effect? Perhaps. In that case, the trial of Doakes by a court-martial takes on an air of discipline because the commander’s very authority to command the respect and obedience of the troops is at stake.

From a civilian perspective, using the court-martial to try military offenses is an entirely different creature. While the community very well might rally around the prosecution of a child abuser or drug kingpin, I doubt that you will see the same support behind the prosecution of a soldier who will not soldier, is charged with AWOL, or fails to show up for morning formation.

Using the same system to meet often competing goals raises problems of interpretation and perspective. Perhaps the answers lie in separating those crimes that are purely disciplinary from those that are what we ordinarily refer to as “common-law” crimes. The military justice system always has lumped them all together because of the need or desire to handle all justice problems within a single system. I am not suggesting that any changes be made in what crimes are triable by the court-martial. The system is worldwide and, in some instances, military justice is literally the only law west of the proverbial Pecos river.

If “discipline” is viewed as the final end-all for military justice, the stereotypes will live on. As long as discipline even is listed as a goal or purpose for military justice, there is a risk that the stereotype will live on. The risk exists that if the ends are something other than “justice,” those participating in the system will view it as nothing more than a rubber stamp for the commander. It is even more troubling, however, if the community views the commander as the rubber stamp for a legal system that gives the appearance of simply serving the needs of discipline.

B. THE CONCEPT OF “MILITARY DUE PROCESS”

1. Due Process Generally

The topic of “due process” is mentioned in both the fifth and the fourteenth amendments: “No person shall be deprived of life or liberty without due process of law.” In the criminal context, it requires that the right person be accused, that the right procedures be used, and that the punishment is right. The concept of due process is fluid and is more akin to a balancing test: Balancing the rights of those accused, the interests of the public, and the relative costs of providing additional procedural safeguards.¹³

A hierarchy exists for applying due process.¹⁴ At the bottom is the United States Constitution, which provides the foundation. Generally, an accused is entitled to whatever procedural and substantive rights the Constitution requires. In the civilian community, no jurisdiction may provide less than mandated by the Constitution. That rule, as I will point out in a minute, does not necessarily apply in the military justice system. In addition to those derived from the Constitution, rights are provided by statute, the Manual for Courts-Martial, and service regulations.

A similar template is used in state courts. The state constitutions and statutes may provide greater protections than those found in the United States Constitution.

2. Origin of the Term “Military Lhte Process”

So what is this term “military due process” and where did it come from? The term has been around for some time in military case law,

¹³Illinois v. Batchelder, 463 U.S. 1112, 1117 (1983)

¹⁴D. Schlueter, *supra* note 8, § 1-1(B).

but it fades in and out of everyday use.¹⁵ Generally, it means due process composed of, not only the constitutional protections, but also statutory and regulatory features that provide guidance on how the military justice system should work.

Recently it was used in an opinion by the Navy-Marine Corps Court of Military Review in concluding that intentional delays in notifying the accused of pending charges violated military due process.¹⁶ The court applied a two-part test: The accused must establish that Congress granted a fundamental right *and* that this right was denied during the course of the trial. The court apparently ignored the concept of fundamental fairness. In my view, that case just as easily could have been decided on grounds of lack of due process without referring to any congressional action or inaction.

3. *What Is the Problem? It Is Only a Term*

The term “military due process” seems relatively harmless. But it may be misleading to the extent that it connotes a form of due process that is somehow less than the process due to any defendant charged with a crime or a template different from the one outlined above. It is also problematic to the extent that it suggests that only rights granted by Congress are worthy of protection by the military courts. Because the term “Military Due Process” is potentially misleading, it should be dropped or used only after reading the proverbial warning label. Such a label might read as follows:

The term “Military Due Process” may be misleading and lead to incorrect results. Be sure to consult your copy of the Constitution, the Manual for Courts-Martial, and your Service Regulations.

Simply affixing a warning label to the term, however, will not solve the problem if the user does not believe the label or simply decides to disregard the danger signs.

¹⁵See Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225 (1961)

¹⁶See *United States v. Berrey*, 28 M.J. 714, 718 (N.M.C.M.R. 1989)

C. CONSTITUTIONAL PROTECTIONS

1. Do the Constitutional Protections Apply?

It is easy to forget that the military justice system as you see it today is in some ways a youngster in the legal systems of the world. Granted, the roots of the system of justice run back to the Roman empire, up through the common-law traditions of England, to our shores and our Constitution.¹⁷ But the system as we know it, with all of its due process protections, is relatively young.

It was not all that long ago that the debate swirled around the issue of whether, and to what extent, the Bill of Rights applied to the military justice system. For example, does the fourth amendment protection against unreasonable searches and seizures apply? If so to what extent? It was not until the **1970's** that the Court of Military Appeals ruled that a service member confined before trial was entitled under the fourth amendment to an independent review of the commander's decision ordering confinement.^{18*}

Most of the rights are now considered applicable. Long before the courts had decided that certain constitutional protections were available, the Congress had made such rights a part of the Articles of War and then later the Uniform Code of Military Justice.

Even now, the question remains. Even assuming the protections apply, do they apply with the same force and effect as they do to the civilian community? The Supreme Court and Court of Military Appeals have indicated that the protections of the Bill of Rights apply to persons in the military except to the extent that they are overridden by demands of "discipline and duty."¹⁹ Again, our answers are not purely academic. Without regard to what the Congress or the President says about the available due process protections, the Court of Military Appeals might very well make a constitutional issue out of it.

Although debate continues about the scope of protections provided by the fourth and fifth amendments, I would like to focus my comments on two particular rights that are found in civilian practice,

¹⁷D. Schlueter, *supra* note 8, §§ 1-4 to 1-6(c) (history of courts-martial).

¹⁸*See* Courtney v. Williams, **1 M.J. 267 (C.M.A. 1976)** (following Supreme Court's decision in *Gerstein v. Pugh*, **420 U.S. 103 (1975)**).

¹⁹*Id.* at **270** (quoting *Burns v. Wilson*, **346 U.S. 137, 140 (1953)**).

but not in military justice. They are the right to indictment by grand jury and the right to trial by jury. The first we can deal with summarily, the second requires a little more attention.

2. *Right to Indictment by Grand Jury*

Two rights that are conspicuously absent from the military justice system are the right to grand jury proceedings and the right to a jury trial. Both are considered essential elements of due process in the civilian community. Although their true utility and worth may be debated, they are part and parcel of American jurisprudence. Nevertheless, they are missing from military justice. Why?

In the case of indictment by grand jury, the fifth amendment explicitly exempts cases arising in the armed forces. The absence of this right is generally noncontroversial because, in some ways, the military's statutory article 32 pretrial investigation offers greater protections for the military defendant.²⁰ That is, article 32 offers the defendant the opportunity to discover the prosecution's case, the ability of the defendant and his or her counsel to be present at the hearing, the opportunity to present defense evidence, and the opportunity to cross-examine adverse witnesses.

3. *The Right to Jury Trial*

Another right guaranteed by the United States Constitution that is not applicable in courts-martial is the sixth amendment right to a jury trial. Consequently, an accused being tried by a special court-martial may appear before a court consisting only of three individuals. If the accused is being tried by a general court-martial, only five individuals are required for the court. In each of those instances, a verdict of guilty may be rendered on less than a unanimous vote.²¹

The Supreme Court in *Ballew v. Georgia*²² concluded that an accused is denied his sixth amendment right to jury trial when the jury is composed of less than six persons. In *Burch v. Louisiana*,²³ the Court held that if the jury consists of **six**, the verdict must be

²⁰Uniform Code of Military Justice, art. 32, 10 U.S.C. § 832 (1988) [hereinafter UCMJ].

²¹UCMJ art. 52(a)(1). A unanimous verdict is required before the court-martial may find an accused guilty of an offense for which the death penalty is a mandatory punishment.

²²435 U.S. 223 (1978).

²³441 U.S. 130 (1979). Nonunanimous findings are apparently permitted if the jury is composed of more than six persons.

unanimous. Nevertheless, the Supreme Court²⁴ and the military courts²⁵ have concluded that, because the sixth amendment right to jury trial does not apply to courts-martial, these cases are inapplicable. Both the Court of Military Appeals and the Supreme Court have declined to revisit the issue.

Central to the Court's conclusions in *Burch* was the fact that below a certain number of jurors, the ability of the jury to interact in a meaningful way—that is to bring out and discuss all of the pertinent issues and competing arguments—was greatly diminished. Is not the same true for military courts? At least one court has said no.²⁶

Are there compelling arguments for the current composition of courts-martial—five members in a general court-martial and three in a special court-martial, with only two-thirds majority needed for a conviction? Why are we different? In the 1774 Articles of War, thirteen members were required in general courts-martial, but in 1776 the number was reduced to five. The reduction apparently was based upon the problem of finding sufficient officers in the units to serve as court members. Probably, tradition has had much to do with the current numbers.

But a new tradition, if that term is appropriate, may be developing. I understand that it is fairly common at some locations for the convening authority to include more than five members on general courts-martial. That practice does not seem to cause any problems.

Notwithstanding the inaction of the Supreme Court and the Court of Military Appeals, why not amend the Uniform Code of Military Justice to require a minimum of six in general courts-martial.²⁷ In capital cases make it twelve. As I have noted, for all practical purposes, more than the jurisdictional minimum number of members are being appointed at some installations. Why not simply make the emerging “tradition” a part of the Code?

²⁴*O'Callahan v. Parker*, 395 U.S. 258, 261 (1969); *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957).

²⁵*See, e.g.*, *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973).

²⁶*United States v. Corl*, 6 M.J. 914 (N.M.C.M.R. 1979). Interestingly, the Navy court pointed out that the Supreme Court had relied upon data derived only from civilian sources, which had no probative value in the military context. *Id.*

²⁷Although I think similar reasoning could be used to support a court of six members for a “regular” special court-martial, the Supreme Court decisions would seem to support less than six members when the offense being tried was a “petty” offense. Because the jurisdictional limit of a regular special court-martial is six months of confinement, the requirement of only three officers for that court, and the sixth amendment guarantees of a right to trial by jury, are more in tune with each other.

The requirement of unanimity is another question. The reason usually given for not requiring unanimity is that it avoids the problem of a “hung jury.” I really doubt that in most cases that is a real problem. To be in harmony with the Supreme Court cases I mentioned earlier, any court consisting of six or less members should be required to reach a unanimous verdict. An intermediate solution would be to require a unanimous verdict, as it is currently required in capital cases, on both findings and sentence when the maximum allowable punishment on the charged offenses is above a certain minimum, such as ten years.

It seems that the sixth amendment requirement of the right to a jury trial could be applied much more liberally than it currently is without doing any great harm to the way in which the military operates. As I will note later, one of the real sticking points in military justice is, not only the composition of the court, but also the method of selecting members. A good start at tackling that overall problem would be to give very serious consideration, as a number of commentators have, to the issue of the size of the court-martial.

D. THE ROLE OF THE COMMANDER

1. The Eagle

In the hallway of the main lobby of this School hangs a picture of the head of an eagle, entitled simply “The Commander.” To me the picture symbolizes the bold leader, the fearless leader, the leader willing to take the troops to new heights of pride and esprit de corps. A symbol of freedom and liberty. To even suggest taking the commander—the eagle—out of the American military justice system sounds unpatriotic. That is probably why the most appropriate role of the commander in the military justice system is perhaps one of the toughest to address. The commander always has been at the heart of the military justice system, and to suggest removing the commander from the system, or to limit the role of the commander in any way, is viewed by some as a sure demise of the uniqueness of the system.²⁸

Yet over the years, the commander’s role has been diminished somewhat . . . and the system has survived. For example, when I first came in the Army, the lives of young JAGs were consumed with drafting lengthy “post-trial reviews” that basically were an entire rehash

²⁸See *United States v. Ralston*, 24 M.J. 709, 711 (A.C.M.R. 1987) (Appendix).

of the trial—a detailed summary of each witness’s testimony, presentation of legal issues, presentation of evidence favorable to the defendant, resolution of legal issues, and a recommendation from the SJA to the commander. The system reached the point at which form clearly was being elevated over substance.

In the Military Justice Act of 1983, those requirements were whittled down, largely because of the recognition that the posttrial review was primarily legal in nature and that lawyers could just as easily make some major decisions about the post-trial disposition of the case.

In 1983, another major change took place. The commander was no longer required to appoint the counsel or the judge to the court-martial. That task for a number of years had really been pro forma anyway.

2. *Selection of Court Members (Jury)*

One important change was not made in 1983; the commander still selects the members who sit on the court. That, in my view, continues to be a major problem area. Despite all the areas in which the defendant is granted more protections, the commander still picks the jury. No matter how you view it or label it, the commander picks the people who will decide whether the accused committed the offense and, if so, what the punishment should be.

In a concurring opinion in *United States v. Smith*,²⁹ a case addressing the process used to select the members for the accused’s court-martial, Judge Cox noted that those responsible for the process should reflect upon its importance as a “solemn and awesome responsibility.” The process of selecting members, he said, “is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack. A fair and impartial court-martial is the most fundamental protection that an accused servicemember has from unfounded or unprovable charges.”³⁰

Why do we still have the commander selecting the members of the court? Do not misread me. Commanders are picked for their integrity, their honor, and their respect for the law. They are the “eagle”—the nation’s **symbol**. I am intimately familiar with the argument

²⁹27 M.J. 242 (C.M.A. 1988).

³⁰*Id.* at 252.

(because I have used it myself) that the military “jury” is composed of top-notch people, most of them with college educations. I am aware that the commander is responsible for picking people who are mature and experienced. Despite those justifications for the present system, the selection process is subject to continual challenges. At a minimum, it looks bad. In legal parlance, the process can present an appearance of evil. The fact that the Supreme Court and the Court of Military Appeals have not ruled the process unconstitutional is no reason not to consider a revision seriously. If we were to apply a simple balancing test, would the benefit of the commander selecting the court outweigh the problems and the perceptions that it causes?

One alternative would be to go with some sort of random selection. Everything is now on computers and they have become a routine part of every legal office. The computer could be programmed to turn out a cross-section of officers and enlisted members based upon the language of article 25 and could be used to weed out those who are due to rotate assignments or those who are scheduled for TDY. I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member’s liberty and property interests are at stake.

Whatever system is used, the role of the prosecutor and the commander in the selection process should be reduced, if not eliminated. Whatever administrative problems there might be, it simply has to be better than responding to allegations of stacked juries.

3. *Composition of the Courts*

If there is any doubt where the civilian community gets the impression that military courts are less than the paradigm of impartiality, consider a sampling of cases in the last several years in which defense counsel successfully or unsuccessfully challenged a number of court members. Notwithstanding repeated statements to the effect that trial courts should grant challenges for cause liberally, the military courts generally have hesitated to overrule trial court rulings denying a wide range of challenges for cause. Consider the following sampling of cases in which such challenges were denied.

—Members who were given efficiency ratings by other members of the court.³¹

³¹United States v. Murphy, 26 M.J. 454, 455-56 (C.M.A. 1988)

- Members had been victims of multiple crimes.³²
- Member who had personal interest and professional interest in stopping bad checks sitting on a bad check case.³³
- Member who had extensive prior civilian experience as social services counselor appointed to child abuse case.³⁴
- Member who expressed abhorrence to sexual offense on child and acknowledged that his emotions would force him to be a little tougher on sentencing but that he could take cognizance of his emotions.³⁵

In the process of deciding these and many similar cases, the appellate courts have concluded that court members can rehabilitate themselves through proper answers to the inquiring trial judge. At least one court has indicated that the trial judge may use leading questions in questioning the challenged court member.³⁶ It should not be too difficult for any judge worth his or her salt to obtain a statement from the member that, despite some bias toward the accused or the crime, the member will keep an open mind about the case. The system should not put either the members or the trial judge in that position. These instances and others like them are, in my view, self-inflicted wounds. Cumulatively, they present the appearance of evil.³⁷ Put yourself in the position of the accused, the accused's family, and the public generally. What is their view of the composition of the court? What would your view be if you were the accused?

The problems associated with composition of courts-martial probably need no statutory solution if those responsible for the assisting in the selection process heed Judge Cox's admonition and take extraordinary efforts to select the most objective fact-finders available.

4. *Command Influence: The Mortal Enemy*

The one issue that poses the greatest threat to any attempt to in-

³²United States v. Smith, 25 M.J. 785, 788 (A.C.M.R. 1988).

³³United States v. Carns, 27 M.J. 820, 822 (A.C.M.R. 1988).

³⁴United States v. Towers, 24 M.J. 143, 146 (C.M.A. 1987).

³⁵United States v. Yardley, 24 M.J. 719, 723 (A.C.M.R. 1987).

³⁶United States v. Mayes, 28 M.J. 748, 752 (A.F.C.M.R. 1989).

³⁷United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). Incredibly, the convening authority appointed the provost marshal to the accused's court-martial, in which he served as the president. The court noted that doing this created the appearance of evil and that individuals assigned to police duties should not be appointed to courts. *Id.* at 760.

crease the respect of the public is the proverbial problem of unlawful command influence—what the Court of Military Appeals has labelled the “mortal enemy” of military justice. Whatever means are appropriate to stop it, whether that means developing a vaccine, quarantining it, or warehousing it, we must get it off the streets. It is no friend of the Corps nor of the system. It has caused more distrust and personal turmoil than any other issue facing those running the military justice system.

Do you know it when you see it? How will you know it? Will there be an official looking memo? How do you know that you have not become an unwitting victim of its snares? What should you do when you see it?

From my personal experience, I will tell you that the issue is not always open and obvious. For example, when I was an energetic young JAGC captain serving as the Chief of Military Justice at Fort Belvoir I realized that we often had problems communicating with the members who had been selected to serve on a court-martial. They would end up calling our office to find out all sorts of information about the approximate length of the trial, where they should go, or what uniform they should wear. At about that same time, a colleague at another installation told me about a little booklet of information that they had worked up giving all of that information. I liked the idea and approached my boss with it. He objected. He pointed out to me that it was good to try to simplify the process, but that real dangers lurked in presenting “advice” or information to the members. He was concerned that anything said to the members, especially by the prosecution side of the house, might be interpreted to reflect the convening authority’s views. He also pointed out to me that the booklet I had heard about contained a brief introduction by the convening authority on the solemn duties of being a court member. Was my boss overreacting? At the time I thought he might be. My motives were good. I simply wanted to make the system more efficient. But in looking back on that incident, it serves to remind me that no matter how innocent the briefing, the memo, or the little talk might be, trouble lurks.

For the next several years, we will all be keenly aware of the personal heartache and the sense of embarrassment that can befall even the best lawyers and the best intentioned commanders. But how many remember the name—or have even heard the name—of the Commanding General at Fort Leonard Wood whose actions decades ago gave rise to what we now know as the *DuBay* hearing, or any

of the myriad other commanders or officers who said or did something that resulted in a finding of unlawful command influence? Our institutional memories can be short, and in the process each generation of new JAGs must face the threat of unlawful command influence.

5. Should the Commander Be Removed From the System

I am not prepared to suggest that the commander—the eagle—should be removed totally from the system. My restraint is not based upon the fear of “civilianization” of military justice. Nor is my restraint grounded upon a belief that the commander is an indispensable element in military justice. Instead, I am restrained from suggesting complete removal because the military society—whether it be a post, camp, or station—is a “community.” Removing the commander totally from the processing of charges or the selection of court members would not necessarily stem the problem of the indignant commander who has just been informed that charges against the division’s drug lord have been dismissed on a “legal technicality.” Nor would it stem the problem of subordinate commanders saying or doing things that threaten the integrity of the court-martial.

It would be incorrect to blame the “commander” for all of the ills of command influence. If there is one clear lesson for us today, it is the responsibility of all those within the system, including lawyers, to do all that is within their power to ensure that the system exemplifies all that is right with justice in this country.

The process of scrutinizing the role of the commander must continue. The irony is that within the military, there exist the resources to combat virtually any problem that presents itself. Yet, the military cannot rid itself of this one menace.

It may be that unlawful command influence never will be eradicated and it may be that other methods will have to be found to contain it. The question is, how strongly do we feel about eradicating it? After all of these years, the Court of Military Appeals finally has taken a stronger stand on the subject, and that is bound to make some difference.

If the commander is to remain a key element in the military justice system, then what we say and do about maintaining the independence of those called upon to judge the actions of the commander takes on even greater significance.

E. THE ROLE OF THE MILITARY JUDICIARY

1. The Military Judge

If there is any hope of increasing respect for military justice it is absolutely essential that the trial and appellate judiciary continue to draw from the best and the brightest.³⁸ It is the judges who are most often called upon to sort through and decide the knotty issues, such as unlawful command influence. Trial judges are at the cutting edge of the law, as they are in civilian life. Judges sitting in the trial courtroom bear an awesome responsibility to see to it that justice is done. The courtroom is where the public sees military justice in action. The military judge, sitting in the predominant position in the courtroom, is the symbol of impartiality, not discipline; of justice, not discipline; of impartiality, not bias.

For a military appellate judge, it means writing the persuasive opinion that spells out why the defendant was or was not granted a fair trial. Appellate judges are not nearly as visible to the civilian community. But the task is just as important and vital. One feature that is often overlooked is that the military appellate courts have the authority to conduct an independent factual analysis. That gives them even more responsibility than that carried by their civilian counterparts who generally are required only to review questions of law.

2. Assignments and Tenure

I am aware that some have suggested that to maintain independence it is important to stabilize tours for military judges or grant some sort of tenure that ensures them that no matter how unpopular their decisions, they have some security. I am not sure that is workable, but I would be willing to consider it. Why would such a change even be necessary? To protect trial and appellate judges? Once you start down the slippery slope of protecting the players who are called upon to call the tough shots, where would we stop? The SJA who initially tells the three-star general that his regulation is unconstitutional because it is overbroad? The JAG who helped write

³⁸This is a delicate matter. In the military justice system, all of the players are important. But I am afraid that, all too often, the goal of military lawyers is to be the chief lawyer in a large office. In the Army, that means a corps or division SJA. What I am suggesting is that it is just as important to promote the idea that serving in the capacity of a trial or appellate judge is "career enhancing." This is not a legislative issue; instead, it is a management issue.

it, or unsuccessfully objected to it? The defense counsel who challenged it? The Court of Military Review that reviewed it? The answer in protecting these people from retribution lies, not in granting tenure, but rather in taking appropriate action against any lawyer or commander who attempts to interfere with a trial or appellate judge's independence. All must understand that military justice is not simply a formality for deciding when the accused gets on the train for the Disciplinary Barracks. Anyone who views it in that light is doing the system a disservice.

F. AN INDEPENDENT COURT OF MILITARY APPEALS

Several years ago, I served as the reporter for the committee that studied the Court of Military Appeals. The committee itself was composed of a number of distinguished individuals who had much to contribute to an in-depth analysis of what the court was about and how it could better perform the function it was originally designed to fulfill—civilian review of the military justice system.³⁹

Ironically, the committee was viewed by some as being a stacked deck—a handpicked committee that simply would endorse whatever the court wanted. Those of you who have read the report know that is not what happened. To the credit of Chief Judge Everett, the committee was composed of independent thinkers.

To say that the road the court has traveled since its formation in 1950 has been smooth would be to ignore the obvious. The road has been rough. From the outset, the court has been criticized, maligned, poked at, and probed. Some of its judges have contributed more than others; some of its opinions have not stood the test of time, while others have become part and parcel of military justice. Through it all, the court has strived to meet the congressional mandate for thorough, independent civilian review of courts-martial. As the committee concluded, it has done that.⁴⁰ The committee's suggested changes were set out in detail in the report that gained some attention in the media—especially the committee's suggestion that the court consider less travel in its plans.

One of the major issues addressed by the committee was the question of whether the court should be converted from an article I to

³⁹See 25 M.J. at XCIX (1987) (announcement of court appointing committee)

⁴⁰See 28 M.J. 99-102 (report of committee).

an article III court. The committee ultimately declined to take a final position on that question. Instead, it offered an alternative that would have the court remain as an article I court, with the appointed judges serving a term without years with retirement at age 70. The committee believed that the other recommendations should be in place first before the article III issue finally was decided.

Interestingly, the Department of Defense was opposed to any attempts to make the court an article III court. In an exhaustive study of the issue, the 1988 Department of Defense report on the status of the court included the following language:

Although Congress has stated its intent that COMA be a court in every sense of the word, COMA is not as fully independent as an Article III court. A COMA judge has no protection against salary reduction; does not have life tenure for good behavior; and can be removed by the President upon notice and hearing, for malfeasance in office, neglect or duty, or physical or mental disability. A sitting Chief Judge of COMA can be replaced; and COMA is still to a certain extent, dependent upon the Executive Branch for administrative support. The question which needs to be answered is whether any of these differences significantly impacts on COMA's ability to fulfil its judicial duties.⁴¹

... COMA is a limited court serving a limited need. Albeit different, COMA is not unique among Art. I courts. Like other Article I courts, COMA is not an independent instrument of justice. COMA is properly accountable to the Executive Branch, for it is the President as Commander in Chief who bears ultimate responsibility for the enforcement, through courts-martial of the congressionally-adopted rules and regulations governing the military forces.

...

... COMA is an integral part of the military justice system and should not be separate and apart from it. Care should be taken not to destroy the court's usefulness to the military judicial system.⁴²

⁴¹United States Court of Military Appeals Report, Jan. 27, 1989, at F-3

⁴²*Id.* at A-5, 6

A number of members on the committee observed that the more intransigent the Department of Defense became on the court's independence, the greater the argument for some separation from the Department of Defense—in much the same way that the federal courts finally were separated from the Department of Justice in 1939.⁴³

For now, the marriage between the court and the Department of Defense appears stable and wholesome. It has not always been so, however, and always lurking in the background is the specter of the court facing a difficult constitutional issue that challenges a key Department of Defense policy or regulation.

Why does the Department of Defense feel uncomfortable with the suggestion of greater independence for the Court of Military Appeals? Is there a concern that the court will run away with military justice and civilianize it? Or do they fear that inexperienced and anti-military judges will be appointed? These are not unreasonable concerns. But, even as we speak, federal judges across the nation are reviewing decisions by military authorities and, for the most part, they are being deferential to the military. Finally, there is always Congress, to which the court is in more ways accountable than to the Department of Defense or to the Executive. I have no doubt that a runaway court could be held in check by Congress.

Although I advocate greater independence for the court, I do not agree that the court should be the primary shaper or legislator of military justice. Most of you were not in the service in the 1970's when the "Fletcher Court," as we now call it, was churning out weekly revisions to the military justice system. If an aspect of military justice is unconstitutional, the court should have the authority to say so, although I never have favored a wholesale revision of military justice by any court acting as a super legislature.

Whatever is said or not said about the Court of Military Appeals, it is absolutely essential that it remain as independent as it possibly can be. The court should stand as the symbol of independent civilian review. That is what Congress intended when it created it in 1950.

G. THE ROLE OF THE LEGAL PROFESSION

How many of you have been asked—What do military lawyers do

⁴³One of the reasons for separating the administrative support of the federal courts from the Department of Justice was that one of the litigants appearing before those courts—the Department—had administrative control over those same courts.

for a living? The answer is that military lawyers make the military justice system work. They are the key to the success of the system. The system is only **as** good as the folks running it. I do not mean to ignore mention of the essential support staff— the legal clerks and administrators who make sure that the lawyers are working on the right file and that the record of trial is correctly assembled. For the critics, you represent the system. You are the lawyers. You are responsible for making it work well.

If the military justice system is to be respected, it is important that when we, **as** lawyers, “cut the wood placed in front of us,” we do it right. Many of the problems that I have addressed today are the result of human error. That is, the underlying statutes and regulations may have provided ample protection, but somewhere along the line an eager lawyer or commander, “cutting his or her pile of wood,” attempted to “cut” corners, “whittle” away the accused’s rights, or “stack” the court.

Other problems or issues I have discussed today are embedded in the system itself and will require lawyers to work out with fine surgical precision any changes in the system’s structure. Within a few short weeks some of you will be in a JAG office for the first time. Whether the system gets the respect it deserves will depend **as** much on you—who will be serving as trial or defense counsel—as it will on the shoulders of those here today who are in, or will be in, positions of leadership.

Aside from your duties as a JAG officer, it is important that you become involved in professional bar associations, such as the American Bar Association, the Federal Bar Association, or your state and local bar associations. In the process, you will present a positive image of military law and you **will** continue to learn about the civilian system. Write articles for civilian periodicals. Inform the public not only about what you do, but what military law is all about.

The key is to contribute. We sometimes ask our children, Are you part of the solution or are you part of the problem? Today I have raised suggested solutions to a wide variety of potential or real problems. But we must continue to ask ourselves: Are we being part of the problem, or are we part of the solution?

11. CONCLUSION

While there is no doubt in my mind that, at its core, the military justice system is an excellent model, it is important to discuss prob-

lem areas that deserve scrutiny. Some can be handled only through legislative efforts. Others can be addressed through slight, internal and informal changes in methodology. If the 1990's are to see any real change in the perception of military justice, some changes are needed. Quick fixes through name changes will not suffice. The system itself must be examined.

The goal of criminal justice always should be to ensure justice—not just convictions. The natural state of things is that the process will continue to evolve. But in that evolution, will military justice in the 1990's lag behind or pull ahead? With your help, it will become the best that it can be and receive the respect it deserves.

UNITED STATES COMPLIANCE WITH HUMANITARIAN LAW RESPECTING CIVILIANS DURING OPERATION JUST CAUSE

by Major John Embry Parkerson, Jr.*

I. INTRODUCTION

On December 20, 1989, United States military forces invaded Panama in "Operation Just Cause." Altogether, the operation included about 26,000 soldiers, sailors, airmen, and marines—the largest United States military combat operation since Vietnam.² The operation followed two years of unsuccessful United States efforts to oust General Manuel Noriega, the Panamanian dictator. Economic sanctions and diplomatic pressure failed, even after Noriega was indicted in United States federal court on drug trafficking charges.³ National elections were held in May 1989, and Noriega's candidate was defeated. The electoral victors, however, were crushed by a brute combination of iron pipes, rifle butts, imprisonment, and disappearance.⁴ In October, members of Noriega's own military launched an unsuccessful coup attempt to oust the dictator from power; reportedly, as many as seventy-five Panama Defense Force (PDF) soldiers were tortured and murdered in response.⁵ In mid-December, after Panama officially named Noriega its "maximum leader," he declared that a

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¹N.Y. Times, Dec. 20, 1989, at A1, col. 6.

²*Soldiers, Panama: Operation Just Cause*, Feb. 1990, at 20.

³See *id.*

⁴Wash. Post, May 9, 1989, at A1, col. 5.

⁵Wash. Post, Oct. 4, 1989, at A1, col. 4; Wash. Post, Oct. 5, 1989, at A1, col. 4 and A61, col. 1; Newsweek, *The Invasion of Panama*, Jan. 1, 1990, at 18.

“state of war” existed with the United States.⁶ The next day, December 16, PDF soldiers shot to death an off-duty United States Marine Corps officer, beat a Navy officer, and brutalized the Navy officer’s wife.⁷

President George Bush declared that Noriega’s “reckless threats and attacks upon Americans in Panama” had “created an imminent danger to the 35,000 American citizens in Panama.”⁸ As President, he was obligated “to safeguard the lives of American citizens.”⁹ The President, in a televised address to the American public, provided four political objectives for the military intervention: (1) to safeguard American interests and the lives of American citizens; (2) to defend democracy in Panama; (3) to bring General Manuel Noriega to justice; and (4) to protect the integrity of the Panama Canal treaties.¹⁰ As legal justification for the operation, the Administration cited the inherent right of self-defense found in Article 51 of the United Nations Charter and Article 21 of the Charter of the Organization of

⁶The action was taken by the National Assembly of Representatives, a 510-member body appointed by Noriega in October following the failed coup attempt. Its action was prompted by U.S. “aggression” and the economic sanctions in effect since 1988. Noriega, speaking to the body, declared: “We the Panamanian people will sit along the banks of the canal to watch the dead bodies of our enemies pass by.” Wash. Post, Dec. 16, 1989, at A21, col. 1; *see also* Wash. Post, Dec. 17, 1989, at A33, col. 6; Newsweek, *supra* note 5, at 18, 20.

⁷On Saturday night, December 16, four off-duty U.S. officers became lost while driving to a restaurant in Panama City. They were stopped at a PDF checkpoint. As an angry crowd gathered around the car, one PDF soldier opened a door and tried to drag out one of the Americans. The driver gunned the engine and, as the car pulled away, the Panamanians opened fire, gravely wounding Marine 1st Lt. Robert Paz. The lieutenant died soon afterward at a military hospital. Wash. Post, Dec. 18, 1989, at A1, col. 6, and A20, col. 4; Newsweek, *supra* note 5, at 20. A U.S. Navy lieutenant and his wife, who had been stopped at the same checkpoint about a half-hour before, witnessed the shooting. The PDF blindfolded the couple and took them to a location where they were interrogated for about four hours. The officer was beaten and threatened with death if he did not reveal information about his unit. The wife was shoved and threatened with rape, made to stand against a wall until she collapsed, and had her head slammed against the wall. Wash. Post, Dec. 18, 1989, at A20, col. 4; Newsweek, *supra* note 5, at 20.

⁸Statement by the President (Dec. 20, 1989) (Office of the Press Secretary, the White House). U.S. officials concluded that Noriega’s wild talk and his assertion that a state of war existed, plus constant PDF harassment and the incidents of December 16, added up to a strong circumstantial case for a threat to the lives of the 35,000 Americans living in Panama. *See* Wash. Post, Dec. 19, 1989, at A16, col. 4; Newsweek, *supra* note 5, at 21; *see also* Wash. Post, Dec. 18, 1989, at A20, col. 2, 3 (describing series of recent confrontations between PDF and U.S. forces since 1988). There also were reports just before the invasion that Noriega and Cuban military advisors had organized a 250-man urban commando unit specifically trained for terrorist assaults on American neighborhoods. Newsweek, *supra* note 5, at 21; N.Y. Times, Dec. 21, 1989, at A9, col. 5.

⁹Statement by the President (Dec. 20, 1989) (Office of the Press Secretary, the White House).

¹⁰N.Y. Times, Dec. 21, 1989, at A19, col. 1.

American States!’ The Administration also cited Article IV of the Panama Canal Treaty, which allows the United States to “protect and defend” the canal.¹²

The purpose of this article is not to examine the validity of the United States intervention in Panama under international law. Scholars, politicians, and others already have expended considerable effort attempting to address the validity issue. Some of the legal justifications advanced by the Bush Administration, such as safeguarding the lives of American citizens, are contentious grounds for armed intervention and continue to create much debate.¹³ The purpose of this article is to examine the difficult issues of “characterization” that an armed conflict like Operation Just Cause presents and, based upon that characterization, to determine which sets of humanitarian law norms apply to the conflict.

Various definitions help us understand precisely what is meant by the term “humanitarian law.” Jean Pictet, the prominent commen-

¹²Secretary of State James Baker relied on these provisions in a State Department briefing on December 20, 1989. N.Y. Times, Dec. 21, 1989, at A19, col. 3, 5. Baker stated that these provisions “entitle[] us to take measures necessary to defend our military personnel, our United States nationals and U.S. installations.” *Id.*; see *infra* note 13.

¹³N.Y. Times, Dec. 21, 1989, at A19, col. 3, 5. For a discussion of the validity of the Panama Canal Treaty assertion, see *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?*, 84 A.J.I.L. 494,500-01(1990) [hereinafter *Agora*]. The existence of a tangible threat to the canal is debatable, and the operation was not designed principally to protect the canal. The threat to the Panama Canal Treaties from U.S. congressional pressure to abrogate the agreements may have been more realistic. See Newsweek, *supra* note 5, at 21.

¹⁴See, e.g., *Agora*, *supra* note 12, at 494-524. In a three-way debate of the issue, Professor Nanda argued that “[t]he state of tension existing in Panama did not present an imminent danger to U.S. citizens.” *Id.* at 497. In his opinion, the tense situation failed to pass the tests of necessity or proportional response that are essential elements of the right of self-defense. *Id.* Professor Farer argued that the principle of necessity was violated. In his opinion, the growing insecurity of U.S. nationals resulted directly from U.S. efforts to remove Noriega. He deduced that the U.S. could have ended Noriega’s campaign of harassment by ending its campaign against Noriega. Therefore, there being a lesser means than intervention available for ending the threat to U.S. citizens, the U.S. could not make a legitimate claim to necessity. *Id.* at 506-08. Professor D’Amato focused on a human rights approach and argued that the intervention was justified because “human rights law demands intervention against tyranny.” *Id.* at 519. In his opinion, the U.S. intervention did not violate Article 2(4) of the U.N. Charter because it was not taken against the “territorial integrity” of Panama. Nor was the use of force directed against Panama’s “political independence.” *Id.* at 520. D’Amato instead viewed the intervention as an example of lawful and temporary humanitarian intervention to free Panamanians from tyranny. *Id.* at 523; see also Bowett, *The Use of Force for the Protection of Nationals Abroad*, in *The Current Legal Regulation of the Use of Force* 39 (A. Cassese ed. 1986). In any event, the legality of the initial resort to use of force does not affect the application of humanitarian law. See Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of The Hague)*, in Henry Dunant Institute, *International Dimensions of Humanitarian Law* 93, 94 (1988).

tator for the International Committee of the Red Cross, defined it very generally as “that considerable portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war.”¹⁴ Others see it simply as an area of international law that “aims to mitigate the human suffering caused by war.”¹⁵ The body of law also is referred to variously as “the law of armed conflict” or “the law of war.”¹⁶ It generally is recognized as having two branches: 1) the “law of The Hague”; and 2) the “law of Geneva.” The “law of The Hague,” exemplified in a series of conventions from 1899 and 1907, determines the rights and duties of belligerents in the conduct of operations and limits the means of doing harm.¹⁷ The “law of Geneva,” exemplified in four Geneva Conventions from 1949, concerns the condition of war victims who have fallen into enemy hands.¹⁸

This article focuses on three principal areas of humanitarian law that are involved in the continuing controversy concerning the conduct of United States forces during the Panama operation. Criticisms made public to date have not included well-considered application of humanitarian law. They either have ignored or have failed to comprehend the importance of properly characterizing the Panama operation before expressing their conclusions.

The first section of the article discusses certain aspects of the conduct of hostilities—“law of The Hague” issues—that have received

¹⁴J. Pictet, *Development and Principles of International Humanitarian Law* 1 (1985).

¹⁵F. Kalshoven, *Constraints on the Waging of War* 1 (1987).

¹⁶The United Nations customarily uses the term “law of armed conflict.” J. Pictet, *supra* note 14, at 1 n.1. The U.S. Army field manual predominantly uses “law of war.” Dep’t of Army, *Field Manual FM 27-10, The Law of Land Warfare* (1956) [hereinafter *FM 27-10*]. U.S. military usage indicates that “law of armed conflict” currently is in vogue.

¹⁷Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538; Hague Convention No. IV Respecting the **L**aws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter *Hague Convention/Regulations*]; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540. *See* J. Pictet, *supra* note 14, at 2; F. Kalshoven, *supm* note 15, at 7.

¹⁸Convention for the Amelioration of the Condition of the Wounded and Sick in **A**rmed Forces in the Field, Aug. 12, 1949, T.I.A.S. No. 3362 [hereinafter *Geneva Wounded and Sick Convention*]; Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. No. 3363 [hereinafter *Geneva Wounded, Sick and Shipwrecked at Sea Convention*]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. No. 3364 [hereinafter *Geneva PW Convention*]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 **U.N.T.S.** 287 [hereinafter *Geneva Civilians Convention*]. *See* J. Pictet, *supm* note 14, at 2; F. Kalshoven, *supra* note 15, at 7.

some degree of media attention. That section addresses issues associated with international law obligations to warn the civilian population of impending attack, and the rules of military necessity and proportionality as applied to certain targeting issues affecting civilians. The second section of the article addresses the treatment of Panamanian civilians as “protected persons” by United States forces—“law of Geneva” issues. The third section focuses on the inviolability of diplomatic premises in wartime.

11. CHARACTERIZATION OF THE CONFLICT

A. THE DIVISION INTO “INTERNATIONAL” AND “ON-INTERNATIONAL” ARMED CONFLICT

Analysis of the Panama operation under the “law of The Hague” or the “law of Geneva” is extremely difficult because the two branches of humanitarian law were developed to place limitations on the conduct of war between *states*. Efforts to regulate *internal* conflicts have encountered strong resistance from states because they were regarded either as interference in the internal affairs of the state or as aid and comfort to bandits and outlaws.¹⁹ Traditionally, only under the customary international law pertaining to recognition of the belligerency of rebel forces in a civil war is there any application of the full body of international humanitarian law to “internationalized” internal conflicts.²⁰ The threshold question, then, is whether Operation Just Cause was an international or a “non-international” armed conflict.

The “law of The Hague” addresses international war between states. Treaty rules to restrict the means and methods of combating an internal situation were not even considered.²¹ This is evident by the terms of Article 2 of the 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land. That Convention, which provides the important regulations respecting land warfare, states that “[t]he provisions . . . do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”²² Prior to 1949, the same also was true with respect to the “law of Geneva,” which until then consisted of two conventions con-

¹⁹J. Pictet, *supra* note 14, at 46.

²⁰*See infra* text accompanying notes 24-26.

²¹*See* F. Kalshoven, *supra* note 15, at 26; Baxter, *supra* note 13, at 97.

²²Hague Convention art. 2.

cerning the Wounded and Sick in the Field, and Prisoners of War.²³ In cases of internal conflict, populations were left at the mercy of their governments.

Nevertheless, the international rules of humanitarian law during that pre-1949 period might have applied to internal armed conflict under one set of circumstances. When conflict progresses to the intensity that it properly may be termed a civil war and certain criteria are met establishing the "belligerent" status of the rebel forces, the full body of international humanitarian law theoretically should apply to the conflict.²⁴ Criteria for recognition of belligerency include the following: the existence of a civil war accompanied by a state of general hostilities; the occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; the observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; and the practical necessity for third states to define their attitude in the civil war.²⁵ Events like the Spanish Civil War of 1936-39 revealed the utter futility of applying to internal conflicts a set of rules that account for state interests and evolved from state practice in international armed conflicts.²⁶

World War II provided incentive for a major revision and further development of the "law of Geneva." Nevertheless, states at the 1949 Geneva Diplomatic Conference were unwilling to craft a new set of humanitarian rules that would apply automatically to internal armed

²³Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Jul. 27, 1929, 47 Stat. 2074, T.S.No. 847; Convention for the Protection of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021, T.S. No. 846. The Wounded and Sick Convention evolved from an earlier Geneva Convention from 1864. The 1929 Prisoners of War Convention greatly expanded PW provisions that were in the 1899 and 1907 Hague Regulations. A third Convention, which made applicable the principles of the 1864 Wounded and Sick Convention to wounded, sick and shipwrecked at sea, was adopted at The Hague in 1907. Therefore, as 1949 dawned, there actually were three Conventions—the two 1929 treaties and the 1907 treaty—that properly may be called the "law of Geneva." See F. Kalshoven, *supra* note 15, at 9-10; see also J. Pictet, *supra* note 14, at 29-49 (development of the "law of Geneva").

²⁴See, e.g., I. L. Oppenheim, H. Lauterpacht (ed.), *International Law* 209-10 (7th ed. 1952); Baxter, *Ius in Bello Interno: The Present and Future Law*, in *Law and Civil War in the Modern World* 518 (J. Moore ed. 1974).

²⁵L. Oppenheim, *supra* note 24, at 249. For an analysis of particular internal armed conflicts see *id.* at 250-52; Taubenfeld, *The Applicability of the Laws of War in Civil War*, in J. Moore, *supra* note 24, at 499, 502-17.

²⁶See Taubenfeld, *supra* note 26, at 506-09; F. Kalshoven, *supra* note 16, at 11.

conflicts.²⁷ The 1949 Geneva Conventions replaced the earlier conventions providing protections for the wounded, sick, and prisoners of war. Also, for the first time, the “law of Geneva” included a new convention to protect certain categories of civilians who, as a consequence of the armed conflict, find themselves in the power of the enemy.²⁸ The “law of Geneva” thus came to comprise four conventions: the wounded and sick on land; the wounded, sick, and shipwrecked at sea; prisoners of war; and protected civilians.²⁹

Like its predecessors, the 1949 Geneva Conventions were designed to apply to international armed conflicts. Nevertheless, they made an important innovation in the area of “non-international” or internal armed conflict. For those conflicts, Article 3, which is common to the four Geneva Conventions, provides a short statement of basic humanitarian principles that define the protections to be accorded persons who find themselves in the power of the enemy.³⁰ As reflected in Article 3, the Diplomatic Conference rejected the notion that the full provisions of the 1949 Geneva Conventions should become applicable to full-scale civil wars in which the rebel forces qualify for belligerent status.³¹ Nothing in the Conventions prohibits the sides to the internal armed conflict from applying the full body of the Geneva Conventions. Indeed, Article 3 strongly urges the sides to make “special agreements” that bring into force all or portions of the Geneva Conventions.³² The proposition of special agreements reinforces the idea that belligerency has become a discarded concept, at least for purposes of the “law of Geneva.”

²⁷See J. Pictet, *Commentary Relative to the Protection of Civilian Persons in Time of War* 29 (1958) [hereinafter Pictet Commentaries]. He states: “There was reason to fear that Governments would be reluctant to impose international obligations on States in connection with their internal affairs, and that it would be said to be impossible to bind provisional Governments, or political parties, or groups not yet in existence, by a Convention.” *Id.*; see generally *id.* at 29-34; see also Baxter, *supra* note 24, at 519.

²⁸See F. Kalshoven, *supra* note 15, at 10-11.

²⁹See *supra* note 18. For an essay on the question of the status of the 1949 Geneva Conventions as customary international law, see Meron, *The Geneva Conventions as Customary Law*, 81 A.J.I.L. 348 (1987).

³⁰Geneva Civilians Convention art. 3. It must be a genuine armed conflict, as opposed to mere acts of banditry or an unorganized and short-lived insurrection. See Pictet Commentaries, *supra* note 27, at 36. These latter cases of simple internal disorders or political tensions more directly relate to the general law of human rights than to the “law of Geneva.” See J. Pictet, *supra* note 14, at 49; T. Meron, *Human Rights in Internal Strife: Their International Protection* 58-59 (1987); see also T. Buergenthal, *International Human Rights* 207 (§ 6-6) (1988).

³¹See Baxter, *supra* note 24, at 520.

³²Geneva Civilians Convention art. 3. It reads: “The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” *Id.*; see Pictet Commentaries, *supra* note 27, at 42-43; Baxter, *supra* note 24, at 520-21.

The strict division of conflict into international and non-international is further reinforced by comparing the language of Article 3 with Article 2. Article 3 states that it applies "[i]n the case of armed conflict *not* of an *international* character occurring in the territory of *one* of the High Contracting Parties."³³ Article 2, in stark contrast, defines the scope of the Conventions as a whole to "apply to all cases of declared war or of any other armed conflict which may arise between *two or more* of the High Contracting Parties, even if the state of war is not recognized by one of them."³⁴ In the body of the Conventions, the distinction between "international" and "non-international" armed conflict is more apparent. The provisions of the Geneva Conventions, designed for application to international conflict, simply do not work in internal conflicts.³⁵ Therefore, for the purposes of the international "law of Geneva," the distinction between "international" and "non-international" armed conflicts became absolute with the introduction of common Article 3.

The effect of the Geneva Conventions' distinction between international and non-international armed conflict on the "law of The Hague" is less clear. Since after the Hague Conventions until the mid-1970's, there has been little conventional development in the regulation of means and methods for conducting warfare.³⁶ Nevertheless, a general trend toward confluence of the two branches of humanitarian law into a single body of principles indicates that the "law of The Hague" today similarly recognizes the distinction between international and internal armed conflict. The recent advent of two 1977 Protocols Additional to the 1949 Geneva Conventions is further evidence of the division. Although the United States is not a **party** to either Protocol I—respecting international armed conflict—

³³Geneva Civilians Convention art 3 (emphasis added).

³⁴*Id.* art. 2 (emphasis added); see Baxter, *supra* note 24, at 521.

³⁵See, e.g., Baxter, *supra* note 24, at 529-31. Professor Baxter examines several **key** articles in the 1949 Geneva Conventions and explains how they are incompatible with the circumstances of civil war. For example, provisions that turn on the nationality of the person to whom protections might be extended, or on the justice system of the person's state, are incapable of application in internal conflicts. Several articles refer to "occupied territory," or "territory of a Party to the conflict"—again, concepts that for the most part are incapable of being superimposed on a civil war. *Id.* He concludes that "grave difficulties will be encountered in giving full effect to the entirety of the Geneva Conventions of 1949 in civil conflicts." *Id.* at 531. *But see* Pictet Commentaries, *supra* note 27, at 43. Pictet concludes that provisions that apply to "territory of the Parties" and "occupied territory" could be applied. **Also**, provisions concerning treatment of internees, as **well** as others, also could apply. *Id.*

³⁶For a brief history of the conventional development of the "law of The Hague," see generally J. Pictet, *supra* note 14, at 49-58.

or Protocol II—pertaining to non-international armed conflict³⁷—their existence and ratification by a large number of states illustrates that international humanitarian law today recognizes two distinct bodies of rules that apply to international and internal armed conflict. The 1977 Protocols reveal that the distinction applies with equal force to the “law of The Hague,” because the Protocols propose to regulate not only protections that traditionally are regarded as part of the “law of Geneva,” but also the conduct of warfare that traditionally is regarded as part of the “law of The Hague.”³⁸

B. APPLICATION TO JUST CAUSE: THE “PAIRING” OF PARTIES

The implications of these developments on Operation Just Cause are enormous. If the military operation in Panama is characterized as an internal conflict, then the “convention in miniature”³⁹—com-

³⁷Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), UN Doc. A/32/144, annex I and II, *reprinted in* D. Schindler & J. Toman, *The Laws of Armed Conflicts* 551 (1981); Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *reprinted in id.* at 619; *see Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 A.J.I.L. 910 (1987). The *Agora* includes the Letter of Transmittal of Protocol II from President Reagan to the U.S. Senate and an appeal for ratification by the U.S. that was written by the Legal Adviser to the Directorate, International Committee of the Red Cross. *Id.*

³⁸*See* J. Pictet, *supra* note 14, at 2 (“the distinction between the movement of Geneva and that of The Hague appears to be fading away”). U.S. Army publications have yet to update the field of humanitarian law. The principal manual on the subject *still* states: “The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.” FM 27-10, at 9, para. 11a; *see also* Dep’t of Army, Pam. 27-161-2, *International Law Vol. II 27-28* (23 Oct. 1962) [hereinafter DA Pam. 27-161-2]. It is generally accepted that the Hague Regulations that are annexed to the 1907 Hague Convention No. IV are part of customary international law. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, CMD. 6964, Misc. No. 12, at 64-65 (1946); Judgment of the International Military Tribunal for the Far East of 1948, 15 U.N. War Crimes Comm., Law Reports of Trials of War Criminals 13 (1949); *see* Baxter, *supra* note 13, at 97 (law of The Hague is customary international law and applies to “international armed conflict, that is to say war in the traditional sense”). The customary international law status of the 1949 Geneva Conventions must be determined by examination of each particular provision. *See* Meron, *supra* note 29, at 348.

³⁹Pictet Commentaries, *supra* note 27, at 34; *see* F. Kalshoven, *supra* note 15, at 59.

mon Article 3—would apply to the parties.⁴⁰ That article requires the parties to the conflict—the government and the rebels—to treat “humanely” all “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. . . .”⁴¹ It enumerates acts that are prohibited in all circumstances, such as violence to life and person, outrages upon personal dignity, the taking of hostages, and the passing of sentences that have not been pronounced by regularly constituted courts.⁴² Article 3, however, does not prevent persons who take up arms against the government from being tried on this charge under a national law. Because it is concerned only with humane treatment of the individual without regard to his other qualities, Article 3 does not affect the legal or political treatment that the individual may receive as a result of his or her behavior.⁴³ Nor is international oversight of the protected person’s fate guaranteed. Article 3 provides that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict,”⁴⁴ but it does not mandate that either side accept the proffered services.⁴⁵

Common Article 3 truly does represent significant advancement in humanitarian law into the void previously found in situations of internal conflict. But characterization of the Panama operation as “non-international” offers few practical constraints of any real relevance on the conduct of United States forces in Operation Just Cause. The United States has not been accused of violating the basic prin-

⁴⁰How an international convention can bind an internal nonparty—that is, the rebel forces—is an interesting question. Pictet, in his Commentaries prepared for the International Committee of the Red Cross, notes that at the Diplomatic Conference some states expressed doubts on this issue. He explains that the insurgents must be bound by the obligations of the state by the fact that they claim to represent the government of that state. Further, application of Article 3 by rebel groups is in their own best interests because, otherwise, “it will prove that those who regard its actions as mere acts of anarchy or brigandage are right.” Pictet Commentaries, *supra* note 27, at 37. Another basis advanced for binding insurgents is that all nationals of High Contracting Parties are bound by the Conventions, including Article 3, and the rebels, as nationals of a party, are bound as individuals who have formed themselves into a political group. Baxter, *supra* note 24, at 527.

⁴¹Geneva Civilians Convention art. 3.

⁴²*Id.*; see J. Pictet, *supra* note 14, at 47. The list of various forms of inhumane treatment is not intended to be exhaustive. Pictet Commentaries, *supra* note 27, at 39.

⁴³Pictet Commentaries, *supra* note 27, at 44; J. Pictet, *supra* note 14, at 47-48.

⁴⁴Geneva Civilians Convention art. 3.

⁴⁵See Pictet Commentaries, *supra* note 27, at 41. Pictet points out that this modest provision nevertheless is of “great moral and practical value.” *Id.* It places offers by humanitarian organizations in internal conflicts on a legal footing. Consequently, parties to the conflict can no longer look upon such offers as unfriendly acts, nor resent the fact that the organization making the offer is trying to aid the victims of the conflict. *Id.*

ciples of humane treatment that are listed in common Article 3. Nevertheless, the feasibility of this kind of characterization must be examined because of the impact that it has on the conduct of hostilities, protection to be accorded civilians, and treatment of diplomatic premises.

At first glance, it may appear ludicrous to contend that an armed conflict in one state—Panama—involving military forces introduced from another state—the United States—could be characterized as anything but “international.”⁴⁶ But the weight of international legal authority indicates that when the armed forces of a third state intervene in the conflict on behalf of opposing parties to the civil war, the relationships of the sides for purposes of choosing the applicable humanitarian law rules is determined by analyzing the various pairings of the opposing belligerents.⁴⁷

The armed conflict is broken down into its international and domestic components and, based on this differentiation, the humanitarian law rules governing relations between the warring parties are identified.⁴⁸ Naturally, between the two domestic parties—the government and the rebels—the conflict is “non-international,” and the relationship is governed by common Article 3.⁴⁹ The legal position of the third state intervenor logically depends on which side in the internal conflict it supports. If it supports the rebels, then the situation actually is an armed conflict between two states, because the forces of the intervening third state are fighting the government forces of another state.⁵⁰ The conflict is thereby “internationalized”

⁴⁶See Falk, *Janus Tormented: The International Law of Internal War*, in *International Aspects of Civil Strife* 185, 218 (J. Rosenau ed. 1964); Meyrowitz, *The Law of War in the Vietnamese Conflict*, in *II The Vietnam War and International Law* 516, 532 (R. Falk ed. 1969).

⁴⁷See Baxter, *supra* note 24, at 523; R. Goldman, *Characterization and Application of International Humanitarian Law in Non-International and Other Kinds of Armed Conflicts* 4-5 (unpublished).

⁴⁸R. Goldman, *supra* note 47, at 4; see Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 A.J.I.L. 589, 603 (1983).

⁴⁹R. Goldman, *supra* note 47, at 4.

⁵⁰See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, 114, para. 219 (Judgment of June 27). The International Court of Justice determined that the conflict between the Government of Nicaragua and the contras was a non-international armed conflict and that their actions were governed by common Article 3, but that “the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.” *Id.*; see R. Goldman, *supra* note 47, at 5. It also is an unlawful intervention in the domestic affairs of the state experiencing the hostilities, and may be a violation of Article 2(4) of the U.N. Charter prohibiting “the threat or use of force against the territorial integrity or political independence” of a state. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153; see Baxter, *supra* note 24, at 524-25.

so that, under common Article 2 of the Conventions, the whole of humanitarian law applies.⁵¹ If, however, the third state intervenor fights alongside the government forces, then the intervening state is effectively grafted onto the domestic state in a kind of “agency” relationship so that the relationship of the intervening state with the rebels is the same as that existing between the two internal parties to the conflict.⁵² Consequently, for that relationship the conflict remains “non-international,” and common Article 3 determines the extent of application of humanitarian law.

Applying this analysis to the conflict in Panama is difficult. Determination of the nature of the conflict is highly subjective because it is based on the recognition policies of the third state intervenor, in this case the United States.⁵³ Based on the United States’ recognition of the Endara government as the “legitimate” government of Panama, the purported invitation to the United States for armed assistance, and President Bush’s stated objective of defending democracy in Panama in its internal conflict against forces loyal to Noriega,⁵⁴ Operation Just Cause arguably could be characterized as a non-international armed conflict. One also could assert that the failed October 1989 coup attempt by PDF officers against Noriega is evidence of a continuing, although admittedly somewhat weak, armed struggle by “legitimate” forces within Panama against the unlawful Noriega opposition. In these circumstances, United States military actions against the Panamanian forces loyal to Noriega would be governed only by the broad humanitarian protections of common Article 3.⁵⁵

This analysis is awkward in the case of the Panama operation because, unlike usual situations that involve third state assistance to a legitimate government, the circumstances were somewhat askew. The so-called “legitimate” Endara government was without organized military forces or any of the government apparatus, at least in-

⁵¹See *supra* text accompanying note 34.

⁵²R. Goldman, *supra* note 47, at 5; see Baxter, *supra* note 24, at 524-25. According to the view of a number of authorities, the government of a state that is engaged in internal conflict may lawfully call upon third state assistance, and that state is entitled to aid in suppressing the rebellion. *Id.* at 524; Moore, *The Lawfulness of Military Assistance to the Republic of Vietnam*, in I *The Vietnam War and International Law* 237, 265 (R. Falk ed. 1968). Apparently, some authorities dispute the legality of external assistance, even to the lawful government. See Baxter, *supra* note 24, at 524 n.27.

⁵³Baxter, *supra* note 24, at 523, 525.

⁵⁴See *supra* text accompanying note 10; N.Y. Times, Dec. 21, 1989, at A19, col. 1. On the legitimacy of defending democracy as justification for armed intervention, see *Agora*, *supra* note 13, at 498-500.

⁵⁵See *supra* text accompanying notes 41-45.

initially. Additionally, the so-called “rebels”—the Noriega government and the Noriega-controlled PDF—exercised clear de facto, if not de jure, control over the state. The situation does not demonstrate the failure of the argument that the conflict was non-international; rather, it illustrates the difficulty in characterizing with any degree of certainty an armed conflict that involves non-traditional circumstances that create alignments beyond the contemplation of the humanitarian law of armed conflict.

The weaknesses in characterizing the United States role in Operation Just Cause as “non-international”—primarily Noriega’s de facto control in Panama—could lead to a conclusion that the insertion of United States forces triggered an international armed conflict within the meaning of common Article 2.⁵⁶ For purposes of analysis, the status of Noriega’s government, as with the status of Endara’s government, could turn on the fact that the Noriega government received international recognition as the government of Panama from many states, including most of Latin America.⁵⁷ Following this line of reasoning, the democratic Endara opposition was in the place of the rebels, and the Noriega government was the state that is party to the humanitarian law conventions. Consequently, from this perspective, United States conduct in Operation Just Cause was regulated by the full body of international humanitarian law.

Whether the United States military operation qualified under this logic for application of the full body of the 1949 Geneva Conventions is determined by reference to common Article 2 of the Conventions.⁵⁸ It provides for their application to any “armed conflict,” whether declared or not, between two parties to the convention, even if the state of war is not recognized by one of them.⁵⁹ The value of this innovation in the law of armed conflict is that it brushes aside the prior terminological difficulties inherent in characterizing the “war” and replaces it with a factual, objectively ascertainable standard.⁶⁰ The result, as evidenced by state practice and by reference to various

⁵⁶ *Agora*, *supra* note 12, at 510 (Noriega’s “effective control” as establishing legitimacy for international law purposes); see *supra* text accompanying note 34; Geneva Civilians Convention art. 2.

⁵⁷ See *Agora*, *supra* note 12, at 510 (general recognition of Noriega by Latin American governments as head of state). The subject of recognition in international law is beyond the scope of this article. On this subject, see generally M. Shaw, *International Law* 207-37 (2d ed. 1986).

⁵⁸ Geneva Civilians Convention art. 2.

⁵⁹ *Id.*; see F. Kalshoven, *supra* note 15, at 27.

⁶⁰ F. Kalshoven, *supra* note 15, at 27; L. McNair & A. Watts, *The Legal Effects of War* 4, 420 (1966).

commentators, is that the Geneva Conventions apply to every type of dispute between states that leads to hostilities between their armed forces.⁶¹ It also applies at every stage of the conflict—from invasion to total or partial occupation.⁶² These standards clearly applied to the United States military operation in Panama.⁶³ Both Panama and the United States are parties to the 1949 Geneva Conventions.⁶⁴ While neither state formally declared war on the other, the existence of *de facto* hostilities between opposing armed forces was indisputable.⁶⁵ The “law of The Hague” applied for the same reasons. Hague Convention No. IV refers simply to “armed conflicts between nations” that are “Contracting Powers.”⁶⁶ Most scholars

⁶¹See J. Pictet, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* 23 (1960). Pictet, in the commentary prepared for the International Committee of the Red Cross on the 1949 Geneva Conventions, commented: “Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.” *Id.* It also applies even if none of the belligerents recognize a state of war. L. McNair and A. Watts, *supra* note 60, at 4. A leading U.S. authority on prisoners of war commented on the same language: “The terminology . . . was intended as a catchall, to include every type of hostility which might occur without being a “declared war.” H. Levie, *Prisoners of War in International Armed Conflict* 14-15 (1977). The U.S. Army applies a literal interpretation to the application of common Article 2. See FM 27-10, at 7-8, paras. 8, 9; Memorandum for the Vice Chief of Staff from MG Hugh Clausen, The Judge Advocate General, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY, at 2-3 (Nov. 4, 1983).

⁶²Geneva Civilians Convention art. 2; see L. McNair & A. Watts, *supra* note 60, at 420.

⁶³See Memorandum of Law, W. Hays Parks, Special Assistant for Law of War Matters, Office of The Judge Advocate General, U.S. Army, subject: Status of Persons Captured or Detained in Operation Just Cause (Jan. 10, 1990) [hereinafter Parks Memorandum].

⁶⁴Dep’t of State, *Treaties in Force* (1989). Neither the U.S. nor Panama are Parties to Protocol I, concerning international armed conflict, to 1977 Protocols Additional to the Geneva Conventions of 12 August 1949.

⁶⁵See Parks Memorandum, *supra* note 63. Parks makes an initial factual determination that *de facto* hostilities existed between Panama and the U.S. that meet the requirements of common Article 2, based on several factors pertaining to U.S. military personnel: receipt of combat pay, award of the Armed Forces Expeditionary Medal, killed or wounded being awarded the Purple Heart, award of a star for the Armed Forces Expeditionary Medal denoting a combat jump, award of the Combat Infantry Badge and Combat Action Ribbon, and adding battle streamers to participating units’ colors. He also cites the President’s report to Congress consistent with the War Powers Resolution. *Id.* The existence of hostilities also is supported by remarks made by General Maxwell Thurman, commander-in-chief of U.S. Southern Command. He stated that U.S. troops met with more resistance than expected in Panama. By the third day of fighting, he declared that soldiers were fighting “a real war” against at least 2,000 well-armed Noriega supporters. Soldiers, *supra* note 2, at 24. U.S. forces quickly were able to abandon conventional warfare techniques to fight a “low-intensity” conflict operation. Nevertheless, four days into the operation Noriega loyalists still had sufficient strength to launch an attack against the newly established transit police headquarters near the U.S. Southern Command headquarters. *Id.* at 24-26.

⁶⁶Hague Convention Preamble (“Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where an appeal to arms may be brought about by events which their solicitude could not avert”) and art. 2 (“The provisions . . . do not apply except between Contracting Powers”); see *supra* text accompanying notes 21-22.

agree that the core of the "law of The Hague," found within the Hague Regulations that are annexed to the 1907 Hague Convention No. IV, is part of customary international law.⁶⁷ Consequently, even states that are not party to that agreement are bound by the legal obligations of the "law of The Hague."⁶⁸

C. THE PRUDENT COURSE

The preceding examination reveals the difficulty in applying current humanitarian law standards to an operation that possesses many of the characteristics of both "international" and "non-international" armed conflict. The distinction between internal and international conflict, which has a profound effect on the choice of rules that will apply, appears especially rigid in the kinds of circumstances exemplified by Operation Just Cause. Allowing the choice to turn on political factors such as recognition adds a degree of fiction to the method. "Legitimate" government and "invitation" for armed assistance aside, the fact remains that a large-scale deployment of United States military forces engaged for a period of time in intense combat in Panama with Panamanian military forces that initially, at least, were responsive to a Noriega government that was firmly in control. The resolution depends essentially on perspective. In this kind of ambiguous legal situation, the prudent course for United States policymakers, even if not legally required by their perspective, is to apply the full body of humanitarian law to the armed conflict.

⁶⁷See *supra* note 38.

⁶⁸*Id.* Hague Convention No. IV often is lauded for the important so-called "de Martens clause" paragraph in its preamble. It recognizes that all problems had not been possible to solve, and that unforeseen cases should not be "left to the arbitrary judgment of military commanders" Hague Convention Preamble. To cover these unforeseen cases, the following paragraph was included:

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 from the dictates of the public conscience.

Id. (emphasis added). The de Martens clause thus assures that the conduct of war is always governed by existing, evolving principles of international law. See E Kalshoven, *supra* note 15, at 14; Draper, *The Development of International Humanitarian Law*, in Henry Dunant Institute, *supra* note 13, at 67, 72.

111. CONDUCT OF HOSTILITIES: WARNINGS, TARGETING, AND CIVILIAN CASUALTIES

A. THE "LAW OF THE HAGUE"

During the early stages of the operation, controversy arose over whether United States forces used permissible methods during the conduct of military combat operations. Critics, such as the Americas Watch human rights group, contended that certain allegations were serious enough to warrant investigation.⁶⁹ Three of the more publicized actions by United States forces are selected here for closer perusal. They invoke obligations that are part of the "law of The Hague" that United States soldiers allegedly breached: the obligation to warn the civilian population of impending attack and targeting procedures that take appropriate account of consequences to the civilian population.

The restrictions on the choice of means or methods for conducting military operations in international armed conflict have their basis in customary and conventional international law. The role of customary law in the area of combat restraints is especially important.⁷⁰ Three general principles are part of customary international law and form the basis for the humane conduct of armed conflict: military necessity, unnecessary suffering, and proportionality.

Military necessity justifies any act not expressly forbidden by international law that is indispensable for securing the prompt submission of the enemy with the least possible expenditure of resources.⁷¹ The 1907 Hague Regulations, in Article 22, make clear

⁶⁹Human Rights Watch. *The Laws of War and the Conduct of the Panama Invasion: An Americas Watch Report* (1990)[hereinafter Americas Watch]; see Wash. Post. May 10, 1990, at A8, col. 1.

⁷⁰The famous de Martens clause in the Preamble of Hague Convention No. IV assures the continuing importance of customary international law in the "law of The Hague." See *supra* note 68; see also J. Pictet, *supra* note 14, at 72. For brief histories of the development of the "law of The Hague," see J. Pictet, *supra* note 14, at 49-58; F. Kalshoven, *supra* note 15, at 11-18.

⁷¹FM 27-10, at 4, para. 3. In 1863, Francis Lieber defined the term as follows: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Section 14, General Orders No. 100, 24 April 1863, Instructions for the Government of the Armies of the United States in the Field, reprinted in D. Schindler & J. Toman, *supra* note 37, at 3. A U.S. Military Tribunal that prosecuted Nazi war crimes held in *United States v. List*:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money The rules of

that military necessity is not absolute by declaring that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”⁷² The basic limitation, in addition to those set out expressly in the Hague Regulations,⁷³ is that any violence not necessary for achieving that military goal is forbidden. The Hague Regulations in this respect forbid commanders from employing “arms, projectiles, or material calculated to cause unnecessary suffering.”⁷⁴ This provision is interpreted as forbidding not only weapons that are so calculated, but also the use of weapons in a manner to cause unnecessary suffering.⁷⁵ The two principles of military necessity and unnecessary suffering are reconciled by yet another highly subjective principle—that of proportionality. It requires that the loss of life and damage to property not be out of proportion to the expected military advantage.⁷⁶ These general principles, taken together, permit armed forces to conduct their military operations in such a way as to defeat the enemy so long as the use of force will not cause incidental damage to life and property that is disproportionate to the expected military advantage.⁷⁷

B. THE OBLIGATION TO WARN

The requirement to warn of impending bombardment is an attempt to ensure that the foregoing general principles will work in wartime. Article 26 of the Hague Regulations succinctly states: “The officer in command of an attacking force must, before commencing a bom-

international law must be followed even if it results in the loss of a battle or even a war.

United States v. List, et al. (The Hostage Case), 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, at 1347 (1950); see Levie, *Combat Restraints*, 30 Naval War C. Rev. 1 (1977); see also F. Kalshoven, *supra* note 15, at 26.

⁷²Hague Convention art. 22.

⁷³See *id.* art. 23.

⁷⁴*Id.* art. 23(e); see FM 27-10, at 18, para. 34; F. Kalshoven, *supra* note 15, at 29-30. The so-called Declaration of St. Petersburg, which in 1868 renounced wartime use of explosive projectiles under 400 grams weight, was an early statement of this first principle of the law of war:

Considering . . . that the only legitimate object . . . to accomplish during the war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would, therefore, be contrary to the laws of humanity.

Quoted in J. Pictet, *s u p* note 14, at 50 (emphasis added); see also F. Kalshoven, *supra* note 15, at 12.

⁷⁵See generally DA Pam. 27-161-2, at 42-43 (discussing permissible and impermissible uses of fire and nuclear weapons).

⁷⁶FM 27-10, at 5, para. 41 (C1).

⁷⁷See, e.g., Tomes, *Legal Implications of Targeting for the Deep Attack*, 64 Mil. Rev. 70-76 (1984).

bardment, except in cases of assault, do all in his power to warn the authorities."⁷⁸ The object is to spare the civilian population from destruction as much as possible.⁷⁹

One of the principal charges of Americas Watch is that the impoverished residents of Panama City's El Chorrillo neighborhood were not warned to evacuate buildings surrounding the Comandancia, Noriega's military headquarters, before the United States forces attacked. As a result, according to the group's report, about fifty to seventy civilians were killed and many more were seriously wounded; approximately 15,000 were left homeless.⁸⁰ The report concluded that no specific military necessity existed that might have justified the lack of warning. It determined that "news of the invasion had leaked to PDF forces a few hours earlier, so that little surprise was left in this attack."⁸¹ Other sources confirmed that the operation, intended to be a surprise attack, was compromised by security leaks.⁸²

The allegation correctly recognizes that the obligation to warn does not apply in cases of assault.⁸³ The tactical reasons behind this exception are readily apparent. The object of a military assault is to surprise the defending enemy force and gain a tactical advantage. Prior warning of the assault removes the surprise element. It conse-

⁷⁸Hague Regulations art. 26. Interestingly, Hague Convention No. IX of 1907 relating to Bombardment by Naval Forces, contains a more relaxed warning requirement, it provides that "*if the military situation permits*, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities." M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts* 367 (1982) (emphasis added). Note that Article 26 of the Hague Regulations, on the other hand, permits derogation from the warning requirements only in case of assault. *Id.*

⁷⁹See F. Kalshoven, *supra* note 15, at 35; FM 27-10, at 20, para. 43(b) ("This rule is understood to refer only to bombardments of places where the civil population remains"); L. Oppenheim, *supra* note 24, at 420 ("The purpose of notification is to enable private individuals within the locality to be bombarded to seek shelter for their persons and for their valuable personal property").

⁸⁰Americas Watch, *supra* note 69, at 18-19. The group determined that U.S. advance planning failed to anticipate adequate warning to Panamanians while including ample warnings to U.S. citizens over American communications of impending attack. *Id.*

⁸¹*Id.* at 19.

⁸²Newsweek, *Inside the Invasion*, June 25, 1990, at 29 (12 to 15 different security leaks; the PDF warned Noriega the night of the invasion that attack might be imminent). Lt. Gen. Carl W. Stiner, operations commander for Operation Just Cause, told a news conference that the operation was "compromised" by a leak from the State Department or by warning from Cuba or by U.S. news media speculation about U.S. troop movements. Stiner said that at 10 p.m., December 19, Panamanian military radio channels began broadcasting urgent messages instructing PDF soldiers to report to their units, draw weapons, and make preparations to counter the U.S. assault that it accurately reported would come at 1 a.m., December 20. Wash. Post, Feb. 27, 1990, at A7, col. 3, 4.

⁸³Hague Regulations art. 26; see *supra* text accompanying note 78.

quently gives enemy forces the opportunity to protect themselves and prepare to counter the assault.⁸⁴ The attacking force that realizes its assault has been compromised will have to either abandon the plan of attack or proceed with the plan knowing that its forces may suffer unacceptably heavy losses. With the element of surprise removed, the attack becomes like any other attack under the “law of The Hague,” and the accompanying preattack warning must be given.

The element of surprise can be regained, however, if intervening events occur that change the circumstances so that surprise nevertheless may be achieved. In that situation, assault again becomes a logical tactical choice. Consequently, the exception to the warning requirement applies again, but this time to the newly created assault. Statements from Lieutenant General Stiner, the operations chief, indicate that as a result of his last-minute forewarning that the invasion hour had been compromised, he advanced the “H-Hour” by fifteen minutes in an effort to regain the element of surprise.⁸⁵ At that moment, the best available information and logic would have suggested to United States forces that a degree of surprise remained in the assault. In those circumstances, the United States may have decided that a warning was not required because it would have vitiated the tactical surprise of the assault.⁸⁶ The widely held view in the military community is that the operation achieved surprise.⁸⁷ Hindsight further reveals that, despite the possibility of security compromises, Noriega either did not learn of the impending operation, or he refused to believe that United States officials would order an invasion.⁸⁸ For the PDF commander-in-chief, therefore, the assault was a surprise.

The development of state practice since 1907 indicates that although the warning requirement remains, the assault exception has evolved into a principle of customary law that permits derogation

⁸⁴See M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 367-68; DA Pam. 27-161-2, at 50; Baxter, *supru* note 13, at 120-121.

⁸⁵Wash. Post, Feb. 27, 1990, at A7, col. 3, 4. Stiner may or may not have been successful. He commented that, nevertheless, “ground fire and resistance were stiffer than expected.” *Id.*

⁸⁶See M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 363.

⁸⁷Interview with W. Hays Parks, International Affairs Division, Office of The Judge Advocate General, U.S. Army (July 17, 1990) [hereinafter Parks Interview 1].

⁸⁸Wash. Post, Feb. 27, 1990, at A7, col. 3, 6; Wash. Post, Jan. 7, 1990, at A22, col. 3, 4; Newsweek, *supra* note 5, at 18 (Noriega was aware that invasion was imminent, but did not alert his personal pilot until 45 minutes after the attack).

when "circumstances do not permit advance warning."⁸⁹ This new formulation is adopted by the 1977 Protocol I to the 1949 Geneva Conventions.⁹⁰ Although the United States is not party to Protocol I, the United States recognizes the new formulation as representing customary international law.⁹¹ Whether this is a relaxation of the warning requirement that provides military commanders increased flexibility in making a warning determination, or whether it simply states an interpretation that allows derogation when the element of surprise is a condition of a successful attack, is unclear. The more persuasive arguments that are advanced in commentaries on the subject indicate that the language expresses a relaxation of the rule of Article 26 of the Hague Regulations.⁹² In that case, any United States obligation to warn Panamanian civilians of impending attack in the circumstances is even less certain.

Interestingly, Field Manual (FM) 27-10 notes that the warning obligation applies "when the situation permits."⁹³ A further noteworthy aspect of the field manual's formulation is its instruction to commanders that the warning rule will be applied "[e]ven when the belligerents are not subject to the [Hague Convention]."⁹⁴ The United States Army's guidance, intentional or not, thus appears to apply the international humanitarian obligation with respect to warnings to internal armed conflicts.

⁸⁹See M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 367 (discussing practice during and after World War II); L. Oppenheim, *supra* note 24, at 420 (commander cannot be expected to warn if circumstances or necessities of war prevent him).

⁹⁰Protocol I art. 57(2)(c) states: "With respect to attacks, the following precautions shall be taken: . . . (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."

⁹¹Parks Interview 1, *supra* note 87.

⁹²One argument contends that the dichotomy between the rule in Article 26 of the Hague Regulation, and the Hague Convention **No. 15** naval bombardment obligation to warn "if the military situation permits," suggests an ambiguity that is resolved by regarding Article 57(2)(c) of Protocol I as an interpretation of the Hague warning requirements which reconciles the two parallel Hague rules. M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 368. This argument suggests a relaxation of the Article 26 warning requirement. The argument advanced by the International Committee of the Red Cross contends that the Protocol I provision merely repeats in "somewhat modernized language" the Article 26 Hague rule. F. Kalshoven *supra* note 15, at 100; International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) [hereinafter, C.R.C. Commentary]; see also Baxter, *supra* note 13, at 121 ("Protocol I strengthens the obligation somewhat").

⁹³FM 27-10, at 20, para. 43(c); see Tomes, *supra* note 77, at 72.

⁹⁴*Id.*

C. TARGETING: THE ISSUE OF CIVILIAN CASUALTIES

1. General principles

The international humanitarian principles of military necessity, unnecessary suffering, and proportionality have become especially relevant with respect to the protection of the civilian population from the destruction of war. The particular concern for the insulation of civilians from the effects of war has its genesis in the growing sufferings of civilian populations in the twentieth century as weapons grew increasingly destructive and large segments of the population of nations became inextricably commingled with states' warfighting capabilities.⁹⁵ Events such as the large-scale casualties suffered by many states as the result of massive aerial bombardments in World War II galvanized efforts in the post-WWII period to develop more specific restrictions on the methods of waging war that would alleviate the suffering of civilian populations.⁹⁶

The development of conventional law in this area, however, has not completely been successful. The 1977 Protocol I to the Geneva Conventions includes within its provisions several restrictions that contribute to the "law of The Hague" in this area. Nevertheless, Protocol I cannot yet be regarded as firmly representing customary international law. Moreover, several major international actors, including the United States, have not ratified that Convention.⁹⁷ That leaves the 1907 Hague Regulations as the primary conventional source of combat targeting restraints to protect the civilian population against the effects of hostilities.⁹⁸ Other than the warning requirement, the Hague Regulations included only a few restraints that specifically address military actions that affect civilians who do not take part in the hostilities (noncombatants). These restraints include

⁹⁵See J. Pictet, *supra* note 14, at 51-52; Baxter, *supra* note 13, at 114-16.

⁹⁶See J. Pictet, *supra* note 14, at 52-53; Baxter, *supra* note 13, at 115-16.

⁹⁷See *supra* text accompanying note 37. The Letter of Transmittal of Protocol II from President Reagan to the U.S. Senate requesting its consent to ratification of Protocol II provided a general statement explaining objections to certain portions of Protocol I that are not regarded by the U.S. as comporting with state practice. See *Agora, supra* note 37, at 910.

⁹⁸Hague Regulations; see generally Levie, *supra* note 71, at 1; Baxter, *supra* note 13, at 114-17. Regulation of targeting also is the subject of a specialized 1954 Hague Convention concerning protection of cultural property consisting of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, Regulations for the execution of that Convention, and a Protocol for the Protection of Cultural Property in the Event of Armed Conflict. See generally Nahlik, *Protection of Cultural Property*, in Henry Dunant Institute, *supra* note 13, at 204, 206-10.

a prohibition against the bombardment of undefended cities,⁹⁹ a prohibition against the use of coercion to obtain military information,¹⁰⁰ and the granting of a protected status to participants of a *levee en masse*.¹⁰¹ Even the 1949 Geneva Civilians Convention includes surprisingly few provisions that can be considered as protecting the enemy civilian population from combat operations. It prohibits belligerents from using civilians to render an area immune from attack,¹⁰² making civilians the objects of reprisals,¹⁰³ and using civilians as hostages.¹⁰⁴ But the Geneva Civilians Convention is largely concerned with the position of enemy civilians in occupied areas and in the domestic territory of a belligerent; it affords few protections to the general populace from the violence of hostilities.¹⁰⁵

The lack of precise application of these conventional provisions to the protection of the civilian population from attack has caused renewed interest in the general principles of military necessity, unnecessary suffering, and proportionality to protect civilians from the effects of hostilities. Recent efforts to define the application of these principles to civilians are evident in United Nations pronouncements and in the 1977 Protocol I to the 1949 Geneva Conventions.¹⁰⁶ These efforts—largely expressive of developing customary international law—together with the Hague Regulations, form the legal basis for analysis of the uses of firepower by United States forces in Panama that resulted in civilian casualties.

⁹⁹Hague Regulations art. 25 states: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

¹⁰⁰*Id.* art. 44 states: "A belligerent is forbidden to force the inhabitants of occupied territory to furnish information about the army of the other belligerent, or about its means of defence."

¹⁰¹*Id.* art. 2 states: "The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war." *Id.* See FM 27-10, at 28, para. 65; DA Pam. 27-161-2, at 75-76; see also Geneva PW Convention art. 4.

¹⁰²Geneva Civilians Convention art. 28 states: "The presence of a protected person may not be used to render certain points or areas immune from military operations."

¹⁰³*Id.* art. 33 states: "Reprisals against protected persons and their property are prohibited."

¹⁰⁴*Id.* art. 34 states: "The taking of hostages is prohibited."

¹⁰⁵*Id.* art. 4; see F. Kalshoven, *supra* note 15, at 40. He states that "[t]he law of Geneva serves to provide protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged here is, hence, not protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of the war over persons belonging to the other party." *Id.*; see also Baxter, *supra* note 13, at 115.

¹⁰⁶See generally Baxter, *supra* note 13, at 115-21; F. Kalshoven, *supra* note 15, at 22, 34-36, 86-102.

2. Facts

Perhaps the most serious of allegations against the United States conduct of the Panama operation is that United States forces failed to minimize harm to the civilian population at some of the battle sites.¹⁰⁷ Civilian casualties and property destruction in the poor Panama City neighborhood of El Chorrillo, located next to the PDF headquarters, are the focus of most of the criticism in this respect.¹⁰⁸ Extensive areas of El Chorrillo were destroyed during the initial attack and during the day when fires broke out in the neighborhood of largely wooden houses.¹⁰⁹ The precise cause of the fires is disputed, some claiming that the fires could have been caused by flares and tracer bullets used by United States troops, with others claiming they were set deliberately by members of Noriega's Dignity Battalions.¹¹⁰ In either event, significant civilian casualties resulted.¹¹¹ Critics do not contend that the El Chorrillo destruction was deliberate; nor do they contend that it resulted from an indiscriminate use of firepower by the United States.¹¹² Rather, they contend that "inadequate observance of the rule of proportionality resulted in unacceptable civilian deaths and destruction."¹¹³

On the other hand, Operation Just Cause was designed to emphasize precision to minimize civilian, PDF, or United States casualties. The rules of engagement for 82d Airborne Division soldiers during Just Cause reflect the restrictions placed on United States military forces by the operation planners. These instructions, issued to soldiers on wallet-sized cards, emphasized several noteworthy distinctions between enemy forces and the civilian population in limiting the permissible use of force in combat.¹¹⁴ Soldiers were to

¹⁰⁷The Americas Watch Report stated: "The United States forces violated their ever-present duty to minimize harm to the civilian population in some of the most important battle sites" Americas Watch, *supra* note 69, at 2-3; see Wash. Post, May 10, 1990, at A8, col. 1.

¹⁰⁸Americas Watch, *supru* note 69, at 20 ("the single episode in the short-lived war that generated the highest number of civilian dead and wounded, along with extensive material damage to civilian property").

¹⁰⁹*Id.* at 16; Wash. Post, Jan. 10, 1990, at A16, col. 1.

¹¹⁰Wash. Post, Jan. 10, 1990, at A16, col. 1. The Comandancia was one of the first targets attacked by U.S. forces during the night-time invasion. U.S. officials acknowledged that tracer bullets consumed nearby buildings. El Chorrillo residents said that Dignity Battalions set fires the day after the attack that leveled additional buildings in a 12-block area surrounding the PDF headquarters complex. *Id.*; Wash. Post, Jan. 7, 1990, at A22, col. 2 and A23, col. 4; see also Americas Watch, *supra* note 69, at 17.

¹¹¹See *supra* text accompanying note 80.

¹¹²Americas Watch, *supru* note 69, at 20.

¹¹³*Id.* at 21.

¹¹⁴Rules of Engagement (card), 82d Airborne Division, Dec. 18, 1989.

avoid harming civilians unless necessary to save United States lives, and armed civilians were to be engaged only in self-defense.¹¹⁵ Soldiers were to try, "if possible," to arrange civilian evacuation prior to any attack.¹¹⁶ Artillery, mortars, armed helicopters, AC-130 Spectre gunships, tube or rocket launched weapons, or M551 main guns could not be used if civilians were in the area, unless approved by a ground commander of Lieutenant Colonel grade or higher.¹¹⁷ If civilians were in the area, infantry were instructed not to shoot except at *known*, as opposed to *suspected*, enemy locations.¹¹⁸

The choice of these restrictive rules of engagement reflected not only legal considerations, but also important political considerations. The primary military goal was to "decapitate" the PDF as a fighting force.¹¹⁹ At the same time, however, United States forces were to minimize PDF and civilian casualties to ensure a friendly Panama in the future.¹²⁰ Military planners determined that the best way to accomplish these goals was to employ sufficient force to terminate the conflict quickly, and use light infantry forces and predominantly direct line-of-sight precision weapons.¹²¹ United States assaults were designed to disorient and frighten PDF soldiers into surrendering or fleeing, rather than surrounding them and thereby provoking resistance.¹²² Nevertheless, PDF soldiers occasionally stood their

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.*; Sewsweek, *supra* note 82, at 31. General Maxwell Thurman, commander of U.S. Southern Command and over-all commander of Operation Just Cause, stressed these limitations at a press interview. Wash. Post, Jan. 7, 1990, at A22, col. 1, 2.

¹¹⁸Rules of Engagement, *supra* note 114.

¹¹⁹Newsweek, *supra* note 5, at 21 and 25; Wash. Post, Jan. 7, 1990, at A22, col. 1 ("The overall objective . . . was 'the taking down of the PDF command and control structure in toto and then provide the capability to rebuild it.'").

¹²⁰Wash. Post, Jan. 7, 1990, at A22, col. 1, 2.

¹²¹Newsweek, *supra* note 5, at 21; Wash. Post, Jan. 7, 1990, at A22, col. 1. Line of sight (LOS) weapons are regarded as more accurate than indirect fire weapons because they do not rely on such variables as grid coordinates that are provided by a forward observer to another person who, without seeing the target, actually fires the weapon. The AH-64 "Apache" attack helicopter and the AC-130 Spectre gunships are direct LOS weapons with night-vision capability that reportedly were used against the Comandancia with devastating effect. Wash. Post, Jan. 7, 1990, at A22, col. 1, 2; Wash. Post, Dec. 29, 1989, at A22, col. 1, 3.

¹²²Wash. Post, Dec. 29, 1989, at A22, col. 1, 2. Two high-technology F117A "Stealth" aircraft, which employ a laser-guided bombing system, made the plane's operational debut, each dropping a 2,000 pound bomb next to PDF barracks in the early hours of the operation as an "inducement" to surrender. Wash. Post, Apr. 11, 1990, at A21, col. 1 (one bomb apparently was off-target because of pilot error). Other U.S. tactics designed to induce PDF surrender included use of loudspeakers telling PDF defenders to surrender, and U.S. officers with PDF acquaintances made telephone calls to PDF garrisons to urge their acquaintances to surrender. Wash. Post, Jan. 7, 1990, at A22, col. 2, 3, 5; Newsweek, *supra* note 82, at 29-30 (more than 1,000 PDF surrendered in response).

ground and defended their positions or resorted to sniper attacks on United States soldiers.¹²³ In spite of these precautions, the total number of civilian deaths in the entire Panama operation was between 220 and 300 Panamanians.¹²⁴

3. *Applicable Principles of the "Law of The Hague"*

Whether the number of civilian deaths was disproportionate to the expected military advantage, despite United States restrictions on use of force, is a highly subjective issue. Many factors must be considered. Important standards have evolved from the general principles of military necessity, unnecessary suffering, and proportionality that provide a basis against which to examine United States actions. A general international consensus emerged in the aftermath of World War II that the civilian population should not be the object of attack, that the incidental harm caused to civilians through the bombardment of military objectives should not be out of proportion

¹²³Wash. Post, Dec. 29, 1989, at A22, col. 1, 2.

¹²⁴Precise numbers are the subject of considerable continuing debate. See Newsweek, *supra* note 82, at 31 (220 to 300). Initial U.S. Embassy figures a week after the invasion estimated civilian deaths at 300. Wash. Post, Dec. 29, 1989, at A22, col. 6. In early January 1990, U.S. officials revised the figures down to 202 dead, including 147 identified and 55 unidentified bodies. Americas Watch, *supra* note 69, at 8. A Boston-based group, Physicians for Human Rights, concluded in March 1990 as a result of investigation that around 300 Panamanian civilians died. Wash. Post, Mar. 16, 1990, at A40, col. 4. Americas Watch also concurred in that figure as its own estimate. Americas Watch, *supra* note 69, at 4, 11.

Americas Watch blamed much of the ambiguity surrounding the number of deaths on "belated and incomplete" U.S. efforts to identify and count the dead that "left no room to examine circumstances under which each person died." *Id.* Other, more important factors, contributed to officials' inability to ascertain in all cases the status of the deceased and the circumstances of death. Many PDF members chose to fight in civilian clothing. A U.S. spokesman reported, "We couldn't always say if a casualty was a PDF, a civilian or what If a guy was shot carrying a weapon, that was a pretty good indication he was not a friendly. But troops under fire didn't always have time to label each corpse with the location where it was found" Wash. Post, Jan. 7, 1990, at A23, col. 1, 3; see Americas Watch, *supra* note 69, at 8. A Panamanian source estimated that 30% of the "civilian" deaths were PDF members in civilian clothing or members of Noriega's civilian-militia Dignity Battalions. Wash. Post, Jan. 7, 1990, at A23, col. 4; see also Wash. Post, Jan. 10, 1990, at A16, col. 6; Wash. Post, Mar. 16, 1990, at A40, col. 4. Some civilians died when caught looting by Panamanian business owners. *Id.* Others died when members of the Dignity Battalions set fire to the El Chorrillo neighborhood. See *supra* text accompanying notes 110-11. Still other deaths are directly attributable to actions by members of the Dignity Battalions. Wash. Post, Jan. 7, 1990, at A23, col. 1. Other contributing factors were the natural Panamanian practices of gathering civilian casualties and taking them to a hospital or directly to the morgue, whereas U.S. personnel brought deceased civilians to designated central collection points. *Id.* Furthermore, rapid decomposition of bodies and associated potential health problems caused U.S. authorities to bury numerous unclaimed corpses in two well-documented mass graves until they could be exhumed and delivered to civil authorities. *Id.* col. 6.

to the military advantage to be gained, and that precautions should be taken to protect the lives and well-being of civilians as much as possible.¹²⁵ These principles were not expressed explicitly in treaties, but their origins could be discerned in several written sources, including the 1864 St. Petersburg Declaration statement that the only legitimate object of war is to weaken the *military* forces of the enemy, and the Hague Regulations articles proscribing attacks on undefended towns and requiring warning prior to attack.¹²⁶

The years spanning the late 1960's through the mid-1970's witnessed intensified development of protections for civilians from hostilities. Several factors prompted renewed concern in this area: the highly visible impact of aerial bombardment in recent wars, such as that in Vietnam; increased interest in the protection of human rights in war; skepticism about the effectiveness of aerial bombardment against the civilian population; and technology developments that allowed greater accuracy in aiming bombs and missiles.¹²⁷ In 1965 in Vienna, the XXth International Conference of the Red Cross adopted two rules of relevance that were reaffirmed by U.N. General Assembly Resolution 2444 in 1968: "(b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."¹²⁸ In 1970, the General Assembly adopted additional principles that further specified that "every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations."¹²⁹

¹²⁵Baxter, *supra* note 13, at 115-16.

¹²⁶F. Kalshoven, *supra* note 15, at 35; see Hague Regulations arts. 25 (undefended places) and 26 (warning requirement); see *supra* text accompanying notes 78-79; see also FM 27-10, at 16, para. 25 ("it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them"). *Id.* at 4, para. 39 (C1) (stating Hague Regulation, Article 25, and defining "undefended places").

¹²⁷Baxter, *supra* note 13, at 116. On the subject of the effects of air war on the development of the "law of The Hague" generally, see Parks, *Air War and the Law of War*, 32 A.F.L. Rev. 1 (1990).

¹²⁸Resolution 2444 (XXIII), 19 December 1968, Respect for human rights in armed conflict, *General Assembly Official Records: Twenty-third Session, Resolutions, Supplement No. 18*, at 50, UN Doc. A 7218 (1969), quoted in Baxter, *supra* note 13, at 116; see F. Kalshoven, *supra* note 15, at 22, 34-35, 92.

¹²⁹Resolution 2675 (XXV), 9 December 1970, Basic Principles for the protection of civilian populations in armed conflicts, *General Assembly Official Records: Twenty-fifth Session, Resolutions, Supplement No. 28* (1971), at 76, UN Doc. A 8028 (1971), quoted in Baxter, *supra* note 13, at 116-17.

The adoption in 1977 by the Diplomatic Conference on International Humanitarian Law of Protocol I to the 1949 Geneva Conventions was the first time that these customary rules protecting the civilian population from the effects of armed conflict were incorporated in the treaty format.¹³⁰ Article 48 states the basic rule that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹³¹ The general prohibition on targeting civilians is repeated in Article 51.¹³² Article 57(1) continues the line of protections enunciated in 1968 at Vienna and in 1970 at the U.N. by requiring that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹³³ The Protocol, however, recognizes that the civilian population and combatants will not always be strictly separated. Article 50(3) confronts this problem by stating that the presence of combatants intermingled with the civilian population does not deprive the civilians of their protections.¹³⁴

On the other hand, the presence of organized bodies of soldiers amidst the civilian population does not provide those combatants any immunity from attack directed against them.¹³⁵ They constitute valid military objectives and may be attacked. Article 52(2), however, warns that while “[a]ttacks shall be limited strictly to military objectives,” the objective must make “an effective contribution to military action,” and its elimination must offer “a definite military advantage.”¹³⁶ Whether these criteria are met will depend on factors such as the “nature, location, purpose or use” of the object and

¹³⁰See Baxter, *supra* note 13, at 117; F. Kalshoven, *supra* note 15, at 36.

¹³¹Protocol I art. 48.

¹³²*Id.* art. 51, paras. 1 (“The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”) and 2 (“The civilian population as such, as well as individual civilians, shall not be the object of attack”).

¹³³*Id.* art. 57, para. 1.

¹³⁴*Id.* art. 50, para. 3 (“The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”).

¹³⁵See *id.* art. 52(2) (stating that attacks shall be limited to military objectives, and defining military objectives); see also Baxter, *supra* note 13, at 117-18.

¹³⁶Protocol I art. 52, para. 2.

“the circumstances ruling at the time.”¹³⁷ A 1976 change to FM 27-10 recognizes these foregoing principles from Protocol I as customary international law and includes them in its guidance to soldiers.¹³⁸

Given that civilians are bound to suffer during even valid attempts to eliminate a military objective, Protocol I elaborates the general principle of proportionality with provisions that balance military advantage against humanitarian considerations. Article 51 includes a prohibition against indiscriminate attacks, such as target-area or carpet bombardment, that either are not directed against specific military objectives or that employ a method or means of attack that is incapable of distinguishing between military objectives and civilians.¹³⁹ Article 51 also prohibits disproportionate attacks—attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁴⁰

Protocol I expands the range of precautions that must be taken by those who plan or decide upon the attack.¹⁴¹ Article 57 states that persons with these responsibilities must do “everything feasible to verify” that the objectives to be attacked are military objectives and not protected civilian objectives. They must minimize incidental loss

¹³⁷*Id.*; see F. Kalshoven, *supra* note 15, at 89-90. He explains:

Objects such as a tank or armoured vehicle, an artillery emplacement, or an arms depot, “by their nature” make an “effective contribution to military action.” Their destruction, capture or neutralization may, moreover, in all circumstances be expected to “offer definite military advantage”. . . . On the other hand, objects such as a road, bridge or railway-line make such an effective contribution to military action only when this follows from their location, viewed in the light of the overall military situation; with regard to this type of object the requirement of “definite military advantage in the circumstances ruling at the time” will therefore be the decisive factor in determining whether they may be regarded as military objectives. The same applies with even greater force with respect to objects such as a house or a school: such objects “by their nature” are destined for civilian purposes. Yet even such an object may by the way it is actually used (for instance, as military quarters or a command post or munitions depot) come to contribute effectively to military action and may then be regarded as a military objective, provided always that the condition of a “definite military advantage in the circumstances ruling at the time” is also met.

Id.

¹³⁸FM 27-10, at 4, para. 40 (C1). The manual expands the definition of “military objectives” that is provided in Article 52(2) of Protocol I by including, logically, “combatants” as well as objects that may be valid military objectives; see *id.*, para. 40(c); see also Tomes, *supra* note 77, at 72.

¹³⁹Protocol I art. 51(4); see F. Kalshoven, *supra* note 15, at 93; Baxter, *supra* note 13, at 118; see also J. Pictet, *supra* note 14, at 76.

¹⁴⁰Protocol I art. 51(5); see Baxter, *supra* note 13, at 118-19; F. Kalshoven, *supra* note 15, at 94.

¹⁴¹Baxter, *supra* note 13, at 121.

of life and injuries among civilians and damage to civilian objects. They must not launch an attack that “may be expected to cause incidental loss” of civilian life and property that would be excessive in proportion to the expected military advantage. The attack must be called off if it becomes apparent that one or more of these principles will be violated.¹⁴² These Protocol I provisions thus draw a line that an attacker may not overstep; he must always discriminate and refrain from carrying out an attack that may be expected to cause such excessive damage.¹⁴³ The 1976 change to FM 27-10 adopts these particular developments from Protocol I as part of United States Army doctrine.¹⁴⁴

Although these principles in general are unobjectionable as customary international law, the vaguely worded formulas in Articles 51 and 57 confront military decisionmakers with extremely difficult problems.¹⁴⁵ Assessing what is the “concrete and direct military advantage anticipated,” the “incidental loss of civilian life, injury to civilians or damage to civilian objects” that may be expected, or the ratio between the two *prior* to attack is an extremely difficult, if not impossible, task to perform with any degree of certainty.¹⁴⁶ One critic notes in this respect that, prior to attack, the attacking commander knows much less than the defender about the location of civilians. Therefore, the emphasis in Protocol I on placing the primary responsibility for minimization of incidental civilian casualties upon the attacker, rather than upon the more informed defender, is misplaced.¹⁴⁷ Consequently, the formulas undermine humanitarian law by encouraging defenders to charge “indiscriminate attack” and to call for analysis of attack results without consideration of the cause of those casualties, thereby exploiting civilians for tactical and propaganda purposes.¹⁴⁸

¹⁴²Protocol I art. 57(2); see Baxter, *supra* note 13, at 121.

¹⁴³F. Kalshoven, *supra* note 15, at 99.

¹⁴⁴FM 27-10, at 5, para. 41. In slightly different language from Protocol I, the Army manual states:

[L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.

Id.

¹⁴⁵See, e.g., Parks, *supra* note 127, at 179-81; F. Kalshoven, *supra* note 15, at 99.

¹⁴⁶See F. Kalshoven, *supra* note 15, at 99; Parks, *supra* note 127, at 181.

¹⁴⁷Parks, *supra* note 127, at 181.

¹⁴⁸*Id.* at 179, 181.

Another commentator, however, asserts that the weighing process cannot be too subtle; the attacker is required to refrain from the attack only if the disproportion between the two sides in the equation "becomes apparent."¹⁴⁹ In his opinion, the attacker's judgment is examined against a standard of "whether a normally alert attacker who is reasonably well informed and who, moreover, makes reasonable use of the available information could have expected the excessive damage among the civilian population."¹⁵⁰

The emphasis in Protocol I on the duties of the commander who is planning or executing an attack does not mean that the defending party is not obliged to take precautions to protect the civilian population from war's effects. The defender's obligations, however, are far less elaborate. Article 58 obliges the defender "to the maximum extent feasible" to remove civilians from the area of military objectives, to locate military objectives away from densely populated areas, and to take other necessary precautions to protect civilians.¹⁵¹ The defender that performs this duty properly cannot violate the remaining obligation, an elaboration of an earlier Geneva Civilians Convention provision, that it has to avoid using civilians to shield military objectives or impede military operations.¹⁵²

4. *General Discussion of the Issues*

Operation Just Cause illustrates well the difficulty in applying with precision these foregoing humanitarian law principles that are designed to protect civilians from the effects of armed conflict. The difficulty experienced by the United States military and other groups in ascertaining *after* the operation the facts related to the assault on the Comandancia and other attacks, and particularly in determining the precise number of civilian casualties, demonstrates the difficulty encountered in assessing whether civilian casualties were

¹⁴⁹F. Kalshoven, *supra* note 15, at 99; *see* Protocol I art. 57(2)(b).

¹⁵⁰F. Kalshoven, *supru* note 15, at 99-100. It would be interesting indeed to see what use a war crimes tribunal could make of this "reasonable attacker" standard.

¹⁵¹Protocol I art 58; *see* F. Kalshoven, *supra* note 15, at 101; Baxter, *supru* note 13, at 121.

¹⁵²Protocol I art. 51(7); Geneva Civilians Convention art. 28; *see* F. Kalshoven, *supra* note 15, at 95; Baxter. *supra* note 13, at 121; *see also supra* text accompanying note 102.

proportionate to the achieved military advantage.¹⁵³ Many value judgments and unknown variables enter the equation. As noted earlier, however, responsibility for compliance is determined according to the reasonableness of the attacker's assessment, *prior* to attack, of the two sides of the proportionality formula.¹⁵⁴ This prevents compliance determinations from being made simply by weighing the number of civilian casualties against the military value of the objective that was attacked. Certainly, no inference in this regard may be drawn from comparing the number of civilian dead against the number of casualties suffered by the attacking military force, as did the Americas Watch Report¹⁵⁵—a macabre and distorted method of viewing proportionality that appears to imply that greater numbers of military deaths would better have fulfilled the humanitarian concerns that the proportionality principle represents.

As noted earlier, the issue of United States conduct does not arise simply because United States forces are alleged to have targeted civilians or used firepower indiscriminately.¹⁵⁶ Critics concede that the Comandancia and other objects of United States attack were valid military objectives.¹⁵⁷ No one could seriously dispute that the criteria for a “military objective”—that it make an effective contribution to

¹⁵³See Parks, *supra* note 127, at 181; see also *supra* note 124. The new Panamanian Vice President, Arias Calderon, asked one week after the invasion whether U.S. forces adequately distinguished between civilian and military areas in their attacks, responded: “I have no way to evaluate their effectiveness, their precision and whether or not it could have been done otherwise.” Wash. Post, Dec. 28, 1989, at A28, col. 3. Americas Watch blamed the U.S. military for the difficulties in assessing whether civilian casualties were in fact proportionate. Its report stated: “Depending on the circumstances, civilian victims may be considered, within the laws of war, incidental to an attack on a legitimate military target. The problem is that there is no way of knowing, at this point *how* each of those civilians died, because the occupying American forces . . . made no real effort to determine those circumstances.” Americas Watch, *supra* note 69, at 14.

¹⁵⁴See *supra* text accompanying notes 149-50.

¹⁵⁵See Americas Watch, *supra* note 69, at 14-15. The Report states:

Indeed, civilian deaths now appear to have exceeded military deaths by a margin of four to one, using official figures, and possibly by as much as six to one. Under the circumstances, boasting by the Bush Administration about the “surgical operation” conducted in Panama is highly misplaced. It is even more disturbing to compare the numbers of civilian dead to American casualties, officially given at 23.

Id. at 14. As a point of information, three U.S. civilians also died, and 323 U.S. military were wounded. Soldiers, *supra* note 2, at 20; Wash. Post, Dec. 28, 1989, at A28, col. 2. Early estimates of PDF casualties were 297 killed and 123 wounded. Wash. Post, Dec. 28, 1989, at A28, col. 2. Later estimates revised PDF dead count down to around 50. Miami Herald, Mar. 27, 1990, cited in Americas Watch, *supra* note 69, at 13.

¹⁵⁶See *supra* text accompanying note 112.

¹⁵⁷Americas Watch, *supra* note 69, at 17 (“It is evident that the buildings immediately adjacent to the Panamanian command forces could have been the legitimate object of attack”).

military action and its elimination offers a definite military advantage¹⁵⁸—are met by an object that serves as the command center of the enemy's armed forces, as did the Comandancia. Rather, the essence of the critical allegations are that, given a valid military objective, the deliberate United States employment of "highly sophisticated weaponry and tactics to present an overwhelming superiority of firepower that would make any resistance unthinkable,"¹⁵⁹ unnecessarily caused civilian casualties and therefore violated the proportionality principle.¹⁶⁰ One legal scholar, interestingly, contends that the disproportionate use of United States firepower can be explained by the United States decision to deploy *too few* troops—that if at least ten times the number (about 26,000) had been deployed, the presence of such superior numbers would have induced Noriega's defenders to surrender much sooner, with a consequent reduction in civilian casualties.¹⁶¹

The foregoing allegations and observations suffer too much from their hindsight perspective. How many United States soldiers or how much firepower it would take to induce Noriega's surrender is highly subjective, and the inquiry misses the point. Military planners must develop the operation based on complex calculations with many unknown variables. The real issue, therefore, is whether military planners properly took into account the relevant principles of humanitarian law in making their calculations, and whether United States forces conducted the military operation in accordance with those calculations.

Numerous factors reveal that the planners of Operation Just Cause fulfilled their obligations to distinguish between civilians and combatants in designing attacks so that incidental damage to the civilian population would be minimized. There was no expectation of disproportionately high civilian losses. The rules of engagement cards issued to United States soldiers were one part of that planning. The guidelines emphasized the importance of avoiding unnecessary harm to civilians by carefully restricting the circumstances under which individual soldiers could shoot their weapons, providing for civilian evacuation prior to attack, and by leaving targeting decisions that would employ certain kinds of weapons to senior grade military of-

¹⁵⁸See *supra* text accompanying notes 136-38.

¹⁵⁹Americas Watch, *supra* note 69, at 16.

¹⁶⁰See *supra* text accompanying note 113.

¹⁶¹*Agora*, *supra* note 12, at 522. Professor D'Amato believes that "legal uneasiness" felt by the U.S. in undertaking the Panama Operation led to the deployment of as few troops as possible, and that there undoubtedly was a fear that a massive use of troops would appear somehow to be a greater international law violation. *Id.*

ficers.¹⁶² One United States journalist, upon returning from Panama, wrote that the rules of engagement provoked a relatively high United States casualty rate. He noted that in two particular assaults, United States deaths occurred because concern for widespread civilian casualties prevented their units from “prepping” their objectives with massive firepower.¹⁶³

The selection of light forces and line-of-sight precision weapons is further indication that targets were selected with care to minimize damage.¹⁶⁴ That United States assaults were designed to induce PDF soldiers to surrender does not indicate that unnecessary firepower was brought to bear. Surprise assaults in hours of darkness, employing methods of firepower that are designed to induce surrender, are not *per se* unnecessarily destructive. Given the primary military goal of preserving the PDF intact while “decapitating” its leadership,¹⁶⁵ the employment of overwhelming firepower with the attendant risks of high incidental civilian losses would be counter-productive. This is not to say that the United States military did not expect Panamanian civilian losses, but rather that planning involved a reasonable effort to keep civilian damage from being excessive.

United States forces generally complied with the operational constraints given to them. PDF garrisons usually were approached first with loudspeaker pleas to surrender. If these were ignored, United States troops generally used well-placed, gradually escalating firepower until the garrison surrendered.¹⁶⁶ Exceptions to these tactics occurred when intelligence sources or other factors indicated that the objective could not be subdued so easily and that surprise assaults were required. An example of such a situation was the Gamboa prison assault to rescue a United States civilian who was being held under Noriega’s orders, without charge, on suspicion of espionage. United States authorities had received warnings that if a rescue attempt oc-

¹⁶²See *supra* text accompanying notes 114-18.

¹⁶³McConnell, *How Many Died in Panama?*, Wash. Post, June 23, 1990, at A27, col. 3.

¹⁶⁴See *supra* text accompanying notes 121-22.

¹⁶⁵See *supra* text accompanying notes 119-20.

¹⁶⁶Wash. Post, Jan. 7, 1990, at A22, col. 2, 3; see *supra* note 122. To cite a few examples reported in the press, a U.S. attack at Fort Amador, a joint U.S.-PDF base where Noriega had his main office, left the tomb of former military ruler Gen. Omar Torrijos, situated opposite Noriega’s office, marred by one rifle round. Wash. Post, Jan. 7, 1990, at A22, col. 3. At Tocument Airport, U.S. firepower was carefully swung along the building to drive people out rather than kill them. *Id.* A nativity scene reportedly was still standing outside the Balboa Police Station after it was heavily damaged in the attack. *Id.* However, numerous shipping agency offices were destroyed in Colon by direct fire after defenders at the PDF police station refused loudspeaker orders to surrender. *Id.*

curred, the prisoner would be killed.¹⁶⁷ The Comandancia presented another kind of military objective that required a surprise assault—a reinforced concrete structure that, as command center of the PDF, needed to be eliminated quickly, but could not be expected to surrender easily. What these targets all have in common is that, based on the information available to them,¹⁶⁸ United States military planners selected tactics and weapons that would subdue the defender while simultaneously minimizing incidental damage to the extent possible. This effort satisfies the proportionality concept.

Allegations of United States disproportionate use of firepower, resulting in excessive civilian losses, are unreasonable in view of the circumstances. The actual cause of fires in El Chorrillo is disputed.¹⁶⁹ United States forces, even if blameworthy in some respect, cannot be held solely accountable for civilian losses. Too many intervening causes are possible. Numerous incidents were reported of Panamanian civilians caught in cross-fire from Dignity Battalion snipers.¹⁷⁰ The Americas Watch Report condemned PDF and Dignity Battalion members for drawing fire on civilians by leaving the site of military objectives, dressing as civilians, melting into the population, and continuing their resistance.¹⁷¹ These actions are clear violations of the 1949 Geneva Civilians Convention provision that forbids using civilians as a shield.¹⁷² Noriega's selection for the Comandancia's location of the impoverished El Chorrillo neighborhood, reportedly in the midst of his political stronghold, placed the residents in an unnecessarily dangerous location. Whether the surrounding "tinderbox" neighborhood was intended by Noriega as a shield for the Comandancia is unknown. Nevertheless, placing the PDF command center in the center of a densely populated civilian neighborhood, instead of on a military installation or in a section of Panama City composed predominantly of offices, probably does not satisfy the obligation to locate military objectives away from densely populated areas.¹⁷³ Once hostilities began, little indication exists that Noriega's loyalists made any attempt to remove Panamanian civilians from El

¹⁶⁷Wash. Post, Jan. 7, 1990, at A22, col. 4, 5. The American, Kurt Muse, lived in Panama City and was caught by Panamanian police running a clandestine radio transmitter. Noriega claimed that Muse was a CIA operative. *id.*

¹⁶⁸For an account of a few of the intelligence problems encountered by U.S. forces, see *U.S. Troops May Have Seen Noriega's Escape*, Wash. Post, Jan. 7, 1990, at A22, col. 1-3.

¹⁶⁹See *supra* text accompanying note 110.

¹⁷⁰See Wash. Post, June 23, 1990, at A27, col. 3.

¹⁷¹Americas Watch, *mpa* note 69, at 25.

¹⁷²Geneva Civilians Convention art. 28; see *supra* text accompanying note 152.

¹⁷³See *supra* text accompanying note 151.

Chorrillo,¹⁷⁴ instead, some reports allege that Dignity Battalion members effectively “bottled up” the neighborhood, substantially contributing to civilian **injuries**.¹⁷⁵

Analysis of the Panama operation essentially becomes an examination into causation. The evidence reveals that United States military planners applied the proper humanitarian formulas when calculating the method of **attack**.¹⁷⁶ It also appears that United States forces conducted themselves appropriately and did not cause excessive incidental civilian **casualties**.¹⁷⁷ Looking at the Comandancia episode in particular, the conclusion is somewhat uncertain because the facts do not indicate with sufficient certainty the extent of civilian casualties or how those casualties were caused. The milieu of confusing facts and mutual responsibilities on the part of both parties to the conflict make a definite assignment of responsibility **unrealistic**.¹⁷⁸ One important reassuring conclusion may be made — whether political or legal reasons were predominant, civilian casualties were an important consideration in the conduct of the military operation, and the expectation among United States military planners was that the operation, if executed according to plan, would not cause excessive damage among the civilian population.

5. *Operation Just Cause as Internal Armed Conflict*

The foregoing discussion is based on the assumption that Operation Just Cause is properly characterized as an international armed conflict. If, however, one characterizes the conflict as internal, and common Article 3 of the 1949 Geneva Conventions applies, the protections to be accorded civilians are much less precise. Article 3 contains no rules regulating the conduct of hostilities, and its provisions nowhere mention distinctions between civilians and combatants or military objectives. Nevertheless, its prohibition of “violence to life and person” against “personstaking no active part in the hostilities” may be sufficiently broad to encompass attacks against civilians in territory controlled by an adverse party in an internal armed conflict.¹⁷⁹

¹⁷⁴*Id.*

¹⁷⁵See *supra* note 110.

¹⁷⁶See *supra* text accompanying notes 162-65.

¹⁷⁷See *supra* text accompanying notes 166-67.

¹⁷⁸See *supra* text accompanying notes 169-75.

¹⁷⁹See R. Goldman, *supra* note 47, at 2; M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 667 n.1.

Authority also seems to exist for the proposition that customary international law recognizes an obligation for warring parties in *all* armed conflicts—international and non-international—to distinguish civilians from combatants at all times. The argument is that the 1968 Preamble to the U.N. General Assembly Resolution 2444, which expressly includes “all armed conflicts” within its civilian protections, supports this conclusion.¹⁸⁰ The further contention is that the International Committee of the Red Cross and the United States government also recognize that these principles reflect existing customary international law.¹⁸¹

The extent of the obligation to protect civilians from the effects of internal armed conflict is not clear. Ample reason exists to conclude that the protections are not as extensive as they are in international armed conflict. If, as the United States has agreed, the 1977 Protocol II to the 1949 Geneva Conventions represents existing customary international law,¹⁸² then the differences between those protections and the more extensive obligations in international armed conflict are substantial. Article 13 of Protocol II merely states that “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations . . . [and] shall not be the object of attack.”¹⁸³ Of particular relevance for our examination of the Panama operation is the absence of any reference to attacks that may be expected to cause a disproportionately large number of civilian losses. It appears, moreover, that its absence was intentional and was not merely part of the effort to keep the Protocol II provisions as simple as possible.¹⁸⁴ Nevertheless, if one accepts the premise that the prohibition against “violence to life,” repeated in Article 4 of Protocol II, is broad enough to expand the range of protection,¹⁸⁵ or that recently developed international law already provides a proportionality rule to internal conflicts, then the international—non-international distinction becomes largely irrelevant for this analysis. In any event, because the United States military conducted its operation as though the full body of the “law of The Hague” applied, expansive constructions of common Article 3 of the 1949 Geneva Conventions or pertinent provisions of the 1977 Protocol II are unnecessary for this particular examination.

¹⁸⁰R. Goldman, *supra* note 47, at 3; M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 667.

¹⁸¹R. Goldman, *supra* note 47, at 3.

¹⁸²See *Agora*, *supra* note 37, at 910.

¹⁸³Protocol II art. 13.

¹⁸⁴M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 677-78.

¹⁸⁵Protocol II art 4(2).

IV. HUMANITARIAN LAW AND WAR'S “VICTIMS”: THE PROTECTION OF PANAMANIAN CIVILIANS

A. DEFINING THE ISSUES

1. Issues

The preceding section examined the conduct of United States forces in Panama in light of constraints placed on the conduct of military operations by the “law of The Hague.” This section progresses beyond the stage of combat military operations and examines what happened to Panamanian civilians who, for whatever reason, found themselves in the power of the United States. Operation Just Cause presents an opportunity to examine obligations under the “law of Geneva” that are designed to provide numerous benefits for these individuals. Actions of United States soldiers toward Panamanian civilians that raise issues in this area include United States practices concerning arrests, detentions, interrogations, and searches.¹⁸⁶ Certain instances of claimed mass burials or cremations also invoke the “law of Geneva.”¹⁸⁷

Numerous factors that are unique to the Panama operation complicate the analysis. The characterization of the conflict as international or non-international is especially relevant in this area of examination.¹⁸⁸ If the conflict is characterized as international, then the application of many of the rules that benefit civilians depends upon whether the actions of United States forces respecting civilians occurred during an “occupation” of Panama or during some earlier stage of armed conflict.¹⁸⁹ To resolve that issue, consideration must be given to whether the law of occupation applies to the conflict and to which provisions of the complex 1949 Geneva Civilians Convention are intended to offer protections to Panamanian civilians at that stage of armed conflict. If the conflict is non-international,

¹⁸⁶Americas Watch, *supra* note 69, at 35-40.

¹⁸⁷Wash. Post, Jan. 7, 1990, at A23, col. 6; Americas Watch, *supra* note 69, at 9-10.

¹⁸⁸See *supra* text accompanying notes 23-31, 39-45, 58-63.

¹⁸⁹See DA Pam. 27-161-2, at 159. It states:

Once the occupation commences international law attributes certain powers to the occupier that it would not otherwise possess. A complicated trilateral set of legal relations springs up between the occupier, the ousted sovereign and the inhabitants of the occupied area. It is therefore necessary to know when the occupation commences.

Id.; see generally G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957).

then the extent of the protections applicable under humanitarian rules pertaining to internal armed conflict become important. This latter situation also raises an ancillary issue concerning possible United States obligations under applicable human rights instruments that the United States may have assumed as Panama's "agent." Although the human rights issue does not involve humanitarian law in the strict sense, it is addressed briefly because the bodies of law are intimately related.¹⁹⁰

2. Facts

The allegations that the United States failed to comply with international law obligations under the "law of Geneva" fall into three broad groups. The first group concerns detentions, arrests, interrogations, and searches of Panamanian civilians. The second group concerns the care for sick, wounded, and displaced civilians. The final group concerns allegations regarding the propriety of alleged cremations and mass burials.

During the course of the invasion, United States forces arrested and detained several hundred Panamanian civilians.¹⁹¹ These detentions were made on the basis of a list that United States and Endara government officials jointly assembled which specified persons that either or both governments wanted picked up during the operation.¹⁹² Many of those detained were former officials of the Noriega government who may have presented security risks to the United States forces or to the Endara government.¹⁹³ The Americas Watch Report contends that some of the detained civilians were journalists, trade union leaders, or others who were detained in pursuit of "political vendettas" because their views "were at odds with the new [Endara] government."¹⁹⁴ Some thirty or forty persons on the list were wanted by the United States on drug-related charges.¹⁹⁵ A United States official reportedly explained that United States soldiers ar-

¹⁹⁰See generally T. Meron, *supra* note 30, at 10-28 (discussing the growing convergence of the two bodies of humanitarian and human rights law).

¹⁹¹Precise figures are unavailable; however, it is clear that the numbers of Panamanians initially detained by U.S. forces were considerable. Early figures put the number of detainees at around 5,000 individuals; but the figure does not distinguish between ordinary civilians, members of the Dignity Battalions, and PDF regulars. Wash. Post, Dec. 29, 1989, at A22, col. 6 ("U.S. troops have detained 5,126 people"): Americas Watch, *supra* note 69, at 35.

¹⁹²Wash. Post, Dec. 29, 1989, at A22, col. 4; Americas Watch, *supra* note 69, at 37.

¹⁹³See Wash. Post, Dec. 29, 1989 at A1, col. 6 and A22, col. 1; Americas Watch, *supra* note 69, at 35.

¹⁹⁴Americas Watch, *supra* note 69, at 35.

¹⁹⁵Wash. Post, Dec. 29, 1989, at A22, col. 4.

resting these civilians were doing so at the request of the Endara government, stating: "At this point we're willing to hold anybody they identify. . . . They have signed authority over to us to arrest civilians and detain them since the government has not yet had time to build up a judicial system . . ." to replace Noriega's.¹⁹⁶ Once detained, according to Americas Watch, United States forces improperly interrogated civilians by asking questions related to their political affiliations, ideology, or sympathies, thus stifling their freedom of association and expression.¹⁹⁷ Critics further contended that searches of Panamanian premises exceeded the permissible scope for searches because they were conducted for either political reasons or other reasons unrelated to the security of United States forces.¹⁹⁸ As with detentions, the searches generally appeared to be part of a cooperative effort between United States and Endara government officials.¹⁹⁹

The chief complaint stated by Americas Watch is that the arrests, detentions, interrogations, and searches continued after any security threat posed by the affected civilians had passed.²⁰⁰ They contended that "[o]nce the period of hostilities was over, the legal basis for the United States forces to detain, arrest, and search civilians was at best tenuous."²⁰¹ Those who were detained had to be repatriated once hostilities ceased.²⁰² Consequently, once the period of pure "security" detentions passed, ordinary human rights and civil liberties obligations fully applied. Thus, there could be no arrest or search without warrant and no detention without charges based on sufficient evidence. Additionally, there existed a right of habeas corpus, a right of access to legal counsel of one's own choice, and notice to relatives and family visits.²⁰³

¹⁹⁶*Id.* at col. 4, 5.

¹⁹⁷Americas Watch, *supra* note 69, at 38.

¹⁹⁸*Id.* at 37. The Americas Watch Report states:

On various occasions, searches by U.S. soldiers were not restricted to looking for weapons or other war materials. Many houses and offices were carefully searched, among them the offices of a leftist publication and at least three offices of church-related development and human rights organizations. In these places, American soldiers proceeded to look through files and to examine documents, an activity which obviously bears no relationship to the security of the occupation force.

Id.

¹⁹⁹For example, the Endara government reportedly ordered more than 100 Panamanian bank accounts frozen and authorized the U.S. Drug Enforcement Agency to search bank and government records for evidence of drug-dealing and money-laundering by Noriega and his associates. Wash. Post, Dec. 29, 1989, at A22, col. 5.

²⁰⁰Americas Watch, *supra* note 69, at 36-40.

²⁰¹*Id.* at 38.

²⁰²*Id.* at 51.

²⁰³*Id.* at 39-40.

Other allegations criticize United States efforts to care for Panamanians who were displaced from their homes by the fighting as well as United States efforts to provide adequate medical and financial assistance to injured Panamanians.²⁰⁴ The Americas Watch report indicated that the United States military closed the American high school in Balboa and provided security, food, and some emergency assistance to thousands of Panamanians who were displaced in the early hours of the operation.²⁰⁵ Later, they moved to a hanger on Albrook Air Force Base.²⁰⁶ The report criticized the United States, however, by finding "appalling" living conditions at these locations that allowed little or no privacy for the Panamanians.²⁰⁷ Many families initially lived in cardboard boxes or made tents out of parachutes, while only a few were given Army tents.²⁰⁸ Later, as the displaced population receded, each family received a small cubicle surrounded by makeshift cloth or cardboard dividers.²⁰⁹ Moreover, the report contends, United States emergency assistance was limited to those civilians who were at those particular locations, thus denying assistance to many other needy Panamanians.²¹⁰ In May 1990, a group of Panamanian civilians filed a claim with the Inter-American Commission on Human Rights seeking \$250 million from the United States government, alleging that indiscriminate actions of United States military forces caused deaths, injuries, and destruction of property, and that United States military authorities had rejected their requests for medical help and financial aid.²¹¹

The final area of criticism involves reports of cremations and mass burials conducted by United States forces. Americas Watch, in its investigation, was unable to confirm any fact of deliberate burning

²⁰⁴See, e.g., *id.* at 47-49; Wash. Post, May 11, 1990, at A13, col. 1; Wash. Post, May 20, 1990, at F2, col. 4 (editorial by Colman McCarthy, *The Price of a "Just Cause"*).

²⁰⁵Americas Watch, *supra* note 69, at 47 (citing 15,000 displaced).

²⁰⁶*Id.* at 48.

²⁰⁷*Id.* at 47-48.

²⁰⁸*Id.* at 47.

²⁰⁹*Id.* at 48.

²¹⁰*Id.*

²¹¹Wash. Post, May 11, 1990, at A13, col. 1; see also Wash. Post, May 20, 1990, at F2, col. 4. The Inter-American Commission on Human Rights is a charter organ of the Organization of American States. As such, it possesses various powers to promote human rights, including the power to prepare country studies and reports and to make recommendations to member states for adopting human rights measures. See T. Buergenthal, *supra* note 30, at 127, 129-32. It also may receive and act on individual petitions charging OAS member states with violations of the rights proclaimed in the 1948 American Declaration of the Rights and Duties of Man. *Id.* at 127-29, 131, 141-43. The Commission also helps draft OAS human rights instruments and is consulted regularly by the OAS Permanent Council and the General Assembly on human rights issues; and it mediates and protects human rights in international and internal armed conflicts and in hostage seizure cases. *Id.* at 135-36.

of bodies; burned bodies that were recovered appeared to be victims of the El Chorrillo fire.²¹² Americas Watch did criticize the United States for allegedly poor efforts to count or otherwise account for the dead.²¹³ Allegations of mass burials, as with cremations, similarly are unfounded. United States authorities readily admitted burying numerous unclaimed, rapidly decomposing corpses that presented hygiene problems in two well-documented graves until they could be exhumed and delivered to Panamanian authorities.²¹⁴

These facts raise many issues concerning compliance of United States forces with obligations to afford the protections under the "law of Geneva" to Panamanian civilians. As with the obligations under the "law of The Hague," compliance determinations are dependent on proper characterizations of the armed conflict so that United States conduct may be scrutinized under the appropriate standards.

B. THE "LAW OF GENEVA" AND THE STAGES OF CONFLICT

1. *The Stages of Conflict Defined*

Generally, customary law distinguished between stages in the process of conquest. The first stage is invasion. In this situation, the foremost military objective is to subdue enemy forces.²¹⁵ In the following stage, occupation, the invader takes possession of enemy territory for the purpose of holding it, at least temporarily.²¹⁶ The primary distinction between invasion and occupation, as codified in the Hague Regulations, is that occupation occurs when enemy territory actually is placed under the authority of the invading army.²¹⁷ Occupation is concerned with the administration of enemy territory, whereas the army that is in the midst of its invasion is not yet principally concerned with administration.²¹⁸ These distinctions have significant

²¹²Americas Watch, *supra* note 69, at 9-10; see *supra* text accompanying notes 108-11.

²¹³Americas Watch, *supra* note 69, at 13; see *supra* note 124.

²¹⁴See *supra* note 124.

²¹⁵L. McNair & A. Watts, *supra* note 60, at 367; G. von Glahn, *supra* note 189, at 28; L. Oppenheim, *supra* note 24, at 434; see FM 27-10, at 4, para. 3a.

²¹⁶L. Oppenheim, *supra* note 24, at 434; G. von Glahn, *supra* note 189, at 28-29; L. McNair & A. Watts, *supra* note 60, at 367; FM 27-10, at 138, para. 352.

²¹⁷Hague Regulations art. 42. Occupation does not necessarily follow the defeat of the enemy state; rather, it focuses upon the territory where the invader's authority has been established and can be exercised. *Id.*; G. von Glahn, *supra* note 189, at 28; L. Oppenheim, *supra* note 24, at 434-35; FM 27-10, at 139, para. 356. Commentators emphasize that authority, or control, is a question of fact. See G. von Glahn, *supra* note 189, at 29; DA Pam. 27-161-2, at 159-60; FM 27-10, at 139, para. 355.

²¹⁸L. Oppenheim, *supra* note 24, at 434-35; G. von Glahn, *supra* note 189, at 28-29; L. McNair & A. Watts, *supra* note 60, at 368.

consequences in analyzing under the law of armed conflict the responsibilities of an invading army toward the inhabitants of the enemy state.

During an occupation, the occupying power's foremost duty is to take all measures within its power to restore and ensure public order and safety while respecting, whenever possible, the laws in force in the occupied country.²¹⁹ The law of belligerent occupation is "an attempt to substitute for chaos some kind of order, however harsh it may be."²²⁰ The means available to an occupying power for ensuring public order and safety, however, are not unlimited. The 1949 Geneva Civilians Convention now supplements the "law of The Hague" pertaining to occupation by specifying the protections that are to benefit civilians who find themselves within territory administered by an occupying force.²²¹

The 1949 Geneva Conventions do not define the stages of armed conflict, but they do afford varying degrees of "protection" to civilians according to the stage of conflict. Article 4 of the Geneva Civilians Convention defines protected civilian persons as those who "at a given moment and in any manner whatsoever, find themselves, in case of a *conflict or occupation*, in the hands of a party to the conflict or occupying Power of which they are *not nationals*."²²² In so doing, it seems reasonably clear that the Convention extends the protection of civilians beyond the situation of occupation, to which the Hague Regulations are limited, to require only that the persons

²¹⁹Hague Regulations art. 43. It states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *Id.*; see L. McNair & A. Watts, *supra* note 60, at 368-72; F. Kalshoven, *supra* 15, at 55.

²²⁰L. McNair & A. Watts, *supra* note 60, at 371. The legality of the occupying force's action in invading the country is irrelevant. *Id.* at 372. Admissions regarding whether there is "war" also are irrelevant. *Id.* at 420.

²²¹Geneva Civilians Convention art. 154 (stating that it is "supplementary" to the Hague Regulations); see Pictet Commentaries, *supra* note 27, at 272; L. Oppenheim, *supra* note 24, at 451-52.

²²²Geneva Civilians Convention art. 4 (emphasis added).

be “in the hands of a Party to the conflict.”²²³ This extension becomes especially important when attempting to discern precisely which protections enumerated in the Convention apply to civilians at particular stages of the conflict.

Leaving aside the protections for *aliens* in a belligerent state’s *domestic* territory, and focusing on protections owed the civilians in the other belligerent state’s territory, the protections afforded by the Geneva Civilians Convention to persons in non-occupied areas appear to be less extensive than those available in occupied areas. The Convention accomplishes this through its system of arranging by parts certain provisions to apply only in the territory of a party to the conflict, others to occupied territory, and a number to both or to civilian populations generally.²²⁴

The first of these parts, “General Protection of Populations Against Certain Consequences of War,” explicitly covers “the whole of the populations of the countries in conflict.”²²⁵ The protections extended here, however, are strictly limited to subjects like establishing protective zones and to specified groups of especially vulnerable people, such as the wounded and sick, aged persons, children, and maternity cases.²²⁶ The second of these parts, “Status and Treatment of Protected Persons,” is most relevant to this examination. It concerns protected civilians in the strict sense—those civilians who find themselves “in the hands of a party to the conflict or Occupying Power of which they are not nationals.”²²⁷ It is divided into five sec-

²²³See Pictet Commentaries, *supra* note 27, at 47, 51. Unfortunately, the language does not specifically distinguish between stages of the conflict. It would seem illogical, however, if civilians were omitted from some aspect of coverage by the Convention based solely on the stage of conflict. Pictet, in his commentary prepared for the International Committee of the Red Cross, dispels some of the ambiguity. He states: “The words ‘at a given moment and in any manner whatsoever’ were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances.” *Id.* at 47. He further states: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.” *Id.* at 51; see also DA Pam. 27-161-2, at 161.

²²⁴See F. Kalshoven, *supra* note 15, at 51-59; FM 27-10, at 98, para. 246.

²²⁵Geneva Civilians Convention art. 13; see DA Pam. 27-161-2, at 131. This part thus concerns not only the relations between a state and aliens, but also relations between a state and its own nationals. *Id.*; Pictet Commentaries, *supra* note 27, at 118.

²²⁶See Geneva Civilians Convention arts. 14-26; see also F. Kalshoven, *supra* note 15, at 51-52; DA Pam. 27-161-2, at 131-32; see generally Pictet Commentaries, *supra* note 27, at 119-98.

²²⁷Geneva Civilians Convention art. 4; see F. Kalshoven, *supra* note 15, at 53.

tions, of which three are relevant to this examination: I—“Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories,” III—“Occupied Territories,” and IV—“Regulations for the Treatment of Internees.”²²⁸

The precise protections that United States forces owed to Panamanian civilians in Operation Just Cause depend upon the determination of which section applied. Section I consists of “Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories.” The choice of this title is unfortunate because it signals the ambiguities in the protections that are provided for those “protected persons” who are defined in Article 4.²²⁹ The reason for the ambiguity is that, while the part supposedly pertains to *all* civilian persons that fall into the hands of the enemy power as defined in Article 4,²³⁰ the part’s sections essentially divide protected civilians into two geographical classes based upon where they are found. Thus, protected civilians are located either in the “territory of a Party to the conflict” or in “occupied territory.”²³¹

The meaning of “occupied territory” is relatively clear, given that the Civilians Convention articles concerning occupation are intended to supplement the Hague provisions on that subject without necessarily expanding situations to which they would apply beyond “occupation” in the traditional sense.²³² Nevertheless, “territory of a Party to the conflict” adds an element of ambiguity to the Convention’s scope of application. It is narrower than the Article 4 definition of protected civilians who at any given moment find themselves in the hands—but not necessarily in the territory—of a party to the conflict.²³³ Further adding to the confusion is the topic of Section 11, which specifically is applicable only to “*Aliens* within the Ter-

²²⁸See Geneva Civilians Convention arts. 27-34 (Section I), 47-78 (Section III), 79-135 (Section IV). Section 11, concerning “Aliens Within the Territory of a Party to the Conflict,” applies to civilians of *enemy nationality* living in the territory of belligerent states. See Pictet Commentaries, *supra* note 27, at 232. Consequently, it is irrelevant to this analysis because Panamanians living within Panama are not enemy nationals—that is, they are not U.S. nationals. Section V, “Information Bureaus and Central Agency,” pertain to subjects that are beyond the **scope** of the article.

²²⁹See *supra* text accompanying notes 222-23.

²³⁰See *supra* text accompanying note 227; see also M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 442. They state: “Except for common Art. 3 (which is applicable only to non-international armed conflict), the humanitarian protections of Wrts I and III of the Fourth Convention deal primarily with the protection of ‘protected persons’ as that term is defined in Art. 4 of the Fourth Convention.” *Id.*

²³¹See Geneva Civilians Convention **Part III**.

²³²See *supra* note 221.

²³³See *supra* text accompanying notes 222-23.

ritory of a Party to the Conflict.”²³⁴ It is clear that these people are civilians of enemy nationality who are located in the territory of belligerent states—for example, Panamanians living in the United States or *vice versa*.²³⁵ What is unclear is whether the “alien” protections are a sub-category of a broader class of protections offered to any civilian who finds himself in the territory of *either* party to the conflict, so long as he is not of the same nationality as the party in whose power he finds himself. Alternatively, “territory of a party to the conflict” might restrict the protection geographically to the situation of a civilian who finds himself in the power of a belligerent in that belligerent’s *domestic* territory, and the civilian is not a national of that state—in other words, a situation synonymous with that of “aliens within the territory of a Party to the conflict.”

Examining this issue in the context of the Convention as a whole leads to conflicting results. If the latter interpretation is the proper one, then it follows that, other than the limited protections provided in the part covering “General Protections,”²³⁶ the only civilians who are protected by the Civilians Convention are those who either are in *occupied* territory or are in the enemy power’s *domestic* territory.²³⁷ The effect is that it could make the broader definition of “protected person” found in Article 4 essentially meaningless for the Panama situation, because none of the protections listed in the part concerning “Status and Treatment of Protected Persons” would be relevant unless the United States actions affecting Panamanian civilians occurred during a United States “occupation” of Panama. Consequently, a gap would exist in the protections that are owed those Panamanian civilians who found themselves “in the hands” of United States forces in the zone of operations where fighting was still taking place but that was not sufficiently under United States “control” to make the United States presence an occupation in the sense of the 1907 Hague Regulations.²³⁸ If the United States did not effect an “occupation,” then its obligations concerning the extent of protections owed Panamanian civilians becomes unclear.

Whether the foregoing construction is reasonable is a complex issue. At least one prominent commentator has placed some significance on the existence of such a gap while writing on various aspects

²³⁴ Geneva Civilians Convention, Part III, Section II (emphasis added).

²³⁵ See *supra* note 228.

²³⁶ See *supra* text accompanying notes 225-26.

²³⁷ See *supra* text accompanying notes 231-35.

²³⁸ See *supra* text accompanying notes 216-17.

of the Geneva Civilians Convention.²³⁹ Moreover, certain provisions of Protocol I purportedly were responses to perceived gaps in this area of the 1949 Convention's coverage.²⁴⁰ A construction that found an absolute gap in the Convention's protections, however, would appear contrary to the "object and purpose" of the Convention. This object and purpose is expressed in Article 2—which makes the Convention's provisions applicable to any "armed conflict" between party states—and Article 4—which does not appear to possess the geographical limitation in defining protected civilians.²⁴¹ If a gap exists, then it is not readily apparent what purpose such a gap would serve in view of the broad coverage for civilians stated in Article 4. Reading the treaty as a whole, the drafters must have intended that *some* protections be afforded the category of civilians that appear to fall in the gap created by a literal reading of several of its provisions.²⁴² This logical conclusion seems to be supported by the commentary prepared for the International Committee of the Red Cross.²⁴³ Nevertheless, the *extent* of those protections—that is, pre-

²³⁹See Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 B.Y.I.L. 323, 328 (1951). Baxter was writing about the derogations permitted by Article 5 of the Geneva Civilians Convention with respect to civilians who threaten the security of an enemy force. He points out that Article 5, however, addresses only civilians in "the territory of a Party of a conflict" and in an "occupied territory." He builds his thesis around the conclusion that "both Articles 4 and 5 were directed to the protection of inhabitants of occupied areas and of the mass of enemy aliens on enemy territory and that unlawful belligerents in the zone of operations were not taken into account in connexion [sic] with the two articles." *Id.* at 328. Baxter concludes that as a result of this gap in protection, this category of civilians is not subject to the procedural and substantive safeguards found in the Civilians Convention that would benefit them if they were in occupied territory *Id.*

²⁴⁰M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 440, 442 n.2, 443.

²⁴¹Geneva Civilians Convention arts. 2, 4; *see supra* text accompanying notes 222-23, 233. The apparent ambiguity involves rules of treaty construction found in the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, May 22, 1969, U.N. Doc. A/CONF. 39/27, *reprinted in* J. Sweeney, C. Oliver & N. Leech, *The International Legal System: Cases and Materials, Documentary Supplement 257* (3d ed. 1988). Although the U.S. has not become a party to the treaty, it considers that the substantive provisions of the Vienna Convention are declaratory of the customary international law of treaties. T. Buergenthal & H. Maier, *Public International Law* 92 (2d ed. 1990); *Restatement (Third) of Foreign Relations Law of the United States*, Part III, Introductory Note. Under the Vienna rules of treaty interpretation, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention art. 31(1). Article 31(2) defines the "context" as comprising the text, including its preamble and annexes, and additional instruments relating to the treaty that were accepted by the parties. *Id.* art. 31(2). Also, subsequent agreements regarding the interpretation and application of the treaty, as well as subsequent practice, may be taken into account in interpreting the treaty. *Id.* art. 31(3). If this analysis still leaves the meaning ambiguous or obscure, or produces an absurd or unreasonable result, then the drafting history may be consulted as a "supplementary means of interpretation." *Id.* art. 32.

²⁴²*See, e.g.*, Geneva Civilians Convention arts. 2, 4, 27.

²⁴³*See supra* note 223.

cisely which articles apply to civilians who fall into enemy hands in their own territory that is not “occupied”—is nowhere delineated clearly.

Concluding which articles of the Civilians Convention do not apply to non-occupied Panamanian civilians is easier than determining which do apply. Nevertheless, after one excludes Section II, pertaining to “aliens” in the territory of a party,²⁴⁴ and Section III, pertaining to “occupied” territory,²⁴⁵ the only relevant remaining provisions are found in Section I, the provisions *common* to the “territories of the Parties” and to “occupied territories.”²⁴⁶ Thus, the examination comes full circle and returns to Section I. Without Section I, therefore, the Convention offers no real protections for the class of civilians caught up in the conflict prior to occupation. Moreover, the articles found under Section I do not appear to be restricted to the precise geographical confines of Sections II and III.²⁴⁷ Article 27, the key provision upon which the section’s remaining articles build, refers simply to “protected persons,” thereby hearkening back to the broader coverage in the definition of protected civilians found in Article 4.²⁴⁸ Finally, the extension of the articles of Section I to any area in which a protected person finds himself in the power of the enemy appears to be entirely consistent with the United States interpretation of these provisions.²⁴⁹ Such a finding is entirely reasonable in view of the overall humanitarian purpose of the Convention.

Because Section I applied to both invasion and occupation stages of the conflict, United States forces were obliged under a characterization of Operation Just Cause as an international armed conflict to extend the important articles of that section to Panamanians who fell within its power. The articles of Section I provide basic humanitarian safeguards for protected persons. Significantly, Arti-

²⁴⁴See *supra* text accompanying notes 228, 234-35.

²⁴⁵See *supra* text accompanying note 228.

²⁴⁶See *supra* text accompanying notes 228-31.

²⁴⁷See *generally* Geneva Civilians Convention arts. 27-34.

²⁴⁸*Id.* arts. 4, 27. With the exception of Article 30, pertaining to assistance and visitation by delegates of the Protecting Powers or the I.C.R.C. and the obligations of the “Detaining Powers” in that regard, Section I makes no implicit or explicit geographical qualifications upon “protected persons” covered by its articles. See *id.* arts. 27-34.

²⁴⁹DA Pam. 27-161-2, at 134. It states:

Articles 27 through 34 apply to *any area* in which a protected person finds himself in the power of a party to the conflict, principally an enemy power. These common articles are designed to prevent the physical mistreatment of protected persons *no matter where they happen to be*. Their protection is spelled out generally in Article 27.

Id. (emphasis added).

cle 27, which is the key provision that proclaims the basic principles of the "law of Geneva," designates protections for certain personal rights by ensuring respect for their persons, honor, family rights, religious convictions and customs, and by requiring humane treatment.²⁵⁰ Nevertheless, the last paragraph of Article 27 makes an exception concerning military requirements and other matters of imperative national interest, thus balancing the rights and liberties of the individual against the state security interests created by war.²⁵¹ Other articles of Section I assign state responsibility for the treatment of protected civilians;²⁵² provide a role for Protecting Powers and the International Committee of the Red Cross;²⁵³ prohibit coercion or "any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands:"²⁵⁴ and prohibit collective penalties, reprisals, pillaging, and hostage taking.²⁵⁵

Section III would apply if the United States actions affecting civilians occurred during a period that could be characterized as "occupation."²⁵⁶ In that situation, the key humanitarian provisions found in Section I also would apply.²⁵⁷ Specifically prohibited measures during occupation include forcible transfers and deportations. Temporary evacuation of a given area is permissible "if the security of the

²⁵⁰Geneva Civilians Convention art. 27; see Pictet Commentaries, *supra* note 27, at 199-200; Umozurike, *Protection of Victim of Armed Conflicts: III - Civilian Population*, in Henry Dunant Institute, *supra* note 13, at 190. A similar provision, applying to occupation forces, is found in the Hague Regulation obligation ensuring respect for "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice." Hague Regulations art. 46; see J. Pictet, *supra* note 14, at 40; G. von Glahn, *supra* note 189, at 67; L. Oppenheim, *supra* note 24, at 316.

²⁵¹Geneva Civilians Convention art. 27 ("the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war"); see Pictet Commentaries, *supra* note 27, at 200; DA Pam. 27-161-2, at 134; G. von Glahn, *supra* note 189, at 57.

²⁵²Geneva Civilians Convention art. 29.

²⁵³*Id.* art. 30.

²⁵⁴*Id.* arts. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties") and 32 ("This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments . . . but also to any other measures of brutality whether applied by civilian or military agents"). Article 31, incidentally, has its antecedent in a similar Hague Regulation obligation. Hague Regulations art. 44.

²⁵⁵Geneva Civilians Convention arts. 33-34. Pillage was forbidden by occupying forces as well by the Hague Regulations. Hague Regulations art. 47 ("Pillage is formally forbidden"); see L. Oppenheim, *supra* note 24, at 316.

²⁵⁶See *supra* text accompanying notes 216-20; Geneva Civilians Convention arts. 47-78; see generally Pictet Commentaries, *supra* note 27, at 272-369; L. Oppenheim, *supra* note 24, at 451-56.

²⁵⁷See *supra* text accompanying notes 250-55.

population or imperative military reasons so demand.’²⁵⁸ Protected persons cannot be compelled to serve in the occupier’s military forces or to work, except in categories of jobs necessary for the occupying army or for the benefit of the general civilian population.²⁵⁹ The destruction of property is prohibited except when “rendered absolutely necessary by military operations.”²⁶⁰ Other provisions ensure that food, medical care, and relief consignments are made available to the civilian population, and that relief organizations are permitted to carry on their work.²⁶¹

In principle, the institutions and public officials in occupied territory continue to function as before; however, the occupying power can remove officials if they “abstain from fulfilling their functions for reasons of conscience.”²⁶² A related principle concerns the continuing applicability of penal laws and courts in the occupied territory. They continue in existence, subject to security concerns. The occupier can enact its own supplemental regulations, however, if essential to its obligation to ensure its security, public order, and safety.²⁶³ Significantly, protected civilians cannot be arrested or prosecuted by the occupier for acts committed or opinions expressed before the occupation, with the exception of breaches of the law of armed conflict.²⁶⁴ Nevertheless, the occupier may subject protected persons to internment or assigned residence if necessary “for imperative reasons of security.”²⁶⁵

The last provision, concerning internment, is especially relevant to this examination. Internment of protected civilians is permitted under the Geneva Civilians Convention only in “occupied territory” or with respect to “aliens in the territory of a party to the conflict.”²⁶⁶

²⁵⁸Geneva Civilians Convention art. 49; see G. von Glahn, *supra* note 189, at 69-73; F. Kalshoven, *supra* note 15, at 55; Umozurike, *supra* note 250, at 191; L. Oppenheim, *supra* note 24, at 452.

²⁵⁹Geneva Civilians Convention art. 51; see G. von Glahn, *supra* note 189, at 67-72; L. Oppenheim, *supra* note 24, at 452-53; Umozurike, *supra* note 250, at 191.

²⁶⁰Geneva Civilians Convention art. 53.

²⁶¹*Id.* arts. 55-57, 59-63; see Umozurike, *supra* note 250, at 191-92; F. Kalshoven, *supra* note 15, at 56.

²⁶²Geneva Civilians Convention art. 54; see L. Oppenheim, *supra* note 24, at 453; F. Kalshoven, *supra* note 15, at 56; Umozurike, *supra* note 250, at 191.

²⁶³Geneva Civilians Convention arts. 64-69; see L. Oppenheim, *supra* note 24, at 453-55; F. Kalshoven, *supra* note 15, at 57; Umozurike, *supra* note 250, at 191-92.

²⁶⁴Geneva Civilians Convention art. 70; see G. von Glahn, *supra* note 189, at 60; L. Oppenheim, *supra* note 24, at 454.

²⁶⁵Geneva Civilians Convention art. 78; see F. Kalshoven, *supra* note 15, at 57-58.

²⁶⁶Geneva Civilians Convention art. 79 (“The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78”). For general development of the law concerning internment, see DA Pam. 27-161-2, at 143-44.

Thus, for our purposes, internment is permitted only during an occupation. Section IV contains the "Regulations for the Treatment of Internees." It comprises fifty-seven articles, about one-third of the entire Convention.²⁶⁸ The section is an important innovation in that all protected civilians who are deprived of their freedom, for any reasons whatever, enjoy a status similar to that of prisoners of war.²⁶⁹ A protected civilian may be interned in occupied territory only for two reasons. The first is for imperative reasons of security of the occupying power.²⁷⁰ The second reason for interning is as a sentence in lieu of imprisonment handed down by a properly constituted occupation court.²⁷¹ Each case of internment has to be decided separately—no question can exist of whether it involves collective measures.²⁷²

The regulations for internment require that civilians be provided clean and healthy surroundings;²⁷³ adequate food and clothing;²⁷⁴ and the opportunity for religious, intellectual, and physical activities.²⁷⁵ They may retain their money and personal belongings, and may receive allowances to purchase necessities.²⁷⁶ The regulations make provisions concerning the administration of, and penal and disciplinary sanctions against, internees.²⁷⁷ They also guarantee certain minimum relations with the outside world through the receipt of mail, parcels, and visits.²⁷⁸ Further provisions cover matters such

²⁶⁷See *supra* text accompanying note 244. The reference in Article 79 to Articles 41, 42 and 43 pertain to Section II, "Aliens in the Territory of a Party." Articles 68 and 78 fall under Section III, "Occupied Territory."

²⁶⁸Geneva Civilians Convention. Section IV, arts. 79-135.

²⁶⁹Umozurike, *supra* note 250, at 192; F. Kalshoven, *supra* note 15, at 58.

²⁷⁰Geneva Civilians Convention art. 78 ("If the Occupying Power considers it necessary for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment"),

²⁷¹Geneva Civilians Convention art. 68. It states in relevant part:

Protected persons who commit an offense which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration . . . is proportionate to the offence committed.

Id.

²⁷²Pictet Commentaries, *supra* note 27, at 367.

²⁷³Geneva Civilians Convention art. 85. For a general listing of the protections afforded internees see L. Oppenheim, *supra* note 24, at 317-18; Umozurike, *supra* note 250, at 192-93. See generally Pictet Commentaries, *supra* note 27, at 370-520

²⁷⁴Geneva Civilians Convention arts. 89-90.

²⁷⁵*Id.* arts. 86, 93-96.

²⁷⁶*Id.* arts. 97-98.

²⁷⁷*Id.* arts. 99-104, 117-126.

²⁷⁸*Id.* arts. 105-116.

as the transfer of internees to other camps and issues associated with their death.²⁷⁹ Internment must cease “as soon as possible” after hostilities are over. Nevertheless, those against whom penal proceedings are pending, or who are serving a sentence depriving them of their liberty, may be detained pending the outcome of the case or the completion of the sentence. The detaining power then must ensure their repatriation.²⁸⁰ The detaining power also is required to set up bureaus for the purpose of exchanging information about the internees.²⁸¹ In summary, the numerous protections afforded protected civilians who are interned in occupied territory invoke considerable obligations for the occupying military force.

2. *Application of the Stages to Operation Just Cause*

The extent of United States obligations toward Panamanian civilians who found themselves in United States hands thus depended to a large degree on whether, at the time they were in United States control, the role of United States forces in Panama could be characterized as in the invasion stage or whether it had become an occupation. Many critics assumed that at some point in time soon following the invasion, the United States role in Panama automatically became that of an occupier.²⁸² This conclusion is supported by the facts that United States forces exerted some degree of control over portions of Panamanian territory for periods of time, and United States forces applied many of the protections that are obligatory in occupied territories.²⁸³

These factors alone, however, do not make an “occupation.” United States policy is to apply the occupation protections “*as far as possible* in areas through which troops are passing and even on the battlefield,” even though no requirement mandates their application absent that “effective control which is essential to the status of occupation.”²⁸⁴ Missing in Panama was the actual placing of the ter-

²⁷⁹*Id.* arts. 127-131.

²⁸⁰*Id.* arts. 132-135.

²⁸¹*Id.* arts. 136-141.

²⁸²The fifty-three page Americas Watch Report, for instance, characterizes the U.S. role as an occupation of Panama no less than nine times, without addressing how it reached that conclusion. Americas Watch, *supra* note 69, at 1-53.

²⁸³For example, television reports at the time showed U.S. soldiers restoring food, water and transportation services, instituting roadblocks, and carrying out limited arrest authority.

²⁸⁴FM 27-10, at 138, para. 352 (emphasis added). It further states that “[s]mall raiding parties or flying columns, reconnaissance detachments or patrols moving through an area cannot be said to occupy it. Occupation on the other hand, is invasion plus taking firm possession of the enemy territory for the purpose of holding it.” *Id.*

ritory where United States forces were located under United States authority and administration.²⁸⁵

This conclusion is supported by two primary interrelated factors. First, the United States government and the “legitimate” Endara Panamanian government recognized by the United States considered the United States intervention to be an assistance to the lawful government of Panama. As a result, United States forces were, in effect, “agents” doing the bidding of the Panamanian government, with the consequence that authority rested with the Panamanian government instead of with the United States forces.²⁸⁶ This view is supported by statements by United States officials to the effect that the Panamanian government authorized searches, arrests, and detentions of Panamanian civilians by United States forces, pending the Panamanian government’s rebuilding of the Noriega-dominated judicial system.²⁸⁷ Logically, however, if one accepts this “agency” view of United States intervention, then the whole examination into occupation becomes irrelevant because the conflict effectively becomes non-international—a characterization that is incompatible with occupation.²⁸⁸ Only if one perceives United States intervention to be on the side of rebel forces, or for that matter, a unilateral intervention against Noriega’s *de facto* government, does occupation become relevant to the “international” armed conflict.²⁸⁹ Secondly, a key indicia of occupation—some kind of United States administration of the territory, such as the traditional military government²⁹⁰—was missing. Although this latter factor is not dispositive of “occupation,” it nevertheless strongly indicates that the United States strove to avoid assembling factual circumstances that would establish occupation as a matter of law.

Several important conclusions follow from the foregoing analysis of the stages of Operation Just Cause as an international armed conflict. First, the United States had responsibilities under the Geneva

²⁸⁵See *supra* text accompanying notes 216-19.

²⁸⁶See *supra* text accompanying note 54.

²⁸⁷Wash. Post, Dec. 29, 1989, at A22, col. 4, 5; see Americas Watch, *supra* note 69, at 38-39.

²⁸⁸See *supra* text accompanying notes 52-55.

²⁸⁹See *supra* text accompanying notes 50-51, 56-57.

²⁹⁰In United States practice, military government is the form of administration by which the U.S. exercises governmental authority over occupied territory. See FM 27-10, at 10, para. 12, and 141, para. 362; G. von Glahn, *supra* note 189, at 263-69; see also Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 A.J.I.L. 44, 57, 57 n.38 (1990) (“There is widespread agreement that the occupying power has substantial discretion as to whether it operates through a military or a civil administration, and whether through an imposed administrative system or indigenous authorities”).

Civilians Convention to provide certain protections to Panamanian civilians who found themselves “in the hands” of United States military forces.²⁹¹ The obligations of Section I, which encompasses Articles 27 through 34, applied to the conduct of United States forces toward Panamanians at every stage of the operation, from invasion until the United States forces withdrew.²⁹² That section’s guarantees of basic individual humanitarian safeguards for protected Panamanian civilians establish a kind of minimum standard below which no military force operating within the bounds of civilized wartime conduct should transgress.²⁹³ In fact, its minimum protections are in many ways similar to the minimum protections afforded to civilians by common Article 3 that are applicable in internal armed conflicts.²⁹⁴

The case for applying the obligations found in Section III, “Occupied Territories,” is weak. Nevertheless, sufficient doubt might exist for some concerning whether the concept of “occupation” has evolved beyond the constraints of the Hague Regulations so that the United States role at some point in time could be so characterized.²⁹⁵ Although support for such an extension of the international law definition of occupation cannot be found, the prospect of its application nevertheless cannot be overlooked. Application of the law of occupation significantly broadens the examination of United States treatment of Panamanian civilians. Matters such as the amount of medical care, food, and shelter provided to Panamanian civilians would be open to closer scrutiny in light of international legal obligations. The same concerns would be present with respect to United

²⁹¹See *supra* text accompanying notes 222-23.

²⁹²See *supra* text accompanying notes 247-49.

²⁹³See *supra* text accompanying notes 249-55; see also T. Meron, *supra* note 30, at 48.

²⁹⁴See Geneva Civilians Convention art. 3. For example, both Article 3 and Section I (arts 27-34) contain provisions concerning humane treatment without adverse distinction based on race, religion or other criteria. Both also have similar lists of prohibited violent conduct toward protected civilians, such as torture; and outrages against personal dignity. Both expressly prohibit the taking of hostages. Also, both recognize a possible role for humanitarian bodies such as the International Committee of the Red Cross in providing services to the Parties to the conflict. *Id.* arts. 3 and 27-34; see *supra* text accompanying notes 41-45. The International Court of Justice, in the 1986 case of *Military and Paramilitary Activities in and Against Nicaragua*, viewed common Article 3 as a statement of the minimum core norms governing international and non-international armed conflict. 1986 ICJ Rep. 14, 114. See T. Meron, *supra* note 30, at 48. Under the Court’s logic, if the U.S. or any other state violated the obligations in common Article 3, it then would be unnecessary to characterize the conflict as international or non-international armed conflict unless, of course, the circumstances made it desirable to invoke additional humanitarian law provisions which would necessitate a characterization of the conflict.

²⁹⁵See *supra* text accompanying notes 282-83.

²⁹⁶See *supra* text accompanying note 261.

States actions, such as detentions and searches, which would be examined against the needs of the occupying force for ensuring its security, public order, and safety.²⁹⁷

3. *Internal Armed Conflict and the "Agency" Theory*

The discussion of the protections afforded by the "law of Geneva" to Panamanian civilians assumed until now that Operation Just Cause is properly characterized as an international armed conflict. As discussed earlier, however, the conflict may be analyzed as an internal armed conflict under the "agency" relationship that results from an intervention on behalf of a foreign government for the purpose of rendering assistance in its struggle against rebel forces.²⁹⁸ If one accepts the United States operation in Panama as this kind of assistance to the "legitimate" Endara Panamanian government, then common Article 3 governs the extent of application of the "law of Geneva."²⁹⁹ Its general protections were enumerated earlier,³⁰⁰ but are expanded in several relevant respects by the 1977 Protocol II to the 1949 Geneva Conventions.³⁰¹ In particular, Article 5 of Protocol II lists additional safeguards for "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."³⁰² Of particular relevance are the provisions that ensure the wounded and sick are treated humanely in all circumstances and receive, "to the fullest extent practicable and with the least possible delay, the medical care and attention required by their con-

²⁹⁷See *supra* text accompanying notes 263-65, 267-70.

²⁹⁸See *supra* text accompanying notes 52-55.

²⁹⁹See *supra* text accompanying notes 39-40.

³⁰⁰See *supra* text accompanying notes 41-45.

³⁰¹Protocol II; see *supra* text accompanying note 37; see also Umzurike, *supra* note 250, at 196-97; Abi-Saab, *Conflicts of a Non-International Character*, in Henry Duntant Institute, *supra* note 13, at 217, 225-38. The requirement is met under Article 1 of Protocol II that the internal conflict be of sufficient intensity that it is more than "internal disturbances and tensions," but rather is between the state's armed forces and dissident armed forces under responsible command, etc. Protocol II art. 1. See generally M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 623-29; Abi-Saab, *supra*, at 227-30. Certainly, the military operations during Operation Just Cause were of greater intensity than "internal disturbances and tensions." Further, if one characterizes the Noriega forces as the dissident forces, as would be necessary in order to keep the C.S. role within the constraints of internal armed conflict rules, the Noriega forces may be said to have possessed to a substantial degree the characteristics—responsible command, exercise of control over a part of its territory, etc.—that invoke the application of Protocol II. See *supra* text accompanying notes 52-55.

³⁰²Protocol II art 5; see M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 645. They state: "Common Art. 3 of the Conventions did not provide for any special and elaborated protection for persons whose liberty has been restricted for reasons related to an armed conflict of a non-international character. The minimum standard established in para. 1 for all persons taking no active part in the hostilities applied also to interned or detained persons." *Id.*

dition.’³⁰³ Interned civilians also are to receive, “to the same extent as the local civilian population, . . . food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate.”³⁰⁴ They also “shall be allowed to receive individual or collective relief.”³⁰⁵ Those who are responsible for the internment must, “within the limits of their capabilities,” permit internees to send and receive letters, and to have the benefit of medical examinations.³⁰⁶ The wounded, sick, and dead must be searched for and collected without delay “[w]hen circumstances permit” to ensure their adequate care, and to ensure that the dead are decently disposed of and are not despoiled.³⁰⁷

Characterization of the Panama operation as an internal armed conflict, with the United States acting as “agent” of the new Endara government, conceivably carries with it additional obligations for the United States beyond those of humanitarian law. As Panama’s agent, the United States unwittingly may have acceded to certain responsibilities toward Panamanian civilians that are Panama’s obligations as a party to human right treaties. This raises the issue of the extent of Panama’s human rights obligations toward its citizens.

Panama is party to the 1969 American Convention on Human Rights.³⁰⁸ This human rights treaty guarantees approximately two dozen categories of civil and political rights, including the right to life, right to humane treatment, right to personal liberty, right to a fair trial, freedom from *ex post facto* laws, right to compensation for miscarriage of justice, right to privacy, freedom of thought and expression, right of assembly, freedom of association, and freedom of movement and residence.³⁰⁹

Article 27 of the American Convention allows parties to derogate from these obligations “in time of war, public danger, or other emer-

³⁰³Protocol II arts. 5(1)(a), 7(2).

³⁰⁴*Id.* art. 5(1)(b).

³⁰⁵*Id.* art. 5(1)(c).

³⁰⁶*Id.* art. 5(2)(b), (d).

³⁰⁷*Id.* art. 8. This provision corresponds to Article 15(1) of the Geneva Wounded and Sick Convention and Article 18(1) of the Geneva Wounded, Sick and Shipwrecked at Sea Convention. Geneva Wounded and Sick Convention art. 15(1); Geneva Wounded, Sick and Shipwrecked at Sea Convention art. 18(1); see M. Bothe, K. Partsch, & W. Solf, *supra* note 78, at 659.

³⁰⁸T. Buergenthal, *supra* note 30, at 143. Twenty member states of the Organization of American States are party to the American Convention on Human Rights. The United States is not a party. *Id.*

³⁰⁹*Id.* at 144; see American Convention on Human Rights, Nov. 22, 1969, T.S.No. 36, OAS Off. Rec. OEA/Ser. A/16a, arts. 4-25, reprinted in J. Sweeney, C. Oliver, N. Leech, *supra* note 241, at 125 [hereinafter American Convention].

gency that threatens [their] independence or security.”³¹⁰ Derogation is permitted, however, only for the period of time “strictly required by the exigencies of the situation.”³¹¹ Moreover, as with most human rights conventions, derogation is not permitted from the application of the more basic human rights guarantees of the Convention.³¹² Eleven fundamental non-derogable guarantees are listed in the American Convention, including the right to life, right to humane treatment, and freedom from *ex post facto* laws.³¹³ Additionally, the American Convention declares that “the judicial guarantees essential for the protection of such rights” may not be suspended.³¹⁴ Presumably, these judicial guarantees include matters such as the Article 25 right to simple and prompt judicial protection against acts that violate the person’s fundamental rights, and the habeas corpus provision of Article 7 for persons who are deprived of their liberty.³¹⁵

Article 27 of the American Convention also contains an important clause that a state, in exercising its derogation rights, may not adopt measures that are “inconsistent with its other obligations under international law.”³¹⁶ This provision, found in all human rights derogation clauses, is especially significant for states that are party to humanitarian law treaties such as the 1949 Geneva Conventions or the 1977 Protocols.³¹⁷ Professor Buergenthal points out that “[f]or

³¹⁰American Convention art. 27(1); see T. Buergenthal, *supra* note 30, at 145. See generally Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* 72, at 78 (1981); see also T. Meron, *supra* note 30, at 23-27, 51-52, 58-63.

³¹¹American Convention art. 27(1).

³¹²See *id.* art. 2; see also T. Buergenthal, *supra* note 30, at 145, 205-06; T. Meron, *supra* note 30, at 52; Hampson, *Human Rights and Humanitarian Law in Internal Conflicts*, in M. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* 55, 56-57 (1989). Three principal human rights instruments contain provisions allowing derogations: The International Covenant on Civil and Political Rights, The European Convention on Human Rights, and the American Convention on Human Rights. Only four non-derogable rights are common to these three conventions: the right to life, the right not to be tortured or to be held in slavery, and the right not to be subjected to *ex post facto* laws or punishments. T. Buergenthal, *supra* note 30, at 205-06; T. Meron, *supra* note 30, at 52. This “common core” of non-derogable rights may be binding on all States as customary law or even *as jus cogens*. T. Meron, *id.* at 59.

³¹³American Convention arts. 27, 4 (right to life), 5 (right to humane treatment), 9 (freedom from *ex post facto* laws). For the remaining eight non-derogable guarantees, see *id.* arts. 27, 3 (right to juridical personality), 6 (freedom from slavery), 12 (freedom of conscience and religion), 17 (rights of the family), 18 (right to a name), 19 (rights of the child), 20 (right to nationality), 23 (right to participate in government).

³¹⁴*Id.* art. 27(2); see T. Buergenthal, *supra* note 30, at 145.

³¹⁵American Convention arts. 25(1), 7(6); see T. Buergenthal, *supra* note 30, at 145-46.

³¹⁶American Convention art. 27(1); see T. Buergenthal, *supra* note 30, at 206.

³¹⁷T. Buergenthal, *supra* note 30, at 206; see also T. Meron, *supra* note 30, at 58; Hampson, *supra* note 312, at 63.

these States the humanitarian law agreements form an integral part of the derogation clause of the particular human rights treaty, barring the suspension during armed hostilities of rights whose enjoyment is guaranteed by the Geneva Conventions, for example, or one of the two Protocols.³¹⁸ He explains that the reverse also is true—so that a state may be barred by the human rights convention in wartime from adopting a given measure that is permitted under humanitarian law but that would adversely affect the enjoyment of a non-derogable right guaranteed in a human rights convention to which the state also is party.³¹⁹ The crux of this inquiry is whether the non-derogable human rights provisions in the American Convention expand or are redundant of the guaranteed rights that the United States forces were obliged to afford under common Article 3 of the Geneva Civilians Convention. The practical effect is that whichever body of law provides the greater protection for Panamanian civilians will apply to Operation Just Cause.

Comparison of relevant protections in the American Convention with those found in Article 3 of the Civilians Convention and Protocol II reveal both convergence and divergence in afforded protections. For this analysis, the most important of the non-derogable rights in the American Convention are in Article 5, “Right to Humane Treatment,” and the “judicial guarantees essential for the protection of [the non-derogable] rights.”³²⁰ Regarding the humane treatment obligation, both the American Convention and the “law of Geneva” have a common core of principles. Both sets of norms expressly prohibit torture and cruel and degrading treatment.³²¹ While common Article 3 prohibits “violence to life and person” and “outrages upon personal dignity,” the American Convention in similar broad language ensures every person “the right to have his physical, mental and moral integrity respected.”³²² Protocol II, Article 4, merely elaborates the basic humane treatment provisions of common Article 3 of the Geneva Civilians Convention.³²³ Where the American Convention goes beyond the Civilians Convention protections in the humane treatment area is in making specific protections available to “per-

³¹⁸T. Buergenthal, *supra* note 30, at 206.

³¹⁹*Id.* Meron notes that this result is consistent with the principle of good faith stated in Article 26 of the Vienna Convention on the Law of Treaties, so that “those derogations which would be in conflict with other obligations of the derogating State under international law are not permitted.” T. Meron, *supra* note 30, at 58.

³²⁰T. Meron, *supra* note 30, at 63 (“of crucial importance to situations of internal strife”); see *supra* text accompanying notes 313-14; see also Hampson, *supra* note 312, at 57.

³²¹Geneva Civilians Convention art. 3(1)(a) and (c); American Convention art. 5(2).

³²²Geneva Civilians Convention art. 3(1)(a) and (c); American Convention art. 5(1).

³²³See Protocol II art. 4.

sons deprived of their liberty,” requiring that they be treated with respect and dignity, that accused persons not be treated **as** convicted criminals, and that their punishments be designed for reform and social readaptation of the **persons**.³²⁴ The Article 3, Civilians Convention, humane treatment protections that are not included in the American Convention generally reflect its purpose of protecting civilians in armed conflict, as indicated by its prohibition on the taking of hostages and the obligation to collect and care for the wounded and sick.³²⁵ The comparison, therefore, with regard to fundamental principles of humane treatment, reveals substantial convergence in the protections offered by the two sets of norms.

Common Article 3 also provides an important counterpart to Article 27 of the American Convention in the area of judicial guarantees. Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the *judicial guarantees* which are recognized as indispensable by civilized peoples.”³²⁶ The article makes no specific mention of non-criminal actions, however, such as internment when absolutely necessary for the security of the detaining power.³²⁷ In this respect, the judicial guarantees provided as non-derogable by Article 27 of the American Convention may afford some due process protections to civilians who are interned in an internal armed conflict that otherwise would not be available under common Article 3 of the Civilians Convention.³²⁸ This may be a particularly valuable protection for civilians who are interned during an internal conflict similar to that applicable in international armed conflict in occupation situations. It provides a form of regular habeas corpus procedure by a judicial tribunal to determine whether the person’s detention truly is merited as a security risk and also to ensure that

³²⁴American Convention art. 5(2), (3), (4), (6).

³²⁵Geneva Civilians Convention art. 3(1)(b) and 3(2).

³²⁶*Id.* art 3(1)(d) (emphasis added). This right is matched by the American Convention as a *derogable* right only. American Convention art. 7(5); *see* T. Meron, *supra* note 30, at 26, 62 n.90.

³²⁷*See* Geneva Civilians Convention art. 3.

³²⁸Certain due process guarantees for protected civilian internees are found in Civilians Convention provisions that are applicable to international armed conflict. *See* Geneva Civilians Convention arts. 43, 78; *see also* T. Meron, *supra* note 30, at 20-21. These due process guarantees are spelled out in greater detail in Article 75(3) of Protocol I, stating:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

Protocol I art. 75(3).

non-derogable rights, such as the right to humane treatment, are not being abridged.³²⁹

A final non-derogable right worth noting is the right to life, found in Article 4 of the American Convention.³³⁰ Common Article 3 of the Geneva Conventions does not expressly guarantee a right to life except in prohibiting “murder of all kinds” and the “carrying out of executions without previous [court] judgment.”³³¹ The American Convention provision, however, includes guarantees protecting life that may hold special relevance to Panamanians who claim that United States actions denied civilian victims a non-derogable right to life.³³² Article 4 states that “[e]very person has the right to have his life respected” and “[n]o one shall be arbitrarily deprived of his life.”³³³ Professor Meron, in his study of this issue in the context of similar provisions in the International Covenant on Civil and Political Rights,³³⁴ concluded that “[d]eath resulting from ‘lawful acts of armed conflict’—as distinguished from deprivation of life as an act of retribution—might not be considered an arbitrary deprivation of life. . . .”³³⁵ The determination of the lawfulness of the acts occurring in armed conflict which caused the death is made by applying principles like proportionality that form part of the “law of The Hague.”³³⁶

Common Article 3 does contain one provision of great practical importance to civilians that is not found in the American Convention. This provision, designed to ensure at least minimum respect for the law, allows an “impartial humanitarian body, such as the International Committee of the Red Cross [I.C.R.C.], [to] offer its services to the Parties to the Conflict.”³³⁷ This so-called “right of initiative” has enabled the I.C.R.C. on many occasions to *gain* access to prisoners and interned persons in internal armed conflicts. These visits are often followed by an I.C.R.C. report to the government concerned.³³⁸

³²⁹See *supra* note 328.

³³⁰American Convention art. 4; see *supra* text accompanying note 313.

³³¹Geneva Civilians Convention art. 3(1)(a) and (d).

³³²See *supra* text accompanying note 211.

³³³American Convention art. 4(1). The right to life under Article 4 also includes guidelines for imposition of the death penalty. See *id.* art. 4(2)-4(6).

³³⁴International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

³³⁵T. Meron, *supra* note 30, at 24.

³³⁶See *supra* text accompanying notes 71-77, 139-44; see also Hampson, *supra* note 312, at 63-64.

³³⁷Geneva Civilians Convention art. 3; see Hampson, *supra* note 312, at 70.

³³⁸See Hampson, *supra* note 312, at 70-71.

C. APPLICATION OF HUMANITARIAN PROVISIONS TO OPERATION JUST CAUSE

Once the armed conflict is “characterized” and choices are made concerning which sets of norms apply to the conflict, the task still remains of applying the relevant provisions within those sets of norms to the particular circumstances. This ordinarily simple task is made difficult in an examination of United States conduct in Operation Just Cause by the lack of detailed, authoritative reporting of the precise facts surrounding United States military operations. Consequently, the analysis must rely largely on media and reports from interest groups that are “open” sources. Nevertheless, those sources, regardless of their reliability, contain sufficient facts to raise important questions concerning certain aspects of the conduct of United States forces in Operation Just Cause in light of the “law of Geneva.”

1. Arrests, Detentions, Interrogations, and Searches

Any examination of United States conduct in making arrests or detentions, and conducting interrogations or searches must be examined in light of the general military goal of overcoming the enemy’s resistance.³³⁹ The “law of The Hague” and “the law of Geneva” limit the conduct of military forces and provide certain protections for the civilians who are innocent bystanders to the hostilities. The law of occupation expressly recognizes the needs of an occupying force to take measures in its own security interests, while at the same time extending numerous protections to civilians who are within the occupying force’s power.³⁴⁰

Regardless of the stage of armed conflict, international law recognizes in an invading military force a security interest that allows the forces to take certain measures affecting civilians who fall within its power that in peacetime may be impermissible as domestic constitutional or even human rights violations. The Geneva Civilians Convention, in providing protections to certain civilians, expressly recognizes this security interest in numerous provisions. The first of these provisions found in the Convention is Article 5, which permits an occupying power to derogate when “absolutemilitary security so requires” from rights of communication that a protected person has, when that person is detained “under definite suspicion of ac-

³³⁹See FM 27-10, at 4, para. 3a.

³⁴⁰See *supra* text accompanying note 219.

tivity hostile to the security of the Occupying Power.’³⁴¹ The most important recognition of the military force’s security interest is found in Article 27 of the Civilians Convention—the key provision that proclaims those basic individual protections, but allows the conflicting parties to “take such measures of control and security in regard to protected persons as may be necessary as a result of war.’³⁴² This basic need for ensuring the security of the invading force also is found in Article 78, which permits occupying forces to intern protected civilians if necessary “for imperative reasons of security.’³⁴³

The basic actions of United States forces in arresting and detaining Panamanian civilians, or in conducting interrogations and searches for the purpose of protecting the security interests of the forces, are not seriously disputed. The Americas Watch Report, for example, concedes that the Civilians Convention clearly allows an occupying force to detain civilians who present security risks while hostilities continue and for a reasonable time thereafter.³⁴⁴ It also correctly states that the occupier has wide latitude in determining security risks; the law does not require “probable cause” or similar standards for non-criminal detentions.³⁴⁵ The report correctly concludes that under this “security standard,” the initial arrests and detentions of former civilian officials of the Noriega government were “probably permissible.’³⁴⁶ The same may be said of the searches of Panamanian premises conducted by United States forces. Again, when they were performed for security purposes, protective measures for the benefit of individuals such as probable cause, warrants, or other judicial authorization were unnecessary.³⁴⁷ Thus, the personal rights of Panamanian civilians under Panamanian law must yield to the “necessities of warfare,” so that United States soldiers may search for weapons and other prohibited articles that may supply a threat to the force’s security interests.³⁴⁸

³⁴¹Geneva Civilians Convention art. 5; see Pictet Commentaries, *supra* note 27, at 57-58. The person nevertheless must be treated humanely. Further, the article “can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion.” *Id.* at 58.

³⁴²Geneva Civilians Convention art. 27; see *supra* text accompanying notes 250-51. Pictet notes in this regard: “A great deal is thus left to the discretion of the Parties to the conflict as regards the choice of means. What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the person concerned. As has been seen, those rights must be respected even when measures of constraint are justified.” Pictet Commentaries, *supra* note 27, at 207.

³⁴³Geneva Civilians Convention art. 78; see *supra* text accompanying notes 265-67.

³⁴⁴Americas Watch, *supra* note 69, at 35.

³⁴⁵*Id.* at 35-36; see also *supra* note 341.

³⁴⁶Americas Watch, *supra* note 69, at 36.

³⁴⁷*Id.* at 36-37.

³⁴⁸See G. von Glahn, *supra* note 189, at 59, 94, 97.

Naturally, the assertion of security interests must be legitimate. The crux of allegations concerning United States conduct in this regard is that many of the internees did not present security risks; instead, they were interned because their views were contrary to those of the new Endara government or because the United States wanted them as part of its drug investigations.³⁴⁹ The same concerns were voiced about the scope of interrogations of internees—which reportedly explored areas such as political affiliation and ideology—and searches—which were not always restricted to looking for weapons or other dangerous materials.³⁵⁰ If the allegations regarding abuse of “security concerns” are true, then numerous provisions of the Geneva Conventions may have been violated. Here, the distinction in stages of the conflict becomes especially relevant. The law of occupation provides much more specific protections for civilians than the Geneva Convention provisions that would apply only during the invasion stage.³⁵¹ Further, human rights standards that govern how a state treats its own nationals will operate to assist Panamanian civilians with respect to United States conduct only if the conflict is non-international, with the United States acting as “agent” of the “legitimate” Panamanian government.³⁵²

Under a characterization of Operation Just Cause as an *international* armed conflict, an abuse of the security risks standard may cause the violation of numerous Geneva Convention articles. Regardless of whether the arrests, detentions, interrogations, and searches occurred during the invasion or occupation stage of conflict, the “humane treatment” provisions of Article 27 of the Civilians Convention will govern United States conduct toward protected Panamanian civilians.³⁵³ Its broad statement of protections, more in the nature of preamble than substantive guarantees, is not especially helpful in these circumstances because they are not sufficiently specific to apply with precision to the Panamanian circumstances. Nevertheless, it is a valuable statement of principle that could form the basis of an assertion that, for example, certain interrogation or

³⁴⁹See *supra* text accompanying notes 194-95.

³⁵⁰See *supra* text accompanying notes 197-98; see also Americas Watch, *supra* note 69, at 36-37.

³⁵¹See *supra* text accompanying notes 292-97.

³⁵²See *supra* text accompanying note 308.

³⁵³Geneva Civilians Convention art. 27; see *supra* text accompanying notes 292-93.

search methods were too intrusive to comply with the “respect” for persons that is demanded by the **article**.³⁵⁴

Arrests and detentions of officials of Noriega’s government for “political vendettas” or other reasons not related to security could prompt an assertion that violations of Article 54 of the Civilians Convention occurred, if one concludes that United States actions occurred during “occupation” of **Panama**.³⁵⁵ Under Article 54, public officials of occupied territory generally are allowed to continue their functions **as before**.³⁵⁶ Nothing prohibits occupation authorities from removing these officials from their **posts**.³⁵⁷ Any removal of these officials from their offices and into a place of internment, however, may constitute a prohibited measure of coercion or sanctions against these public **officials**.³⁵⁸ Another occupation law provision, Article 70, which applies not only to public officials but also to all protected civilians, may offer further support to a claim that civilians were improperly detained. That article prohibits an occupying power from arresting or prosecuting protected civilians “for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of **war**.”³⁵⁹

These particular occupation law prohibitions on various forms of coercive behavior against protected civilians have no detailed counterpart for actions that may be taken by enemy military forces toward protected civilians during the invasion stage of the conflict. Nevertheless, broad prohibitions found in the “respect” and “humane treatment” provisions of Article 27,³⁶⁰ **as** well as prohibitions

³⁵⁴Geneva Civilians Convention art. 27. Its first paragraph states:

Protected persons are entitled, in all circumstances, to *respect* for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be *humanely treated*, and shall **be** protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Id. (emphasis added).

³⁵⁵Geneva Civilians Convention art. 54; *see supra* text accompanying notes 194-95.

³⁵⁶*See* G. von Glahn, *supra* note 189, at 132; *see supra* text accompanying note 262.

³⁵⁷*See* Geneva Civilians Convention art. 54. It states:

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience. . . . It does not affect the right of the Occupying Power to remove public officials from their posts.

Id.; *see* G. von Glahn, *supra* note 189, at 135-36, 137 n.17.

³⁵⁸*See* Geneva Civilians Convention art. 54.

³⁵⁹*Id.* art. 70; *see supra* text accompanying note 264.

³⁶⁰*See supra* text accompanying notes 353-54.

against “physical or moral coercion” and collective penalties and other measures of intimidation found in Articles 31 and 33, assist in filling any perceived gap in protections for situations in which “occupation” is not effective.³⁶¹

Furthermore, the legality of any internment by invading forces prior to “occupation” during an international armed conflict is questionable in view of the restrictive language of Article 79 and the development of the regulations concerning internment as part of the law of occupation and treatment of aliens within the enemy state’s own territory.³⁶² The consequences of this conclusion present a dual dilemma. First, if internment is not allowed during the invasion stage, then what is the United States or any other invading state to do with civilians who fall within its power who do constitute genuine security risks? Secondly, for those same protected civilians, what protections are they entitled to from the invading forces in the absence of regulations governing the conditions of internment? No clear answers to these questions exist other than that general minimum protections such as those noted in the preceding paragraph will provide some limited guidance in this regard.³⁶³ In any event, application of the detailed regulations concerning internment requires some kind of established control and administration by the invading force over the civilian population.³⁶⁴ Consequently, “internment”—in the sense that it is a legal term of art—is incompatible with the situation of chaos that prevails during the invasion stage of armed conflict, and is compatible only with the conditions prevailing under occupation.³⁶⁵

Under a characterization of Operation Just Cause as an *internal* armed conflict, allegations concerning improper internment of civilians and questions concerning the proper scope of United States interrogation and search practices must be examined against the provisions of common Article 3 and applicable human rights standards. The broad humane treatment standards of Article 3, like those found in Article 27 of the Civilians Convention, similarly are difficult to apply to the Panama operation with any degree of preci-

³⁶¹See Geneva Civilians Convention arts. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”) and 33 (“collective penalties and likewise all measures of intimidation or of terrorism are prohibited”).

³⁶²See *id.* art. 78; see also text accompanying notes 266-67.

³⁶³See *supra* text accompanying notes 360-61, 292-93.

³⁶⁴See Geneva Civilians Convention arts. 80-135; see *supra* text accompanying notes 273-81.

³⁶⁵See *supra* text accompanying notes 215-18.

³⁶⁶See *supra* text accompanying notes 298-301, 308.

sion.³⁶⁷ Application of those human rights obligations of Panama that are non-derogable to United States forces as “agents” produces much the same results.³⁶⁸ Whether common Article 3 allows internment of civilians is not addressed specifically in that article. The 1977 Protocol II to the Geneva Conventions, although not obligatory on the United States or Panama as conventional or customary international law,³⁶⁹ lends credence to a finding that the law concerning internal conflicts contemplates internment by its listing additional safeguards for “interned” persons.³⁷⁰ Thus, in internal conflict, the common core of broad fundamental protections concerning respect, dignity, and humane treatment are provided as counterweights to actions of United States military forces in conducting arrests, detentions, interrogations, or searches as “agents” of the Endara government.

Critics of United States actions affecting Panamanian civilians were concerned about the lack of speed in repatriating interned civilians. Under the law of occupation applicable in international armed conflicts, a civilian must be repatriated either “as soon as the reasons which necessitated his internment no longer exist” or, in any event, “as soon as possible after the close of hostilities.”³⁷² These provisions are consistent with the security concerns of the occupying force that allow the extraordinary measure of internment in the first place.³⁷³ Therefore, as long as the security risk to the occupier continues, internment of those particular civilians who present security risks is permissible.

As a result, the focus first should be on the obligations concerning procedures for determining at what point in time the person no longer constitutes a threat to the military force’s security. An absence of procedures for making these determinations under the rules pertaining to occupation could result in violations of several articles of the Civilians Convention. First, it may give the appearance of a prohibited collective measure under Article 33, which applies to any stage of the conflict.³⁷⁴ Secondly, Article 78, which provides the basis

³⁶⁷See *supra* text accompanying notes 293-94, 353-54.

³⁶⁸See *supra* text accompanying note 322.

³⁶⁹See Hampson, *supra* note 312, at 68 (“It would appear premature to regard as customary international law those provisions which go beyond common Article 3, which does have that status”); see also *supra* text accompanying note 37.

³⁷⁰Protocol II art. 5; see *supra* note 302.

³⁷¹See *supra* text accompanying notes 201-03; see also Americas Watch, *supra* note 69, at 36.

³⁷²Geneva Civilians Convention arts. 132-133; see *supra* text accompanying note 280.

³⁷³See *supra* text accompanying note 270.

³⁷⁴Geneva Civilians Convention art. 33; see *supra* text accompanying notes 272, 361.

of internment for security reasons, requires the occupier to establish a “regular procedure” for making internment decisions and for periodical review of internments.³⁷⁵ Given that internment is an “occupation law” concept, the United States had no obligations regarding internment review procedures during the invasion stage.³⁷⁶ If Operation Just Cause is characterized as an *internal* conflict, however, the human rights provisions in the American Convention on Human Rights may provide some support for Panamanian civilians in this regard.³⁷⁷ Most important are the non-derogable judicial guarantees of Article 27 of the American Convention that may afford some degree of due process protections to interned civilians that otherwise would be unavailable in an internal conflict.³⁷⁸ Under this logic, interned Panamanians might be able to assert that this human rights obligation extended to the United States “agents” and thereby required them to provide review procedures somewhat like those available under the rules pertaining to occupation in international armed conflicts.³⁷⁹

The final focus concerning repatriation concerns when, after the conclusion of hostilities, interned civilians must be released. Unfortunately, the Civilians Convention is vague in this respect, providing only “as soon as possible”—a condition of considerable discretion—as a guide. Presumably, the time should be based on the occupier’s reasonable assessment of any continuing security risk even after general hostilities have ceased. As a general rule, however, internment should cease when the actual fighting ceases, or at least as soon as repatriation can be organized, taking into account transportation and other practical considerations.³⁸⁰ Here again, under an *internal* conflict characterization, non-derogable provisions of the American Convention may provide Panamanians due process procedural protections to ensure that their liberty is not unnecessarily restrained.³⁸¹

2. Carefor Sick and Wounded and Displaced Civilians

Under a characterization of Operation Just Cause as an international armed conflict, the United States forces owed a special duty

³⁷⁵Geneva Civilians Convention art. 78. The article also includes a right of expeditious appeal of internment decisions. The periodic review is to be conducted “if possible every six months, by a competent body” set up by the occupying power. *Id.*; *see supra* note 328.

³⁷⁶*See supra* text accompanying notes 364-65.

³⁷⁷American Convention; *see supra* text accompanying notes 308-19.

³⁷⁸*See supra* text accompanying note 328.

³⁷⁹*See supra* text accompanying note 329.

³⁸⁰DA Pam. 27-161-2, at 149.

³⁸¹*See supra* text accompanying notes 378-79.

of “protection and respect” to the wounded and sick that transcended the stages of conflict.³⁸² In the case of “occupation,” this obligation is developed further by the Civilians Convention, which provides elaborate guarantees that the food and medical needs of the civilian population **will be met**.³⁸³ If the resources of the occupied territory are inadequate to meet the population’s food and medical needs, the occupying power has the obligation to bring in the necessary foodstuffs and medical stores.³⁸⁴ The occupier also must ensure that medical and other health services establishments can continue functioning.³⁸⁵ In each case, however, these duties apply to the occupying forces only “[t]o the fullest extent of the means available to it.”³⁸⁶ Interned civilians in particular must be provided clean and healthy surroundings, and adequate food and clothing³⁸⁷—requirements that also expressly are extended to internees in *internal* armed conflict by Protocol II to the 1949 Geneva Conventions.³⁸⁸ Moreover, in “all circumstances” in internal armed conflicts, medical care is to be provided the wounded and sick “to the fullest extent practicable and with the least possible delay.”³⁸⁹

What is especially noteworthy about these medical and food provisions is that they recognize the practical limitations of the military force in providing these services to the civilian population. In each instance, the forces have a good faith obligation to do whatever practicable to assist the local population.³⁹⁰ Was it for reasons of practical necessity that emergency assistance may have been limited to Panamanians who resided at the aid centers established by the United States forces?³⁹¹ Without more information, no judgment can be made concerning United States conduct in providing adequate care. The fact that United States authorities provided food and some emergency assistance to thousands of Panamanian citizens in the early hours of the operation, however, indicates that United States authorities made some effort in this direction.³⁹²

³⁸²Geneva Civilians Convention art. 16 (“The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect”); see *supra* text accompanying notes 225-26.

³⁸³See Geneva Civilians Convention arts 55-56; see *supra* text accompanying note 261.

³⁸⁴Geneva Civilians Convention art. 55.

³⁸⁵*Id.* art. 56.

³⁸⁶*Id.* arts. 55-56.

³⁸⁷See *supra* text accompanying notes 274-75.

³⁸⁸See *supra* text accompanying notes 302-04.

³⁸⁹Protocol II art. 7; see also *id.* art. 5(2)(b) and (d).

³⁹⁰See *supra* text accompanying notes 386, 389.

³⁹¹See *supra* text accompanying note 210.

³⁹²See *supra* text accompanying note 205.

Protected civilians in occupied territories also have a right to receive relief consignments of things like foodstuffs, medical supplies, and clothing.³⁹³ Relief organizations, such as the I.C.R.C. must be allowed to supply these relief consignments and to carry out their relief activities in the territory where the conflict is occurring, subject only to “*temporary* and *exceptional* measures imposed for *urgent* reasons of security” by the occupier.³⁹⁴ Relief efforts also are recognized for *internal* conflicts by common Article 3, which allows an impartial humanitarian body such as the I.C.R.C. to “offer its services,” without, however, requiring that the warring parties accept them.³⁹⁵ Protocol II may evidence some development in this area, however, with respect to interned persons, who “shall be allowed to receive individual or collective relief.”³⁹⁶

Protected civilians who are rendered homeless by the hostilities constitute a special problem because the Geneva Conventions do not contain any express obligations concerning provision of adequate housing. Nevertheless, it would seem that some minimum obligations should exist. Article 27 of the Civilians Convention, concerning “respect” and “humane treatment,” may suffice in this respect to require some degree of protection in the way of shelter for these people.³⁹⁷ Also, one might conclude that the general duty to provide medical care might provide some obligation in this respect.³⁹⁸ Under these circumstances, criticisms of “appalling living conditions” that provided little privacy appear unreasonable.³⁹⁹ The important fact is that some efforts were made to provide temporary shelter to displaced civilians.⁴⁰⁰ Perhaps a standard of reasonableness, taking into account the practical limitations of the military forces, would be the proper standard against which to measure United States efforts. The same logic applies also to a characterization of the conflict as *internal*; the “humane treatment” obligations of common Article 3 of the Civilians Convention and Article 5 of the American Convention on Human Rights may afford some degree of obligation with respect to shelter.⁴⁰¹ Protocol II also may evidence some develop-

³⁹³Geneva Civilians Convention arts. 59-62.

³⁹⁴*Id.* art. 63.

³⁹⁵*Id.* art. 3. Even Protocol II, which provides some elaboration on this subject, makes the relief efforts of organizations such as the ICRC “subject to the consent of the High Contracting Party concerned.” Protocol II art. 18(2).

³⁹⁶Protocol II art. 5(1)(c).

³⁹⁷See *supra* text accompanying note 250.

³⁹⁸See *supra* text accompanying notes 382-89.

³⁹⁹See *supra* text accompanying note 207.

⁴⁰⁰See *supra* text accompanying notes 208-09.

⁴⁰¹Geneva Civilians Convention art. 3; American Convention art. 5; see *supra* text accompanying notes 11-45, 299, 313.

ment in this area with respect to *interned* persons, who are entitled to “protection against the rigours of the climate.”⁴⁰²

Humanitarian law places obligations on an invading military force to avoid destruction of the enemy’s property, unless the necessities of war imperatively demand its **destruction**.⁴⁰³ The Geneva Conventions also prohibit wanton destruction of **property**.⁴⁰⁴ Nevertheless, international law does not recognize a right for civilians to claim compensation from the enemy forces or from their own sovereign if military action causes the destruction of their private **property**.⁴⁰⁵

3. Care for the Dead: Cremations and Mass Burials

The Geneva Conventions contain several articles that oblige an invading force to account for the dead and to use proper methods for their disposal. The Americas Watch Report was especially critical of United States efforts in counting or otherwise accounting for the **dead**.⁴⁰⁶ Article 16 of the Civilians Convention contains the basic obligation in international armed conflict concerning the civilian dead, requiring warring parties “[a]s far as military considerations allow,” to “facilitate the steps taken to search for the killed . . . and to protect them against pillage and ill-treatment.”⁴⁰⁷ Oddly, other than this provision, the Civilians Convention contains only one arti-

⁴⁰²Protocol II art. 5(1)(b); see *supra* text accompanying note 304.

⁴⁰³Hague Regulations art. 23(g); FM 27-10, at 23, para 56.

⁴⁰⁴Geneva Civilians Convention art. 53. It states:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Id.

⁴⁰⁵See G. von Glahn, *supra* note 189, at 227. Article 21 of the American Convention on Human Rights provides that “[e]veryone has the right to the use and enjoyment of his property” and that “[n]o one shall be deprived of his property except upon payment of just compensation. . . .” American Convention art. 21(1) and (2). The guarantee of Article 21, however, is not listed in Article 27 as among those rights that are non-derogable in time of war. *Id.* art. 27(2). For explanations of U.S. military policies and procedures for paying foreign claims, including combat-related claims for private property, injuries and deaths, see Harris, *Grenada - A Claims Perspective*, The Army Lawyer, Jan. 1986, at 7; Warner, *Planning for Foreign Claims Operations During Overseas Deployment of Military Forces*, The Army Lawyer, July 1987, at 61.

⁴⁰⁶Americas Watch, *supra* note 69, at 13; see *supra* note 124; see also *supra* text accompanying note 213.

⁴⁰⁷Geneva Civilians Convention art. 16. The Wounded and Sick Convention and the Wounded, Sick, and Shipwrecked at Sea Convention apply only to combatants and not to protected civilians. They contain numerous provisions concerning care for the combatant dead. See Wounded and Sick Convention art. 13; Wounded, Sick and Shipwrecked at Sea Convention art. 13.

cle pertaining to care for the dead, and that article expressly pertains only to internees, requiring that they be honorably buried in individual, properly maintained graves.⁴⁰⁸ The bulk of the provisions concerning care for the dead is found in the two Geneva Conventions concerning the wounded and sick⁴⁰⁹ and also in the Geneva Prisoners of War Convention.⁴¹⁰ The provisions found in those conventions, however, pertain only to combatant, as opposed to civilian, deaths.⁴¹¹ Provisions pertaining to civilian dead in *internal* armed conflict also are lacking. Protocol II, in Article 8, however, does provide that “[w]hen circumstances permit, . . . all possible measure shall be taken, without delay, . . . to search for the dead, prevent their being despoiled, and decently dispose of them.”⁴¹² This provision might be considered a reasonable statement of humanitarian care of the dead that should be extended to international armed conflict as well.

Apparently, the standards pertaining to care of combatant dead were met by United States forces.⁴¹³ Whether United States efforts at counting or otherwise accounting for Panamanian civilian dead were reasonable in the circumstances is unknown.⁴¹⁴ Regarding burned bodies and reports of mass burials, United States forces operated within the standards for the treatment of combatant deaths found in the first three 1949 Geneva Conventions.⁴¹⁵ Despite the fact that no evidence of cremations was uncovered, cremations are permitted under Geneva Convention standards only if hygienic reasons so demand.⁴¹⁶ The same standard of hygiene concern applies to mass burials, which are permitted for hygienic concerns so long as the graves are properly marked so that the remains may be exhumed at a later date for individual burial.⁴¹⁷ United States forces, as previously noted, followed these requirements for the two mass burials that they performed.⁴¹⁸

⁴⁰⁸Geneva Civilians Convention art. 130.

⁴⁰⁹Wounded and Sick Convention arts. 15-17; Wounded, Sick and Shipwrecked at Sea Convention arts. 18-20.

⁴¹⁰Geneva PW Convention arts. 120-121.

⁴¹¹Wounded and Sick Convention art. 13; Wounded, Sick and Shipwrecked at Sea Convention art. 13; Geneva PW Convention art. 4.

⁴¹²Protocol II art. 8; *see supra* text accompanying note 307.

⁴¹³*See supra* text accompanying note 411.

⁴¹⁴*See supra* text accompanying notes 406, 412.

⁴¹⁵*See supra* note 411.

⁴¹⁶Geneva PW Convention art. 120; Geneva Wounded and Sick Convention art. 17.

⁴¹⁷Geneva PW Convention art. 120; Geneva Wounded and Sick Convention art. 17.

⁴¹⁸*See supra* text accompanying note 214.

4. *Obligations Counterbalanced by Necessity*

This brief application of several of the more publicized accounts of the conduct of United States forces toward Panamanian civilians reveals an absence of flagrant, intentional abuses of relevant humanitarian law provisions. The rules concerning obligations owed civilians by enemy military forces are designed to account for the realities of armed conflict. Consequently, the obligations generally are counterbalanced by the practical necessity of taking account of the enemy force's security concerns and the limitations in supplying some of the mandated assistance imposed by the logistical and material realities of the armed conflict. In all circumstances, United States conduct in this respect must be examined using a standard of reasonableness. Individual incidents of inexcusable conduct may occur on particular occasions. Nevertheless, examining the conduct of United States forces as a whole, the cited allegations do not reveal adequate facts to justify a conclusion that United States forces acted with culpable disregard of humanitarian law protections.

V. INVIOABILITY OF DIPLOMATIC PREMISES IN WARTIME

While the military operation generally progressed as planned,⁴¹⁹ two widely publicized incidents involving the treatment of foreign diplomatic premises by United States forces caused widespread criticisms. One of the incidents grew out of the surprising elusiveness of Noriega, who on December 24 managed to find refuge in the Papal Nunciature—the Vatican's embassy in Panama City.⁴²⁰ United States troops, in response, surrounded the embassy, sealed off the neighborhood, shot out the street lights, searched automobiles that entered and exited the premises, and bombarded the building with rock music.⁴²¹ United States personnel also assumed the role of conducting direct negotiations with the Nuncio, the Ambassador, for the release of Noriega.⁴²² Another incident occurred on December 29, when United States soldiers raided and searched the Nicaraguan Ambassador's purported residence in Panama City, turning up a cache

⁴¹⁹See Wash. Post, Dec. 29, 1989, at A1, col. 1 ("Despite Problems, Invasion Seen as Military Success").

⁴²⁰See N.Y. Times, Jan. 5, 1990, at A1, col. 4.

⁴²¹Newsweek, *A Standoff in Panama*, Jan. 8, 1990, at 28; Wash. Post, Dec. 28, 1989, at A28, col. 5; see also Wash. Post, Jan. 7, 1990, at A22, col. 5. The Cuban, Nicaraguan, and Libyan embassies also were surrounded. *Id.*; see also Wash. Post, Jan. 5, 1990, at A13, col. 1. The Peruvian ambassador's residence was surrounded later. Wash. Post, Jan. 10, 1990, at A12, col. 5.

⁴²²Newsweek, *supra* note 421, at 28; Wash. Post, Dec. 28, 1989, at A29, col. 3.

of weapons.⁴²³ United States officials subsequently admitted that the raid violated international law and offered an apology to Nicaragua.⁴²⁴ Nevertheless, Nicaraguan President Daniel Ortega quickly retaliated by expelling twenty United States diplomats from Managua.⁴²⁵ Various critics claimed that both incidents violated established principles of international law, and in particular the 1961 Vienna Convention on Diplomatic Relations.⁴²⁶

A. THE NICARAGUAN DIPLOMATIC RESIDENCE INCIDENT

1. Facts

A short time after the invasion, United States officials initiated a "money-for-guns" program that paid reward money to Panamanians who turned over weapons and ammunition to the Americans.⁴²⁷ An enterprising United States citizen living in Panama City, who had provided accurate advice on several occasions concerning the locations of weapons, reported seeing weapons cached in a particular house.⁴²⁸ United States soldiers responded to the tip at approximately 1730 on December 29. A few minutes after the soldiers arrived, but before they entered the property, a chauffeured automobile with diplomatic license plates arrived at the house.⁴²⁹ The passenger in the automobile claimed that the residence was his, that he was the Nicaraguan Ambassador, and that the house was entitled to diplomatic protection.⁴³⁰ Some confusion ensued over the individual's

⁴²³Wash. Post, Dec. 31, 1989, at A1, col. 5; Newsweek, *supra* note 421, at 28.

⁴²⁴Wash. Post, Dec. 31, 1989, at A1, col. 5. President Bush called the search a "screw up" that "shouldn't have happened." *Id.*: see Wash. Post, Jan. 1, 1990, at A16, col. 1. Nicaragua alleged a "second invasion" of apartments occupied by its diplomatic personnel occurred on December 31, 1989. It filed a formal protest with the U.S. Embassy in Managua. Wash. Post, Jan. 3, 1990, at A1, col. 5; see also Newsweek, *supra* note 421, at 28.

⁴²⁵Wash. Post, Jan. 1, 1990, at A16, col. 1. Ortega countered that the admission of a "screw up" was insufficient. *Id.*: see also Newsweek, *supra* note 421, at 28.

⁴²⁶Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T.3227, T.I.A.S. No. 7502, 500 U.N.T.S.95 (effective Apr. 24, 1964) [hereinafter Vienna Convention]; see, e.g., Wash Post, Dec. 31, 1989, at A17, col. 6; Wash. Post, Jan. 3, 1990, at A14, col. 1; Newsweek, *supra* note 421, at 28.

⁴²⁷Newsweek, *supra* note 421, at 30; Wash. Post, Dec. 31, 1989, at A16, col. 2.

⁴²⁸Wash. Post, Dec. 31, 1989, at A16, col. 2; Wash. Post, Jan. 7, 1990, at A22, col. 5; Files of the Office of The Judge Advocate General, U.S. Army [hereinafter OTJAG Files] (U.S. citizen residing in Panama was informant).

⁴²⁹Wash. Post, Dec. 31, 1989, at A16, col. 1; Address by W. Hays Parks, International Affairs Division, Office of The Judge Advocate General, U.S. Army, to Humanitarian Law class, George Washington University, Feb. 14, 1990 [hereinafter Parks Address].

⁴³⁰Wash. Post, Dec 31, 1989, at A16, col. 2; Wash. Post, Jan. 1, 1990, at A16, col. 1; Wash. Post, Jan. 7, 1990, at A22, col. 5.

identity, and he did not have his diplomatic passport.⁴³¹ When questioned further, he did not know the street address of the house or its telephone number.⁴³²

Meanwhile, the United States forces present at the house communicated with their superiors, seeking instructions on whether to enter the residence and conduct a search. A diplomatic shield on the residence improperly was described as some kind of "decal" on the window.⁴³³ Coordination with the American Embassy revealed discrepancies both in the name of the person claiming to be the Nicaraguan Ambassador and in the address that was listed in the Panamanian government directory as the diplomatic residence.⁴³⁴ An aide to the ambassador who was allowed to use a telephone located in the area for the purpose of obtaining verification of the diplomatic status for the United States forces apparently was unsuccessful.⁴³⁵ Considerable time elapsed, and the search finally was authorized approximately one and one-half hours after the United States soldiers initially arrived at the house.⁴³⁶ The search produced a large number of weapons, rocket-propelled grenades, hand grenades, and ammunition.⁴³⁷ Finally, a short time after soldiers conducted the search, new instructions directed them to leave the house and to return the seized items.⁴³⁸

The Organization of American States (OAS), on January 8, 1990, by a 19 to 0 vote, passed a watered-down resolution that did not specifically refer to the United States, but expressed support for the

⁴³¹Wash. Post, Dec. 31, 1989, at A16, col. 2; Wash. Post, Jan. 7, 1990, at A22, col. 5; OTJAG Files, *supra* note 428 (initially identified self as "consul"). He apparently possessed a blue card holder that identified him as a member of the diplomatic corps. Wash. Post, Dec. 31, 1989, at A16, col. 3.

⁴³²Wash. Post, Jan. 7, 1990, at A22, col. 5.

⁴³³Parks Address, *supra* note 429 (miscommunication of diplomatic shield as "decal"); see Wash. Post, Dec. 31, 1989, at A16, col. 1.

⁴³⁴OTJAG Files, *supra* note 428; Parks Address, *supra* note 429; Wash. Post, Dec. 31, 1989, at A16, col. 1 (different address). The Nicaraguan Ambassador later stated that the address obtained by U.S. soldiers was that of the previous ambassador, whom he replaced in April. *Id.*

⁴³⁵Parks Address, *supra* note 429; OTJAG Files, *supra* note 428.

⁴³⁶OTJAG Files, *supra* note 428; Wash. Post, Dec. 31, 1989, at A16, col. 3.

⁴³⁷Weapons found included pistols, grenades, 4 Uzi submachine guns, 1 AK-47 rifles, 1 anti-tank rocket propelled grenade launchers with rounds, 10 Sten guns, bayonets, anti assorted other weapons and ammunition. Wash. Post, Dec. 31, 1989, at A1, col. 5 and A16, col. 4; Wash. Post, Jan. 1, 1990, at A16, col. 1; OTJAG Files, *supra* note 428 (the house was described as poorly furnished and dirty—unlike expectations for an ambassador's residence).

⁴³⁸Wash. Post, Dec. 31, 1989, at A1, col. 6, and A17, col. 1; Wash. Post, Jan. 1, 1990, at A16, col. 1; OTJAG Files, *supra* note 428 (time frame from the soldiers' arrival at the house to the return of the weapons and departure was a little over three hours).

diplomatic immunity principles contained in the Vienna Convention on Diplomatic Relations.⁴³⁹ The United States Administration responded that the matter should not have been brought before the OAS because government officials previously had explained the mistake and had expressed regret at the incident.⁴⁴⁰ Nevertheless, the action of the OAS may be viewed as indicative of the kind of concern that issues of diplomatic inviolability raise in the international community.

2. *Issues*

One of the more challenging aspects of an examination into the legal issues presented both by the search of the Nicaraguan Ambassador's residence and United States actions at the Papal Sunciature, is the determination of which set of legal rules apply when "armed conflict" collides with "diplomatic intercourse." Do ordinary laws of armed conflict provide any guidance for the conduct of military forces when well-established principles of "military necessity" appear to compel some attenuation of equally valid principles of diplomatic privileges and immunities? The clash in the two sets of legal rules is difficult to reconcile conceptually. Each has its own separate objects: the law of armed conflict is primarily a humanitarian attempt to minimize suffering caused by war,⁴⁴¹ and the rules of diplomatic privilege and immunity are designed to promote the "free and unhampered exercise of the diplomatic function."⁴⁴² The clash between the two sets of norms becomes especially acute when, as in the Nicaraguan residence incident, military necessity might appear to require relaxation of seemingly rigid rules concerning the inviolability of diplomatic premises and residences of states that are not parties to the armed conflict. The question then becomes the extent to which the principles of privileges and immunities—and in particular inviolability of diplomatic property—can be reconciled, if at all, with the exigencies of armed conflict.

3. *Inviolability under the Law of Armed Conflict*

a. General Rules Pertaining to the Wartime Treatment of Diplomats

⁴³⁹Wash. Post, Jan. 10, 1990, at A16, col. 6.

⁴⁴⁰*Id.*

⁴⁴¹*See, e.g.*, F. Kalshoven, *supra* note 15, at 1.

⁴⁴²20 A.J.I.L. Spec. Supp. 149 (1926). The basis for diplomatic privileges and immunities is "the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents, and the respect properly due to . . . traditions." *Id.*; *see* W. Bishop, *International Law: Cases and Materials* 709 (1971).

Very few legal principles exist that have specific wartime application to treatment of diplomats. Customary international law on the treatment of diplomats in wartime essentially is confined to ensuring that diplomats from neutral and belligerent states are assured safe-passage, or “safe-conduct,” to their sending states. This practice of allowing written safe-conducts to guarantee the safety of diplomats during wartime was established by the Middle Ages,⁴⁴³ became part of the famous Lieber Instructions in the American Civil War,⁴⁴⁴ was adhered to regularly during the World Wars,⁴⁴⁵ and even found its way into the United States Army’s Field Manual on the law of land warfare, FM 27-10.⁴⁴⁶

Substantial development also occurred in establishing a practice of allowing neutral embassies to represent and safeguard the diplomatic interests of one party to an armed conflict in the territory of the other party to the conflict.⁴⁴⁷ That latter development is especially interesting for several reasons. It encompasses the established practice of allowing enemy diplomats, with their families and possessions, to leave the territory of the belligerent state without interference.⁴⁴⁸ The diplomatic residence that is left behind, along with the embassy, remains protected by the right of inviolability—although this protection actually is assured by the neutral embassy that agreed to safeguard the enemy state’s diplomatic interests.⁴⁴⁹ If these enemy diplomatic premises continue to be treated as inviolable in wartime, then certainly no less degree of privilege should attach to the diplomatic premises and residences of neutral envoys who remain in the belligerent state.

⁴⁴³M. Keen, *The Laws of War in the Late Middle Ages 196-205* (1965). Ambassadors enjoyed immunities from war. But they all required written safe-conducts to guarantee their safety, which were purchased from the conquerors. *Id.*

⁴⁴⁴Lieber Instructions, 1863, Article 87, *quoted in* D. Schindler & J. Toman, *supra* note 37, at 5. Article 87 states: “Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary. . . .” *Id.*

⁴⁴⁵Hackworth, *Digest of International Law*, Vol. IV, at 463 (1943); L. Oppenheim, *supra* note 24, at 677; *see* G. von Glahn, *supra* note 189, at 87-90.

⁴⁴⁶FM 27-10, at 166, para. 456b; *see also* Vienna Convention art. 44.

⁴⁴⁷*See, e.g.*, W. Franklin, *Protection of Foreign Interests* (1947); *see also* E. Satow, *A Guide to Diplomatic Practice* 194 (1922) (“In time of war the representative of a neutral friendly Power commonly undertakes the protection of the subjects of one belligerent in the dominions of the other belligerent, so far as is permitted by the state to which he is accredited, and, of course, with the sanction of his own Government.”); Hackworth, *supra* note 445, at 566; Vienna Convention art. 45(b).

⁴⁴⁸*See* Hackworth, *supra* note 445, at 566; E. Satow, *supra* note 447, at 253.

⁴⁴⁹*See* Hackworth, *supra* note 445, at 566; E. Satow, *supra* note 447, at 253; Vienna Convention art. 45(a)(b).

These developments in customary international law, of course, do not establish precedent that applies directly to the issue of inviolability of diplomatic premises and residences of neutral states in wartime. Nevertheless, they are illustrative of practices which reveal that diplomats are allowed certain privileges and are accorded certain protections in wartime that are not available to other persons from neutral states who find themselves in the contested territory of a belligerent state.

b. Customary Rules Under the Various "Stages" of Conflict

Additional customary international law norms concern the situation of the neutral diplomat who is accredited to a belligerent state and is found there by the other belligerent in territory under the military control of the latter.⁴⁵⁰ These rules are important because they significantly supplement the modern rules concerning treatment of neutrals that are found in the 1949 Geneva Civilians Convention.⁴⁵¹

As discussed previously, distinctions exist between the invasion and Occupation stages of conflict.⁴⁵² In the occupation stage, the invading military force is concerned principally with restoring order; this requires some kind of administration of the occupied territory.⁴⁵³ One important aspect of occupation, however, is the principle that sovereignty is not vested in the occupying power. The Geneva Civilians Convention implements the principle through articles ensuring that minimum alteration, subject to restrictions that are necessary for the security of the occupying force, should be made to the existing administration, legal system, economy, and general life of the community.⁴⁵⁴ In practice, states generally continue to apply local laws during the occupation, subject to security considerations.⁴⁵⁵ To the extent possible, states also are expected to administer foreign affairs pertaining to the area under occupation in the same manner as the dispossessed government was obliged to act.⁴⁵⁶

Applying these principles concerning occupied territory to the treatment of neutral diplomats can be difficult. The few principles

⁴⁵⁰See, e.g., E. Satow, *supra* note 447, at 340-42.

⁴⁵¹Geneva Civilians Convention.

⁴⁵²See *supra* text accompanying notes 215-217.

⁴⁵³See *supra* text accompanying notes 218-20.

⁴⁵⁴See Hague Convention art 78; L. McNair & A. Watts, *supra* note 60, at 370, 420.

⁴⁵⁵I Hackworth, *Digest of International Law*, at 155 (citing U.S. practice during its military occupation of the Dominican Republic in 1916); see also L. McNair & A. Watts, *supra* note 60, at 420-21.

⁴⁵⁶Hackworth, *supra* note 455, at 155; L. McNair & A. Watts, *supra* note 60, at 421.

of customary international law that do exist on the subject, however, provide an idea of how the law of war and diplomatic protection regimes may be reconciled. One prominent commentator on diplomatic practice asserts the continuing inviolability of diplomats in territory under the “military control” of an invading **belligerent**.⁴⁵⁷ The neutral diplomat’s inviolability continues **as long as** his actions are harmless—that is, so long **as** he refrains from acts that prejudice the military interests of the occupying **force**.⁴⁵⁸ Oppenheim and other authorities stress the impartial and courteous treatment that these neutral diplomats are to receive, **as well as** the rule that they must be permitted **as much freedom of action as** the necessities of the war allow.⁴⁵⁹ Exactly how far the necessities of the war may restrict the freedom of diplomats is unclear, but persuasive authority exists for the proposition that the diplomat who chooses to remain in the occupied territory cannot expect to enjoy all his privileges and immunities to their full **extent**.⁴⁶⁰

For an occupying military force, the return to a degree of normalcy must account for wartime security **considerations**.⁴⁶¹ For neutral diplomats, this means that their actions cannot be allowed to prejudice the military interests of the occupying force. The important remaining question—to what extent the necessities of war allow the privileges and immunities of neutral diplomats to be restricted—is not answered clearly by the law of armed conflict pertaining to belligerent occupation. Consequently, if one assumes that the locale of the Nicaraguan Ambassador’s purported residence was in an area of Panama that, at the time of the search, was under United States military occupation, and undisputed military necessity demanded that the United States forces seize weapons known to be inside the residence, the law of occupation still does not clarify the options available to United States forces for ensuring that their military interests are not prejudiced by the potentially harmful acts of the neutral diplomat in storing the weapons.

⁴⁵⁷E. Satow, *supra* note 447, at 340, § 362(iv).

⁴⁵⁸*Id.*

⁴⁵⁹L. Oppenheim, *supra* note 24, at 676; FM 27-10, at 192, para. 549; G. von Glahn, *supra* note 189, at 87. This is consistent with the interesting provision in the Lieber Instructions: “The functions of Ambassadors, Ministers, or other diplomatic agents accredited by neutral powers to the hostile government, cease, so far **as** regards the displaced government; but the conquering or occupying power usually recognizes them **as** temporarily accredited to itself.” Lieber Instructions, 1863, Article 9, *quoted in* D. Schindler & J. Toman, *supra* note 37, at 5; *see also* G. von Glahn, *supra* note 189, at 32.

⁴⁶⁰E. Satow, *supra* note 447, at 342, § 364(b); *see* L. Oppenheim, *supra* note 24, at 676; FM 27-10, at 192, para. 549; G. von Glahn, *supra* note 189, at 87.

⁴⁶¹*See supra* text accompanying notes 340-43.

A stronger argument can be presented for limiting the wartime activities of diplomats during the "invasion" stage of the conflict. In that situation of chaos, the foremost consideration of military forces is attaining the military objective of subduing the enemy forces.⁴⁶² If soldiers receive hostile fire while engaging in combat, they are expected to defend themselves and to subdue the enemy by returning the fire.⁴⁶³ Soldiers who receive hostile fire from diplomats of states that are considered neutral cannot be expected to refrain from defending themselves or subduing this new enemy simply because of the assailant's diplomatic protections. Like other "protected" classes of persons—whether ordinary civilians, medical personnel, prisoners of war, or some other category—diplomats who abuse their status by engaging in hostile activities should not be allowed to cloak their activities by claiming privileges.⁴⁶⁴ Under this "military objective" theory, the protections accorded a diplomatic residence would depend on whether the threat emanating from the premises was sufficient to make it a military objective that required a defensive military response. Reliable information that the residence harbors a substantial arms cache, in circumstances such as those surrounding the Nicaraguan Ambassador's purported residence, could justify under the "military objective" theory a lifting of the abused privilege of diplomatic inviolability.⁴⁶⁵ A subsequent entry and search to recover weapons to subdue the threat would be consistent with this line of reasoning.

Thus far, the discussion has applied rules that presume that the conflict in Panama was international in character. Certain statements from United States officials, undoubtedly made with political consequences in mind, indicated that the United States operation was not directed against Panama, but rather against Noriega loyalists in the illegitimate Panamanian government. As discussed earlier, the United States operation under this theory was not an invasion of Panama, but rather an intervention by United States forces to assist

⁴⁶²See FM 27-10, at 4, para. 3a; see *supra* text accompanying note 215.

⁴⁶³See, e.g., F. Kalshoven, *supra* note 15, at 28 (discussing rules concerning persons entitled to perform acts of war).

⁴⁶⁴See Geneva Civilians Convention art. 5; see also E. Satow, *supra* note 447, at 342, § 364(b).

⁴⁶⁵For the U.S. Army's guidance concerning diplomats from neutral states who are found accompanying enemy forces, but were not taking part in hostilities, see FM 27-10, at 34, para. 83. They may be ordered out of the theater of war or handed over to their respective states. If they refuse to leave the theater of war, they may be interned. *Id.* If these neutral diplomats participated in hostilities, then they apparently are treated as prisoners of war. *Id.*: see also *id.* at 44h (if the neutral diplomats volunteer to remain in a besieged place after hostilities commence, they incur the same risks as other inhabitants).

the “legitimate” Endara government in defending democracy in its internal conflict against forces loyal to Noriega.⁴⁶⁶ Furthermore, the agency relationship that this establishes for intervening forces with the legitimate government means that the relationship of intervening forces with the “illegitimate,” or rebel, forces is governed by the rules pertaining to non-international armed conflict.⁴⁶⁷ Logic necessarily extends the agency relationship to other aspects of the intervening forces’ interaction with the state in which the conflict occurs. As a result, the intervening state cannot do anything with respect to neutral diplomats that the legitimate government of the state involved in the civil war could not do. The practical effect of arriving at this conclusion is that it shifts the analysis from the realm of law of armed conflict into the realm of the law of diplomatic relations.

c. Inviolability Under Conventional Humanitarian Rules

The discussion thus far has focused on the customary international law of armed conflict that applies to neutral diplomats. The reason for the emphasis on customary law is the lack of conventional international law of armed conflict rules that apply directly to neutral diplomats. Nevertheless, two articles in the 1949 Geneva Civilians Convention,⁴⁶⁸ Articles 4 and 5, provide some guidelines that are applicable to the subject. These articles apply, however, only if the Panama operation is an “international” armed conflict.⁴⁶⁹ If one accepts the premise that United States forces by invitation were assisting the legitimate Panamanian government in its internal armed conflict, then only common Article 3—the only article of the Geneva Conventions that applies to non-international armed conflict—would apply.⁴⁷⁰ Common Article 3, however, with its general humanitarian norms, offers no relevant guidance for the treatment of diplomats.⁴⁷¹

Examination of Articles 4 and 5 of the Geneva Civilians Convention provides some idea about the extent of protections that the conventional law of armed conflict offers to neutral diplomatic personnel. Article 4 defines the classes of civilian persons that are protected

⁴⁶⁶See *supra* text accompanying notes 52-55.

⁴⁶⁷See *supra* text accompanying notes 47-55.

⁴⁶⁸Geneva Civilians Convention.

⁴⁶⁹See *supra* text accompanying notes 34-35, 50-51; Geneva Civilians Convention art. 2.

⁴⁷⁰Geneva Civilians Convention art. 3; see F. Kalshoven, *supra* note 15, at 59 (“the one and only Article of those Conventions especially written for the event of a non-international armed conflict”); see *supra* text accompanying notes 39-40, 52-55.

⁴⁷¹See *supra* text accompanying notes 41-45.

by the convention. Its first paragraph reaffirms the principle found in common Article 2 that the convention applies at every stage of the conflict.⁴⁷² The second paragraph creates an important exception in this regard with respect to neutral persons. It states that “[n]ationals of a neutral state who find themselves in the territory of a belligerent State . . . shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”⁴⁷³ This provision excepts from the coverage of the Civilians Convention only neutral persons in the territory of a “belligerent” state, and not those who are in occupied territory.⁴⁷⁴ The quoted provision is limited thereby in application to the relationship that already exists between the neutral civilian and the state of his location. The neutral person whose diplomatic representatives remain in place thus finds himself in exactly the same legal position as he would be if the state were at peace.⁴⁷⁵ The logic behind this conclusion is that, so long as the person’s diplomatic representatives continue to function, he can call upon those diplomats for assistance and protection.⁴⁷⁶ For these neutral individuals the protections guaranteed by the Geneva Civilians Convention are unnecessary.

By inference, Article 4 recognizes that, even during armed conflict, diplomatic practice between neutral states and the belligerent party to which the diplomats are accredited continues to accord certain protections to these neutral people. A logical conclusion from this is that if protections are to be guaranteed to diplomats, then the diplomatic function must be allowed to continue in operation. Because the principles of privileges and immunities are necessary corollaries to the operation of the diplomatic function,⁴⁷⁷ normal diplomatic immunities, including the principle of inviolability of diplomatic premises, must continue to function unimpeded.

This analysis complements the discussion of the “agency” theory of the United States operation in Panama. If one accepts the premise that the United States acted on behalf of, or as an agent of, the “legitimate” Panamanian government, the United States relationship with neutral diplomats in Panama cannot be such that it impedes the diplomats’ right to inviolability of premises—just as the

⁴⁷²Geneva Civilians Convention art. 4.

⁴⁷³*Id.*

⁴⁷⁴*See* H. Levie, *The Code of International Armed Conflict* 798 (1986)

⁴⁷⁵*Id.*

⁴⁷⁶*Id.*

⁴⁷⁷*See supra* text accompanying note 442.

Panamanian government would be prevented from infringing inviolability. The analysis does not, however, complement the “military objective” theory, which allows some infringement of inviolability if military necessity demands it.⁴⁷⁸ In that situation, which contemplates a chaotic environment that exists in the midst of the invasion, “normal diplomatic representation” under Article 4 cannot comport with reality. The consequences that flow from this cannot allow the same logical progression that, with respect to the “agency” theory, concluded that normal diplomatic immunities must be allowed to continue.⁴⁷⁹ This does not mean that the “military objective” theory is invalid. It conflicts only with the inferences drawn from the omission in Article 4 of standards for determining the protections to be accorded neutral civilians and their diplomats who find themselves in the non-occupied territory of a belligerent state. Because the “military objective” theory also is inferred and little evidence exists to indicate whether these theories correspond to firmly established state practice, the law in this area appears unsettled.

The law is only a little more firmly established with respect to neutral persons who find themselves in occupied territory. Article 4, by excepting out neutral persons who find themselves in the hands of the belligerent state, retains under its protection neutrals who find themselves in the hands of an occupying power.⁴⁸⁰ The Convention does not exclude neutral diplomats from its protections, and it is logical that these civilians benefit at least as much as other neutral civilians.⁴⁸¹ Examination of the Civilian Convention’s articles, however, shows that the treaty emphasizes special protections for categories of civilians such as children, the aged, the infirm, and those persons whose job it is to provide relief to these persons.⁴⁸² Neutral diplomats are not addressed as requiring particular protection. Consequently, other than general humanitarian protections that are available to all neutral civilians under the Convention, diplomats receive no special protection. Inviolability of diplomatic premises or residences, therefore, is not included as a protection guaranteed by the Geneva Civilians Convention.

The extent to which diplomatic inviolability is protected by the law of armed conflict during an occupation consequently must be deter-

⁴⁷⁸See *supra* text accompanying notes 462-65.

⁴⁷⁹See *supra* text accompanying note 467.

⁴⁸⁰Geneva Civilians Convention art 4; see *supra* text accompanying notes 472-74.

⁴⁸¹See Pictet Commentaries, *supra* note 27, at 51.

⁴⁸²Geneva Civilians Convention arts. 16, 23, 24, 50, 143.

mined in light of customary international law. 'Unfortunately, customary international law does not provide a wholly satisfactory answer. Although inviolability of diplomatic premises is a recognized principle under the customary international law of armed conflict, it exists alongside the occupier's recognized interest in restoring public safety and order, and in ensuring its own security. These coexisting principles prompted the inference that they must be balanced against each other when they conflict. As a result, neutral diplomats cannot be allowed to prejudice the military interest of the occupying force. Nevertheless, state practice does not divulge to what extent the occupying force may infringe the diplomatic inviolability to satisfy its security concern.⁴⁸³

Article 5 of the Geneva Civilians Convention recognizes the concern of occupying forces for protecting their security. It allows the forces to derogate from providing the protections "under the present convention" that could harm their security when a "protected person is definitely suspected of or engaged in activities hostile to [their] security."⁴⁸⁴ Although Article 5 appears to offer a means for limiting protection available to neutral diplomats who threaten the occupier's security, closer examination reveals that the article is limited to curbing only those rights and privileges that are provided under the Geneva Civilians Convention.⁴⁸⁵ Having already established that diplomatic inviolability is not one of the protections extended by the Convention,⁴⁸⁶ any assertion of Article 5 as direct authority for restricting inviolability of neutral diplomats during an occupation is futile. Nevertheless, the provision may have some limited value simply for its recognition of wartime security concerns during occupation that allow some restriction of protections generally available to civilians in occupied territories.

d. Summary: Inviolability Under the Law of Armed Conflict

Neutral diplomats are not free under the law of armed conflict to conduct themselves in a manner contrary to the interests of the state in whose hands they find themselves. The status of humanitarian

⁴⁸³See *supra* text accompanying notes 458-60.

⁴⁸⁴Geneva Civilians Convention art 5. One right that specifically is noted as subject to forfeiture in occupied territory is the right of communication. *Id.* Forfeiture of this right could prevent the neutral civilian who engages in hostile activities from reaching family, a lawyer, or even his diplomatic representatives. See F. Kalshoven, *supra* note 15, at 54.

⁴⁸⁵Geneva Civilians Convention art. 5 ("rights and privileges under the present Convention").

⁴⁸⁶See *supra* text accompanying note 482 (and following).

law concerning measures that may be taken against diplomats who abuse their neutral status is not resolved in this area of international law, but the law of armed conflict does contemplate at least some infringement of the right of inviolability in the interests of military necessity. The law concerning the extent of permissible infringement, however, remains undeveloped. Another international law regime, the international law concerning diplomatic relations, elaborates the protections available to neutral diplomats that remain vague under the law of armed conflict. It supplements the foregoing concepts of wartime diplomatic inviolability and, to some extent, provides greater protections to diplomats that will prevail in those instances over the vague humanitarian law guarantees.⁴⁸⁷

4. *Inviolability Under the Law of Diplomatic Relations*

a. The Principle of Inviolability

Emissaries of foreign princes commonly received special consideration in ancient times, and privileges and immunities for diplomatic personnel have been established in modern international law for quite some time.⁴⁸⁸ The rules evolved out of a functional necessity for the orderly and effective conduct of friendly relations between states.⁴⁸⁹ They imply that the receiving state is obliged to afford a higher degree of protection to diplomats than is accorded to private persons.⁴⁹⁰ In this respect, immunities accorded to diplomats are exceptions to the general rule of territorial jurisdiction.⁴⁹¹ Ancillary to diplomatic immunities are the principles of inviolability of the premises of the diplomatic mission and of the envoy's residence.⁴⁹² Both the mission and the residence are inviolable to the same ex-

⁴⁸⁷See Pictet Commentaries, *supra* note 27, at 51. Pictet states: "[I]f diplomats do not enjoy more favorable treatment as a result of international customary law, they must be accorded the full benefit of the Convention's provisions." *Id.* The converse situation where diplomats do enjoy more favorable treatment under customary international law logically allows that law to prevail over the Civilians Convention's provisions. Since the Civilians Convention does little to protect neutral diplomats; customary international law concerning diplomats, now largely replaced by the Vienna Convention on Diplomatic Relations, becomes especially important.

⁴⁸⁸Restatement, *supra* note 241, at 455; B. Sen, A Diplomat's Handbook of International Law and Practice 90 (1979).

⁴⁸⁹Restatement, *supra* note 241, at 455.

⁴⁹⁰B. Sen, *supra* note 488, at 90. Article 29 of the 1961 Vienna Convention provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Vienna Convention art. 29.

⁴⁹¹Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 A.J.I.L. 641 (1985).

⁴⁹²See B. Sen, *supra* note 488, at 93.

tent, notwithstanding that the residence is regarded as part of the personal immunity of the diplomat, whereas the inviolability of the mission is attributed to the sovereignty of the sending state.⁴⁹³

Until the end of the 1950's, customary international law was the exclusive source of law governing missions.⁴⁹⁴ In 1961, the customary law of diplomatic immunities was codified in the Vienna Convention on Diplomatic Relations.⁴⁹⁵ The great majority of states have ratified the Vienna Convention, including the United States, which ratified the Convention in 1972.⁴⁹⁶ Article 30 of the Vienna Convention states that "[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission," and thereby incorporates the provisions of Article 22, which details the inviolability of the mission.⁴⁹⁷ Article 22 places several responsibilities for ensuring inviolability on the host receiving state. Its officials may not enter the mission or residence unless the head of mission consents, and the receiving state is also under a special duty to take all appropriate steps to protect the mission or residence against any intrusion or damage, and to prevent any disturbance of the peace of the premises or impairment of its dignity.⁴⁹⁸ Special provision is made for ensuring that the premises are

⁴⁹³U.N. Yearbook of the International Law Commission. Vol. II, Report of the Commission to the General Assembly 95, Commentary to Draft Article 20 (1958) [hereinafter ILC Report]; *Id.* at 98. Commentary to Draft Article 28. Vattel stated the principle:

The independence of the Ambassador would be imperfect and his security very precarious if the house in which he lives were not to enjoy a perfect immunity and to be inaccessible to the ordinary officers of justice. The Ambassador might be molested under a thousand prettexts, his secret might be discovered by searching his papers, and his person exposed to insults. Thus all the reasons which establish his independence and inviolability concern likewise in securing the freedom of his house.

Vattel, *Le droit des Gens*. Vol. IV, Ch. 4, *quoted in* B. Sen, *supra* note 488, at 94; *see also* Moore, *A Digest of International Law*. Vol. 4, at 627 (1906).

⁴⁹⁴*See* Higgins, *supra* note 491, at 641; Restatement, *supra* note 241, at 456

⁴⁹⁵Vienna Convention. Some 81 states participated in the conference leading to the Convention, building on the commentary prepared by the International Law Commission during its study from 1956 to 1959. Higgins, *supra* note 491, at 641 n.3; *see* Restatement, *supra* note 241, at 456.

⁴⁹⁶*See* Restatement, *supra* note 241, at 456; J. Sweeney, C. Oliver, N. Leech, *The International Legal System: Cases and Materials* 941 (3d ed. 1988); Higgins *supra* note 491, at 642. Panama became a Party in 1963. United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as of December 13, 1984* (1985).

⁴⁹⁷Vienna Convention art. 30. "Private residence" includes even a temporary residence of the diplomat. ILC Report, *supra* note 493, at 98, Commentary to Draft Article 28.

⁴⁹⁸*Id.* art. 22(1), (2); *see* Restatement, *supra* note 241, § 466 comment a. The premises include all buildings, garden and car park, appurtenances, goods inside the residence, and automobile. ILC Report, *supra* note 493, at 95, Commentary to Draft Article 20: *id.*, Commentary to Draft Article 28; *see also* E. Satow, *supra* note 447, at 293, § 326.

immune from search and other judicial processes.⁴⁹⁹ The receiving state therefore is obligated to adopt special measures over and above those it takes to discharge its general responsibility of ensuring order.⁵⁰⁰

The law of diplomatic relations thus appears to include well-established rules concerning inviolability that govern the relationship between the receiving state and the diplomats that are stationed in the receiving state. The duties in the Vienna Convention, however, specifically apply to the receiving state. Relationships between diplomats and third parties, such as wartime invading forces or occupiers, are not addressed. At least one state that participated in the implementation of the Vienna Convention, The Netherlands, recognized the problem and stated that the International Law Commission's draft articles were written to cover peacetime, while the law of war covers wartime relationships.⁵⁰¹ No record exists, however, that the statement became the prevailing view. In any event, the exclusion of wartime application of the Convention is unlikely in view of the existence of two articles, **44** (concerning assistance to diplomats in leaving in case of armed conflict) and **45** (concerning third-state and receiving state protection of a belligerent state's diplomatic interests), that have specific wartime application.⁵⁰² Furthermore, nowhere does the Vienna Convention specifically exclude wartime application of its provisions. Because war does not make it impossible to perform the obligations of the Vienna Convention, the Convention has continuing applicability in wartime.⁵⁰³

Accepting that the Vienna Convention applies in wartime, it would be illogical to conclude that it did not continue to protect diplomats in situations in which the receiving state no longer is able to guarantee the protection. In those cases, which are analogous to situations of occupation as well as invasion, the responsibilities of providing diplomatic protections must pass to the power able to provide them.⁵⁰⁴ The situation is, as Lieber concluded in his famous **1863** Instructions to the United States Army, as though the neutral states'

⁴⁹⁹Vienna Convention art. 22(3).

⁵⁰⁰ILC Report, *supra* note **493**, at 95, Commentary to Draft Article 20; see B. Sen, *supra* note **488**, at **93**.

⁵⁰¹ILC Report, *supra* note **493**, at 126, Commentary to Draft Article 39.

"Vienna Convention arts. **44**, **45**."

⁵⁰³Regarding the doctrine of impossibility of performance, see Vienna Convention on the Law of Treaties art 61, and B. Sen, *supra* note **488**, at 92 ("In times of war a special obligation towards a diplomatic officer is owed").

⁵⁰⁴See *supra* text accompanying notes **457-60** (inviolability continues during occupation, but diplomats cannot harm military interests of occupying force), **462-65** (inviolability continues during invasion, but may be limited by military necessity).

diplomats were "temporarily accredited to itself."⁵⁰⁵ This conclusion, applied to the Panama operation, would require the United States to be responsive to the Vienna Convention provisions in its relations with neutral diplomats. Further, if one accepts the "agency" theory of United States intervention, the United States is even more directly obliged by the Vienna Convention because it is acting on behalf of the Panamanian government as though the United States were the receiving state.⁵⁰⁶ The premise that the Vienna Convention obligations are applicable to third-state intervening forces is supported further by the United Nations practice of calling on member states, through annual resolutions, to report all serious violations of diplomatic immunities to the Secretary General.⁵⁰⁷ Most reports naturally concern peacetime violations. Many, such as a November 1983 report from the Soviet Union objecting to "criminal acts" committed against its diplomatic mission and citizens by United States soldiers during the invasion of Grenada, apply Vienna Convention rules to wartime scenarios.⁵⁰⁸

b. The Issue of Limitations on Inviolability

Having established that the law of diplomatic relations continues the principle of diplomatic inviolability during wartime, and that it applies the receiving state obligations toward diplomats to third-party states that find diplomats within their control, the examination next must consider the extent to which inviolability may be limited. The issue is especially relevant because, to the extent that the law of diplomatic relations provides greater protection to diplomats than the law of armed conflict, then the greater protections will apply.⁵⁰⁹

Inviolability of diplomatic premises does not mean that they are extraterritorial.⁵¹⁰ They are subject to the host state's jurisdiction to prescribe, adjudicate, or enforce law.⁵¹¹ This means that the diplomat

⁵⁰⁵See *supra* note 459; see also G. von Glahn, *supra* note 189, at 32.

⁵⁰⁶See *supra* text accompanying notes 466-67.

⁵⁰⁷United Nations, Yearbook, 1980, Vol. 34, at 1148 (1984) (G.A. Res. 35 168); United Nations, Yearbook, 1982, Vol. 36, at 1380-82 (1986) (G.A. Res. 37 108); United Nations, Yearbook, 1983, Vol. 37, at 1116-18 (1987) (G.A. Res. 38 136).

⁵⁰⁸United Nations, Yearbook, 1983, Vol. 37, at 1117 (1987) (U.S.S.R., in a letter to U.N. Secretary General, charged the U.S. with, among other things, blockading the Soviet Embassy and firing at those premises, thereby wounding an employee, during the October 1983 U.S. military operation against Grenada).

⁵⁰⁹See *supra* text accompanying note 487.

⁵¹⁰Restatement, *supra* note 241, § 466 comment a. U.S. courts consistently deny foreign diplomats' assertions of extraterritoriality. See Digest of U.S. Practice in International Law 551-55 (1978); United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978) (denying right of Yugoslavian officials to retake their Mission to the United Nation?; after Yugoslavian terrorists occupied it).

⁵¹¹Restatement, *supra* note 241, § 466 comment c.

is expected to pay due regard to fire and police codes, and other laws and regulations for the maintenance of public health, order, and safety.⁵¹² Therefore, the Nicaraguan Ambassador's statement subsequent to the December 29 search that "[t]he relevant thing is the violation . . . [not] what they found . . . [since] [w]e have the right to have anything in our embassy" was not correct.⁵¹³ The statement does illustrate a serious deficiency in the obligation of diplomats to respect host receiving state laws—the lack of the receiving state's ability to exercise its jurisdiction to enforce its law.⁵¹⁴ Largely because of the importance of reciprocity in diplomatic practice, the unwillingness of states to enforce their laws in such a manner that would interfere with diplomatic premises has evolved into a customary rule of immunity from exercises of judicial authority without the consent of the diplomat's state.⁵¹⁵

Nevertheless, some states, including the United States, advance a theory of implicit consent in those cases in which public safety demands an exception to inviolability. While these states generally admit the absolute immunity of diplomatic premises from exercises of judicial authority, they contend that certain public safety circumstances are of such "genuine public emergency" that they justify

⁵¹²*Id.* § 466 comment a; see B. Sen, *supra* note 488, at 77, 91; W. Franklin, *supra* note 447, at 184.

⁵¹³Wash. Post, Dec. 31, 1989, at A16, col. 4.

⁵¹⁴Vienna Convention art. 41(1) ("it is the duty of [diplomats] to respect the laws and regulations of the receiving State"); see Restatement, *supra* note 241, § 466 comment c.

⁵¹⁵*Id.*; ILC Report, *supra* note 493, at 95, Commentary to Draft Article 20 ("the premises must not be entered even in pursuance of a judicial order"). The following statement from Secretary of State Buchanan in 1848 summarizes well the principle: "[T]he residence of the minister should enjoy absolute immunity from the execution of all compulsory process within its limits, and from all forcible intrusions. 'If it can be rightfully entered at all without the consent of its occupant, it can only be so entered in consequence of an order emanating from the supreme authority of the country in which the minister resides, and for which it will be held responsible by his government.'" Quoted in E. Satow, *supra* note 447, at 301, § 329. The importance of reciprocity was emphasized in a sad case from 1935 involving the arrest of the Iranian Minister to the U.S. at Elkton, Maryland, for disorderly conduct following the arrest of his chauffeur for a violation of local traffic laws. The charge against the Minister was dismissed two hours later and the "offending" police officers were fired. The Secretary of State, expressing the apologies of the U.S. Government, said: "It should be obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstandings which may lead to serious consequences are dependent in large measure upon a strict observance of the law of nations regarding diplomatic immunity. If we are to be in a position to demand proper treatment of our own representatives abroad, we must accord such treatment to foreign representatives in this country, and this Government has no intention of departing from its obligations under international law in this respect." Quoted in M. McDougal & F. Feliciano, Law and Minimum World Public Order 297-98 (1967); see also M. Shaw, *supra* note 57, at 395; Higgins, *supra* note 491, at 641 ("here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest").

an intrusion into the premises.⁵¹⁶ The United States position is expressed in its 1958 response to the International Law Commission's draft of the current Article 22 provisions on inviolability. It agrees with the principle of inviolability absent consent, but adds that "such consent will be presumed when immediate entry is necessary to protect life and property, as in the case of fire endangering adjacent buildings."⁵¹⁷ While the United States and other concerned states failed to have a public safety exception included in the provisions of Article 22 of the Vienna Convention, its exclusion appeared to be less a case of disagreement with the principle than a general fear that any express exception to inviolability of diplomatic premises could lead to abuse by the receiving state.⁵¹⁸ The recent Restatement on United States foreign relations law supports an apparent consensus that emerged at the Vienna Conference on the subject. It recognized that, although no public safety provision would be included in the Vienna Convention text, cases of genuine public emergency might require the receiving state to take measures to minimize an impending catastrophe.⁵¹⁹

Whether United States officials applied an implicit public safety exception in authorizing the December 29 search of the Nicaraguan Ambassador's purported residence is not public knowledge. If the

⁵¹⁶Japan, in its response to the ILC draft concerning the inviolability provisions of the current Article 22, expressed concern that the language was too absolute and that it needed to express more clearly the duty of the head of mission to cooperate with receiving state authorities in the case of extreme emergency, such as fire or epidemic. ILC Report, *supra* note 493, at 120. Switzerland's Permanent Observer at the U.N. expressed a similar concern with the draft, stating his state's understanding that "inviolability of mission premises does not preclude the taking of appropriate steps to extinguish a fire likely to endanger the neighborhood or to prevent the commission of a crime . . ." *Id.* at 130. At the following Vienna Conference in 1961, the ILC draft article on inviolability of premises came under further scrutiny. Japan, this time joined by Ireland, again registered its concern and proposed an additional paragraph covering "exceptional circumstances of emergency"; for instance, where the head of mission might be absent and unable to provide consent. Official Records, U.N. Conference on Diplomatic Intercourse and Immunities, Vienna, 1961, at 135 [hereinafter Vienna Records]. Mexico and Spain also submitted "public danger" amendments. *Id.*; see M. Shaw, *supra* note 57, at 395-96 (legal position is uncertain, but "justification might be pleaded by virtue of implied consent . . . a highly controversial area"). See, e.g., E. Denza, *Diplomatic Law* 82-84 (1976).

⁵¹⁷ILC Report, *supra* note 493, at 135 (U.S. Note Verbale of Feb. 24, 1958 from the Acting Representative of the U.S. to the United Nations).

⁵¹⁸See, e.g., Vienna Records, *supra* note 516, at 135-42; see B. Sen, *supra* note 488, at 95; E. Denza, *supra* note 516, at 83-84.

⁵¹⁹Vienna Records, *supra* note 516, at 139 (statement of Canada expressing the consensus); Restatement, *supra* note 241, § 466 comment a ("consent to entry on diplomatic premises might be assumed in special circumstances"), and § 466 reporters' note 1 ("The presumption of consent to enter premises in emergency . . . is expressed only in the Consular Convention, but is not necessarily precluded in respect of diplomatic missions").

standard enunciated by the United States in its response to the draft provisions on inviolability was considered, however, a strong argument could be articulated that supported the entry and search. The specific factual circumstances are very important in the determination. By considering a number of factors, including the proven credibility of the American informant, the genuine fear of guerrilla counter-attack so long as Noriega remained elusive, and the fear of a costly battle with substantial loss of life and damage to property if the search was delayed, the United States search could be justified under an implicit public safety exception.⁵²⁰ The exception would not apply, however, unless the United States soldiers knew that the residence was a diplomatic residence, since it presumes an implied consent to a waiver of inviolability. Ironically, if the soldiers were alerted at some point that the residence might be that of a diplomat—as they surely must have been by the presence at the scene of the individual who had at least some indicia of diplomatic status⁵²¹—then the apparent exigency presented in this particular case is placed in sufficient doubt so that the application of the public safety exception loses its persuasiveness.

United States military forces likely would apply some kind of public safety exception to diplomatic inviolability.⁵²² It has the added advantage of being compatible under the law of armed conflict with the predominant concern in occupied territory with restoring order and security.⁵²³ The exception also is compatible with the self-defense elements of the “military objective” theory that applies during the

⁵²⁰See *supra* text accompanying notes 427-28.

⁵²¹See *supra* text accompanying notes 429-31.

⁵²²A recent application of the exception occurred during the October 1983 Grenada operation. The Soviet mission wanted to leave Grenada during the conflict, and the U.S. Air Force made arrangements to fly them on a U.S. military cargo plane to Barbados. The Soviets wanted to bring along an embassy automobile; but the Air Force refused to load the car onto the plane until it was searched to ensure that it was safe to transport. The Soviets claimed inviolability, but the automobile was searched over their objections. Several weapons and forged passports were found and confiscated. The Soviets did not formally protest the incident. Interview with MAJ Gary Walsh, Instructor, The Judge Advocate General's School, U.S. Army (Apr. 11, 1990). Recognition of public safety considerations also is found in instructions issued by the U.S. State Department during the early days of World War II in the context of U.S. protection of foreign interests abroad. Those instructions stated that in the event of U.S. protection of official premises of a belligerent state in the territory of a co-belligerent, U.S. officials “should first cause to be removed therefrom all weapons and dangerous material . . . in order that [their presence] . . . will not serve to compromise you or to weaken your effective protection of the represented interests or expose you to the allegation that you are endangering public safety” Secretary Hull to the Legation in Switzerland, circular telegram no. 225, Oct. 16, 1941, MS., file 701.4160 H/72, quoted in W. Franklin, *supra* note 447, at 185.

⁵²³See *supra* text accompanying notes 452-60.

invasion stage.⁵²⁴ Indeed, self-defense alone has been cited as a possible exception to inviolability of diplomatic premises in appropriate circumstances.⁵²⁵

The existence of a public safety exception to diplomatic inviolability is not accepted with unanimity. Many contend that the principle of inviolability of diplomatic premises is absolute.⁵²⁶ For those people, the threat to lives and property through declining to deal with an emergency promptly is far less dangerous than the possibility of embittering relations between states through failure to respect the inviolability of the diplomatic premises.⁵²⁷ The difficult job of balancing the interests between sending state and receiving state is illustrated by the 1984 shooting death of a British policewoman and the wounding of others by persons who fired shots from the safety of the Libyan Embassy, The "Libyan People's Bureau."⁵²⁸ Although it was widely felt that terrorist acts of this kind should not be cloaked by the fact that they emanated from an embassy, the British Government decided against entering the premises, choosing instead to terminate diplomatic relations and require the persons in the embassy to leave the United Kingdom. Only then, after the building no longer was inviolable, did they enter.⁵²⁹ A U.K. Foreign Affairs Committee that subsequently reviewed the Vienna Convention, as a result of the Libyan incident, recommended against pursuit of any kind of

⁵²⁴See *supra* text accompanying notes 462-65. Switzerland, in expressing its concern with the ILC draft article on inviolability, stated that the public safety exception "accords with the principle that personal inviolability does not exclude either self-defence or measures to prevent the diplomatic agent from committing crimes . . . ILC Report, *supra* note 493, at 130.

⁵²⁵See M. Shaw, *supra* note 57, at 397 (protection of police justified search of personnel leaving the Libyan People's Bureau in London, following the 1984 death of policewoman from shots fired from the embassy; also, entry into the premises could be justified in some circumstances). *cf.* Higgins, *supra* note 491, at 647 ("This writer remains skeptical . . ."); see also E. Denza, *supra* note 516, at 268.

⁵²⁶See, e.g., Higgins, *supra* note 491, at 643-51; B. Sen, *supra* note 488, at 94; E. Denza, *supra* note 516, at 84.

⁵²⁷See B. Sen, *supra* note 488, at 95 (citing statement from Mr. Bartos and Mr. Tunkin to the International Law Commission in 1958).

⁵²⁸See, e.g., Higgins, *supra* note 491, at 643-51. On April 17, 1984, Libyan opponents of Colonel Qaddafi held a peaceful demonstration outside the self-styled Libyan People's Bureau in London. Shots were fired from the embassy's windows, killing Police Constable Fletcher, who was on duty in the square opposite the embassy. The British Government requested Libya to consent to a search of the premises for weapons and explosives, but this was refused. Finally, after a standoff of five days, the British Government notified the Libyans that diplomatic relations were being terminated and that Libyan personnel would have to depart the U.K. Two days later, the embassy was evacuated and, in the presence of a Saudi Arabian diplomat, the premises were searched. Weapons and other relevant forensic evidence were found. The departing Libyans were questioned and electronically searched, but departing diplomatic bags were not searched or scanned. *Id.* at 643-44; see also M. Shaw, *supra* note 57, at 396.

⁵²⁹Higgins, *supra* note 491, at 644.

restrictive amendment to the Convention.⁵³⁰ Professor Rosalyn Higgins, who acted as a special adviser to the Committee, stressed two factors in connection with the incident that militated against restricting absolute inviolability: 1) the presence in the sending state (Libya) of a large British expatriate community;⁵³¹ and 2) the availability under the Convention of exclusive remedies in case it is violated.⁵³²

One could attempt a distinction between the Libyan Embassy incident and the Nicaraguan Ambassador's residence on the basis that wartime circumstances must be figured into the latter incident. Nevertheless, the British example, even in the Panama situation, could be cited as a plausible model for exercising restraint in the face of claimed diplomatic inviolability. If the Nicaraguan Ambassador's residence incident can be isolated from the armed conflict raging simultaneously in other areas of the city, and compared with the situation that existed at the Libyan People's Bureau, the incident in London involving actual use of weapons could be seen as a danger to the public safety that was at least as great as that emanating from the residence in Panama City.

Related to the diplomat's duty to respect host state laws in the interest of public health and safety, which spawned the claim to a public safety exception, is the diplomat's duty of non-interference in the internal affairs of the state.⁵³³ The principle recognizes that the primary function of the diplomat is to promote friendly relations between the states concerned.⁵³⁴ Certain kinds of actions that increase the influence of the diplomat's state or gain advantages for his nationals are contrary to the diplomat's function.⁵³⁵ For example, assisting in the overthrow of the government in power by aiding opposition parties would not be proper activity for a diplomat. If the diplomat used his privileged position in such a manner outside of the diplomatic function, then he is abusing the privileges accorded to him by the receiving state.⁵³⁶ Article 41(3) of the Vienna Conven-

⁵³⁰Higgins, *Editorial Comments: UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report*, 80 A.J.I.L. 135 (1986).

⁵³¹Higgins, *supra* note 491, at 645. She states: "The extent to which countries will avail themselves of the opportunities for lawful response to abuse of diplomatic immunities will depend in large measure upon whether that expatriate community is perceived to be at risk. That is something that the balanced text of the Vienna Convention cannot provide against. . . ." *Id.*

⁵³²Higgins, *supra* note 491, at 649-51 (citing especially the power to limit the size of the mission, and to declare a diplomat *persona non grata*).

⁵³³Vienna Convention art. 41(1); *see* B. Sen, *supra* note 488, at 75.

⁵³⁴*See* B. Sen, *supra* note 488, at 76.

⁵³⁵*Id.* at 76-77.

⁵³⁶*Id.* at 77.

tion clearly applies the prohibition against abuse of the diplomatic function to diplomatic premises, stating: "The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention . . ."⁵³⁷ Because diplomatic residences are to be treated in the same manner as diplomatic missions, the prohibition against incompatible use extends to residences as well.⁵³⁸

The real issue is whether the proscriptions of Article 41 create any right in the receiving state (or its "agent") to enter the premises to halt the incompatible activity. Statements from the United States Department of State following the search of the Nicaraguan Ambassador's purported residence that focused on the seized weapons as "in excess of normal requirements for defending the residence" appear to be an implicit acknowledgment from those officials that the answer may be affirmative.⁵³⁹ If that is the case, then the United States government would not be alone in advocating that position. Recalling once again the 1984 Libyan People's Bureau shoot-out, substantial support was expressed at that time for an interpretation of the Vienna Convention that inviolability of premises fell away when diplomats abused diplomatic premises.⁵⁴⁰ Arthur Goldberg, former United States Supreme Court Justice and Ambassador to the U.N., was inspired by the London incident to write that the Vienna Convention's provisions on privileges and immunities must be interpreted in light of reality.⁵⁴¹ In Goldberg's opinion, the Vienna Convention provisions were designed to grant immunities to *bona fide* embassies that are devoted to diplomatic relations. When an embassy harbors assassination teams or otherwise is turned into a base of terrorist activities, it no longer qualifies as an embassy.⁵⁴² Under Goldberg's logic, inviolability did not apply to the Libyan People's Bureau, and the British government should not have felt constrained from entering and searching the premises following the shooting incident.⁵⁴³

Much of the confusion concerning the incompatible use provision of Article 41 was dispelled earlier by the International Court of

⁵³⁷Vienna Convention art. 41(3); see B. Sen, *supra* note 488, at 77-78.

⁵³⁸See *supra* text accompanying notes 493, 497.

⁵³⁹Wash. Post, Dec. 31, 1989, at A1, col. 5.

⁵⁴⁰Higgins, *supra* note 491, at 644.

⁵⁴¹A. Goldberg, *The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State-Supported Terrorism*, 30 S.D.L. Rev. 1 (1984).

⁵⁴²*Id.* at 2-3.

⁵⁴³*Id.*

Justice (I.C.J.) in its 1980 decision in the Iran Hostage Case.⁵⁴⁴ In 1979, the United States Embassy in Teheran was seized by several hundred demonstrators. Fifty United States diplomatic and consular staff were held hostage.⁵⁴⁵ Iranian officials claimed that the demonstrators' acts, which were endorsed by the government, were taken in self-defense. They claimed that a pattern and practice of United States violations of international law had emanated from the embassy. These violations allegedly included espionage and surveillance, support for the Shahs human rights abuses, and participation in the deposing of former Prime Minister Mossadegh. They also believed that the United States would attempt to restore the Shah to power.⁵⁴⁶ The I.C.J. declared that, under the Vienna Convention, "Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy."⁵⁴⁷ Thus, by failing to come to United States assistance after the militants seized the embassy, Iran violated Article 22(2) of the Vienna Convention.⁵⁴⁸ Furthermore, Iran violated Article 22(1) and (3) by its continuing ratification of the militants' acts.⁵⁴⁹

The I.C.J. considered Iran's allegations of United States criminal activities to be a claim of abuse of diplomatic privileges under Article 41, stating that espionage or interference in the affairs of the receiving state under the cloak of diplomatic function is precisely what Article 41 contemplates.⁵⁵⁰ Most significantly, the court explained that even if Iran's allegations were true, Iran's actions against the United States Embassy could not be justified, because "diplomatic law itself provides the necessary means of defense against,

⁵⁴⁴Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), I.C.J. Rep. 2 (1980) [hereinafter Iran Case].

⁵⁴⁵*Id.*

⁵⁴⁶*Id.* para. 82; see N. Hevener, Ed., *Diplomacy in a Dangerous World: Protection for Diplomats Under International Law* 51 (1986).

⁵⁴⁷Iran Case, *supra* note 544, at 30-31; see also Gross, *The Case Concerning United States Diplomatic and Consular Staff in Teheran: Phase of Provisional Measures*, 74 A.J.I.L. 395 (1980).

⁵⁴⁸Iran Case, *supra* note 544, para. 67. Article 22(2) states: "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." Vienna Convention art. 22(2).

⁵⁴⁹Iran Case, *supra* note 544, para. 77. Article 22(1) states: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Article 22(3) states: "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Vienna Convention art. 22(1) and (3).

⁵⁵⁰Iran Case, *supra* note 544, para. 84. Iran did not appear before the I.C.J. to contest the case.

and sanction for, illicit activities by members of diplomatic or consular missions.”⁵⁵¹ The I.C.J. addressed two specific sanctions that are available to remedy possible abuses of diplomatic functions: 1) Article 9 of the Vienna Convention, which allows a receiving state to declare a diplomat *persona non grata*;⁵⁵² and 2) the more radical remedy of breaking off diplomatic relations and closing the mission if the abuses reach serious proportions.⁵⁵³ The court added that the level of diplomatic tensions between the two states did not affect the application of these rules; they continue to apply even in the case of armed conflict.⁵⁵⁴ The decision of the I.C.J. appears to leave little room for a claim that abuse of the diplomatic function justifies a restriction on the right of inviolability of diplomatic premises. If the rule that provides the greater protection to diplomats is to apply to instances during armed conflict in which inviolability may be questioned,⁵⁵⁵ the Vienna Convention rules clearly will prevail over the law of armed conflict.

Whether the I.C.J. rule of absolute inviolability comports with reality for all situations of abuse of diplomatic premises is another question. Some commentators note that certain instances have shown that when a state believes its “essential security” to be at risk, the state that is sufficiently certain of the evidence of abuse probably will take the risk of acting in violation of Article 22.⁵⁵⁶ Such was the case in 1973 in Pakistan when, over the Iraqi Ambassador’s objections, Pakistani police acting on strong evidence forced their way into the Iraqi embassy and discovered huge consignments of arms stored

⁵⁵¹*Id.* para. 83; see also *id.* para. 86. It states: “The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.” *Id.*

⁵⁵²*Iran Case, supra* note 544, para. 85. Article 9(1) states: “The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.” Vienna Convention art. 9(1). See B. Sen, *supra* note 488, at 76, 78.

⁵⁵³*Iran Case, supra* note 544, para. 85.

⁵⁵⁴*Id.* paras. 86, 88.

⁵⁵⁵See *supra* text accompanying note 487.

⁵⁵⁶See E. Denza, *supra* note 516, at 84, 267-68; L. Dembinski, *The Modern Law of Diplomacy* 194 (1988).

in crates that were to be delivered to Pakistani **rebels**.⁵⁵⁷ In such an extreme instance of abuse, a receiving state violation of Article 22 inviolability founded on evidence much stronger than “mere suspicion” of a breach of Article 41 may *ex post facto* justify the entry as an act of **self-defense**.⁵⁵⁸ Even if an “essential security” exception exists, the suspicion that the Nicaraguan Ambassador was abusing the diplomatic residence would not be strong enough evidence to justify violation of inviolability in view of the Iran Hostage Case judgment.

The principle of implied consent in exigent situations affecting public safety may provide a basis, albeit somewhat weak because of its uncertain status, for limiting inviolability in the proper circumstances. As for claims of abuses of the diplomatic function, however, the I.C.J. opinion in the Iran Hostage Case unambiguously declares that no such implicit exception exists through Article 41 for bypassing the remedies provided in Article 9. A brief statement of I.C.J. dicta, however, should be noted and addressed. The court commented that respect for inviolability of diplomatic premises should not be construed to mean that a diplomat “caught in the act of committing an . . . offense may not . . . be briefly arrested by . . . the receiving state in order to prevent the commission of the particular **crime**.”⁵⁵⁹ This situation permitting a brief arrest, however, is not applicable to the Nicaraguan Ambassador’s residence incident because, in that case, United States forces were acting on suspicion that weapons were in the house instead of actually catching the Nicaraguan Ambassador or other residents of the house in the commission of a crime. To conclude, accepting that the extensive weapons cache found in the Nicaraguan Ambassador’s purported residence is inconsistent with the diplomatic function of facilitating friendly relations, the exclusivity of Vienna Convention remedies nevertheless bars a lifting of inviolability to permit entry and search.

5. *Synthesis of Laws*

Inviolability of diplomatic residences in wartime is a subject of in-

⁵⁵⁷E. Denza, *supra* note 516, at 84, 267-68; L. Dembinski, *supra* note 556, at 194. A container addressed to the Iraqi embassy in Islamabad was accidentally damaged and Pakistani customs officials discovered that it contained a large quantity of arms. The Pakistani Foreign Ministry requested the Iraqi ambassador to allow police officers to search the embassy premises. The ambassador refused, and the police forced their way into the embassy and discovered 59 containers filled with arms, explosives and ammunition destined for Baluchistani rebels. Pakistan then sent a strong protest to Iraq, declared the Iraqi ambassador *persona non grata*, and recalled its own ambassador. See *id.*; E. Denza, *supra* note 516, at 84.

⁵⁵⁸E. Denza, *supra* note 516, at 84, 267-68.

⁵⁵⁹*Iran Case*, *supra* note 544, para. 86.

ternational law that provides few clear rules. Much of the problem in defining the law is attributable to the idea that diplomacy is primarily a peacetime activity. The few rules that are available generally contemplate their operation in a peacetime environment. War, being the antithesis of successful diplomacy, has provided little development of rules that have specific application to diplomats. The principles that have emerged on the subject are the product of a synthesis between traditional general laws of armed conflict and the more specifically directed laws on diplomatic relations. Contrasting the two regimes is fascinating work because it identifies more similarities in the protections and how they are applied than was anticipated. The two regimes also are more complementary than expected; the more specific laws of diplomatic relations in some instances actually helped define the general principles emanating from the humanitarian law in the area.

From the old law of armed conflict concept of occupation, with its preoccupation on public order and the concomitant prohibition against activities by diplomats that prejudice the military interests of the occupying force, one can see some similarities with the concerns inherent in the claimed public safety exception to inviolability under the law of diplomatic relations. The latter principle, conceiving of situations of extreme emergency that might justify intrusion into diplomatic premises to protect life and property, can apply with equal validity to any stage of the armed conflict. The problem with its application to the entry and search of the Nicaraguan Ambassador's residence is one of degree. As we saw from the Libyan People's Bureau incident, the principle of inviolability is intentionally strong and only truly extraordinary circumstances of public safety could justify its use as the basis for intrusion into diplomatic premises. The facts surrounding the Nicaraguan incident in Panama City, as reported, do not make a persuasive case for that doctrine's application. Nor does abuse of diplomatic premises constitute a legal basis for restriction of the principle of inviolability. Again, even assuming some "essential security" exception arising from abuse of diplomatic premises, the circumstances simply were not strong enough to permit a search. Therefore, the law of diplomatic relations provides no independent basis that might justify an entry and search of the Nicaraguan Ambassador's residence in Panama.

The juxtaposition of the rules of diplomatic relations against the law of armed conflict leaves available a possible basis for intrusion into diplomatic premises. The invasion stage of armed conflict, with the forces' concern for accomplishment of military objectives, demands that no more stringent rules be applied to "protected" diplo-

mats than are applied to other analogous classes of protected persons or objects under the law of armed conflict. The general concept of proportionality, and the idea that protected persons who abuse their protections are not entitled to benefit therefrom, should apply with equal force in this area of the law. The sanctions that are available under the two regimes, however, are vastly different. The forfeiture of protected "status" under the law of armed conflict has no parallel under the law of diplomatic relations that specifies the available sanctions. Reprisal is available under the law of armed conflict to permit a belligerent to take a proportionate action that otherwise would be illegal against an offending state's actions; even then, however, reprisal is not permitted against protected persons or objects.⁵⁶⁰ Only those actions that are genuinely taken by military forces in self-defense, therefore, appear to be unrestricted by the rigid principle of diplomatic inviolability.

Applying these principles to the entry and search of the Nicaraguan Ambassador's residence is not very difficult once the applicable standards governing inviolability in wartime have been determined. The law of diplomatic relations as applied to the facts throughout this study indicate no convincing valid legal basis for the entry and search. The law of armed conflict, to the extent that it survives in the form of permissible defensive actions against objects that through their actions have become valid military objectives, may provide a basis for the actions of the United States soldiers. This assumes, however, that the facts establish that the residence, taking into account conditions in the country at the time, was sufficiently threatening to justify the intrusion. Here, the reminder of the I.C.J. in the Iran Hostage Case that inviolability did not apply to diplomats who are caught in the act of committing an offense is recognition of the maxim that law, to be respected, must be capable of practical application. It also furnishes a practical yardstick for gauging when a diplomatic premise has become sufficiently threatening to warrant a military response in the form of entry and search. Under that standard, the United States entry and search were not justified.

The final question is whether the United States forces should be held responsible for their actions on December 29 at the residence. The foregoing discussion indicates the difficulty in discerning clear legal standards for the conduct of soldiers in this kind of situation. Furthermore, the facts disclosed an extraordinarily confusing set of circumstances that made suspect the Ambassador's assertion of

⁵⁶⁰Geneva Civilians Convention art. 33; *see* FM 27-10, at 17, para. 497.

diplomatic residence. Assertions of diplomatic inviolability do not make a residence inviolable; the premises actually must be the diplomat's residence. Whether the residence was the Ambassador's is unclear. If it was his residence, then any violation of inviolability may have been the result of legitimate mistake of fact. A more prudent course of action in these circumstances, in hindsight, would have been for the United States forces to cordon off the neighborhood and prevent any entry or egress from the house until the Nicaraguan Ambassador's assertion could be established or disclaimed. If established, then the United States forces could have requested consent to enter; if refused, the "legitimate" Panamanian Endara government could have declared the Ambassador *persona non grata* and ordered the departure of the occupants from the house. Then, as in the Libya case, the residence could be entered by United States forces and searched as "agents" of the Panamanian government. The law clearly favors prudence in confrontations with the principle of inviolability of diplomatic premises, whether mission or residence.

B. THE PAPAL NUNCIATURE EPISODE

The United States treatment of the Papal Nunciature, the Vatican Embassy, also raised the question of the interplay between the law of armed conflict and the law concerning diplomatic relations, although it raises those issues in a different context. The United States generally appeared more certain concerning applicability of the law of diplomatic relations and was careful to avoid violations of the Vatican Embassy's premises. Instead, its actions raise important questions concerning the extent of the United States duty to "prevent any disturbance of the peace of the mission or impairment of its dignity."⁵⁶¹ The actions also prompt examination into whether the United States legally was a proper party for conducting negotiations with the Vatican's head of mission.⁵⁶²

1. Facts

On December 24, the elusive Noriega found "temporary refuge" in the Papal Nunciature. An awkward standoff developed between the United States—which wanted to arrest Noriega and take him to Florida for trial on drug-trafficking charges—and The Vatican—which has a long tradition of granting refuge to political refugees.⁵⁶³ Protracted negotiations ensued between United States officials and the Vatican's emissary, Msgr. Jose Sebastian Laboa, over the proper status

⁵⁶¹Vienna Convention art. 22(2).

⁵⁶²*See id.* art. 41(2).

⁵⁶³*Newsweek*, *supra* note 421, at 28; *see Wash. Post*, Der. 29, 1989, at A23, col. 2, 4.

and future disposition of **Noriega**.⁵⁶⁴ Meanwhile, for the next ten days, soldiers from the 82d Airborne Division sealed off the surrounding neighborhood, extinguished street lights in the area, instituted patrols around the embassy walls, and searched automobiles that entered and exited the **area**.⁵⁶⁵ A “noise barrier” of loud rock music was aimed at the Papal Nunciature so that the sensitive negotiations being conducted at the embassy’s gate could not be intercepted electronically—a tactic that was abandoned following a papal protest.⁵⁶⁶

The initial Vatican position opposed handing Noriega over to United States officials. Panamanian President Endara pleaded with the **Papal Nuncio** and wrote a letter to the Pope asking that Noriega be expelled from the nunciature into the awaiting hands of United States troops.⁵⁶⁷ Endara felt that Noriega’s release to United States authorities was the most practical solution for saving Panamanian lives.⁵⁶⁸ The Vatican, for its part, made clear that it had no intention

⁵⁶⁴*Id.*

⁵⁶⁵*Id.*; Wash. Post, Dec. 28, 1989, at A28, col. 6. The barriers were removed on January 4 following Noriega’s surrender the previous evening. Wash. Post, Jan. 5, 1990, at A13, col. 1. Out of fear that Noriega or his associates would seek refuge in a hostile embassy, U.S. troops also surrounded the Cuban, Libyan, and Nicaraguan embassies. Wash. Post, Jan. 7, 1990, at A22, col. 5. About 65 people, including Noriega’s wife, sought asylum in the Cuban embassy. Wash. Post, Dec. 29, 1989, at A22, col. 2. *See* Wash. Post, Jan. 5, 1990, at A13, col. 2. Nicaragua responded to the surrounding of its embassy by surrounding and delaying delivery of supplies to the U.S. embassy in Managua. Wash. Post, Dec. 28, 1989, at A29, col. 4; Wash. Post, Jan. 1, 1990, at A16, col. 2. Twelve Panamanians took refuge in the Peruvian ambassador’s residence, prompting U.S. soldiers to surround it. Wash. Post, Jan. 10, 1990, at A12, col. 5. Other embassies, for States such as Mexico, Ecuador, and Venezuela, also gave refuge to Noriega associates, prompting continuing disputes between the Endara government and those States long after the withdrawal of U.S. forces. *See* Wash. Post, Mar. 26, 1990, at A13, col. 1. *See generally* Newsweek, *supra* note 421, at 29.

⁵⁶⁶Wash. Post, Jan. 7, 1990, at A22, col. 5; Wash. Post, Dec. 28, 1989, at A28, col. 1, 5; Wash. Post, Dec. 31, 1989, at A16, col. 1. Some observers characterized the music as a form of psychological warfare designed to induce Noriega to surrender. Wash. Post, Dec. 29, 1989, at A1, col. 6; Wash. Post, Jan. 5, 1990, at A9, col. 1.

⁵⁶⁷Wash. Post, Dec. 28, 1989, at A1, col. 5; Wash. Post, Dec. 29, 1989, at A21, col. 1, 3.

⁵⁶⁸Wash. Post, Dec. 28, 1989, at A1, col. 5; Wash. Post, Dec. 29, 1989, at A21, col. 1, 3; Wash. Post, Jan. 1, 1990, at A1, col. 3 (Panama has no judicial system yet that could handle any such case against Noriega). Panama’s twelve Roman Catholic bishops also wrote to the Pope, urging him to expel Noriega so that he could be brought to justice immediately and the “process of pacification” in Panama could proceed. Wash. Post, Dec. 31, 1989, at A16, col. 1; *see also* Newsweek, *supra* note 421, at 29 (his presence in the country would be destabilizing). The solution may have been seen as a means for bypassing the 1983 Panamanian Constitution, which prohibits extradition of Panamanian citizens. If The Vatican expelled Noriega directly into the awaiting hands of the U.S. forces, then Panama would not be extraditing Noriega; rather, he instead would be a prisoner (of war) of the U.S. A problem with this logic is that it goes against any theory that the U.S. forces were merely acting as “agents” of the legitimate Panamanian government headed by Endara. If the U.S. was acting as Panama’s agent in the process, then its actions are attributable to the Panamanian government; and the Panamanian government could not extradite constitutionally. *See, e.g., id.*

of harboring a criminal, and appeared to be uneasy with its "guest."⁵⁶⁹ Vatican officials were troubled, however, by the questionable legality of an embassy accredited to a certain country, in this case Panama, handing over to another state someone who has sought sanctuary within the embassy.⁵⁷⁰ The Papal Nuncio, Laboa, nevertheless did authorize the United States military to storm the embassy complex if Noriega tried to take embassy employees hostage.⁵⁷¹ Finally, on January 3, Noriega surrendered to United States military authorities at the gate of the embassy. Monsignor Laboa had told Noriega that he would lift the diplomatic immunity of the nunciature's premises that day and that if he did not give himself up, the new Panamanian government would be invited to send in forces to arrest him.⁵⁷²

2. Issues

United States officials initially found it difficult to comprehend the Vatican's reluctance to expel Noriega from the nunciature. A senior Bush administration official reportedly exclaimed, "Asylum . . . is granted to people who fear political or religious persecution. Noriega doesn't fit that description by any means."⁵⁷³ Under the customary law of diplomatic intercourse, immunity of diplomatic premises does not extend to granting asylum to ordinary fugitives from justice.⁵⁷⁴ The envoy's duties under the law of diplomatic relations to act with due regard for the law and order in the receiving state, and to refrain from interfering in the internal affairs of that state, prohibit him from granting asylum to common criminals.⁵⁷⁵ The envoy in these circumstances either should surrender the fugitive to the police, or the authorities should be permitted to apprehend the offender within the diplomatic premises.⁵⁷⁶

⁵⁶⁹Wash. Post, Dec. 31, 1989, at A16, col. 1; Newsweek, *supra* note 421, at 28.

⁵⁷⁰Wash. Post, Dec. 28, 1989, at A28, col. 1 and A29, col. 3; Wash. Post, Dec. 29, 1989, at A21, col. 1 and A23, col. 1; Wash. Post, Jan. 1, 1990, at A1, col. 3; *see also* Newsweek, *supra* note 421, at 28.

⁵⁷¹Wash. Post, Dec. 28, 1989, at A28, col. 5; *see* Newsweek, *supra* note 421, at 28. Noriega reportedly was armed, and U.S. officials earlier warned Laboa that the U.S. could not be responsible for the safety of the mission's employees. *Id.*

⁵⁷²Wash. Post, Jan. 5, 1990, at A1, col. 1. The prospect of seizure by Panamanian forces may have appeared especially frightening to Noriega. Earlier that day, approximately 20,000 Panamanians massed a few hundred yards from the Vatican embassy, calling him an assassin and demanding "justice." *Id.* at A9, col. 3. Laboa apparently also warned Noriega that many people could be killed by the growing crowd of demonstrators outside the nunciature's gates. *Id.* at A12, col. 2.

⁵⁷³Newsweek, *supra* note 421, at 29.

⁵⁷⁴Restatement, *supra* note 241, § 466 comment b; E. Satow, *supra* note 447, at 301; B. Sen, *supra* note 488, at 95. Vattel, writing in 1750, denied any right to grant asylum in diplomatic premises. E. Denza, *supra* note 516, at 79.

⁵⁷⁵Vienna Convention art. 41(1); B. Sen, *supra* note 488, at 95.

⁵⁷⁶B. Sen, *supra* note 488, at 95.

The rule against granting asylum, however, is not absolute. The Vatican's policy of providing "temporary refuge" in certain circumstances comports with United States and international practice. The official policy of the United States with respect to requests for asylum in United States diplomatic premises abroad is to decline such requests and to grant only "temporary refuge for humanitarian reasons in extreme or exceptional circumstances when the life or safety of a person is put in immediate **danger**."⁵⁷⁷ The temporary refuge terminates once the period of active danger to the individual has **passed**.⁵⁷⁸ The practice of some states, particularly Latin American countries, more liberally grants diplomatic asylum to political and other **refugees**.⁵⁷⁹ The United States policy generally is reflective of the current state of international law with respect to asylum **practice**.⁵⁸⁰ Because the United States recognized the right of temporary refuge, it likely was willing to remain relatively mute on the Vatican's exercise of the right. Rather, United States officials instead concentrated their efforts to assure Vatican officials that release of Noriega to United States officials would not pose a danger to the life or safety of Noriega—that in view of the increasingly dangerous tone of anti-Noriega demonstrations outside the nunciature, expulsion actually might secure the safety of Noriega by his removal to a more secure **location**.⁵⁸¹

Even in cases in which an embassy improperly grants asylum, the inviolability of the premises prevents host nation entry to arrest the person who seeks asylum **there**.⁵⁸² While Article 22 of the Vienna

⁵⁷⁷Dep't St. Bull. No. 2043, Oct. 1980, at 50-51; see *Contemporary Practice of the United States Relating to International Law: Privileges and Immunities*, 75 A.J.I.L. 142 (1981) [hereinafter *Contemporary Practice: Privileges and Immunities*].

⁵⁷⁸*Id.* In some cases, the refuge granted by the U.S. was not so temporary. For U.S. practice in this respect, see [1978] *Digest of U.S. Practice in Int'l. L.* 568-71; *Contemporary Practice: Privileges and Immunities*, *supra* note 577, at 144-47; 6 Whiteman, *Digest of International Law* 428-502 (1968); Note, *Toward Codification of Diplomatic Asylum*, 8 N.Y.U.J. Int'l. L. & Pol. 435 (1976).

⁵⁷⁹See Restatement, *supra* note 241, §466 reporters' note 3.

⁵⁸⁰Dep't St. Bull., *supra* note 577. ("U.S. policy in this area comports with the practice of most other states"); *Contemporary Practice: Privileges and Immunities*, *supra* note 577, at 143; see W. Bishop, *supra* note 442, at 713; G. von Glahn, *supra* note 189, at 274-77. The International Court of Justice ruled in 1950, in the *Asylum* case: "A decision to grant diplomatic asylum involves a derogation from the sovereignty of [the territorial] state. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case." *Asylum Case* (Colombia v. Peru), [1950] I.C.J. Rep. 266, 274-75.

⁵⁸¹See *supra* note 572.

⁵⁸²*Vienna* Convention art. 22(1). The 1957 proceedings of the International Law Commission separated the question of diplomatic asylum from that of inviolability of embassy premises, since in modern law and practice it was not seriously contended that a failure to comply with rules relating to asylum entitled the receiving state to enter the premises. See E. Denza, *supra* note 516, at 82.

Convention places this obligation against entry upon “agents of the receiving State,” these rules in practice apply to United States forces, whether as occupier or as “agents” of the Endara government.⁵⁸³ Receiving state authorities or their “agents” are confined in that case to surrounding the diplomatic premises so as to prevent the escape of the fugitive, as did the United States forces.⁵⁸⁴ Alternatively, the government of the state to which the diplomat is accredited may complain to the diplomat’s government, demand the diplomat’s recall, or declare the envoy *persona non grata*.⁵⁸⁵

United States authorities likely realized the difficulty in formulating a convincing legal argument that would have allowed United States forces to enter the Vatican Embassy’s premises to seize Noriega under the circumstances as they existed on December 24. By the time Noriega surfaced at the nunciature, fighting had subsided except for isolated instances of violence from a few die-hard individuals.⁵⁸⁶ The theories previously advanced for allowing some limitation on inviolability in extreme circumstances—military necessity, public safety, essential security⁵⁸⁷—lost their persuasiveness once large-scale Panamanian resistance had ended and Noriega was powerless to influence events. Practically speaking, considering the importance of maintaining the generally amiable relations between the United States and The Vatican, and the realization by all parties that Noriega was not a likely candidate for a sympathetic resolution by The Vatican on the asylum issue, entry of the nunciature’s premises without consent likely was not considered a feasible option. Nor was it likely that the new government of Panama, struggling to establish its legitimacy in the international community in the days immediately following the military operation, would determine that any measures more coercive than negotiations and surrounding the embassy area was in its own best interests, even if the nunciature episode had not been brought to a conclusion so quickly.

The actions that actually were taken by United States forces—sealing off the neighborhood, extinguishing street lights, and instituting patrols around the embassy walls⁵⁸⁸—are not problematic, because they were necessary for the embassy to be surrounded effectively.⁵⁸⁹ As such, they involved no violation of the nunciature’s premises. The searches of diplomatic automobiles that entered and

⁵⁸³Vienna Convention art. 22(1); *see supra* text accompanying notes 478-79, 501-06.

⁵⁸⁴E. Satow, *supra* note 447, at 301; *see supra* text accompanying note 565.

⁵⁸⁵E. Satow, *supra* note 447, at 301; *see* Vienna Convention art. 9(2).

⁵⁸⁶*See* Soldiers, *supra* note 2, at 20, 24, 26.

⁵⁸⁷*See supra* text accompanying notes 458, 465, 516, 556.

⁵⁸⁸*See supra* text accompanying note 56.5.

⁵⁸⁹*See supra* text accompanying note 584.

exited diplomatic premises,⁵⁹⁰ however, do raise issues, because inviolability extends to “the means of transport of the mission [which] shall be immune from search, requisition, attachment or execution.”⁵⁹¹ Again, absent sending state consent, searches of diplomatic automobiles must undergo the stringent tests enunciated earlier to determine whether they are justified. As before, mere suspicion that a fugitive such as Noriega or one of his cohorts may be in the automobile is insufficient justification,⁵⁹² and blanket searches of diplomatic automobiles cannot pass legal muster. The “noise barrier” of rock music also raises inviolability issues, and the United States wisely discontinued the practice following objections from The Vatican’s embassy.⁵⁹³ The receiving state obligation under Article 22(2) of the Vienna Convention “to prevent any disturbance of the peace of the mission or impairment of its dignity”⁵⁹⁴ is ambiguous. Nevertheless, if the quip of one United States official that Monsignor Laboa was unable to sleep because of the music, and reports from others that the music could be heard for blocks around were accurate,⁵⁹⁵ then it is not difficult to imagine that Article 22(2) may have been one of the legal bases behind The Vatican’s protest.

Much of The Vatican’s initial reluctance to expel Noriega was attributable to the receiving state-sending state relationship contemplated by the law concerning asylum and the general law of diplomatic relations.⁵⁹⁶ An embassy is established in a particular receiving state for the purpose of conducting diplomatic relations with that receiving state.⁵⁹⁷ Similarly, diplomatic asylum concerns an ef-

⁵⁹⁰See *supra* text accompanying note 565. U.S. forces also searched diplomatic automobiles leaving other embassies. It is unclear whether U.S. forces obtained “consent” to search by refusing to allow vehicles to enter or exit diplomatic premises unless they agreed to the search. See Wash. Post, Dec. 29, 1989, at A22, col. 1.

⁵⁹¹Vienna Convention art. 22(3). Also, diplomats’ “freedom of movement and travel” cannot ordinarily be restricted. *Id.* art. 26.

⁵⁹²See *supra* text accompanying notes 558-59.

⁵⁹³See *supra* text accompanying note 566.

⁵⁹⁴Vienna Convention art. 22(2).

⁵⁹⁵Wash. Post, Dec. 31, 1989, at A16, col. 1 (a U.S. Embassy official said: “I’m very sympathetic to the papal nuncio’s plea that the music was keeping him awake while Noriega was sleeping.”); Wash. Post, Dec. 28, 1989, at A28, col. 1, 5; Wash. Post, Jan. 7, 1990, at A22, col. 5; see also Wash. Post, Dec. 29, 1989, at A1, col. 6; Wash. Post, Jan. 5, 1990, at A1, col. 1; Newsweek, *supra* note 421, at 28.

⁵⁹⁶See *supra* text accompanying note 570.

⁵⁹⁷Vienna Convention art. 3. The article lists the functions of a diplomatic mission as:

- (a) representing the sending State in the receiving State;
- (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) negotiating with the Government of the receiving State;
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Id.

fort by an individual to escape some kind of actions from the receiving state. The entry of a third state into the picture—in this case the United States—confuses settled legal procedures considerably. Article 41(2) of the Vienna Convention reflects the bilateral diplomatic relationship by placing upon the sending state mission the duty to conduct “[a]ll official business with the receiving State . . . through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.”⁵⁹⁸ The rule's purpose is to facilitate the task of the Foreign Ministry, and allow more efficient conduct of foreign relations, if all communications are normally channeled through the Ministry that is best qualified in the light of its overall knowledge of the bilateral relations between the two states.⁵⁹⁹ Whether Vatican officials, United States officials, or authorities in the new Panamanian government violated this provision in the context of United States-Papal Nunciature negotiations over Noriega's fate is an interesting issue.

Several points are worth noting in this regard. First, the duty in Article 41(2) is upon the sending state⁶⁰⁰—in this case, The Vatican. The United States could not violate the provision by negotiating directly with Vatican officials in Panama because the United States is not part of the bilateral sending state-receiving state relationship. Panama technically could not violate the provision either, not only because the duty is upon the sending state, but also because the rule is principally for the benefit of the receiving state⁶⁰¹—Panama. If Panama designated the United States to act as its “agent” for the purpose of conducting these particular negotiations,⁶⁰² then appropriate United States officials simply took the place of Panamanian Foreign Ministry officials.⁶⁰³ Assuming the legitimacy of the new Panamanian government, the United States could not otherwise have assumed the role of negotiator without violating Panama's independent sovereign right to conduct its own foreign relations.”⁶⁰⁴ If, however, one does not accept the “agency” theory, then the actions of United States officials in negotiating directly with Msgr. Laboa at the Papal Nunciature must be examined in light of military needs that

⁵⁹⁸*Id.* art. 41(2).

⁵⁹⁹E. Denza, *supra* note 516, at 266.

⁶⁰⁰*See* Vienna Convention art. 41(2) (“All official business with the receiving State entrusted to the mission by the *sending State* . . .”) (emphasis added). Furthermore, Article 41 lists a series of sending State duties owed to the receiving State. *See id.* art. 41.

⁶⁰¹*See supra* text accompanying note 599.

⁶⁰²*See supra* text accompanying notes 567-68.

⁶⁰³*See supra* text accompanying notes 466-67.

⁶⁰⁴*See, e.g.*, M. Shaw, *supra* note 57, at 126-30; J. Brierly, *The Law of Nations* 129-30 (6th ed. 1963); G. von Glahn, *supra* note 189, at 119.

were the subject of the “stages of conflict” discussed earlier.⁶⁰⁵ The situation of chaos that prevails during the initial invasion stage would appear to invite some assumption of authority on the part of the invading state to communicate with sending state diplomatic representatives. The following stage of occupation, when previous authority **has** departed and the occupying force must restore order in the occupied areas, presents even stronger circumstances for the third party—the occupier—to assume the functions of the absent Ministry of Foreign Affairs.⁶⁰⁶

3. Awkward Relationships

The actions taken by United States forces at the Papal Nunciature fortunately did not result in clear violations of international law. United States officials, likely for political as much as legal reasons, carefully avoided breaches of international rules of diplomatic relations that would create confrontation with The Vatican. With Noriega powerless to influence events from within the embassy, United States authorities chose to use patient negotiation rather than military force to seize Noriega. The use of United States soldiers to surround the mission and prevent the escape of Noriega and his loyalists was an acceptable exercise of customary practice concerning dangerous fugitives.⁶⁰⁷ Other actions ancillary to surrounding the embassy are *de minimus* in view of the relative inconveniences they created when compared to the significance of preventing the escape of important individuals associated with the Noriega regime. The one action that may have been in breach of the Vienna Convention—the loud playing of rock music—invokes a highly subjective provision of the convention. When it became apparent to United States forces that the music was either a “disturbance of the peace of the mission . . . [or an] impairment of its dignity,”⁶⁰⁸ the practice was discontinued. The search of automobiles is an unanswered issue, because the facts are insufficient to indicate whether consent was obtained, or whether the United States felt that the searched cars were con-

⁶⁰⁵See *supra* text accompanying notes 450-67.

⁶⁰⁶See *supra* text accompanying notes 504-05. An example is the British civil affairs manual during World War II. It provides:

While military government is maintained foreign consuls or representatives will not be allowed except with the permission of the C.-in-C. It may, however, be necessary for their functions to be carried out on their behalf; if so, this will be the responsibility of the Civil Affairs Branch. A section for this purpose may be required under the Military Government Division.

British Civil Affairs Manual 10, *quoted in* G. von Glahn, *supra* note 189, at 88.

⁶⁰⁷See *supra* text accompanying note 584.

⁶⁰⁸Vienna Convention art. 22(2).

cealing things of such extreme importance that military necessity or some exception to inviolability permitted their search. In any event, blanket searches of diplomatic automobiles could not be justified.

The final significant issue concerns the legality of the bilateral United States-Papal Nunciature negotiations. While the interjection of a third party into the customarily bipartisan relationship appears awkward on its face, the Vienna Convention **provision**⁶⁰⁹ reveals that, however awkward, the United States role of chief negotiator with the Papal Nuncio was not legally flawed. Whether the United States acted as agent of the new Panamanian government or as occupier or invading power, the role assumed by United States officials is consistent with international law in the circumstances. In the case of the Papal Nunciature episode, the prudence of United States forces in their potential confrontation with the law of diplomatic relations was rewarded with the expulsion of Noriega from the Papal Nunciature.

VI. CONCLUSION

This study focused on the issue that is critical to any examination of United States conduct under humanitarian law in Operation Just Cause. For that particular armed conflict, as is increasingly the case with armed conflicts worldwide, the key to application of humanitarian law principles is characterization of the conflict. Only when that key question is resolved can the proper humanitarian norms be applied. Professor Baxter observed that “[t]he first line of defense against international humanitarian law is to deny that it applies at all.”⁶¹⁰ Professor Meron summarizes the problem well, stating:

Denials of the applicability of humanitarian law are facilitated by the complexity of various conflicts, by the difficulty involved in the characterization of the conflict (*e.g.*, as international armed conflict, internationalized-internal conflict, internal conflict of an armed character, internal strife accompanied by violence and internal tensions not accompanied by violence) and by the dependence of the applicability of certain norms on the characterization of the conflict.⁶¹¹

⁶⁰⁹*Id.* art. 41(2)

⁶¹⁰Baxter, *Some Existing Problems of Humanitarian Law*, in *The Concept of International Armed Conflict: Further Outlook 1, 2* (Proceedings of the International Symposium on Humanitarian Law, Brussels 1974), *quoted in* T. Meron, *supra* note 30, at 43.

⁶¹¹T. Meron, *supra* note 30, at 43-44.

Operation Just Cause does not present a case of the United States denying the applicability of humanitarian law to an armed conflict; it is, however, a wonderful case for illustrating the difficulties that an armed conflict may present for characterization of the conflict so that the warring parties will be aware of the extent of their humanitarian law obligations.

In the final analysis, the difficulties that are now apparent in characterizing Operation Just Cause—not just whether it was international or internal, but also in determining the stages within the characterization—lead to the conclusion that the law of armed conflict may have become too complex for practical application to the kinds of armed conflicts that prevail today. In the state of uncertainty over which sets of humanitarian norms apply, the only common ground appears to be the minimum “humane treatment” standards that are common in one fashion or another to all kinds of armed conflict. Yet, while recognition of that common core of humanitarian principles might constitute an improvement over existing conduct in many conflicts in various parts of the world, more detailed protections are required. The 1977 Protocols represent an effort toward progress in this respect, as their provisions are not as dependent as are the 1949 Geneva Conventions and 1907 Hague Regulations on the proper characterization of the conflict. Those Protocols clearly represent the trend, as international-internal distinctions become less clear in current armed conflicts. Still, the 1977 Protocols in their entirety are not yet representative of customary international law, and key international players, such as the United States, are not yet party to those treaties.

For the present, then, characterization remains the ever-present key to successful application in most cases of the considerable body of existing humanitarian law principles. This state of affairs is unsatisfactory from the standpoint of uniform application of humanitarian law principles. For example, while the ebbing of the level of threat in Europe from high-intensity conventional warfare may represent hope for the future of mankind, it typifies the perils for humanitarian law presented by rigid compartmentalization of humanitarian norms according to characterization of the conflict. The reason for this pessimistic view of the current state of humanitarian law, with its reliance on characterization, is that the more typical armed conflict today is of a lower intensity than were those conflicts from which the current norms evolved. Grenada in 1983 and Panama in 1989 are representative of this trend. Other conflicts, such as those in Afghanistan, Cambodia, and Liberia, reveal the defi-

ciencies in applying old characterization principles to armed conflicts that are difficult to characterize.

The losers, in any event, are the citizens of the states involved. Ambiguity in characterization inevitably will lead in most situations either to denial of the application of humanitarian law at all, or to the acceptance of some minimum application of certain of those principles to the conflict. The rigidity of the characterization concept is especially apparent, for example, when humanitarian law application turns on the biased perceptions of "legitimacy" of one side or the other in the armed conflict. As this study demonstrates, how an intervening state, such as the United States, perceives the legitimacy of the side that it is assisting in an armed conflict has profound effects upon the extent of humanitarian protections that the intervening state is obliged to respect. Although from the United States perspective its recognition of the Endara government as the "legitimate" government of Panama may appear incontrovertible, other states having different traditions may have different perceptions. The Soviet intervention in Afghanistan, for example, which is recognized generally as a flagrant case of aggression against the people of Afghanistan, is a stronger case for questioning the legality of outside intervention on behalf of a so-called "legitimate" Afghan government. It demonstrates, however, the futility in allowing characterizations to be based upon the intervening state's perceptions, with the result that standards applicable to internal armed conflict, or indeed no standards at all, will apply.

The most recent invasion of Kuwait by Iraq again demonstrates the problem: Was the old regime in Kuwait illegitimate? Did "legitimate" Kuwaiti elements invite Iraq's intervention? Was Kuwait really part of Pan-Arabic Iraq, unjustly created by old colonial masters? Was Kuwait occupied by Iraqi forces with the consequent strict legal regime that occupation law imposes on occupying forces? Unfortunately, no agreed-upon binding international mechanism exists for characterizing these armed conflicts.⁶¹²

Many factors influence how states characterize armed conflicts. In the final analysis, however, after considering all factors, the decision will remain for individual states to make. The United States declined to make clear characterizations of Operation Just Cause for numerous reasons. Among them, United States policymakers apparently felt that the intervention itself could be defended best if

⁶¹²See *id.* at 44, 50 (stating ICRC's policy of avoiding, as often as possible, characterization of conflicts).

United States intervention was explained as lawful assistance to the “legitimate” Endara government in its internal struggle against Noriega’s forces. An alternate basis that was stated for United States intervention—based on international self-defense and protection of United States citizens—is more closely associated with international armed conflict.

For purposes of application of humanitarian law, United States officials similarly viewed Operation Just Cause as a hybrid international-internal armed conflict. International armed conflict considerations determined how the United States forces conducted the actual hostilities, invoking the full application of the “law of The Hague” and its proportionality principles. These principles are firmly part of United States military doctrine and enter into the planning and execution of any armed conflict in which United States forces participate, whether international or internal. United States treatment of protected Panamanians under the “law of Geneva,” however, illustrated the inherent difficulties in making the clear characterizations that are necessary for satisfactory application of that body of law in an armed conflict like the Panama operation. Here, the conflict became most “hybrid,” with United States forces justifiably denying the existence of occupation, while simultaneously awkwardly attempting to apply traditional occupation concepts such as internment regulations, or medical and food care services to Panamanian civilians.

Blaming United States deficiencies in offering protection to Panamanian citizens on the deficiencies in humanitarian law is too easy. Many of the criticisms leveled at United States conduct toward civilians in Operation Just Cause reveal general deficiencies both in humanitarian law and in the understanding of those who assert that United States conduct did not meet required standards. Some of the expressions of dissatisfaction with United States conduct demonstrate a misperception that the legality of the intervention itself and the accompanying suffering from warfare constituted the critical elements for judging United States conduct in the military operation. Methods of assessing humanitarian conduct by resort to counting bodies and placing monetary values on destruction and then applying a “but for United States intervention this would not have occurred” kind of formula to conclude a disproportionate use of United States firepower miss the mark entirely. That kind of analysis places the blame for all suffering upon the United States; this is really a judgment on the legality of the intervention. The proper standard, given the intervention, is whether the United States forces then con-

ducted themselves within international humanitarian constraints. The answer to that inquiry, conceding ever-present shortcomings in some particulars and unfortunate unplanned incidences of personal misconduct, is that the United States forces met their humanitarian law obligations in Operation Just Cause.

CONTRACTOR ASSERTION OF CLAIMS UNDER THE CONTRACT DISPUTES ACT

by Major Samuel J. Rob*

I. INTRODUCTION

The contractor's assertion of claims under the Contract Disputes Act of 1978¹ is not the streamlined dispute resolution process originally envisioned by the drafters of the Act. Intended to provide "a fair, balanced, and comprehensive statutory system of legal and administrative remedies"² for resolving government contract claims by negotiation prior to litigation, the Act has evolved into a hypertechnical process that often is neither efficient nor equitable.

A. BACKGROUND OF THE CONTRACT DISPUTES ACT

The stated purpose of the Act was to "equalize the bargaining power of the parties" and to "insure fair and equitable treatment to contractors and Government agencies."³ The prior system of dispute resolution—a mixture of contract provisions, agency regulations, judicial decisions, and statutory coverage—was characterized by the drafters of the Act as "restrictive and uncoordinated"; it was the result of "unstructured reactions to various events and decisions."⁴ The old system was further labeled as "too expensive and

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¹Pub. L. No. 95-563, 92 Stat. 2383-91 (codified as amended at 41 U.S.C. §§ 601-613 (1988)).

²S. Rep. No. 95-1118, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Admin. News 5235 (hereinafter Senate Report).

³*Id.*

⁴*Id.* at 2-3.

time consuming,” and suffered from the failure to “provide the procedural safeguards and other elements of due process that should be the right of litigants.”⁵

While the Act was intended to benefit both the government and the contractor by creating a more efficient dispute resolution process, the legislative history of the Act makes clear that the primary focus was on easing the contractor’s burden in pursuing a claim. As stated by Senator Packwood, “The legislation . . . [would] end many of the procedural inequities and inconveniences currently being experienced by the contractor who feels he has been wronged by his Government.”⁶ Senator Chiles, in introducing the bill, made the observation that the then-current system of resolving disputes and contract claims “[made]some people wonder whether it [was]the intent of the Federal Government to literally drive business away from the Government marketplace.”⁷ Senator Chiles, who had served as a member of the Commission on Government Procurement,⁸ concluded that:

[O]ur current system of resolving disputes is beset by serious problems of delay. A contractor can be funneled into a long and convoluted pipeline from which he may never emerge. Such delay, combined with the impact of high interest rates, inflation and sheer frustration have driven many corporations to declare publicly that they will never again do business with the Federal Government. . . . Cases rebound between Federal agencies and the courts for years. Contractors have been pushed into bankruptcy or have given up in frustration and disgust.⁹

Senator Chiles attributed the difficulties with the then-current disputes process to the government’s move back toward a system of sovereign immunity, which, in his opinion, Congress had neither promoted nor endorsed.”

Senator Chiles’ concern that contractors would no longer bid on government contracts because they perceived little likelihood of a

⁵*Id.* at 3-4.

⁶123 Cong. Rec. S18,665 (daily ed. Nov. 3, 1977) (statement of Sen. Packwood).

⁷122 Cong. Rec. S8343 (daily ed. June 2, 1976)(statement of Sen. Chiles).

⁸Congress created the Commission in 1969 to study the procurement process and make recommendations to improve its efficiency. In 1973, the Commission issued a six-volume report recommending 149 changes to the procurement system, some of which subsequently were incorporated in the Contract Disputes Act. Pub. L. No 91-129, 41 U.S.C.A. § 251 (West Supp. 1977).

⁹*Id.*

¹⁰*Id.*

fair settlement in the event of a contract dispute ran head-long into the views of Admiral H.G. Rickover, who testified at the joint hearings on the proposed bill.¹¹ Admiral Rickover's attitude towards a revision of the contract disputes process is summed up in the following excerpt from his testimony:

In trying to streamline contract dispute procedures for valid claims, we need to establish procedures to discourage contractors and law firms who develop and prosecute grossly inflated claims in an attempt to get more from the Government than they are legally owed. I am concerned that the bill provides many loopholes which large, influential contractors can exploit at a time they already have a distinct advantage over the Government in contract disputes and litigation. In this climate, I believe the proposed bill would do the following:

Place the Government at a substantial and unfair disadvantage particularly in relation to large contractors.

Encourage Government officials to settle claims and contract disputes independent of their legal merits, and to circumvent existing safeguards prescribed by Congress in cases where extra-contractual relief is authorized.

Encourage contractors to submit unfounded claims, and hold out for settlements in excess of amounts legally owed by the Government.¹²

In testimony replete with examples of what Admiral Rickover believed to be instances of fraudulent claims with regard to Navy ship-building contracts, he argued against a proposed section of the bill that would have authorized agencies to settle claims,¹³ and suggested a contractor certification requirement.¹⁴ Others argued that the

¹¹*Contract Disputes Act of 1978: Joint Hearings on H.R. 2787 & S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Government Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 5-26 (1978) (hereinafter *Joint Hearings*) (testimony of Admiral Rickover).

¹²*Id.* at 5-6.

¹³*Id.* at 10. Section 4 of the proposed bill stated that "[e]ach executive agency was authorized to settle, compromise, pay, or otherwise adjust any claim by or against, or dispute with, a contractor relating to a contract entered into by it or by another agency on its behalf, including a claim or dispute initiated after award of the contract based on breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission." In Admiral Rickover's opinion, this proposal was the most serious loophole in the proposed act, and undoubtedly would be construed as congressional authorization for agencies to settle claims independent of their legal merit. The proposed section was deleted from the final version of the bill.

¹⁴*Id.* at 13. The certification requirement was incorporated into the final version of the bill at 41 U.S.C. § 605(c) (1988).

legislation should not be modified on the basis of aberrant cases like the major shipbuilding claims referenced by Admiral Rickover? Nevertheless, the bill finally enacted, by inclusion of the certification requirement and deletion of the agency settlement authority provision, created a dispute resolution process that was neither as expeditious nor as settlement-oriented as originally intended.

B. THE CONTRACT DISPUTES ACT

The Contract Disputes Act provides the contractor with a clearly defined framework for the assertion of claims. The Act requires that all claims by a contractor against the government relating to a contract be in writing and be submitted to the contracting officer for a decision.¹⁶ The contracting officer is required to issue a decision on a submitted claim of \$50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period.¹⁷ For claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government liable.¹⁸ For certified submitted claims over \$50,000, the contracting officer is required to either issue a decision within sixty days or notify the contractor of the time within which a decision will be issued.¹⁹ Any failure by the contracting officer to issue a decision within the time required is deemed to be a decision of the contracting officer denying the claim and authorizes the contractor to commence an appeal or suit on the claim.²⁰

The contractor may appeal the contracting officer's decision to an agency board of appeals or directly to the United States Claims Court.²¹ Appeals to a board must be filed within ninety days of the receipt of the contracting officer's decision or within twelve months

¹⁵Joint Hearings at 118, 160 (statement of Mr. Joseph, chairman, Public Contract Law Section, American Bar Association; letter from Mr. Drembling, General Counsel, U.S. General Accounting Office, to Senator Chiles, dated July 5, 1978). *But see* Joint Hearings at 299 (prepared statement of Mr. Andrews, attorney) ("The truth of the matter is that billions of taxpayer dollars are ripped off the Federal Government each year in the settlement of Federal contract claims.")

¹⁶41 U.S.C. § 605(a) (1988).

¹⁷41 U.S.C. § 605(c) (1) (1988).

¹⁸*Id.*

¹⁹41 U.S.C. § 605(c)(2) (1988). All decisions on submitted claims must be issued within a reasonable period of time. 41 U.S.C. § 605(c)(3) (1988).

²⁰41 U.S.C. § 605(c)(5) (1988).

²¹41 U.S.C. §§ 606 & 609 (1988).

of the receipt of the decision to the Claims Court.²² Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim until the payment thereof.²³ If the contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he will be held liable to the government for an amount equal to the unsupported part of the claim in addition to all costs to the government attributable to the cost of reviewing that fraudulent portion of his claim.²⁴ The Act also established procedures for the expedited disposition of claims when the amount in dispute is \$10,000 or less.²⁵

C. INTERPRETATION OF THE CONTRACT DISPUTES ACT

The Act, while establishing a basic procedure for the submission and resolution of claims, created several problems of interpretation as a result of the Act's failure to define, or clarify, key terminology and provisions. The most significant omission was the failure to provide a definition of the term "claim."²⁶ The Office of Federal Procurement Policy (OFPP), Office of Management and Budget, subsequently issued a policy letter in 1980 that defined a claim as "a written demand by one of the parties seeking, as a legal right, the payment of money, adjustment of or interpretation of contract terms, or other relief, arising under or relating to the contract."²⁷ The current definition of a claim used by courts and boards interpreting the Contract Disputes Act is set forth in the Federal Acquisition Regulation (FAR) and is substantially similar to the one supplied by OFPP.²⁸ Despite general agreement concerning the basic definition, courts

²²*Id.*

²³41 U.S.C. § 611 (1988).

²⁴41 U.S.C. § 604 (1988). Fraudulent claims are beyond the scope of this article.

²⁵41 U.S.C. § 608 (1988). Small claim procedures are not addressed further in the context of this article.

²⁶Grossbaum, *"Debugging" the Contract Disputes Act of 1978*, 17 Nat'l Cont. Mgmt. J. 1-18 (1983), discussed the lack of definition for the term "claim" and noted that adjudicatory tribunals are not well-suited for the task of statutory interpretation because "courts are not legislatures." Nonetheless, it has been left to the courts and boards to do just that.

²⁷OFPP Policy Letter No. 80-3, 45 Fed. Reg. 31035 (1980). The policy letter was intended to provide a uniform policy applicable to the Contract Disputes Act and became effective on June 1, 1980.

²⁸Fed. Acquisition Reg. 33.201 (1 Apr. 1984) [hereinafter FAR] defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."

and boards continue to struggle to reach a consensus on issues such as, how the metamorphic process from routine request for action to claim occurs, what is a government claim versus what is a contractor claim, and what are the requirements for converting a government claim to a contractor's claim (upon which interest is payable).²⁹

The contractor certification requirement included in the Act was, in the words of one commentator, an "enigma."³⁰ Regarded by some with cautious pessimism,³¹ the significance of the requirement would not become apparent until its subsequent interpretation by the United States Court of Claims.

Judge Grossbaum, of the Armed Services Board of Contract Appeals, expressed the belief in 1983 that the "debugging" of the Contract Disputes Act. "seem[ed] to be nearing completion."³² Nevertheless, the interpretation and implementation of the Act has not yet resulted in the efficacious dispute resolution process originally contemplated by the Act's drafters. What has developed is a system that demands strict adherence to the technical aspects of the claim submission process. Clearly, the claim is the "centerpiece" of the disputes process,³³ for without a claim, there is nothing to which the procedures of the Act apply.³⁴ Even so, the courts and boards have elevated procedural compliance to jurisdictional status, with a concomitant deleterious effect on contractors asserting factually valid, but technically defective, claims.

The purpose of this article is to provide the reader with a summary and analysis of the case law applicable to the claims submission process. This article has been organized into three sections that address the primary issues in the dispute resolution process that are

²⁹41 U.S.C. § 611 (1988).

³⁰Petrillo, *Some Notes on the Contract Disputes Act of 1978*, Pub. Cont. Newsl., Jan. 1979, at 2, 4.

³¹*Id.* at 2. Petrillo described the certification requirement as "vague, potentially quite broad, and without temporal restrictions." He referred to the language as unspecific, and predicted that defining the limits of contractor liability under the requirement would "take years of administrative interpretation and several decisions by the Court of Claims and Boards of Appeals." In an open letter, Mr. Coburn, chairman, Public Contract Law, American Bar Association, expressed distress with the certification requirement, but assured colleagues that implementing regulations would be drafted to minimize the opportunities the provision afforded to "protract or frustrate the negotiation, compromise and settlement of legitimate claims." Pub. Cont. Newsl., Jan. 1979, at 1, 11.

³²Grossbaum, *supra* note 26, at 18.

³³Federal Electric Corp., ASBCA No. 24002, 82-2 BCA ¶ 15,862.

³⁴The Boeing Co., ASBCA No. 27396, 83-1 BCA ¶ 16,256.

in a state of judicial flux. Unanimity, where it exists, is duly noted, while divergent approaches between the courts and boards (and among the boards themselves) are highlighted. Further, judicial trends are identified, and predictions as to future developments in the law are set forth. An overview of the claims submission process is provided and changes are suggested to the current analytical approach that would more nearly comport with the expectations of the drafters of the Contract Disputes Act.

11. MATTER IN DISPUTE

The Contract Disputes Act does not explicitly require the existence of a dispute between the contractor and the government before a valid claim can be submitted. The FAR, however, in both its definition of a claim and in the Disputes clause, specifically notes that “[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.”³⁵ The requirement that a matter be in dispute before a final decision can be issued by the contracting officer has been attributed to the pre-Act case of *Keystone Coat & Apron Manufacturing Corp. v. United States*,³⁶ in which the United States Court of Claims held that a contracting officer’s decision rendered prior to the initiation of a dispute between the parties would not be accorded finality.³⁷ In oft-quoted language, the court stated:

This can hardly be classified as a dispute. We have always thought it takes two to make a dispute. But this was unilateral. Months after settlement under the contract the contracting officer decided the Government was due some money and on May 25, 1955, sent plaintiff a statement that it owed the Government \$6,203.67, and demanded payment. Plaintiff was not asked to explain. It was told to pay. The contracting officer did not ask for plaintiff’s position so that a dispute might arise. He merely took a shillalah and struck him down.³⁸

The *Keystone* rationale never has been rejected explicitly, although recent developments in the law may have eroded its vitality to some degree.

³⁵FAR 33.201; 52.233-1(c).

³⁶150 Ct. Cl. 277 (1960).

³⁷The court, in requiring the existence of a dispute, relied on the Navy procurement directive applicable to the administration of the contract in question, said directive requiring the contracting officer, when a dispute arose, to decide the dispute and issue to the contractor a written decision and findings of fact. *Id.* at 280-81.

³⁸*Id.* at 281-82.

A. *DELAY OR DISAGREEMENT FOLLOWING ROUTINE REQUESTS FOR ACTION*

While the origins of the disputes requirement may be traced to the *Keystone* case, the initial efforts of the OFPP in 1979 to draft a Disputes clause implementing the Contract Disputes Act first tied in the “dispute” element with the requirements of the Act. The 1979 interim Disputes clause defined a claim, in pertinent part, as:

- (1) a written request submitted to the contracting officer;
- (2) for payment of money, adjustment of contract terms, or other relief;
- (3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government³⁹

The interim clause was rescinded in 1980 and replaced by a new Disputes clause that read, in pertinent part:

- (c)(i) As used herein “claim” means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.
- (ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim⁴⁰

In 1982, the Defense Acquisition Regulatory (DAR) Council, which had adopted the OFPP Disputes clause,⁴¹ proposed changes to the Disputes clause that would have required a contractor’s submission to be the subject of a dispute to qualify as a claim.⁴² The OFPP notified the DAR Council that the proposed changes did not properly implement the Contract Disputes Act as the Act did not require that a claim be disputed, and further, that the changes conflicted with Part 33, Disputes and Appeals, of the proposed Federal Acquisition Regulation.⁴³ The proposed changes never were implemented by the DAR Council. The current FAR Disputes clause was derived

³⁹44 Fed. Reg. 12,519 (1979).

⁴⁰OFPP Policy Letter No. 80-S. 45 Fed. Reg. 31035 (1980).

⁴¹Defense Acquisition Reg. Acquisition Letter No. 80-16, July 2, 1980.

⁴²See R.G. Beer Corp., ENG BCA No. 4885, 85-2 BCA ¶ 18,162, at 91,195, for a more detailed recitation of the DAR Council’s proposed changes to the DAR Disputes clause.

⁴³*Id.* at 91,198.

from the OFPP Disputes clause, with minor **changes**.⁴⁴ None of the changes made, however, required a claim to be either disputed or unresolved after a reasonable period of time for **consideration**.⁴⁵ The FAR provisions state that a contractor's invoice, voucher, or other request for payment that is routinely submitted in the ordinary course of business will not constitute a claim absent a dispute as to the government's obligation to make payment **thereon**.⁴⁶ The dispute requirement is not contained within the basic claim **definition**,⁴⁷ but rather, in the illustrative language that follows. The requirement, being specifically keyed to routine payment requests, serves the practical purpose of placing the contracting officer on notice that the contractor perceives a potential problem in the administration of the contract. Clearly, problems must be identified before they can be resolved. Courts and boards have had little difficulty in applying the **FAR** guidance that undisputed invoices and vouchers do not constitute a **claim**.⁴⁸ In *General Dynamics Corp.*⁴⁹ the government sought to characterize certain contractor aircraft costs **as** a contractor claim that was defective for lack of certification. The board rejected the government's argument, concluding that the contractor's invoices, which had been routinely submitted and paid over the years, could not be considered claims for purposes of the Contract Disputes Act. In *Salisbury and Dietz, Inc.*⁵⁰ the board, without specifically finding the existence of a dispute, held that submitted vouchers constituted a claim. The vouchers could not be classified as "routine vouchers"

⁴⁴One change in the FAR version that is noteworthy is the insertion of the word "routine" before the phrase "request for payment." In the opinion of one commentator, if the addition of the term "routine" in the FAR clause is an indication of the intent underlying the 1980 OFPP Disputes clause, undisputed invoices, vouchers or other routine requests for payment would draw interest under the Prompt Payment Act, 31 U.S.C. §§ 3901-3907, and contractors would have little incentive to seek relief via the Disputes clause. See Cibinic, *What's a "Claim": Is Prior Disagreement Necessary?*, The Nash & Cibinic Report, May 1988, para. 25.

⁴⁵*Id.*; FAR 52.233-1; see also B & A Electric Co., Inc., ASBCA No. 27689, 85-1 BCA ¶ 17,781 (and cases cited therein).

⁴⁶FAR 33.201; FAR 52.233-1.

⁴⁷FAR 33.201: "Claim," **as** used in this part, means a written demand or written assertion by one of the contracting parties seeking, **as** a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

⁴⁸See *Dombrowski & Holmes*, GSBCA No. 6328, 83-1 BCA ¶ 16,300 (invoice); *Falcon Research & Dev. Co.*, ASBCA No. 27002, 82-2 BCA ¶ 16,049 (voucher); see also *Lance Dickinson & Co.*, ASBCA No. 36804, 88-3 BCA ¶ 21,186 (invoices and accompanying letter demanding payment held a cognizable claim after contracting officer disputed entitlement); *Westinghouse Electric Corp.*, ASBCA No. 25787, 85-1 BCA ¶ 17,909 (while initial progress payment request not a claim, its resubmission, together with a letter demanding immediate payment or a final decision, satisfied the requirements for a claim); *Capital Security Services, Inc.*, GSBCA No. 5722, 81-1 BCA ¶ 14,923 (disputed invoice held a claim).

⁴⁹ASBCA No. 31359, 86-3 BCA ¶ 19,008.

⁵⁰BCA No. 2090, 86-3 BCA ¶ 19,079.

because their payment would have been in excess of the total estimated cost of the contract.⁵¹

What constitutes an "other routine request for payment" (in particular, settlement proposals following a termination for convenience) has not been clearly delineated by the courts and boards.⁵² Courts and boards have chosen to focus on whether or not the matters submitted were in dispute, rather than address the threshold question of whether or not the submitted matters were classifiable as a routine request for payment.

Mere delay by the contracting officer in making payment is not, in itself, evidence that the matter is in dispute.⁵³ An unreasonable delay in making payment, however, has been held to convert a routine request for payment into a dispute, even without a written request of the contracting officer for a decision.⁵⁴ The FAR Disputes clause is unambiguous in its requirement that, while an undisputed routine request for payment can be converted to a claim if not acted upon in a reasonable period of time, the conversion is contingent upon compliance with the clause's submission (i.e., written demand on the contracting officer) and certification requirements.⁵⁵ In reality, the existence of an unreasonable delay would seem to have no legal significance, because the delay itself is not the basis for the requested payment, nor does it convert the request into a claim. Only if the

⁵¹*Id.* at 96,387.

⁵²As a general rule, settlement proposals have not been considered claims. *See* Mayfair Construction Co. v. United States, 841 F.2d 1576, 1578 (Fed. Cir. 1988); Gardner Machinery Corp. v. United States, 14 Cl. Ct. 286, 293 (1988); Hugo Auchter GmbH, ASBCA No. 33123, 88-3 BCA ¶ 20,926. In *Solar Turbines v. United States*, 11 Cl. Ct. 304, 312 (1989), the Claims Court specifically declined to address the issue of whether a settlement proposal constitutes a routine request for payment. Further, as noted by Professor Cihinic, significant regulatory history exists that indicates that the FAR clause was not intended to cover requests for contract adjustments such as equitable adjustments or settlement proposals. Cihinic, *supra* note 44, at 69.

⁵³*Casework Installations, Ltd.*, IBCA So. 1635-11-82, 84-1 BCA ¶ 17,049 (unreasonable delay in paying undisputed invoice did not establish that dispute existed at the time of claim submission); *Safeguard Maintenance Corp.*, GSBCA No. 6054, 83-1 BCA ¶ 16,276 (dispute not imputed from delay in paying invoice absent facts indicating contracting officer knew or was otherwise responsible for the delay).

⁵⁴*See* *Joseph Fusco Construction Co.*, GSBCA So. 5717, 81-1 BCA ¶ 14,837; *Capital Security Services, Inc.*, GSBCA No. 5722, 81-1 BCA ¶ 14,923; *Dawson Construction Co.*, GSBCA No. 5777, 80-2 BCA ¶ 14,817. *But see* *Hoffman Construction Co. v. United States*, 7 Cl. Ct. 523 (1985); *Esprit Corp., Inc. v. United States*, 11 Cl. Ct. 546 (1984); *Consolidated Technologies, Inc.*, ASBCA No. 33; 60, 88-1 BCA ¶ 20,470; *Nab-Lord Associates*, PSBCA So. 1080, 85-1 BCA ¶ 17,741; *Granite Construction Co.*, ASBCA Nos. 26023, 26776, 83-2 BCA ¶ 16,843 (cases holding that a written demand is required to convert such a request to a claim).

⁵⁵FAR 52.233-1(c) & (d).

delay is viewed as an imputed dispute does its inclusion in the clause make sense.⁵⁶

The FAR is explicit in requiring the existence of a dispute (whether actual or imputed) to convert a routine request for payment into a claim. The existence of a dispute, however, is only a necessary predicate to the actual conversion process, which requires contractor compliance with the submission requirements.⁵⁷ Accordingly, the dispute requirement, as applied to routine requests for payment, is difficult to justify unless derived from a general requirement that all contractor submissions—irrespective of their nature—must be the subject of dispute before "claim" status is conferred. The essential question, therefore, is whether a dispute is required for a claim to be valid.

B. PREEXISTING DISAGREEMENT OR DISPUTE

While the United States Claims Court has stated that "[i]t is black letter law that a contractor may appeal only 'disputes' as defined in the Contract Disputes Act,"⁵⁸ a review of the case law (and in particular, board decisions) does not support the court's conclusion.⁵⁹ Further, the recent decision of the United States Court of Appeals for the Federal Circuit in *Mayfair Construction Co. v. United States*,⁶⁰ which was expected to resolve the question, did not do so and therefore added to the confusion. In fairness to the Claims Court and its predecessor, the United States Court of Claims, the court consistently has required the existence of an underlying dispute.⁶¹ The various boards, however, have not adopted a uniform approach to the requirement for a dispute. The Engineer Board of Contract Appeals has not

⁵⁶The Claims Court, in interpreting a contract disputes clause that comported with the language of the FAR Disputes clause, concluded that the contract clause "[e]ssentially . . . create[d] a dispute where none may actually exist based on one party's unreasonable delay." *Hoffman Construction Co. v. United States*, 7 Cl. Ct. 518, 523 (1985).

⁵⁷*See Allimpex Internationale Spedition GmbH, ASBCA No. 34310, 87-3 BCA ¶ 20,050* (board dismissed uncertified claim; rejected contractor's argument that it was not required to convert its request for payment of invoices into a proper claim).

⁵⁸*Frawley v. United States*, 14 Cl. Ct. 766, 768 (1988).

⁵⁹Moreover, the court's statement that "disputes" is defined in the Contract Disputes Act is not supported by a perusal of the language of the Act.

⁶⁰841 F.2d 1576 (1988).

⁶¹*See Timherland Paving and Construction Co. v. United States*, 18 Cl. Ct. 129, 151 (1989); *Solar Turbines, Inc. v. United States*, 16 Cl. Ct. 304, 312 (1989); *Frawley v. United States*, 14 Cl. Ct. 766, 768 (1988); *Gardner Machinery Corp. v. United States*, 14 Cl. Ct. 286, 294 (1988); *Citizens Associates, Ltd. v. United States*, 12 Cl. Ct. 599, 601 (1987); *Berna Gunn-Williams v. United States*, 8 Cl. Ct. 531, 535 (1985); *Keystone Coat & Apron Manufacturing Corp. v. United States*, 150 Cl. Ct. 277 (1960).

required the existence of a dispute for a contractor's submission to be recognized as a valid claim.⁶² Nor has the Department of the Interior Board of Contract Appeals,⁶³ or the General Services Administration Board of Contract Appeals.⁶⁴ Conversely, the Veterans Administration Board of Contract Appeals has held that a dispute is required.⁶⁵

The Armed Services Board of Contract Appeals has adopted the Claims Court view that the existence of a dispute is a prerequisite to a valid dispute.⁶⁶ In *Mayfair Construction Co.*⁶⁷ the Armed Services Board, in construing a contract incorporating the 1979 interim OFPP Disputes clause,⁶⁸ held that no claim existed because the government and the contractor were in "a pre-dispute, negotiation posture."⁶⁹ The board specifically declined to decide whether a dispute was required under the FAR Disputes clause. Administrative Judge Duvall, in a lengthy dissent, argued that the common definition of the word "claim" did not require the existence of an antecedent dispute.⁷⁰ Moreover, in his opinion, because a review of the legislative history of the Act did not reveal a clear congressional mandate that an antecedent dispute was required for a valid claim, the plain meaning of the word "claim" should control.⁷¹ Judge Duvall urged the board to overrule its decision in *Racquette River* requiring the existence of a dispute, and adopt the position of the Engineer Board in *R.G. Beer*, which held that neither the 1980 OFPP Disputes clause nor the FAR Disputes clause required a dispute, except in the

⁶²See *Tom Shaw, Inc.*, ENG BCA Nos. 5540 et. al., 89-3 BCA ¶ 21,961; *R.G. Beer Corp.*, ENG BCA No. 4885, 85-2 BCA ¶ 18,162; *Western Contracting Co.*, ENG BCA No. 5066, 85-2 BCA ¶ 17,951; *Luedtke Engineering Co.*, ENG BCA No. 4556, 82-2 BCA ¶ 15,851; *Arlington Electrical Construction Co.*, ENG BCA No. 4440, 81-1 BCA ¶ 15,073.

⁶³See *A & J Construction Co., Inc.*, IBCA No. 2269, 87-3 BCA ¶ 19,965; *Power City Construction, Inc.*, IBCA No. 1839, 86-2 BCA ¶ 18,828.

⁶⁴See *Sixth & E Associates*, GSBCA No. 8914, 87-3 BCA ¶ 20,077; *Tera Advanced Services Corp.*, GSBCA No. 7199, 85-2 BCA ¶ 17,941.

⁶⁵See *J.C. Edwards Contracting & Engineering, Inc.*, VABCA Nos. 1947 et. al., 85-2 BCA ¶ 18,068.

⁶⁶See *Instruments & Controls Service Co.*, ASBCA No. 38332, 89-3 BCA ¶ 22,237; *Hugo Auchter GmbH*, ASBCA No. 33123, 88-3 BCA ¶ 20,926; *J.M.T. Machine Co., Inc.*, ASBCA No. 29739, 86-2 BCA ¶ 18,917; *Fortec Constructors*, ASBCA No. 27601, 83-1 BCA ¶ 16,402; *Racquette River Construction, Inc.*, ASBCA No. 26486, 82-1 BCA ¶ 15,769.

⁶⁷ASBCA No. 30800, 87-1 BCA ¶ 19,542.

⁶⁸See *supra* text accompanying notes 38-40.

⁶⁹ASBCA No. 30800, 87-1 BCA ¶ 19,542, at 98,745.

⁷⁰For his common definition, Judge Duvall used the definition set forth in Webster's *New World Dictionary* (1968 ed.).

⁷¹ASBCA No. 30800, 87-1 BCA ¶ 19,542, at 98,746-48.

case of invoices, vouchers, and other regular payments under the contract.⁷²

Mayfair appealed the adverse decision of the Armed Services Board to the Court of Appeals for the Federal Circuit. The court, apparently seeking to dispose of the case on the narrowest possible grounds, concluded that it was “beyond cavil” that under the 1979 interim OFPP Disputes clause, “no claim exist[ed] unless it involve[d] a dispute.”⁷³ The majority considered the terms of the clause to be dispositive and declined to decide whether the Contract Disputes Act requires a claim to be disputed.⁷⁴ Judge Bennett, in dissent, addressed the issue the majority avoided and, relying primarily on the dissent of Judge Duvall below, concluded that the Act does not require a dispute for a claim to be valid. Judge Bennett considered the inclusion of the dispute requirement in the 1979 interim clause to be an error, as evidenced by its deletion from the 1980 OFPP Disputes clause, and argued that the majority was wrong in deferring to a superseded clause.⁷⁵ In Judge Bennett’s opinion, the dispute requirement would encourage inflated claims as precursors to bargaining and would make litigation, not negotiation, the primary means of claim resolution.⁷⁶

The Court of Appeals for the Federal Circuit, having passed on the opportunity to clarify whether or not the Contract Disputes Act requires a dispute before a claim will be recognized,⁷⁷ has left it to the contractor to ascertain whether or not the forum in which the con-

⁷²*Id.* at 98,748;98,746. While acknowledging that the contract in question contained the 1979 interim OFPP Disputes clause, and that that particular version of the clause required a dispute, Judge Duvall found it incongruous that the majority used that clause’s definition of a claim, when the OFPP deleted the dispute element from its claim definition contained in its 1980 Disputes clause, which while not in existence at the time the contract was drafted, was in effect prior to the award of the contract.

⁷³*Mayfair Construction Co.*, 841 F.2d at 1577.

⁷⁴*Id.* at 1578.

⁷⁵*Id.* at 1580.

⁷⁶*Id.* at 1579.

⁷⁷In *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987), the Court of Appeals for the Federal Circuit did not even consider whether a dispute existed in determining the validity of a claim. The court simply stated:

We know of no requirement in the Disputes Act that a “claim” must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.

Id. at 592. The court’s exclusion of the dispute requirement from its definition of a claim, whether or not intentional, has been cited by at least one board in support of its conclusion that a dispute is not required. See *A & J Construction Co., Inc.*, IBCA No. 2269, 87-3 BCA ¶ 19,965, at 101,080.

tractor is seeking relief requires a dispute. Clearly, an appeal filed before the Claims Court risks dismissal if an identifiable dispute did not exist prior to the contracting officer's final decision. At the board level, whether or not a dispute is required depends on the particular agency board. Obviously, the validity of a claim should not be dependent on such a random factor. Disparate results for similarly situated contractors is an intolerable legal anomaly that requires resolution. The Court of Appeals for the Federal Circuit has the obligation to provide definitive guidance, as the various agency boards cannot dictate a uniform construction applicable to all agency boards.

As to how the dispute issue ultimately should be decided, neither the language of the Act itself, the Act's legislative history, nor case law can justify a broad dispute requirement. The Act requires a dispute *only* as to vouchers, invoices, and other routine requests for payment, and it should not be expansively construed to require a dispute as to all claims. The two cases generally cited for the proposition that a dispute is required, *Keystone* and *Magtiair*, did not interpret the FAR Disputes clause and were limited to interpretations of contract clauses that specifically required the existence of a dispute. In *Magtiair*, the clause in question has been rescinded and agency efforts to modify the clause by making the dispute requirement more explicit were expressly rejected by the OFPP, the principal agency charged with coordination of government procurement policy. Accordingly, the requirement for a dispute should be limited only to the submission of vouchers, invoices, and other routine requests for payment, as stated in the FAR Disputes clause.⁷⁸

C. DECLARATORY RELIEF

Until recently, it was settled law that the Claims Court and its predecessor, the Court of Claims, had no jurisdiction under the Declaratory Judgment Act.⁷⁹ In *United States v. King*⁸⁰ the United States Supreme Court held that the traditional Tucker Act jurisdiction⁸¹ of the Court of Claims covered only suits against the United States for money judgments and that there was no clear indication of congressional intent in the Declaratory Judgment Act to broaden this jurisdiction.⁸²

⁷⁸FAR 52.233-1(c). While the dispute requirement, as applied to routine requests, would seem to have little utility beyond placing the contracting officer on notice of a perceived problem in the administration of the contract, its specific inclusion in the Disputes clause cannot be ignored.

⁷⁹28 U.S.C. § 2201 (1988).

⁸⁰395 U.S. 1 (1969).

⁸¹28 U.S.C. § 1491(a) (1988).

⁸²The Court reaffirmed its ruling in *King* in *United States v. Testan*, 424 U.S. 392 (1976), shortly before the passage of the Contract Disputes Act.

In 1976, Congress passed the Contract Disputes Act, which provided, in relevant part, that in lieu of appealing the decision of the contracting officer to an agency board, the contractor could bring the action directly on the claim in the Court of Claims.⁸³ In conjunction with the passage of the Contract Disputes Act, the Tucker Act was amended to grant the Claims Court jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act.⁸⁴ A third piece of legislation, the Federal Courts Improvement Act of 1982,⁸⁵ which abolished the Court of Claims and created the Claims Court and the Court of Appeals for the Federal Circuit, vested the Claims Court with the exclusive power to grant declaratory relief with regard to any claim brought before contract award.⁸⁶

Whatever the intent of Congress, the aforementioned legislative acts have not been universally recognized as either limiting or expanding the jurisdiction of the Claims Court to grant declaratory relief.⁸⁷ Following their enactment, the Claims Court continued the Court of Claims' policy of refusing to grant purely declaratory relief.⁸⁸ The Claims Court, however, has held it can grant declaratory relief if the request is coupled with, and subordinate to, a monetary claim.⁸⁹

⁸³41 U.S.C. § 609(a)(1) (1988).

⁸⁴28 U.S.C. § 1491(a)(2) (1988).

⁸⁵Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in pertinent part at 28 U.S.C. § 1491 (1988)).

⁸⁶28 U.S.C. § 1491(a)(3) (1988).

⁸⁷Nash, in his article, *Contractors' Nonmonetary Claims: The "Declaratory Judgment" Red Herring*, The Nash & Cibinic Report, Nov. 1987, para. 84, expressed the opinion that the Disputes Act and the amended Tucker Act make it "abundantly clear" that the Claims Court has the same declaratory judgment power as the boards. See also Schooner, *More Bites of Red Herring: Claims Court/BCA Differences in Handling Default Terminations*, The Nash & Cibinic Report, April 1988, para. 21. Other commentators believe it equally clear that legislation has not conferred declaratory powers on the Claims Court. See Schweiter, *Post-Award Declaratory Judgment Jurisdiction of the Claims Court and BCA Over Non-Monetary Claims: Faithful Statutory Construction or the Abdication of Judicial Responsibility* 18 Pub. Cont. L.J. 277 (Mar. 1989); Kosarin, *Nonmonetary Contract Interpretation at the Board of Contract Appeals*, The Army Lawyer, Sept. 1985, at 11.

⁸⁸See *Placeway Construction Corp. v. United States*, 18 Cl. Ct. 159, 163 (1989); *Citizens Associates, Ltd. v. United States*, 12 Cl. Ct. 599, 600 (1987); *Industrial Coatings, Inc. v. United States*, 11 Cl. Ct. 161, 164 (1986); *Alan J. Haynes Construction v. United States*, 10 Cl. Ct. 526, 528 (1986); *Gunn-Williams v. United States*, 6 Cl. Ct. 820, 824 (1984); *Austin v. United States*, 206 Ct. Cl. 719, 723, cert. *h i e d.*, 423 U.S. 911 (1975). But see *Ralcon, Inc. v. United States*, 13 Cl. Ct. 294, 301 (1987) (language in Tucker Act (28 U.S.C. § 1491(a)(2)) held sufficiently express to waive the sovereign immunity of the United States to suits for declaratory relief by a contractor appealing a contracting officer's demand for the return of progress payments); *Z.A.N. Co. v. United States*, 6 Cl. Ct. 298, 307 (1984) (portion of claim seeking a determination that a termination was not for default held properly before the court).

⁸⁹See *A & S Council Oil Co., 16 Cl. Ct. 743, 748 (1989)*; *Fidelity & Deposit Co. of Maryland v. United States*, 14 Cl. Ct. 421, 423 (1988); *McEniry v. United States*, 7 Cl. Ct. 622, 625 (1985).

The agency boards, unlike the Court of Claims, routinely granted declaratory relief, absent a monetary claim, in pre-Contract Disputes Act cases.⁹⁰ The passage of the Contract Disputes Act created confusion as to the authority of the boards to grant purely declaratory relief. The Act provides, in pertinent part, that:

(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes⁹¹

Commentators⁹² and the various agency boards have disagreed as to whether the language of the Act was intended to continue the prior board practice of granting declaratory relief, or, by making the jurisdiction of the boards parallel that of the Claims Court, limit the boards to those forms of relief available in the Claims Court.⁹³ Certainly, the language, "authorized to grant any relief that would be available . . . in the United States Claims Court," should not be read as restricting the boards to those forms of relief that the Claims Court could grant.

⁹⁰See generally Nash, *supra* note 87, at 183 (and cases cited therein); Schweiter, *supra* note 87, at 281-85 (and cases cited therein); Kosarin, *supra* note 87, at 13-14 (and cases cited therein); see also discussion of cases in Varo, Inc., DOT BCA No. 1696, 87-1 BCA ¶ 19,430, at 98,227-28.

⁹¹41 U.S.C. § 607(d) & (e) (1988).

⁹²Nash, *supra* note 87, at 183-84, reads the language of 41 U.S.C. § 607(d) as giving agency boards the same "all-disputes" authority that a contracting officer possesses, which would include the power to grant declaratory relief. Both Schweiter, *supra* note 87, at 318, and Kosarin, *supra* note 87, at 12-13, argue that the legislative history of the Act establishes that the agency boards were not given authority to grant declaratory relief on a non-monetary claim. Yet, Kosarin, *supra* note 87, at 12-13, 17, while agreeing with Schweiter that the Act did not give boards the authority to grant declaratory relief, further believed that the Act did not limit the boards' ability to fashion such relief. In his view, the ability of the boards to interpret contract terms where no monetary relief is sought "survived passage of the CDA." *Id.* at 17.

⁹³Professor Nash is of the opinion that, regardless of whether or not the Act grants declaratory judgment jurisdiction to the Claims Court and the agency boards, the Act's statutory scheme, as implemented by the FAR, independently gives those tribunals the power to decide nonmonetary claims. Nash, *supra* note 87, at 182.

Among the agency boards, the Armed Services Board of Contract Appeals,⁹⁴ the General Services Board of Contract Appeals,⁹⁵ the Postal Service Board of Contract Appeals,⁹⁶ and the Department of Transportation Board of Contract Appeals⁹⁷ have granted declaratory relief absent a monetary claim. The Veterans Administration Board of Contract Appeals has held it has the authority to issue declaratory judgments on matters of contract interpretation absent a monetary claim,⁹⁸ although it apparently has placed some limitation on the exercise of such authority.⁹⁹

The Department of Agriculture Board of Contract Appeals has taken the opposite view. In *Rough and Ready Timber Co.*,¹⁰⁰ a contract interpretation case not involving a monetary claim, the board's review of the legislative history of the Contract Disputes Act led it to conclude that the board's authority was limited to those forms of relief available to a litigant in the Court of Claims, and accordingly, the board lacked the power to grant the requested relief.¹⁰¹ In *Cedar Lumber, Inc.*,¹⁰² another contract interpretation case, the board noted that a declaratory judgment was an extreme remedy requiring a clear and specific waiver of sovereign immunity, and that such a waiver was not contained within the language of the Contract Disputes Act.¹⁰³ Interestingly, the Court of Appeals for the Federal

⁹⁴See General Electric Automated Systems Division, ASBCA No. 36214, 89-1 BCA ¶ 21,195 (technical data dispute); Systron Donner, Inertial Division, ASBCA No. 31148, 87-3 BCA 120,066; Advanced Computer, ASBCA No. 30128, 85-3 BCA ¶ 18,171; McDonnell Douglas Corp., ASBCA No. 26747, 83-1 BCA ¶ 16,377, *aff'd in part, rev'd in part*, 754 F.2d 365 (Fed. Cir. 1985) (board concluded that the Contract Disputes Act (CDA) did not reduce its pre-CDA power to issue declaratory judgments). The board in *McDonnell* reasoned that the Declaratory Judgment Act did not apply to administrative tribunals like the boards of contract appeals, and accordingly, there was no specific statutory prohibition against boards granting declaratory relief, such as applied to the Claims Court. *Id.* at 81,420.

⁹⁵See GT Warehousing Co., GSBCA No. 6860, 84-1 BCA ¶ 17,006; Ulric McMillan, GSBCA Nos. 7029-COM, 7070-COM, 83-2 BCA ¶ 16,595.

⁹⁶See Roger Dean Barrett, PSBCA No. 2490, 89-3 BCA 122,220; Great Eastern Holding Co., PSBCA No. 1128, 83-2 BCA ¶ 16,784.

⁹⁷See Dr. Michael M. Grinberg, DOT BCA No. 1543, 87-3 BCA 120,102; Sentell Brothers, Inc., DOT BCA No. 1824, 87-2 BCA ¶ 19,785; Varo, Inc., DOT BCA No. 1695, 87-1 BCA ¶ 19,430 (board concluded that the CDA did not reduce the board's jurisdiction).

⁹⁸Smith's Inc. of Dothan, VABCA No. 2198, 85-2 BCA ¶ 18,133.

⁹⁹See Jones Plumbing and Heating Inc., VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659. In *Jones* the board refused to exercise jurisdiction over a number of contract interpretation issues. The board stated it would decline to issue declaratory judgments except in cases in which "it is clear that the dispute over an interpretation has reached the point where one or the other of the parties has been required to alter its contractual position or method of performance and will likely incur costs in the foreseeable future." *Id.* at 93,852.

¹⁰⁰AGBCA Nos. 81-171-3 et al., 81-2 BCA 1 15,173.

¹⁰¹See also Pine Mountain Lumber Co., AGBCA No. 83-194-1, 83-2 BCA ¶ 15,173.

¹⁰²AGBCA No. 85-222-1, 85-3 BCA ¶ 18,346, *rev'd*, 799 F.2d 743 (Fed. Cir. 1986).

¹⁰³*Id.* at 92,003.

Circuit reversed the board in the *Cedar* case, finding that the board erred in holding it lacked jurisdiction because the contractor appeared to be requesting a declaratory judgment.¹⁰⁴ The Agriculture Board has refused to grant declaratory relief unless combined with a monetary claim.¹⁰⁵ Nevertheless, when the board was confronted with contract interpretation issues, it did not require a monetary claim in default termination cases.¹⁰⁶

The Engineer Board of Contract Appeals has refused to issue a declaratory judgment without a monetary claim when the contractor is seeking only a contract interpretation.¹⁰⁷ The board retained jurisdiction over a default termination after dismissing the accompanying uncertified monetary claim.¹⁰⁸ The Department of the Interior Board of Contract Appeals apparently has adopted a similar approach.¹⁰⁹

The jurisdictional confusion could be resolved by the Court of Appeals for the Federal Circuit and, to some degree, it has been. In *Lisbon Contractors, Inc. v. United States*,¹¹⁰ a case involving a default termination, the court recognized, but declined to resolve, the jurisdictional differences between the Claims Court and the boards. In

¹⁰⁴799 F.2d 743 (Fed. Cir. 1986). The court held that "the board committed error . . . by ruling that it had no jurisdiction because Cedar actually sought a declaratory judgment (without calling it that) which is not authorized by the Contract Disputes Act. We find it unnecessary here to decide whether the board could grant such a judgment in a proper case." *Id.* at 745.

¹⁰⁵See also *South Coast Lumber Co.*, AGBCA Nos. 84-267-1, 84-268-1, 86-1 BCA ¶ 18,662 (contractor's request for contract term adjustments and rate determinations dismissed because board lacked jurisdiction absent damage claims); *J & J Shake, Inc.*, AGBCA No. 83-263-1, 86-1 BCA ¶ 18,663 (contractor's request for contract term adjustment dismissed for lack of jurisdiction because no claim for monetary damages asserted).

¹⁰⁶See *Western Machinery Co.*, AGBCA No. 83-266-1, 87-3 BCA ¶ 20,085; *Schmalz Construction Ltd.*, AGBCA Nos. 86-207-1, 86-229-1, 87-1 BCA ¶ 19,575.

¹⁰⁷See *Guy F. Atkinson*, ENG BCA No. 4785, 83-1 BCA ¶ 16,406 (board, after reviewing the Contract Disputes Act and the Federal Courts Improvement Act, concluded that Congress had intentionally withheld declaratory judgment authority (not coupled with a monetary claim) from both the Claims Court and the boards of contract appeals).

¹⁰⁸*Almeda Industries, Inc.*, ENG BCA No. 5148, 87-1 BCA ¶ 19,401.

¹⁰⁹See, e.g., *Walden General, Inc.*, IBCA No. 1475-6-81, 82-2 BCA ¶ 16,090, at 79,804 n.1 (board dismissed one of the contractor's claims because it sought a declaratory judgment which the board considered outside its authority to issue); *Husky Oil NPR Operations, Inc.*, IBCA No. 1792, 86-1 BCA ¶ 18,568 (board declined to dismiss a request for declaratory relief, but only because it was intertwined with other monetary claims, arising out of the same fact situation, already before the board); *Philomath Timber Co.*, IBCA No. 2409, 89-1 BCA ¶ 21,418 (board had jurisdiction over an appeal involving the propriety of a default termination unaccompanied by any monetary claim because boards of contract appeals have jurisdiction to hear all claims arising out of contract).

¹¹⁰828 F.2d 759 (Fed. Cir. 1987).

1988, the court, in *Malone v. United States*,¹¹² provided definitive guidance with respect to default terminations, but limited its holding to the agency boards.¹¹² The court cited the Transportation Board's opinions in *Grinberg* and *Varo*¹¹³ in support of its conclusion that Congress, in enacting the Contract Disputes Act, actually expanded the jurisdiction of the boards. Accordingly, the Court held that the Act granted the boards jurisdiction over default terminations unaccompanied by a monetary claim.¹¹⁴ The court viewed a monetary claim as unnecessary for jurisdiction because the issue of the validity of a default termination is "money oriented."¹¹⁵ The court subsequently reaffirmed its holding in *Malone* in *Johnson & Gordon Securities v. General Services Administration*.¹¹⁶

Starting with the holding in *Malone* that boards have jurisdiction over default terminations unaccompanied by any claim for specific monetary relief, Judge Turner of the Claims Court, in *Claude E. Atkins Enterprises, Inc. v. United States*,¹¹⁷ concluded that the Claims Court also had jurisdiction over such claims.¹¹⁸ He based his reasoning on section 609(a)(1) of the Contract Disputes Act—which made the jurisdiction of the agency boards and the Claims Court coexten-

¹¹¹849 F.2d 1441 (Fed. Cir. 1988).

¹¹²*Id.* at 1444. After reviewing the Claims Court cases holding that that court lacked jurisdiction over default terminations absent a claim for money, the court stated: "This court has not yet considered, nor does it now consider, the validity of the Claims Court precedent just noted. We are here concerned with only deciding whether the CDA grants the BCAs jurisdiction over default terminations absent a monetary claim by the parties."

¹¹³See *supra* note 97.

¹¹⁴Though not requiring a money claim, the court did regard default terminations as being "inextricably linked" to the financial liability of both the government and the contractor. *Id.* at 1445. Cibinic has questioned what result would obtain where neither party would have a money claim (i.e., contractor made no expenditures and government made no progress payments and did not procure). Cibinic, *Nonmonetary Claims: One Small Step for Man*, The Nash & Cibinic Report, Oct. 1988, para. 61. While possibly too remote or speculative to be considered "inextricably linked," a contractor who has been defaulted can lose its bondability as a result or face higher premiums. When future bondability may be adversely affected, a contractor should argue that the "money oriented" requirement is satisfied, even in the absence of identifiable expenditures. Another adverse consequence of a default termination is the possibility of the contractor's debarment. See *Malone*, 849 F.2d at 1445.

¹¹⁵*Malone*, 849 F.2d at 1445.

¹¹⁶857 F.2d 1435, 1437-38 (Fed. Cir. 1988).

¹¹⁷15 Cl. Ct. 647 (1988).

¹¹⁸*Atkins* adopts the *Malone* rationale that default terminations are, by their nature, money oriented. *Id.* at 647 n.4. By doing so, *Atkins* did not depart from the Claims Court's consistent position that "the sine qua non for jurisdictional purposes in [the Claims Court] is that such actions, claims and disputes be money oriented in some way." *Industrial Coatings, Inc. v. United States*, 11 Cl. Ct. 161, 164 (1986) (citing *Williams International Corp. v. United States*, 7 Cl. Ct. 726, 731 (1985)).

sive with respect to review of contracting officer decisions¹¹⁹—and the Tucker Act, as amended—which permitted the Claims Court to exercise jurisdiction to render judgment upon "any claim by or against, or dispute with, a contractor arising under [41 U.S.C. § 609(a)(1)]."¹²⁰ *Atkins* has been followed in several subsequent Claims Court opinions.¹²¹

While these cases may be viewed with cautious optimism, a decision by the Court of Appeals for the Federal Circuit will be required before it safely can be said that, as to default terminations, the Claims Court and the agency boards have adopted a uniform approach.¹²² In the interim, contractors should heed the following guidance:

1. Default terminations should be appealed to an agency board. Appeals of default terminations should not be taken to the Claims Court unless a full monetary claim for a settlement under a termination for convenience clause has been presented to the contracting officer.

2. Other types of nonmonetary claims, such as contract interpretation, also should be pursued before the agency boards instead of the Claims Court. In bringing such claims, the contractor should not identify the claim as a request for a declaratory judgment, but rather, as a request for a determination of the contractor's rights under the contract.¹²³

D. CONVERSION OF GOVERNMENT CLAIMS

The Contract Disputes Act does not define a government claim. The Act merely provides that all claims by the government against a contractor relating to a contract shall be the subject of a decision

¹¹⁹Judge Turner relied on 41 U.S.C. § 609(a)(1), which provides, in pertinent part [I]n lieu of appealing the decision of the contracting officer . . . to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

¹²⁰28 U.S.C. § 1491(a)(2) (1988).

¹²¹See *Russell Corp. v. United States*, 15 Cl. Ct. 760, 762 (1988); *Crippen & Graen Corp. v. United States*, 18 Cl. Ct. 237, 239 (1989).

¹²²At least one commentator has predicted that the requisite Federal Circuit opinion would follow shortly after *Atkins*. See Nash, *Postscript: Claims Court Jurisdiction Over Default Termination Claims*, The Nash & Cibinic Report, Feb. 1989, para. 15. While such an expectation was certainly reasonable, it must be noted that almost two years have elapsed since *Atkins*, and the Court of Appeals for the Federal Circuit has yet to address the issue of the Claims Court's jurisdiction.

¹²³See Nash, *supra* note 87, at 185-86; see also Schooner, *supra* note 87, at 56-57.

by the contracting officer.¹²⁴ The significance of the contractor/government claim distinction is twofold.¹²⁵ First, the Act limits the payment of interest on amounts found due the contractor to those claims the contracting officer receives from the contractor.¹²⁶ Second, the Act's certification requirement for claims applies only to contractor claims.¹²⁷ While the classification of an uncertified claim as a government claim is important insofar as it precludes dismissal for lack of certification, contractors are generally more interested in converting a government claim into a contractor claim to collect interest on monies owed. Accordingly, relevant decisions of the courts and boards will be analyzed to ascertain what type of claims require conversion and by what steps or procedures the conversion is accomplished.

Because the Contract Disputes Act does not set forth a methodology for identifying government claims, the necessary guidance must be gleaned from case law. The allocation of the burden of proof frequently has been cited as the "appropriate algorithm to determine the identity of the [claimant]"¹²⁸ Another method of identifying whether a claim is a government or a contractor claim is to look at which party is in possession of the disputed monies and which party is seeking payment.¹²⁹ In *Cecile Industries, Inc. v. United States*³⁰ the government withheld payment on invoices submitted by the contractor. The Claims Court concluded that, because the

¹²⁴41 U.S.C. § 605(a) (1988); see also *Morton v. United States*, 757 F.2d 1273 (Fed. Cir. 1985); *Cord Moving & Storage Co. v. United States*, 17 Cl. Ct. 741 (1989); *Teledyne MEC*, ASBCA Nos. 35680, 35681, 89-1 BCA 121,334.

¹²⁵Two other distinctions merit mention. Unlike contractor claims, an agency board, in the event of undue delay, may not direct a contracting officer to issue a decision on a government claim. 41 U.S.C. § 605(c)(4). See *Mutual Maintenance Co.*, GSBICA No. 7496, 85-2 BCA ¶ 18,098, at 90,857. In the same vein, the failure of a contracting officer to issue a final decision on a government claim will not be deemed a final decision denying the claim. 41 U.S.C. § 605(c)(5) (1988); see *The Boeing Co.*, ASBCA No. 37579, 89-3 BCA 121,992, at 110,596.

¹²⁶41 U.S.C. § 611 (1988); see also *Ruhnau-Evans-Ruhnau Associates v. United States*, 3 Cl. Ct. 217, 218-19 (1983) (interest under the Act may not be paid to a contractor where a tribunal has denied a government claim and has awarded the contractor a recovery of monies collected by the government on that claim by administrative offset).

¹²⁷41 U.S.C. § 605(c)(1) (1988).

¹²⁸*Equitable Life Assurance Society of the United States*, GSBICA No. 7699-R, 87-2 BCA ¶ 19,733, at 99,899; *Mutual Maintenance Co.*, GSBICA No. 7496, 85-2 BCA ¶ 18,098, at 90,857; see also *Advance Building Maintenance Co.*, GSBICA No. 8852, 88-2 BCA 120,721, at 104,711 (Devine, J., dissenting) (a government claim is a claim which the government must initiate and on which the government has the burden of nonpersuasion if its actions are challenged).

¹²⁹The Claims Court, in *Cecile Industries, Inc. v. United States*, 18 Cl. Ct. 730, 733 (1989), made the following observation: "[Contractor] argues that the happenstance of who has the money cannot determine whether the dispute is a government claim or a contractor claim, but the [Contract Disputes Act] seems to contemplate precisely such a distinction."

¹³⁰18 Cl. Ct. 730 (1989).

government had merely retained the funds now in dispute, the contractor was making the demand, and accordingly, the claim.¹³¹ In *Mutual Maintenance Co.*,¹³² however, the General Services Board of Contract Appeals reached the opposite conclusion, holding that monies due a contractor but retained by the government by means of administrative offset involved a government claim.¹³³ The board reasoned that the contractor did not bear the burden of proof in terms of challenging the deductions, but that the burden of proof was on the government to justify its deductions. The board also noted that it would be illogical to require the contractor to certify a claim to recover deductions proposed and taken by the government.¹³⁴ Irrespective of which is the better reasoned position, the contractor must recognize that if an offset is viewed as a government claim, no interest will accrue to the contractor unless steps are taken to convert the claim to a contractor claim.

In *General Dynamics Corp.*¹³⁵ the government attempted to disallow costs already paid to the contractor. The Armed Services Board declined to decide whether the claim before it was properly classifiable as a government claim or a contractor claim, noting that:

In a case where costs have been incurred by a contractor and such costs have been provisionally paid by the Government, one can persuasively argue that when the Government seeks to disallow and recover moneys paid, it ought to be the Government's claim. Equally persuasive, however, is the argument that since the contractor is the one that incurs the costs, and seeks to demonstrate . . . that it is entitled to such costs, it should at least claim the costs when the Government seeks to disallow them.¹³⁶

In later decisions, however, the Armed Services Board held that when the government is seeking to recoup funds already paid the contrac-

¹³¹*But see* *Placeway Construction Corp. v. United States*, 18Cl. Ct. 159, 164 (1989) (court concluded that the government's assertion of its right to set off was the equivalent to the assertion of a government claim within the meaning of the FAR).

¹³²GSBCA No. 7496, 85-2 BCA ¶ 18,098.

¹³³The board cited two Armed Services Board opinions in support of its holding: *Perkins & Will*, ASBCA No. 28335, 84-1 BCA ¶ 16,953; *General Dynamics Corp., Electric Boat Div.*, ASBCA No. 25919, 82-1 BCA ¶ 15,616. *Id.* at 90,857; *see also* *Fruit Growers Express Co.*, ASBCA No. 28951, 84-1 BCA ¶ 17,158.

¹³⁴*Id.* at 90,857.

¹³⁵ASBCA No. 30642, 86-3 BCA ¶ 19,231.

¹³⁶*Id.* at 97,231. The board was able to avoid deciding which party was the claimant by finding that no claim existed for lack of a contracting officer's final decision.

tor, the dispute should be deemed a government claim.¹³⁷ While a clear definition of what constitutes a government claim has not been agreed upon by the courts and boards,¹³⁸ certain types of claims are generally treated as government claims. These include administrative setoffs;¹³⁹ assessments of liquidated damages;¹⁴⁰ unilateral contract modifications permitting the government to exercise options;¹⁴¹ downward adjustments of the contract price;¹⁴² and the government's disallowance of certain contract costs already paid to the contractor.¹⁴³

One area of confusion that finally was resolved by the Court of Appeals for the Federal Circuit in *Malone* was default terminations. The court held that a government decision to terminate a contractor for default is a government claim that the contractor can appeal to the appropriate board without having to submit a monetary claim of its own to the contracting officer.¹⁴⁴ If the default is held to be proper, the contractor is liable for the government's excess procurement costs. If the default is held to be improper, the government will be liable for the contractor's termination for convenience costs. Although the contractor may recover convenience termination costs

¹³⁷The Boeing Co., ASBCA No. 36612, 89-1 BCA ¶ 21,421; LTV Aerospace & Defense Co., ASBCA No. 36036, 88-2 BCA ¶ 20,752. The holding that government recoupment efforts constitute a government claim is consistent with prior opinions of the board. See cases cited *supra* note 133.

¹³⁸See LTV Aerospace & Defense Co., ASBCA No. 35674, 89-2 BCA ¶ 21,858 ("Neither case law nor statute clearly define what constitutes a 'government claim' . . . under the Contract Disputes Act"). *Id.* at 109,950.

¹³⁹See Placeway Construction Corp. v. United States, 18 Cl. Ct. 159 (1989); see also Mutual Maintenance Co., GSBCA No. 7496, 85-2 BCA ¶ 18,098. *But see* Cecile Industries, Inc. v. United States, 18 Cl. Ct. 730 (1989) (government withholding of payments neither a government nor a contractor claim; held not a claim because no demand for money involved).

¹⁴⁰Elgin Builders, Inc. v. United States, 10 Cl. Ct. 40 (1986); see also Crippen & Graen Corp. v. United States, 18 Cl. Ct. 237, 240 (1989); Z.A.N. Co. v. United States, 6 Cl. Ct. 298, 304 (1984); Evergreen International Aviation, Inc., PSBCA No. 2468, 89-2 BCA 121,712.

¹⁴¹The Boeing Co., ASBCA No. 37579, 89-3 BCA ¶ 21,992.

¹⁴²Siebe North, Inc., and Norton Co., ASBCA No. 34366, 89-1 BCA ¶ 21,487.

¹⁴³LTV Aerospace & Defense Co., ASBCA No. 36036, 88-2 BCA ¶ 20,752; see also General Dynamics Corp., ASBCA No. 31359, 86-3 BCA ¶ 19,008; Data-Design Laboratories, ASBCA No. 27535, 85-3 BCA ¶ 18,400.

¹⁴⁴849 F.2d at 1443 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987); *Z.A.N. Co. v. United States*, 6 Cl. Ct. 298 (1984); *James Reedom, d/b/a J & M Electronic*, ASBCA No. 30226, 85-1 BCA ¶ 17,879); see also *The Russell Corp. v. United States*, 15 Cl. Ct. 760, 762 (1988); *Almeda Industries, Inc.*, ENG BCA No. 5148, 87-1 BCA ¶ 19,401.

without filing a separate claim, the contractor apparently cannot recover interest thereon.¹⁴⁵

In conclusion, default terminations, as with other types of government claims, must be converted to, or accompanied by, a contractor claim to invoke the Contract Disputes Act's interest provision.¹⁴⁶ In reality, the term "convert" is somewhat misleading, as no metamorphosis occurs. Rather, the contractor must file its own claim with the contracting officer.¹⁴⁷ Merely contesting a government claim will not suffice.

III. THE DEMAND

The Contract Disputes Act requires that all claims by a contractor against the government relating to a contract be in writing and be submitted to the contracting officer for a decision.¹⁴⁸ While the Act sets forth the procedural requirements for the submission of a claim, it leaves unanswered the question of what documentation must be submitted. The FAR definition of a claim requires that the submission contain a "written demand or written assertion . . . seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."¹⁴⁹ While neither "demand" nor "assertion" is further defined, the FAR guidance that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim,"¹⁵⁰ by exclusion, requires the contractor to put the contracting officer on notice that a contract problem exists that the contracting officer must resolve or rectify. Because contract problems are numerous and varied, no demand format has been legislatively or judicially created, nor would one be appropriate. What constitutes a demand requires a case-by-case

¹⁴⁵In *Berna Gunn-Williams v. United States*, 6 Cl. Ct. 820 (1984), the court concluded that the contractor went beyond merely defending against the government's termination for default and asserted an affirmative claim for termination for convenience costs. *Id.* at 823. The court determined that the affirmative claim was defective because it was not certified and was not submitted to the contracting officer for a final decision. However, had the affirmative claim been properly submitted, and the default termination been determined improper, the contractor would have been entitled to its termination for convenience costs and the interest thereon.

¹⁴⁶*See* 41 U.S.C. § 611 (1988).

¹⁴⁷The contractor's claim must comply with the Act's submission requirements. *See RSH Constructors, Inc. v. United States*, 14 Cl. Ct. 655, 660 (1988); *A & J Construction Co.*, IBCA No. 2269, 87-3 BCA ¶ 19,965.

¹⁴⁸41 U.S.C. § 605(a) (1988).

¹⁴⁹FAR 33.201; FAK 52.233-1(c).

¹⁵⁰*Id.*

analysis,¹⁵¹ with the courts and boards examining the language and content of the claim to determine its **sufficiency**.¹⁵²

A. CLAIM LANGUAGE

The Contract Disputes Act has not required, nor has case law created the requirement, that the claim be submitted in any particular form or use any particular **wording**.¹⁵³ As succinctly stated by the United States Claims Court, “[N]o magic words are required by the **statute**.”¹⁵⁴ The submission, however worded, must manifest a positive, present intent to seek relief as a matter of **right**.¹⁵⁵ The demand must be a clear and unequivocal statement that gives the contracting officer notice of the basis and amount of the **claim**.¹⁵⁶ Adequate notice can be either actual or **constructive**.¹⁵⁷ Whether a communication constitutes sufficient notice to trigger the contracting officer’s obligation to render a final decision depends on the totality of the contractor’s **communications**.¹⁵⁸ Accordingly, a series of documents, letters, or other forms of correspondence will be read together to determine if they adequately apprise the contracting officer of the nature of the contractor’s **claim**.¹⁵⁹ Communications between the contractor and the contracting officer will be liberally construed in determining whether a claim has been properly **asserted**.¹⁶⁰

¹⁵¹*Technassociates, Inc. v. United States*, 14 Cl. Ct. 200, 209 (1988); *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176 (1981).

¹⁵²The demand, as analyzed within the context of this paper, is viewed as a requisite element of a valid claim. Courts and boards frequently use the terms “demand” and “claim” interchangeably. One commentator draws a legal distinction between the two terms. See Bugge, *So You Think You Have a Claim*, 16 Pub. Cont. L. J. 298 (1986). Bugge defines “demand” as an assertion of an entitlement. According to Bugge, the contractor’s demand, if rejected by the contracting officer, may be appealed, the appeal being the legally cognizable claim. *Id.* at 304-05. Bugge argues that the distinction is one of substance, not semantics. The author’s research, however, uncovered no cases in which a board or court’s failure to draw this distinction could fairly be said to have resulted in a faulty analysis.

¹⁵³*Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *City of El Centro v. United States*, 17 Cl. Ct. 794, 799 (1989); *Metric Construction Co. v. United States*, 1 Cl. Ct. 383, 392 (1983); *Insurance Co. of the West*, ASBCA No. 35253, 88-3 BCA 121,056.

¹⁵⁴*West Coast General Corp. v. United States*, 19 Cl. Ct. 98, 100 (1989).

¹⁵⁵*Essex Electro Engineers, Inc.*, DOTCAB No. 1025, 81-1 BCA ¶ 15,109; see also *Sims Paving Corp.*, DOT BCA No. 1822, 87-2 BCA ¶ 19,928; *Harry Brown, Inc.*, ENG BCA No. 5263, 86-3 BCA ¶ 19,078.

¹⁵⁶*Contract Cleaning*, 811 F.2d at 592; *West Coast*, 19 Cl. Ct. at 100; *Gauntt Construction Co., Inc.*, ASBCA No. 33323, 87-3 BCA 120,221.

¹⁵⁷*Essex*, 81-1 BCA ¶ 15,109, at 74,747.

¹⁵⁸*Winding Specialists Co., Inc.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737 (citing *Dave’s Excavation*, ASBCA No. 35533, 88-2 BCA 120,745; *Fuel Storage Corp.*, ASBCA No. 26994, 83-1 BCA ¶ 16,418).

¹⁵⁹*Alliance Oil & Refining Co. v. United States*, 13 Cl. Ct. 496, 499 (1987), *aff’d*, 856 F.2d 201 (1988).

¹⁶⁰*Sims*, 87-2 BCA ¶ 19,928, at 100,836.

Factors to be considered in assessing the claim are whether the contractor asserted specific rights, requested specific relief, or requested that the contracting officer render a final decision.¹⁶¹ Because the determination of whether or not a proper demand has been made requires a case-by-case examination of the correspondence between the contractor and the contracting officer, there are few definitive analytical guidelines. In formulating guidance, the courts and boards have looked variously to the legislative history of the Contract Disputes Act, federal regulations, and the terms of the contract at issue.¹⁶²

1. Written Submission to Contracting Officer

One specific, easily applied requirement is that the claim must be in writing.¹⁶³ A second clearly defined requirement is that the demand or claim be made to the contracting officer.¹⁶⁴ Submission of the claim to the contracting officer has been referred to as the "essential first step" in the contract disputes process.¹⁶⁵ In *West Coast General Corp. v. United States*¹⁶⁶ the United States Claims Court held that the contractor's submission of correspondence to the resident officer in charge of construction (ROICC) invalidated the claim because it was not submitted to the contracting officer. The contractor's contention that the requirement was a "meaningless formality" because the ROICC forwarded the claim and the contracting officer issued a final decision was rejected by the court.¹⁶⁷ The court stated that "[s]trict compliance with the [Contract Disputes] Act is important so that the contracting officer will know what he is dealing with, and what he is expected to do."¹⁶⁸ Because the contracting

¹⁶¹*West Coast*, 19 Cl. Ct. at 100 (citing *Tecom, Inc. v. United States*, 732 F.2d 935, 936 (Fed. Cir. 1984); *Z.A.N. v. United States*, 6 Cl. Ct. 298, 304 (1984)).

¹⁶²*RSH Constructors, Inc. v. United States*, 14 Cl. Ct. 655, 657 (1988).

¹⁶³41 U.S.C. § 605(a) (1988); FAR 33.201 and 52.233-1(c); *see also* *Brener Building Maintenance Co., Inc.*, ASBCA No. 35726, 88-2 BCA ¶ 20,786 (Contracting officer issued a decision after two telephone conversations with contractor. Decision held invalid since not preceded by a written demand); *Checker Moving*, ASBCA No. 32654, 87-1 BCA ¶ 19,357 (the contractor's telephone conversation with the contracting officer did not constitute a claim "in writing"); *Adroit Manufacturing, Inc.*, DOT CAB No. 1598, 85-3 BCA ¶ 18,215 (oral claim for monetary damages did not satisfy submission requirement that claim be written).

¹⁶⁴41 U.S.C. § 605(a) (1988); FAR 33.206(a) and 52.233-1(d)(1); *see also* *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612, 614 (1990); *Freeman General, Inc.*, ASBCA No. 34611, 89-2 BCA ¶ 21,809; *BRS Contracting Co., Inc.*, GSBCA No. 7945, 89-2 BCA ¶ 21,884; *Integral Biomedics Engineering, Inc.*, IBCA No. 2069, 88-2 BCA ¶ 20,570.

¹⁶⁵*Palmer & Sicard, Inc. v. United States*, 6 Cl. Ct. 232, 235 (1984).

¹⁶⁶19 Cl. Ct. 98 (1989).

¹⁶⁷*Id.* at 100-01.

¹⁶⁸*Id.*

officer had issued a final decision denying the contractor's claim, the court's rationale clearly was inapplicable to the realities of the case.

In *Souter Asphalt Paving*¹⁶⁹ the Armed Services Board of Contract Appeals held that a contractor's letter, addressed to the authorized representative of the contracting officer, did not constitute a valid submission because the representative lacked the authority to render a final decision. The board reasoned that the requirement that the claim be submitted to the contracting officer meant that the claim must be decided by the person having authority under the contract to render a final decision.¹⁷⁰ In *F.J. Zeronda, Inc.*¹⁷¹ the contractor mailed, but the contracting officer did not receive, a claim letter. The board held it lacked jurisdiction because the contractor could not establish compliance with the submission requirement.

The results in *Souter Asphalt* and *Zeronda* fully comport with the intent of the Contract Disputes Act that disputes be addressed initially at the contracting officer level. As stated by the United States Court of Appeals for the Federal Circuit, the contracting officer is:

[A] person with expertise in the administration of Government contracts - often in the field of the contract in issue. Also, the [contracting officer] has had experience in dealing with the parties in the suit and is likely to understand the problems involved and the claims asserted by each party. It is, therefore, appropriate for the [contracting officer] to render a decision on claims before they are asserted elsewhere.¹⁷²

The contracting officer's final decision is the "linchpin"¹⁷³ of the disputes process, and submission of a claim is a prerequisite to consideration of that claim. A failure of submission—as in *Zeronda*—or submission to the wrong person—as in *Souter Asphalt*—precludes a final decision by the contracting officer. The holding in *West Coast General*, however, invalidated a contracting officer's final decision and is logically indefensible. Further, the result is not mandated by a strict construction of the language of 41 U.S.C. § 605(a), which simp-

¹⁶⁹ASBCA No. 35205, 88-1 BCA 120,277.

¹⁷⁰*Id.* at 102,617.

¹⁷¹ASBCA No. 36253, 88-3 BCA 121,165.

¹⁷²*Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280 (Fed. Cir. 1985).

¹⁷³*Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 177, 645 F.2d 966, 967 (1981). Of course, as caustically noted by one administrative judge, "[S]ince its enactment, the Contract Disputes Act has acquired as many 'linchpins' as a wagon train." *Gauntt Construction Co., Inc.*, ASBCA No. 33323, 87-3 BCA ¶ 20,221.

ly states that claims "shall be submitted to the contracting officer for a decision."¹⁷⁴ The court in *West Coast General* has inserted the requirement that the submission be made *directly* to the contracting officer. This additional requirement does not further the intent of the Act that matters be resolved by the contracting officer; it serves no purpose other than to provide another hypertechnical, albeit incorrect, basis for dismissal.

2. Contractor Correspondence: Claim v. Settlement Posture

While the writing and submission requirements are, or were intended to be, easily applied and objective standards, the collective assessment of contractor-contracting officer correspondence to determine the validity of a claim seems to be largely a subjective analysis. As previously noted, no magic words exist to assist the courts and boards in their review, though some cases have considered the use, or non-use, of the word "claim" in the contractor's correspondence as pertinent to the assessment of the validity of the claim.¹⁷⁵

While the Act itself imposes no obligation on the contractor to request a final decision from the contracting officer,¹⁷⁶ the requirement that the contractor's demand be submitted to the contracting officer for a written decision¹⁷⁷ has been uniformly interpreted as requiring the contractor to make such a demand.¹⁷⁸ A formal demand is not required,¹⁷⁹ although the demand, either explicitly or implicitly, must

¹⁷⁴41 U.S.C. § 605(a) (1988).

¹⁷⁵*West Coast*, 19 Cl. Ct. at 101 (court considered contractor's consistent use of the word "claim" in its correspondence in assessing claim); *Mayfair Construction Co.*, ASBCA No. 30800, 87-1 BCA 19,542, at 98,748 (Duvall, J., dissenting) ("I also find that the labelling of appellant's proposal as a claim under the CDA is an implicit demand for a contracting officer's decision"); *Canadian Commercial Corp.*, ASBCA No. 34257, 88-1 BCA ¶ 20,224 (board's conclusion that submission was not a claim based, in part, on contractor's failure to use the word "claim" in letter to contracting officer). *But see* *San Antonio Foam Fabricators*, ASBCA No. 36637, 88-3 BCA ¶ 21,058 (invalid claim: although the contractor's letter used the word "claim," it did so in the context of an offer to settle the grievance through negotiation).

¹⁷⁶*See generally* 41 U.S.C. § 605(a) (1988).

¹⁷⁷41 U.S.C. § 605(a) (1988); FAR 33.201, 33.206, and 52.233-1(d)(1).

¹⁷⁸*See generally* *ReCon Paving, Inc. v. United States*, 745 F.2d 34 (Fed. Cir. 1984); *Gardner Machinery Corp. v. United States*, 14 Cl. Ct. 655 (1988); *Structural Painting Corp.*, ASBCA Nos. 36813, 37305, 89-2 BCA ¶ 21,605; *John S. Vayanos Contracting Co., Inc.*, PSBCA No. 2317, 89-1 BCA 4 21,494; *Columbia Engineering Corp.*, IBCA Nos. 2351, 2352, 88-2 BCA 120,595; *M.G.C. Co.*, DOTCAB No. 1553, 85-1 BCA ¶ 17,777. *But see* *Kleen Rite Corp.*, GSBCA No. 1893, 83-2 BCA ¶ 16,582, *modified on other grounds*, 83-2 BCA ¶ 16,772 ("The act of submission is in itself the demand for a decision since the Act requires the contracting officer to decide claims submitted to him").

¹⁷⁹*West Coast*, 19 Cl. Ct. at 100 (The Court of Claims has held that an "expressed interest" in a final decision is sufficient, citing *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 192, 645 F.2d 966, 976 (1981)); *see also* *St. George International*, ASBCA No. 35063, 88-1 BCA ¶ 20,278; *Kleen-Rite*, 83-2 BCA ¶ 16,582.

be contained in the contractor's submission.¹⁸⁰ A review of relevant decisions highlights the subjectivity of the analysis.

In *Contract Cleaning Maintenance, Inc. v. United States*¹⁸¹ the United States Court of Appeals for the Federal Circuit stated that although the contractor's letters frequently expressed the hope that the dispute could be settled and suggested a meeting to accomplish that result, the letters could constitute a claim.¹⁸² The United States Claims Court, however, generally has found that any correspondence that alludes to negotiations or settlement falls short of a demand for a final decision. In its decision in *West Coast General*, the court stated that the submission of a claim to the contracting officer ended the negotiations phase of a dispute and triggered formal proceedings under the [Contracts Disputes Act].¹⁸³ The court proceeded to find that a contractor's letter setting forth its estimate of the cost of disputed work and requesting a change order fell short of making a request for a final decision because the contractor was "clearly still seeking an informal resolution to the matter."¹⁸⁴ In *Hoffman Construction Co. v. United States*¹⁸⁵ the court held that the contractor's cover letter to the contracting officer in which he expressed a desire to "meet in the near future" to resolve and "reach an agreement on . . . issues" was not a request for a final decision.¹⁸⁶ Rather, the court viewed the letter as a request for the opportunity to resolve certain cost disputes.¹⁸⁷ In support of this conclusion, the court noted that the contractor ended each cost item argument by stating that it "should be paid the full amount as opposed to what [the government] was offering."¹⁸⁸ Such language, in the assessment of the court, fell short of an assertion of entitlement.¹⁸⁹ Settlement proposals also have been denied claim status by some courts and boards because they left open the prospect of further negotiations. In *Technassociates, Inc. v. United States*¹⁹⁰ the court, citing *Hoffman*, found that the Contractor's cover letter and settlement proposal expressed a "willingness to reach an agreement as opposed to a demand that the

¹⁸⁰Maintenance Engineers, Inc., ASBCA No. 37512, 89-2 BCA ¶ 21,788; Stay, Inc., ASBCA No. 35063, 88-2 BCA ¶ 20,650; Grunley-Walsh Construction Co., Inc., ASBCA No. 30459, 88-1 BCA 120,279; J.G. Enterprises, Inc., ASBCA No. 27150, 83-2 BCA ¶ 16,808.

¹⁸¹811 F.2d 586 (1987).

¹⁸²*Id.* at 592.

¹⁸³19 Cl. Ct. at 101.

¹⁸⁴*Id.* at 100.

¹⁸⁵7 Cl. Ct. 518 (1985).

¹⁸⁶*Id.* at 524, 526.

¹⁸⁷*Id.* at 526.

¹⁸⁸*Id.* at 525 (emphasis in original).

¹⁸⁹*Id.*

¹⁹⁰14 Cl. Ct. 200 (1988).

contracting officer reach a final decision.’¹⁹¹ In *Gardner Machinery Corp. v. United States*¹⁹² a settlement proposal that did not request a final decision was determined to have been submitted for “the purpose of negotiating a settlement agreement.”¹⁹³

In *Alliance Oil & Refining Co. v. United States*,¹⁹⁴ however, the court distinguished *Hoffman* as “a creature of its particular facts,”¹⁹⁵ and considered as a claim a contractor’s request that it be notified if the volume of government crude oil required to be purchased by the contractor would be altered in response to the contractor’s protests. The court found that the notification request amounted to a demand, “albeit politely framed.”¹⁹⁶ In *G & H Machinery Co. v. United States*¹⁹⁷ the court again looked beyond the lack of a specific request for a final decision. The court found that the statement in the contractor’s letter—that the contracting officer was required by statute to make a decision, and in the absence of a response within a fairly short time, the contractor would seek relief elsewhere—“should reasonably be construed as a request - even a demand - by the [contractor] that the contracting officer render a decision.”¹⁹⁸ The Armed Services Board of Contract Appeals has adopted an analytical approach similar to the Claims Court. In *Canadian Commercial Corp.*¹⁹⁹ the Armed Services Board of Contract Appeals viewed a contractor’s letter as, at most, a pricing proposal that lacked the requisite demand for a final decision. Similarly, in *EDL Construction, Inc.*²⁰⁰ a contractor’s estimates for change orders were rejected as claims because the contractor’s desire for a decision by the contracting officer was not clearly indicated. In *John McCabe*²⁰¹ the contractor wrote to the government asking why he had not been paid and not assigned additional work. The board dismissed the appeal, finding that the correspondence was no more than an inquiry. In *San Antonio Foam Fabricators*²⁰² a contractor’s letter contained generalized complaints, made vague reference to injuries suffered, and did not request a final decision. The board determined the letter was not a claim, but was an invitation to resolve through further negotia-

¹⁹¹*Id.* at 210.

¹⁹²14 Cl. Ct. 286 (1984).

¹⁹³*Id.* at 292.

¹⁹⁴13 Cl. Ct. 496 (1987).

¹⁹⁵*Id.* at 499.

¹⁹⁶*Id.* at 500.

¹⁹⁷7 Cl. Ct. 199 (1985).

¹⁹⁸*Id.* at 202.

¹⁹⁹ASBCA No. 34257, 88-1 BCA ¶ 20,224.

²⁰⁰ASBCA No. 34623, 88-1 BCA ¶ 20,313.

²⁰¹ASBCA No. 35717, 88-2 BCA ¶ 20,493.

²⁰²ASBCA No. 36637, 88-3 BCA ¶ 21,058.

tions a grievance that had not yet ripened into a dispute. Likewise, in *Filter Products Corp.*²⁰³ a contractor's letter requesting the contracting officer's cooperation in "getting this issue resolved in a timely manner," was held insufficient to obligate the contracting officer to issue a decision. In *Howard W. Pence, Inc.*²⁰⁴ the board rejected the government's argument that a contractor's letter constituted a claim, labeling the correspondence as "merely an attempt by [the contractor] to convince the Government that the threatened assessment of liquidated damages and additional inspections was unwarranted." In short, the letter was argumentative, but not sufficiently demanding.

3. *Settlement as a Goal of the Claim Submission Process*

The Armed Services Board decisions holding that a request for final decision is fatally flawed by the inclusion of language indicating a willingness to negotiate are difficult to reconcile with the board's decisions addressing the related issue of the sufficiency of the submitted claim. In *Orbas & Associates*²⁰⁵ the board held that a sufficiently detailed claim was a prerequisite to the contracting officer's obligation to issue a final decision. The board stated that its rationale for the requirement "was to place the contracting officer in a position to make 'a meaningful review of the claim' prior to attempting *settlement* or issuing a final decision."²⁰⁶ Likewise, in *Westclox Military Products*²⁰⁷ the board stated that when a submitted claim fails to contain basic factual allegations, "there is no basis upon which the parties can enter into a meaningful dialogue towards *settlement*, or upon which the issues can be sufficiently identified by a contracting officer's decision. . . ."²⁰⁸ Moreover, the board explicitly has recognized that "nothing in the [Contract Disputes Act] forbids a contractor from negotiating with the contracting officer subsequent to the submission of the claim," and that such subsequent settlement discussions have no bearing on the claim's vitality.²⁰⁹ Accordingly, while settlement discussions are not precluded by the submission of a claim (and, are in fact, anticipated), a claim that is sufficiently demanding to elicit a final decision from the contracting officer, yet recognizes the possibility of future discussions, is held to be invalid. These anomalous holdings are likely the result of the board's

²⁰³ASBCA No. 36571, 89-1 BCA ¶ 22,097.

²⁰⁴ASBCA No. 36670, 89-1 BCA 121,473.

²⁰⁵ASBCA No. 35832, 88-3 BCA ¶ 21,062.

²⁰⁶*Id.* at 106,360 (emphasis added).

²⁰⁷ASBCA No. 25592, 81-2 BCA ¶ 15,270.

²⁰⁸81-2 BCA ¶ 75,615 (emphasis added).

²⁰⁹*Maintenance Engineers, Inc.*, ASBCA No. 37512, 89-2 BCA ¶ 21,788

piecemeal analysis of the individual elements of a claim—a result that could be avoided by the development of a comprehensive analytical framework.

The Department of Transportation Board of Contract Appeals has taken a more liberal view of the demand requirement than the Armed Services Board. In *Sims Paving Corp.*²¹⁰ the contractor wrote to the contracting officer, informed him of differing site conditions, and concluded his letter with the following: “We look forward to meeting with you to review this situation and determine the proper solution, which would include an equitable adjustment and time extension.”²¹¹ While the quoted language could be interpreted merely as a request for negotiations, the board decided the correspondence was sufficient to constitute a claim, despite the equivocal language. The result is best explained by the board’s recognition that the purpose of the claim requirement is to encourage contractors and the government to settle without resorting to litigation.²¹² To penalize a contractor by dismissing an otherwise valid claim simply because it left open or encouraged further negotiations pending a final decision, defeats, rather than furthers, the purpose underlying the Act.

In sum, while claims have been upheld absent a specifically articulated request for a final decision by the contracting officer, the case law clearly indicates that the contractor assumes the risk of dismissal if such a request is not explicitly set forth in its submission. A simple statement in the contractor’s submission that “A final decision by the contracting officer is requested,” and the avoidance of language indicating a negotiating posture, should be adequate to preclude dismissal for failure to request a final decision.²¹³

B. CLAIM CONTENT

A claim must contain sufficient information to enable the contracting officer to issue an informed decision.²¹⁴ Sufficient information

²¹⁰DOT BCA No. 1822, 87-2 BCA ¶ 19,928.

²¹¹*Id.* at 100,836.

²¹²Norfolk Shipbuilding and Drydock Corp., DOT BCA No. 1936, 88-2 BCA ¶ 20,674.

²¹³In making this suggestion, the author recognizes that the contractor is more interested in the expeditious, informal settlement of its demands for payment rather than the formal claims process. Nevertheless, the submission of a claim that is ambiguous in its demand for a final decision creates the risk of dismissal, in the event of appeal, and could ultimately prove to be the more expensive, time-consuming approach. Further, the contracting officer is more likely to carefully consider the merits of a technically correct, appealable claim.

²¹⁴*Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984); *Metric Construction Co. v. United States*, 1 Cl. Ct. 383 (1983); *Dickman Builders, Inc.*, ASBCA No. 32612, 89-3 BCA ¶ 22,206; *I.B.A. Co.*, ASBCA No. 37182, 89-1 BCA ¶ 21,676; *Westclox Military Products*, ASBCA No. 25592, 81-2 BCA ¶ 15,270.

has been defined **as**: “the minimum information necessary to inform the contracting officer of what was being claimed and the grounds of the **claim**,”²¹⁵ “the minimum standard of reasonable information that would enable the contracting officer to issue a meaningful final **decision**,”²¹⁶ and “the basic factual allegations necessary to an informed decision by the contracting **officer**.”²¹⁷ Such generalized guidance, by necessity, requires a case-by-case analysis.²¹⁸ In assessing the sufficiency of the claim, the contracting officer should consider the information submitted by the contractor and any relevant information otherwise known to the contracting **officer**.²¹⁹ If the information submitted or otherwise known to the contracting officer is insufficient to establish the claim, the proper course of action for the contracting officer is to deny the claim for lack of **proof**.²²⁰

In *Tecom, Inc. v. United States*²²¹ the United States Court of Appeals for the Federal Circuit addressed the government’s argument that the contractor’s claim was inadequate because it did not specify the relief sought or the amount of compensation requested. The court noted that the claim expressed the contractor’s view that the government’s new demands were beyond the contract’s requirements, and that the contractor specifically asked for “compensation of **\$11,000.04** per year, to be billed at **\$916.67** per month.”²²² The court summarily rejected the government’s position by way of its succinct comment that the claim contained “quite enough specificity . . . , under both statute and **regulation**.”²²³ The only Contract Disputes Act provision cited was the requirement that the claim be submitted in writing to the contracting **officer**,²²⁴ and the only regulation cited was the Defense Acquisition Regulation definition of a **claim**.²²⁵ While not stated, the court may have found little merit in a government sufficiency argument when the contracting officer had considered and denied the contractor’s claim.

²¹⁵McDonnell Douglas Corp., ASBCA No. 23826, 80-2 BCA ¶ 14,807.

²¹⁶Reese Industries, ASBCA No. 29594-91, 84-3 BCA ¶ 17,628.

²¹⁷J.J. Bonavire Co., ASBCA No. 29846, 86-2 BCA ¶ 18,788.

²¹⁸Logus Manufacturing Co., ASBCA No. 26436, 82-2 BCA ¶ 16,025.

²¹⁹*Dickman*, 89-3 BCA ¶ 22,206; Gauntt Construction Co., Inc., ASBCA No. 33323, 87-3 BCA 120,221, at 102,413 (Andrews, J., concurring) (“Surely the contracting officer must consult the data he already has or should have, in considering a claim, and not limit such consideration to the ‘four corners’ of the claim document itself”).

²²⁰*Dickman*, 89-3 BCA 122,206 at 111,699; Fred A. Arnold, Inc., ASBCA No. 27151, 83-2 BCA ¶ 16,795, modified on other grounds, 84-3 BCA ¶ 17,517.

²²¹732 F.2d 935 (1984).

²²²*Id.* at 937.

²²³*Id.*

²²⁴41 U.S.C. § 605(a) (1988).

²²⁵DAR 1-314(b)(1) defines a claim **as** “a written demand . . . seeking, **as** a matter of right, the payment of money, adjustment or interpretation of contract terms or other relief arising under or related to the contract.”

In *City of El Centro v. United States*²²⁶ the United States Claims Court analyzed the government's reply letters to the contractor, found that a claim existed, and determined that the contractor gave the government adequate notice of the basis and amount of its claim. The only contractor documents in the record were invoices. The court circumvented the government's argument that invoices alone could not constitute a claim by noting it was "evident" that the contractor had submitted more than mere invoices (even though the record was devoid of any contractor claim letters).²²⁷ The court established the sufficiency of the contractor's claim by reviewing the government's reply letters and concluding that the government "was not at all confused as to the nature of what was being requested."²²⁸ *City of El Centro* must be viewed as an aberration because the Claims Court has not otherwise exhibited such magnanimity in regards to contractor claims so utterly lacking in documentation.

In *T.J.D. Services, Inc. v. United States*²²⁹ the court denied claim status to a contractor's letter that demanded damages but failed to identify the contract or the grounds upon which the claim was based. In *West Coast General*²³⁰ the court read a series of five contractor letters together to arrive at a determination of sufficiency. The five letters, taken as a whole, referenced the work in question, asserted the contractor's legal theory underlying its right to a contract adjustment, set forth its estimate of the cost of the disputed work, and specifically noted that its change order request was being submitted under the Disputes clause. The analysis of board decisions regarding the sufficiency of claims reveals, for the most part, a more practical approach to the determination of sufficiency. The boards seem less inclined to engage in a *de novo* review of the contents of the claim, and are more likely to attach significance to the contracting officer's ability, or inability, to issue a final decision based on the documentation submitted.²³¹ In *Orbas & Associates*²³² the Armed Ser-

²²⁶17 Cl. Ct. 794 (1989).

²²⁷*Id.* at 800.

²²⁸*Id.* The cited language previously was used by the Court of Claims in *Paragon*, 645 F.2d 966. The court in that case determined that a letter written by the contractor's attorney to the contracting officer, "while . . . hardly . . . a model," was adequate to set forth a claim, noting that the contracting officer's denial "was premised in part upon 'basictenets of contract law,' proof that he was not at all confused as to the nature of what was being requested." *Id.* at 976.

²²⁹6 Cl. Ct. 257 (1984).

²³⁰19 Cl. Ct. 98 (1989).

²³¹*See generally* Grunley-Walsh Construction Co., Inc., ASBCA No. 30459, 88-1 BCA ¶ 20,279 (a claim must be presented in sufficient detail to permit meaningful review by the contracting officer).

²³²ASBCA No. 36832, 88-3 BCA 121,062.

VICES Board determined that two contractor letters, when read in combination, constituted a claim. In support of its conclusion, the board noted that “[b]y issuing a final decision on the merits based upon these two letters, the contracting officer affirmed that they were, indeed, sufficient for a meaningful review of the claim.”²³³ Conversely, in *Dickman Builders, Inc.*²³⁴ the board, while noting the contractor’s letter made clear the contractor’s wish to assert a claim, found the accompanying material lacked the basic factual information necessary to permit the contracting officer to make an informed decision. In reaching its determination, the board found it significant that the contracting officer had responded to the contractor’s letter by requesting that the contractor “provide a coherent assertion of [the] claim.”²³⁵ In *B & A Electric Co., Inc.*²³⁶ the board refused to inquire into the adequacy of the contractor’s supporting data, noting simply that the contracting officer could have denied the claim for lack of proof if it had been made without sufficient data.

In *Gauntt Construction Co.*²³⁷ the contractor submitted a purported claim that did not specify the government acts that caused the delay at issue, did not cite the contract provisions upon which the contractor relied, did not indicate how the delay occurred, and did not indicate how the overhead rate used by the contractor had been computed. The contracting officer responded by notifying the contractor that the letter did not contain enough specific information concerning the basis for the claim or how the Contractor’s alleged problems increased its costs. The contracting officer further advised the contractor that upon receipt of additional information, a final decision would be rendered. No additional details were provided, and no final decision was issued. The board found that the information regarding the alleged impact of the various actions or inactions by governmental personnel was peculiarly within the contractor’s knowledge, and that absent such information, the contracting officer was precluded from making a meaningful review. The board, after noting the contractor had chosen to initiate an appeal rather than provide the requested information, held that to require the contracting officer to make a determination, absent a proper submission, would “amount to an exercise in futility.”²³⁸ The board further explained its holding in the following passage:

²³³*Id.* at 106,360.

²³⁴ASBCA No. 32612, 89-3 BCA 122,206.

²³⁵*Id.* at 111,700.

²³⁶ASBCA No. 27689, 85-1 BCA ¶ 17,781.

²³⁷ASBCA No. 33323, 87-3 BCA ¶ 20,221.

²³⁸*Id.* at 102,411 (quoting *Logus Manufacturing Company*, ASBCA No. 26436, 82-2 BCA ¶ 16,025).

[I]f we should allow Gauntt to proceed in the Board with a claim the merits of which have not been considered by the contracting officer only because he did not have sufficient information to form a reasoned position and the contractor chose not to provide additional information that would have made such a review possible, we would encourage practice that defeats one of the legislative purposes of the CDA. Although we have to be fair and should not approve dilatory tactics by contracting personnel, this does not mean that contractors should not be required to comply with some minimal claim submission requirements.²³⁹

The board rejected the contractor's request that the contracting officer's refusal to render a final decision be construed as a "deemed decision,"²⁴⁰ and the board dismissed the appeal for lack of jurisdiction.

In *Regan/Nader Construction Co.*²⁴¹ the board was faced with an obviously insufficient claim that did not relate specific costs to specific causes. A fourteen page supplement was submitted with the claim, however, which provided a cost breakdown and a narrative setting forth the basis for recovery of the contractor's impact costs and for time extensions. The board determined that the supplement provided sufficient information on entitlement and quantum for the contracting officer and the contractor to conduct meaningful settlement discussions or for the contracting officer to render a final decision.

The determination of whether or not a claim is sufficiently detailed to trigger the contracting officer's obligation to issue a final decision is as much dependent on the particular court or board that is conducting the review as it is on the contents of the claim itself. An approach that accorded more deference to the contracting officer's determination of the claim's sufficiency, as reflected by his issuance or refusal to issue a final decision, would certainly yield more consistent results. A post-decisional de novo review of a claim that serves

²³⁹*Id.* at 102,412.

²⁴⁰41 U.S.C. § 605(c)(1) (1988), provides that a contracting officer shall issue a decision on any submitted claim of \$50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. 41 U.S.C. § 605(c)(5) (1988), further provides that any failure by the Contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim.

²⁴¹PSBCA No. 1070, 85-1 BCA ¶ 17,778.

to nullify the contracting officer's final decision (when he apparently felt sufficiently knowledgeable of the facts and circumstances surrounding the claim to render a decision) is a form of judicial "second-guessing" that impedes, rather than expedites, the disputes process.²⁴² Further, the courts and boards have exhibited a reluctance to presume any degree of knowledge on the part of the contracting officer,²⁴³ although the contracting officer and his site representative usually know most of the details of the contract performance. It would be more efficient to accord a presumption of correctness to the contracting officer's sufficiency determination, and if the contractor is unable to adequately document its cause for action, dismiss the appeal on the basis of the contractor's failure to sustain its burden of proof.

C. SUM CERTAIN

The FAR definition of a claim requires a demand for the payment of money to be stated "in a sum certain."²⁴⁴ Monetary demands that fail to state a sum certain amount generally have been held not to be claims.²⁴⁵ The United States Claims Court provided the following rationale for requiring that claims submitted to the contracting officer specify a particular money amount:

When a claim seeks a particular amount and the contracting officer finds entitlement to the amount sought, the claim can be settled and the contractor is precluded from taking an appeal under the doctrine of accord and satisfaction If, however, the contracting officer finds entitlement to only a portion of the amount sought, the contractor is entitled to appeal the difference between the particular amount sought and that

²⁴²In *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417-18 (1987), the Claims Court, in determining whether a claim was properly before the court for the purpose of a de novo review, concluded that "[t]he critical test appears to be whether the scheme of adjudication prescribed by the [Contract Disputes Act] is undermined by the contractor's claim on appeal - that is, by circumventing the statutory role of the contracting officer to receive and pass judgment on the contractor's entire claim." It can hardly be said that reversing a well-considered final decision on technical grounds meets the court's "critical" test.

²⁴³See *Gawnti*, 87-3 BCA ¶ 20,221, at 102,413 (Andrews, J., concurring) ("[The majority's opinion] must suppose that the contracting officer may decide upon the adequacy of the claim within the radius of the circle of his swivel chair, and like the Queen of Spain, 'has no legs'").

²⁴⁴FAR 33.201; FAR 52.233-1(c).

²⁴⁵*Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984); *Metric Construction Company, Inc. v. United States*, 14 Cl. Ct. 177 (1988); *Z.A.N. Company v. United States*, 6 Cl. Ct. 298 (1984); *J.J. Bonavire Company*, ASBCA No. 29846, 86-2 BCA ¶ 18,788; *Logus Manufacturing Company*, ASBCA No. 26436, 82-2 BCA ¶ 16,025.

awarded by the contracting officer . . . When, however, no specific amount is sought, the contracting officer cannot settle the case by awarding the contractor the amount sought. Thus, a final decision by a contracting officer could not preclude a contractor from filing suit seeking the difference between the amount awarded and a greater amount that the contractor has not specifically stated.²⁴⁶

Even though a sum certain is required, a claim in which the amount in dispute can be determined by a simple mathematical calculation or from the contractor's submission to the contracting officer is considered sufficient.²⁴⁷ In discussing the contractor's burden of proof with regards to a sum certain, the Claims Court concluded that "the facts necessary to meet [the contractor's] burden of proof need not be found with 'mathematical exactitude.' It is sufficient if [the contractor] furnishes . . . a reasonable basis for computation even though the result is only approximate."²⁴⁸ It would appear, based on the aforementioned guidance, that the courts and boards would construe the quantification requirement very liberally. A review of the case law, however, indicates that such is not always the case.

Before a court or board can reach the issue of whether or not a claim has been quantified properly, it must first determine if the contractor's claim is merely a request for an interpretation or adjustment of the contract, or some other form of declaratory relief not requiring quantification. In *Winding Specialists Co.*²⁴⁹ the board dismissed the contractor's appeal because the contractor failed to quantify its claim for an equitable adjustment in the contract price. The contractor argued that quantification was not required because the claim only involved a dispute in contract interpretation. The board determined, however, that the essence of the dispute was the increased costs to the contractor of performing additional work; therefore, the contractor's failure to submit a claim quantifying a specific dollar amount proved fatal. In *ACS Construction Co.*²⁵⁰ the contractor's letter was cast in the language of a request for a contract interpretation. The board, however, concluded that, while the "[i]nterpretation of contract terms and specifications [would] undoubtedly . . . be involved," the ultimate issue was one of money—

²⁴⁶*Metric*, 14 Cl. Ct. at 179.

²⁴⁷*Metric Construction Company, Inc. v. United States*, 1 Cl. Ct. 383 (1983); *Dillingham Shipyard*, ASBCA No. 27458, 84-1 BCA ¶ 16,984.

²⁴⁸*Dawco Construction, Inc. v. United States*, 18 Cl. Ct. 682, 698 (1989) (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968, 173 Ct. Cl. 180 (1965)).

²⁴⁹ASBCA No. 37765, 89-2 BCA ¶ 21,737.

²⁵⁰ASBCA No. 36535, 89-1 BCA ¶ 21,406.

i.e., whether the contractor was entitled to payment for work which it considered to be beyond the requirements of the **contract**.”²⁵¹ Accordingly, the board found the contractor’s lack of quantification required dismissal of its “monetary” claim.

In *Metric Construction Co. v. United States*²⁵² the contractor submitted a claim letter seeking extended home office overhead “in an amount exceeding \$91,000” and third-party indemnification fees “exceeding \$7,500.”²⁵³ Metric argued that its supporting data would allow the contracting officer to determine the sum certain amounts of its claims simply by adding up the figures for extended home office overhead and third-party indemnification fees as broken down in each particular exhibit of a detailed appendix. The court found the exhibits “at the very least, confusing,” and disagreed that it was a matter of simple arithmetic to calculate the sum certain amounts of Metric’s claims.²⁵⁴ The court concluded that, given the voluminous exhibits, “it would be quite easy for a contracting officer to compute incorrectly the amounts that Metric claims.”²⁵⁵ In the opinion of the court, it was not the intent of the Contract Disputes Act to give rise to disputes over the disparities in such computations. While apparently not relied upon by the court, the fact that the contracting officer never issued a final decision on Metric’s claims may have been indicative of the complexity of the numbers involved.²⁵⁶

In *I.B.A. Co.*²⁵⁷ the contractor performed his own calculations, but suffered dismissal because he did not provide any supporting data explaining how he arrived at the calculations. The board held that the contractor had a responsibility to furnish a reasonably detailed breakdown of, and supporting data for, the amount claimed. In *Insurance Co. of the West*²⁵⁸ the board held that the contractor sufficiently documented **his** request for extended home office overhead; the contractor specifically stated that he computed costs using the Eichley formula and provided a list of equipment used, the number of days the equipment was used, and the charge per day. In an interesting twist, the Department of Transportation Board of Contract Appeals rejected the government’s argument in *Todd Pacific Shipyards Corp.*²⁵⁹ that the contractor had failed to set forth the

²⁵¹*Id.* at 107,894.

²⁵²14 Cl. Ct. 177 (1988).

²⁵³*Id.* at 179.

²⁵⁴*Id.* at 180.

²⁵⁵*Id.*

²⁵⁶*Id.* at 179.

²⁵⁷ASBCA No. 37182, 89-1 BCA ¶ 21,576.

²⁵⁸ASBCA No. 35253, 88-3 BCA ¶ 21,056.

²⁵⁹DOT BCA No. 2023, 89-3 BCA ¶ 21,920.

amount of the claim and, as a result, that there was no sum certain for the contracting officer to consider. The board, in concluding that the amount in dispute was capable of being ascertained, relied on an affidavit of the contracting officer that set forth the precise amount the Coast Guard proposed to pay the contractor on a per hour basis and the amount that the contractor was seeking. In addition, the contracting officer attached an exhibit to his affidavit demonstrating how the respective hourly rates translated into the total amounts in dispute. A clearer example of an attempt by the government to rely on a hypertechnical argument that is wholly at odds with the realities of the case can hardly be imagined. The board correctly referred to the government's argument as "baseless."²⁶⁰

In *RSH Constructors Inc. v. United States*²⁶¹ the contractor alleged that the government had wrongfully withheld \$25,000 from its final payment. In its claim letter, the contractor stated that the punch list items had been completed "with the exception of a few minor items, certainly no more than \$2,000.00 in value," and further stated that "payment in full should be made and if any retention is withheld, it should not be in excess of \$2,000.00."²⁶² The court concluded that this language "reflect[ed] uncertainty as to the amount of money [the contractor] is owed," and consequently, did not represent a demand for payment of a sum certain.²⁶³ The court's finding of uncertainty appears strained, as it is patently obvious from the contractor's letter that it was demanding the full \$25,000 withheld, although it would accept a minimum of \$23,000. Yet, in *Atlantic Industries, Inc.*²⁶⁴ the Armed Services Board of Contract Appeals similarly dismissed a contractor's claim for "not less than" \$75,000, holding that it was not a claim for a sum certain. Apparently, the inclusion, or reference to, a minimal acceptable payment nullifies the demand. While the concern underlying the rejection of minimally acceptable payments has not been articulated,²⁶⁵ the courts and boards may fear that tolerance of such claims will result in poorly-documented claims that are submitted only for the purpose of initiating a new round of negotiations, rather than to seek a final decision. Interestingly, a contractor's demand for an amount exceeding a specified sum, as

²⁶⁰*Id.* at 110,296.

²⁶¹14 Cl. Ct. 655 (1988).

²⁶²*Id.* at 658.

²⁶³*Id.*

²⁶⁴ASBCA No. 34832, 88-1 BCA ¶ 20,244.

²⁶⁵The contractor's inclusion, or reference to, a minimal acceptable payment is certainly not inconsistent with the Claim Court's stated rationale that specifying a particular dollar amount permits the contracting officer to settle the case by awarding the contractor the amount sought.

in *Metric Construction*, apparently does not invoke the same degree of scrutiny. The court in *Metric* focused, not on the prefatory language, but on the complexity of the computations. In sum, little certainty exists as pertains to the “sum certain” analysis. Even a specified amount may not suffice if the supporting data does not delineate the manner and method by which the sum certain was calculated. Further, a specified amount may be denied sum certain status by prefatory language that either indicates uncertainty as to the exact amount in dispute or creates the perception of a settlement offer (with the expectation of further negotiations), instead of a demand for a final decision. The imposition on the contracting officer of the obligation to perform simple mathematical calculations and to consider information not contained in the contractor’s submission, but otherwise known to the contracting officer, is certainly reasonable and furthers the Act’s objective that disputes be resolved as efficiently and expeditiously as possible at the contracting officer level.²⁶⁶ As with the requirement that the contractor demand a final decision of the contracting officer, the courts and boards should show greater deference to the contracting officer’s assessment of whether or not he has been provided with the necessary facts and figures upon which to render a decision. The sum certain requirement has no utility other than to ensure the contractor’s demand is sufficiently defined to permit resolution. Yet, as the case law has shown, the government has been permitted to attack claims upon which a final decision has been issued on the inherently contradictory theory that no decision was possible for want of definitiveness. The fallacy of this form of hypertechnical construction of the sum certain requirement was revealed in the *Todd Pacific Shipyards*²⁶⁷ case, in which the government’s argument that the contracting officer lacked sufficient data to render a decision was contradicted by the contracting officer’s own affidavit.

Postdecisional judicial review of the sum certain requirement is a largely superfluous exercise that is most frequently invoked to dismiss an otherwise cognizable claim, rather than to rectify an incorrect final decision based on insufficient or defective data. As a practical matter, the sum certain requirement should be enforced by the contracting officer, who is in the best position to make the necessary assessment of quantification.

²⁶⁶FAR 33.204 states that it is the government’s policy to try to resolve all contractual issues by mutual agreement at the contracting officer’s level, without litigation.

²⁶⁷DOT BCA No. 2023, 89-3 BCA ¶ 21,920.

IV. CERTIFICATION

Section 605(c)(1) of the Contract Disputes Act provides, in part, that:

For claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.²⁶⁸

No other provision of the Act has generated as much controversy, both at its inception and at present, as the certification requirement.

The certification requirement was not included in the initial drafts of the Contract Disputes Act. The inclusion of the requirement was the result of the following recommendation by Admiral H. G. Rickover:

Require, as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. In other words, you put the contractor in the same position as our working man, the income taxpayer who must certify his tax return.²⁶⁹

Because the certification requirement was a last-minute addition to the Act, there was little in the way of legislative history to explain the intent of Congress or to guide the courts and boards in implementing the certification provision.²⁷⁰ The inclusion of the certification requirement in the Contract Disputes Act was greeted with some degree of trepidation by most commentators. Lambert and Morrow described the requirement as "hazy at best," with the potential for abuse, and of questionable merit.²⁷¹ In a prophetic statement,

²⁶⁸41 U.S.C. § 605(c)(1) (1988).

²⁶⁹*Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 & S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 21 (1978).

²⁷⁰For a brief summary of the legislative history of the adoption of the certification requirement, see Paul E. Lehman, Inc. v. United States, 230 Ct. Cl. 11, 14-15 (1982).

²⁷¹Lambert & Morrow, *OFPP Implements the Contract Disputes Act of 1978*, 13 Nat'l Cont. Mgmt. J. 145, 155 (1980).

they predicted that, “[d]epending upon the scope and manner in which it is implemented, the certification requirement could be another pro-forma requirement or a controversial means of controlling government contract claims.”²⁷² Judge Grossbaum, of the Armed Services Board of Contract Appeals, believed the Act failed to expressly address whether certification was a prerequisite to the proper submission of a contractor claim, and he noted that the requirement had generated substantial controversy.²⁷³ On the other hand, Dees and Knight, despite their observation that the certification requirement had caused “no small amount of confusion,” misapprehended the future development of the law, as reflected by the following conclusion:

The Contract Disputes Act does not require the contractor to certify a claim on appeal where the contracting officer has rendered a final decision without certification. The purpose of certification is to facilitate the contracting officer’s evaluation of the claim. Where the contracting officer has evaluated the claim and issued a final decision, certification would serve no useful purpose and is, therefore, unnecessary.²⁷⁴

Two years later, following a series of Court of Claims decisions holding that certification was a prerequisite to a valid claim, Dees, this time with co-author Churchill, concluded that the extraordinary amount of litigation spawned by the requirement, coupled with the fact that the “certification requirement serves no useful purpose, strongly demonstrates that Congress should eliminate the certification requirement from the statute altogether.”²⁷⁵

A. FAILURE TO SUBMIT CERTIFICATE

1. Jurisdiction

The series of cases that prompted Dees’ change of heart was the Court of Claims trilogy of *Lehman - Moseley - Skelly and Loy*, and the Court of Appeals for the Federal Circuit’s decision in *Schlosser*. In *Paul E. Lehman, Inc. v. United States*²⁷⁶ the Court of Claims sur-

²⁷²*Id.* at 153.

²⁷³Grossbaum, *supra* note 26, at 3, 6.

²⁷⁴Dees & Knight, *Certification Requirements and Problems of Contract Claims and Requests for Relief*, 12 Pub. Cont. L. J. 162, 166 (1982). The fact that subsequent case law proved the authors wrong does not detract from the soundness of their conclusion.

²⁷⁵Dees & Churchill, *Government Contract Disputes and Remedies: Corrective Legislation is Required*, 14 Pub. Cont. L. J. 201, 203 (1984).

²⁷⁶230 Ct. Cl. 11, 673 F.2d 352 (1982).

mised that because Admiral Rickover had been the prime mover of the certification requirement, Congress, by its adoption, must have intended to incorporate his views concerning the effect of the certification requirement.²⁷⁷ Because Admiral Rickover had been outspoken in his criticism of contractors submitting inflated claims,²⁷⁸ the court concluded that his view (and consequently, their view) was that certification was a necessary prerequisite to the consideration of any claim.²⁷⁹ In the words of the court, "Unless [the certification] requirement is met, there is simply no claim that this court may review under the Act."²⁸⁰ In addition, the court rejected the contractor's argument that the contracting officer, despite the lack of certification, had fully considered the claim and had issued a final decision. The court held that the contracting officer had no authority to waive a requirement that Congress had imposed.²⁸¹

In *W.H. Moseley Co. v. United States*²⁸² the court cited *Lehman* as the basis for its holding that the certification requirement was "a jurisdictional prerequisite to a direct challenge in [the Court of Claims] of a contracting officer's decision."²⁸³ The court also reaffirmed its holding in *Lehman* that the contracting officer lacked the discretion to determine the adequacy of the contractor's certification.²⁸⁴ In *Skelly and Loy v. United States*²⁸⁵ the court, in addition to reaffirming that a contractor's claim over \$50,000 was not a valid claim unless it had been certified, held that the certification must be in writing and that a contractor could not retroactively comply with the certification requirement by certifying the claim after the final decision of the contracting officer.²⁸⁶ In deciding that the failure to certify a submitted claim tainted every decision that followed, the court stated: "In sum, any proceedings on an uncertified claim—under the CDA—are of no legal significance. In such a case, . . . the legal process simply has not begun."²⁸⁷ In early 1983, the Court of Appeals for the Federal Circuit, on an appeal from a decision of the General Services Board, issued its opinion in *W.M. Schlosser Co. v. United*

²⁷⁷*Id.*, 230 Ct. Cl. at 15-16. In oft-quoted language, the court noted that an important objective of Congress was to "discourage the submission of unwarranted contractor claims." *Id.* at 14.

²⁷⁸See *supra* text accompanying notes 9-14.

²⁷⁹230 Ct. Cl. at 14.

²⁸⁰*Id.* at 16.

²⁸¹*Id.* at 17.

²⁸²230 Ct. Cl. 405, 677 F.2d 850 (1982).

²⁸³*Id.* 230 Ct. Cl. at 406.

²⁸⁴*Id.* at 407.

²⁸⁵231 Ct. Cl. 370, 685 F.2d 414 (1982).

²⁸⁶*Id.* 231 Ct. Cl. at 372.

²⁸⁷*Id.* at 377.

States.²⁸⁸ Relying on the decisions of the Court of Claims, the court held it lacked jurisdiction over the appeal because the underlying claim had not been certified prior to submission to the contracting officer. The court further held that the board, like the contracting officer, could not waive the certification requirement.²⁸⁹ The aforementioned decisions have been justly criticized. White and Churchill considered it unfortunate that *so* much emphasis was placed on the testimony of Admiral Rickover, while the statement (following passage of the Act) of the House Judiciary Committee that “certification . . . should not be viewed as a prerequisite to ‘receipt’ of a claim” was not even acknowledged.²⁹⁰ Lovitky has argued that serious consideration should be given to legislation eliminating certification as a jurisdictional requirement, because “[t]he goal of efficient resolution of contract disputes is poorly served by a scheme focusing such unwarranted attention on the mere presence of a piece of paper.”²⁹¹ Dees and Churchill, in a similar vein, regarded the *Lehman* line of cases as “fundamentally inconsistent with a primary purpose of the Disputes Act, which was to simplify and streamline the government contract disputes resolution process.”²⁹² Even among the Claims Court judges, dissatisfaction with *Lehman* and its progeny existed.²⁹³ Despite the criticisms, the *Lehman* line of cases and

²⁸⁸705 F.2d 1336 (Fed. Cir. 1983).

²⁸⁹*Id.* at 1338.

²⁹⁰White & Churchill, *Court of Claims Springs a Trap on Uncertified Contractor Claims*, 16 Nat'l Cont. Mgmt. J. 1, 3 (1982) (citing H.R. Rep. No. 97-47, 97th Cong., 1st Sess. 3 (1981)).

²⁹¹Lovitky, *Frequently Encountered Problems with Certification of Claims Under the Contract Disputes Act*, 16 Pub. Cont. L. J. 511, 529 (1987).

²⁹²Dees & Churchill, *supra* note 275, at 205. In addition, Dees and Churchill made the following observations:

It is difficult to believe that Congress intended the parties to a government contract to engage in the fiction that an uncertified contractor claim is not a “claim” at all, and that a final decision on the merits of the claim is not really a final decision. Congress could not have intended that the contracting parties be forced to repeat the entire administrative or judicial review process merely because both parties neglected the certification requirement at the contracting officer level, where the statute requires it. Congress could not have intended the protracted and pointless relitigation of the certification issue before both the court and the appropriate board. The *Lehman* line of cases has, in short, made the entire disputes process hinge upon this purely legalistic and unnecessary formalism.

Id. at 205.

²⁹³See Nash, *The Contract Disputes Act: Can It Be Improved?*, The Nash & Cibinic Report, Dec. 1987, para. 88. Professor Nash referenced the comment of Chief Judge Smith in *Clark Mechanical Contractors v. United States*, 12 Cl. Ct. 415, 416 (1987) (“There are good and strong arguments for why the certification requirement under the CDA should not be jurisdictional”), and noted that discussions at the first Judicial Conference of the United States Claims Court in October 1987 indicated a great dissatisfaction with the holdings in certification cases. *Id.* at 191.

Schlosser never have been overturned and remain good law today.²⁹⁴ As a result of their holdings, the following two black letter rules, with regard to contractor claims requiring certification, can be identified: 1) Uncertified claims are a legal nullity and no decision can be rendered thereon by the contracting officer, the agency boards, or the courts; and 2) Certification must occur before the contracting officer's final decision. Retroactive certification is not permitted.

Failure to adhere to these rules can lead to unfortunate results. In *Charles J. Dispenza & Associates*²⁹⁵ the Veterans Administration Board stated it had no option but to dismiss a contractor's uncertified claim. The board expressed regret that the necessity for certification was not brought to the contractor's attention during the nearly four and one-half years of settlement negotiations that preceded the issuance of the contracting officer's decision.

2. *Hamilton Stipulations*

The Court of Appeals for the Federal Circuit has fashioned an exception to these otherwise inviolate rules. In *United States v. Hamilton Enterprises*²⁹⁶ the contractor submitted several uncertified claims to the contracting officer who issued a final decision denying the claims. The contractor appealed to the Armed Services Board. In its supplemental complaints, Hamilton certified the previously denied claims and added a new cause of action (reformation), which it certified. The parties entered into a stipulation that provided, in pertinent part, the following:

1. The contracting officer had informally considered the additional claim for reformation, and if asked for a final decision, would have denied the claim. The contracting officer felt it would serve no useful purpose to issue another final decision.

2. To the extent a final decision was necessary to provide a jurisdictional basis for the Board's consideration of the reformation claim, the parties stipulated that the above facts constituted a de facto final decision sufficient to justify a finding that jurisdiction exists.²⁹⁷

²⁹⁴See generally *Thoen v. United States*, 766 F.2d 1110, 1116 (Fed. Cir. 1986); *Haberman v. United States*, 18 Cl. Ct. 303, 306-07 (1989); *Glenn v. United States*, 13 Cl. Ct. 784, 786 (1987); *H.H.O. Co. v. United States*, 12 Cl. Ct. 147, 169 (1987); *Prefab Products, Inc. v. United States*, 9 Cl. Ct. 786, 789 (1986); *United Construction Co., Inc. v. United States*, 7 Cl. Ct. 47, 51 (1984).

²⁹⁵VABCA No. 2740, 89-2 BCA ¶ 21,640.

²⁹⁶711 F.2d 1038 (Fed. Cir. 1983).

²⁹⁷*Id.* at 1042-43.

The board issued a decision in favor of Hamilton and the government appealed, arguing that the reformation claim did not comply with the certification requirement because a certified claim was never presented to the contracting officer for his final decision. The court rejected the government's argument, noting that it "collide[d] head-on" with the facts set forth in the stipulation, and stated that "there is . . . no doubt that the certified reformation claim was submitted to the contracting officer; that it was considered by him, and for all practical purposes it was denied."²⁹⁸ The court concluded it had jurisdiction over the reformation claim because there was "substantial compliance" with the certification requirement.²⁹⁹

In *Joseph P. Mentor*³⁰⁰ the General Services Board approved the use of a *Hamilton* stipulation to cure a certification deficiency.³⁰¹ In *Carothers & Carothers Co.*³⁰² the board repeatedly suggested the parties use a *Hamilton* stipulation to resolve a certification issue, but the parties were unable to reach agreement on the execution of such a stipulation.³⁰³ The Claims Court has yet to approve the use of *Hamilton* stipulations.³⁰⁴

Hamilton stipulations, which in essence permit retroactive certification, more fully comport with the intent of the Contract Disputes Act to create a less expensive, more expeditious disputes resolution process than the *Lehman/Schlosser* "certification as jurisdiction" approach. Nevertheless, *Hamilton* is bad law. Jurisdiction either exists or does not exist; the doctrine of substantial compliance has no application.³⁰⁵ The *Hamilton* holding directly conflicts

²⁹⁸*Id.* at 1043.

²⁹⁹*Id.* The doctrine of substantial compliance, as applied to certification, will be discussed in greater detail later in the article.

³⁰⁰GSBCA No. 6757, 85-1 BCA ¶ 17,887.

³⁰¹*But see* *LaCoste Builders, Inc.*, ASBCA No. 31209, 86-2 BCA ¶ 18,963 (appeal did not involve a stipulation, but board expressed its opinion that the GSBCA, in *Mentor*, was doubtful as to the validity of the *Hamilton* stipulation and did not base its decision thereon).

³⁰²ENG BCA No. 4739, 88-3 BCA ¶ 21,161.

³⁰³*See also* *Pioneer Construction Co., Inc.*, ASBCA No. 36180, 89-1 BCA ¶ 21,335, at 107,581-82 (government considered, but ultimately declined to enter into, a *Hamilton* stipulation).

³⁰⁴*While* not referred to as a *Hamilton* stipulation, the court, in *Al-Kurdi v. United States*, 16 Cl. Ct. 660, 661 (1989), rejected the idea of stipulating to certification, noting that such stipulations would have "no real effect on the court's jurisdiction." As stated by the court, "Should the parties stipulate that [contractor's] previous discovery requests constituted a certified claim, and the claim did not fulfill the procedural requirements of 41 U.S.C. § 605(c)(1), a future tribunal would nevertheless be required to decline jurisdiction in light of the defective certification." *Id.* at 662.

³⁰⁵As noted by the Claims Court in *Al-Kurdi*, parties to a suit may not by prior action or consent confer subject matter jurisdiction upon a federal court. *Id.* at 662 (citing *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

with *Lehman* and *Schlosser*, and although well-intentioned, is an ineffectual attempt to circumvent the strict application of the jurisdictional requirement. The solution to this conflict is simple: the Court of Appeals for the Federal Circuit should overturn its holding in *Schlosser* that certification is a jurisdictional requirement to the consideration of a claim. It was judges, not legislators, who created the jurisdictional construction, and it is judges who should rectify the error, not compound it.

3. Interest

The Contract Disputes Act provides that: "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof."³⁰⁶ The FAR provides that: "The Government shall pay interest on a contractor's claim on the amount found due and unpaid from . . . the date the contracting officer receives the claim (properly certified if required . . .), . . . until the date of payment."³⁰⁷ The courts and boards have held, consistent with the *Lehman* line of cases, that an uncertified claim is a legal nullity, and accordingly, not a claim upon which interest can accrue.³⁰⁸ By coupling certification with the accrual of interest, a contractor is, in effect, penalized for maintaining a negotiating posture (in the hopes of settlement), instead of proceeding with the submission of a claim in anticipation of litigation. Moreover, no valid policy considerations exist for making the accrual

³⁰⁶41 U.S.C. § 611 (1988). Section 6(a), referred to in the quoted language, is 41 U.S.C. § 605, which includes the requirement for certification among its various provisions.

³⁰⁷FAR 33.208.

³⁰⁸See *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983). See, e.g., *Timberland Paving and Construction Co. v. United States*, 18 Cl. Ct. 129, 150-51 (1989); *Columbia Engineering Corp.*, IBCA No. 2322, 89-2 BCA ¶ 21,762. Legislative efforts to uncouple certification from the accrual of interest have been unsuccessful. In 1981, a House Judiciary Committee report stated that certification was intended to be a condition precedent to the payment of a claim, but was not intended to delay the starting point for computing interest. See 23 Gov't Cont. para. 195 (June 1, 1981). A subsequent bill (H.R. 1371), which would have required the government to pay contractors interest from the date claims were submitted to the contracting officer without regard to the date of certification, passed Congress, but was vetoed by President Reagan. See 24 Gov't Cont. para. 379 (Nov. 1, 1982). While the report and the bill provided clear guidance as to the intended interrelationship between certification and interest, there was no concomitant effect on judicial analysis.

of interest contingent upon certification.³⁰⁹ Unfortunately, in light of the case law and the express language of FAR 33.208, the situation is not easily remedied; the certification requirement has been inexorably linked with the validity of a claim. At the risk of being overly simplistic: if no certification exists, no claim exists; if no claim exists, no interest is due. Accordingly, contractors should certify claims as soon as possible, even though the probable consequence will be the issuance of an adverse final decision (and the necessity for an appeal), instead of the desired settlement.

4. Summary

In conclusion, the failure to certify, when required, renders a contractor's claim a legal nullity and precludes the accrual of interest. Certification must occur prior to the issuance of the contracting officer's final decision, and attempts at retroactive certification will have no legal effect. The use of *Hamilton* stipulations is limited to the agency boards and are of questionable value because the boards cannot abdicate their responsibility to establish jurisdiction over appealed claims.

B. LANGUAGE OF CERTIFICATE

While the Contract Disputes Act does not specify an exact format for certification, the following three assertions must be made in some form or manner: 1) The claim is made in good faith; 2) Supporting data are accurate and complete to the best of the contractor's knowledge and belief; and 3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.³¹⁰

Because certification has been elevated to jurisdictional status, courts and boards have subjected certification language to the closest

³⁰⁹The majority in *Fidelity* expressed its belief that, but for the certification requirement, contractors would be compensated, in terms of additional interest, for delaying the settlement of claims. *Fidelity*, 700 F.2d at 1384. As noted by Judge Baldwin, however, in dissent:

This assumes that contractors would consider leaving money in the government's hands, where it collects interest, as preferable to having the money in their own hands as soon as possible. Actually, a contractor has every economic incentive to certify a claim promptly to speed his receipt of money claimed. When the money is in the contractor's hands he can get as good an interest rate as the government gives, or he can put the money to some more urgent or productive use. From the contractor's perspective, delaying certification would have no economic benefit and may be economically irresponsible.

700 F.2d at 1389.

³¹⁰41 U.S.C. § 605(c)(1) (1988); FAR 33.207.

scrutiny. An examination of relevant case law will reveal that the oft-used phrase "formover substance" is descriptive. Cases addressing the issue of certification language, by their nature, generally involve a subjective analysis of whether or not the language used satisfies the requirement for certification. As a consequence, the cases provide little in the way of clear guidance. Nevertheless, a couple of general rules are ascertainable. One rule is that, depending on the tribunal, the omission of any one of the three required assertions ordinarily is fatal.³¹¹ A second rule is that the contractor must simultaneously make all three of the certification assertions.³¹² "Simultaneous" has not, however, been construed to require that the assertions be made at the same time as submission of the claim.³¹³ A final rule is that the language of the certification need not "parrot" the language of the statute.³¹⁴

Though not a rule per se, it also should be noted that the submission of certificates or documents intended for other purposes consistently have been held not to satisfy the certification requirements of the Contract Disputes Act.³¹⁵

³¹¹See *Fredenburg v. United States*, 10 Cl. Ct. 216 (1986); *Centex Construction Co., Inc.*, ASBCA No. 35338, 89-1 BCA ¶ 21,259; *Sarbo, Inc.*, ASBCA No. 34292, 87-3 BCA 120,176; *Whited Co., Inc.*, VABCA No. 2364, 87-1 BCA ¶ 19,526; *LaCoste Builders, Inc.*, ASBCA No. 31209, 86-2 BCA ¶ 18,963. *But see* *United States v. General Elec. Corp.*, 727 F.2d 1567, 1569 (Fed. Cir. 1984); *Joseph P. Mentor, GSBBCA No. 6757, 85-1 BCA ¶ 17,887.*

³¹²See *Embrey v. United States*, 17 Cl. Ct. 617, 622 (1989); *Technassociates, Inc.*, 14 Cl. Ct. 200, 211 (1988); *Turbine Eagle Charters, Inc.*, ASBCA No. 36259, 88-3 BCA ¶ 21,128; *Sarbo, Inc.*, ASBCA No. 34292, 87-3 BCA 120,176.

³¹³See *IPS Group, Inc.*, ASBCA No. 33182, 87-1 BCA ¶ 19,482; *Newhall Refining Co.*, EBCA Nos. 363-7-86 et al., 87-1 BCA ¶ 19,340.

³¹⁴The "parrot" phrase seems to be popular with courts and boards and its use is normally a good indication that, while exactitude was not required, the contractor's certification was not exact enough. *See* *Aeronetics Div., AAR Brooks & Perkins Corp. v. United States*, 12 Cl. Ct. 132, 135 (1987); *Liberties Environmental Specialties, Inc.*, VABCA No. 2948, 89-3 BCA 121,982, at 110,563; *Fire Security Systems, Inc.*, VABCA No. 2901, 89-2 BCA ¶ 21,711, at 109,162; *Kaufman Contractors, Inc.*, VABCA No. 2357, 86-3 BCA ¶ 19,121, at 96,651. *But see* *William A. Ransom and William Greg Nesen v. United States*, 7 FPD ¶ 1 (Fed. Cir. 1988), at 3 (unpub.; not citable as precedent).

³¹⁵*E.g.*, FAR cost or pricing data certificates (*Norcoast-BECK Constructors, Inc.*, ASBCA No. 37977, 89-3 BCA ¶ 21,979; *Continental Maritime of San Diego, Inc.*, ASBCA No. 36733, 89-1 BCA ¶ 21,249; *Kaufman Contractors, Inc.*, VABCA No. 2357, 86-3 BCA ¶ 19,121; *Ed Dickson Contracting Co., Inc.*, ASBCA No. 26211, 84-1 BCA ¶ 17,224); *Truth in Negotiations Act certificate* (*Turbine Eagle Charters, Inc.*, ASBCA No. 36259, 88-3 BCA ¶ 21,128); *Standard Form 1436-settlement proposal certification* (*Pan-Alaska Construction, Inc.*, ASBCA No. 35160, 88-3 BCA ¶ 20,920; *Daly Construction Co., Inc.*, VABCA No. 2791, 88-3 BCA ¶ 21,069); *Standard Form 1411-Contract Pricing Proposal Cover Sheet* (*Fire Security Systems, Inc.*, VABCA No. 2901, 89-2 BCA ¶ 21,711); *Department of Defense Form 633-Contract Pricing Proposal* (*Aeronetics Div., AAR Brooks & Perkins Corp. v. United States*, 12 Cl. Ct. 132, 136 (1987)); *see also* *Whited Company, Inc.*, VABCA No. 2364, 87-1 BCA ¶ 19,526 (fact that the certification furnished by the contractor was on forms provided by the government had no bearing on board's determination that certification was defective).

1. *Variations from the Statutory Language*

While the courts and boards uniformly have held that a contractor's certification need not repeat the precise language used in the Contract Disputes Act, contractors who stray from the statutory language do so at risk. In *Pioneer Construction Co.*³¹⁶ the Armed Services Board applied a strict construction to the certification requirement and concluded that the contractor's certification, which stated the supporting data was "accurate and true" (instead of accurate and complete), was fatally defective.³¹⁷ In *Cochran Construction Co.*³¹⁸ a contractor's statement that supporting data was "as accurate and complete as practicable," was held to be an improper qualification of the certificate. In *Norcoast-BECK* the contractor's certification stated that the supporting data and certificate "reflects the contractor's belief that the Government is liable for the claim set forth," rather than the mandatory language, "The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." The board held the variance was fatal. In *Liberty Environmental Specialties, Inc.*³¹⁹ the contractor omitted the word "belief" from the second assertion (requiring the contractor to certify to his knowledge and belief). The board, relying on the dictionary definitions of the words "knowledge" and "belief," determined that the terms were not synonymous, and therefore, the omission of either word rendered the assertion defective.³²⁰ The Claims Court in *Aeronetics* apparently did not even bother with a comparison of terminology. Instead, the court, without explanation, concluded that the substitution of the phrase "the attached claim is free from fraud or misrepresentation," for the mandatory first assertion (the claim is made in good faith) was improper. The *Aeronetics* result is simply indefensible. The substituted language is certainly the equivalent of the statutory language. More importantly, if the purpose behind the certification requirement is to discourage contractors from acts of fraud or misrepresentation, it is the height of folly to declare a certification defective because the contractor certifies the claim is free from fraud or misrepresentation.³²¹ Decisions such as *Aeronetics* only invite government argu-

³¹⁶ASBCA No. 36180, 89-1 BCA ¶ 21,335.

³¹⁷The board reached the same result on an identical misstatement in Sarbo, Inc., ASBCA No. 34292, 87-3 BCA 120,176.

³¹⁸ASBCA No. 34378, 87-3 BCA ¶ 19,993.

³¹⁹ASBCA No. 2948, 89-3 BCA 121,982.

³²⁰*Id.* at 110,564.

³²¹The unfortunate consequence of such a hypertechnical approach is that it only serves as ammunition for the cynics who suspect that the certification requirement, as construed by the courts and boards, has no purpose other than to serve as a jurisdictional impediment to claim appeals.

ments such as that put forth in *Carlin Contracting Co.*,³²² in which the government contended that the inclusion of the word "information" in the second assertion, which was otherwise correct in every respect, fatally qualified the certification.³²³ The board found no merit in the government's argument. Certification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for claims.³²⁴

2. Substantial Compliance

The doctrine of substantial compliance is frequently alluded to by courts and boards analyzing certification language. Unfortunately, the degree of compliance required varies from tribunal to tribunal. The Court of Appeals for the Federal Circuit has rejected a formalistic approach.³²⁵ In *Ransom* the contractor's certification that the supporting data was "true and correct" (instead of accurate and complete) was held to be in accord with the objectives of the statute, while in *General Electric* the absence of the third assertion did not prevent the court from concluding that the statutory requirements had been satisfied. The Claims Court, as might be expected, has not taken the same liberal approach. In *Fredenburg v. United States*³²⁶ the court stated it had no desire to "commence a journey down the slippery slope of substantial compliance," noting that "[t]here is no room in the statutory scheme for such a development."³²⁷ The agency boards have generally applied the substantial compliance test.³²⁸ In reality, however, the degree of exactitude required is sometimes so

³²²ASBCA No. 36569, 89-1 BCA ¶ 21,256.

³²³The contractor's second assertion read as follows: "[T]he supporting data is accurate and complete to the best of my knowledge, information, and belief."

³²⁴*Fidelity*, 700 F.2d at 1384.

³²⁵See *William A. Ransom and William Greg Nesen v. United States*, 7 FPD ¶ 1 (Fed. Cir. 1988); unpub. op. (not citable as precedent); *United States v. General Elec. Corp.*, 727 F.2d 1567 (Fed. Cir. 1984); *United States v. Hamilton*, 711 F.2d 1038 (Fed. Cir. 1983).

³²⁶10 Cl. Ct. 216, 218 (1986).

³²⁷In *Ransom* the Court of Appeals for the Federal Circuit concluded that the Claims Court applied the substantial compliance test in *Metric Constr. Co. v. United States*, 1 Cl. Ct. 383 (1983). While the court applied a more liberal construction than was, or is, typical for the Claims Court the court did not use the term "substantial compliance," and *Metric* cannot be read as an adoption of the substantial compliance test by the Claims Court. See also *Aeronetics Diu*, 12 Cl. Ct. 132. While not explicitly rejecting the substantial compliance test, the court found the contractor's implicit representations of the required assertions insufficient to meet the strict requirements of the Act. *Id.* at 137, 138.

³²⁸See *Liberty Environmental Specialties, Inc.*, VABCA No. 2948, 89-3 BCA ¶ 21,982; *Time Fiber Communications, Inc.*, ASBCA No. 36276, 88-3 BCA ¶ 20,857; *Kaufman Contractors, Inc.*, VABCA No. 2367, 86-3 BCA ¶ 19,121; *Xplo Corp.*, DOT CAB No. 1252, 86-2 BCA ¶ 18,874; *LaCoste Builders, Inc.*, ASBCA No. 31209.86-2 BCA ¶ 18,963; *Joseph P. Mentor*, GSBCA No. 6757, 85-1 BCA ¶ 17,887.

high that reference to the board's analytical approach as a substantial compliance test would appear to be a misnomer.³²⁹ In sum, with the exception of the Court of Appeals for the Federal Circuit, the substantial compliance test has not been uniformly applied; and, when applied, has been emasculated by some boards so as to vary little from a strict construction approach. Accordingly, the wise contractor will ensure that its certification contains only the exact statutory language (with no additional terms that might be construed as qualifying the certification), because post-certification efforts to justify variances in the language, however minor, may well prove unsuccessful.

3. *Supporting Data*

"Supporting data" is not defined by the Contract Disputes Act. Among the various efforts to fill this definitional void,³³⁰ the Armed Services Board has provided the following guidance:

What constitutes "supporting data" must necessarily depend on the nature of a contractor's claim on an ad hoc basis. Generally, we would think that "supporting data" are any data that a contractor perceives as supporting the validity of its claim. If certain contract provisions form the basis of a contractor's claim, such provisions become its "supporting data." If invoices and vouchers support a contractor's claim, they become its "supporting data." If a contractor keeps performance records, they are "supporting data" to the extent relevant.³³¹

The significance of a definition, however, is unclear, because neither the Act nor regulations specifically require the submission of supporting data for purposes of certification.³³² As might be expected, the requirement that supporting data be certified as accurate and complete, without a specific underlying statutory requirement that supporting data even be submitted, has resulted in no small amount of confusion. In *Paradyne Corp.*³³³ the contractor's certification was rejected as defective because it created the impression that

³²⁹See *Liberty Environmental*, 89-3 BCA ¶ 21,982; *Kaufman*, 86-3 BCA ¶ 19,121.

³³⁰See *Cibinic, Certifying Supporting Data: Form (her Function)*, The Nash & Cibinic Report, Dec. 1988, para. 77, and cases cited therein.

³³¹*Paradyne Corp.*, ASBCA No. 39194, 85-1 BCA ¶ 17,916, at 89,722.

³³²See *Cibinic, supra* note 319, at 185; see also *Mentor*, 85-1 BCA ¶ 17,887, at 89,586. But see Nash, *Certifying Supporting Data: Some Second Thoughts*, The Nash & Cibinic Report, Jan. 1989, para. 7. In the opinion of Professor Nash, not even a statute as badly drafted as the Act can be construed to mean that no data can be complete data, and therefore, *Mentor*, as to that proposition, is bad law. *Id.* at 15.

³³³ASBCA No. 39194, 85-1 BCA ¶ 17,916.

the contractor had relied exclusively on the government's data to support its claim.³³⁴ While *Paradyne* would obviously be a correct result if the contractor had used his own uncertified data to support its claim, no evidence exists that he did so. Further, the board went on to state that "[o]nce certified as accurate and complete, [it] generally will not examine or evaluate the adequacy of a contractor's supporting data."³³⁶ In *Gauntt Construction Co.*³³⁷ the board held that substitution of the phrase "all data used" in lieu of "supporting data" was unacceptable because it restricted the certification to "unidentified data the contractor chose to use while the statute requires certification of all data that support the claim."³³⁸ The board's reasoning, however, is faulty, because it is reasonable to assume that the contractor used all data that supported his position. Common sense dictates that if data supporting the contractor's position was not used, it was because the contractor was unaware of it. Moreover, the certification is limited to *supporting* data, so there is no obligation to identify (and certify) any data that contradicts the contractor's position. Essentially then, the language of the assertion, and not the supporting data it refers to, is of paramount importance. Variations in the required assertion, even if an accurate reflection of the data used, will nullify the certification. Because the boards will not look behind the supporting data assertion, and even if they chose to, no requirement exists that such data be submitted for review, the assertion is of questionable value, though nonetheless required.

C. THRESHOLD

In determining whether or not a contractor's claim exceeds the \$50,000 threshold that triggers the certification requirement, FAR 33.207(b) provides that the aggregate amount of both the increased

³³⁴In *Paradyne*, the contractor brought a claim to recover monies withheld by the government. The contractor complained that the government refused to provide documentation substantiating the withholding. The contractor's certification read, in part, as follows: "Paradyne certifies that this claim is made in good faith: that, without complete detailed supporting data from [the government] substantiating its credit withholdings, the claim is accurate and complete . . ." *Id.* at 89,721.

³³⁵It would appear that *Paradyne* labored under the misapprehension that because the government withheld monies, it was the government's obligation to justify the withholding. In the board's view, it was the contractor's responsibility to provide data in support of its argument of entitlement. *Id.* at 89,722.

³³⁶*Id.* at 89,723.

³³⁷ASBCA No. 33323, 87-3 BCA ¶ 20,221.

³³⁸*Id.* at 102,412.

and decreased costs associated with the claim shall be used.³³⁹ The difficulty with threshold determinations is typically not the math, but with the determination of whether or not a claim has been split into several smaller claims (none of which exceed **\$50,000**) to avoid the certification requirement.

The basic test for determining whether claims are unitary or discrete was formulated by the Claims Court in *Warchol Construction Co. v. United States*³⁴⁰ and *Walsky Construction Co. v. United States*.³⁴¹ If the claims are determined to be separate and individual, aggregation is not required, but if the claims are found to be so related to one another that they form parts of a whole, the claims should be combined into a single, unified claim. In determining whether separately stated claims are to be deemed unitary for certification purposes, neither the language nor the organization of the claims governs.³⁴² Rather, what is vital is whether the demands arose out of essentially interrelated conduct and services, and the same or closely connected facts.³⁴³ In applying this test, courts and boards have given great weight to the manner in which a contractor treated its claims both at the agency level and in its complaint.³⁴⁴ In *Vern W. Johnson & Sons, Inc.*³⁴⁵ the board apparently even considered the contractor's motive as relevant, as the board, in upholding separate claims, noted that nothing in the record revealed a desire on the con-

³³⁹By way of example, if a contractor requested a net price increase of \$20,000 for a change involving \$40,000 of added work and \$20,000 of deleted work, certification would be required since the combined amount of the addition and deletion (\$60,000) exceeds the \$50,000 threshold. Western States Management Services, Inc., ASBCA No. 34268, 89-2 BCA 120,763, provides another example. The government exercised an option to extend a contract for three months at a contract price of \$19,810 per month. The contractor performed, then submitted an uncertified claim for \$21,800, the difference between the contractor's proposed contract price (\$27,210 per month) and the option price. The board dismissed for lack of certification since the claim was, in actuality, for \$81,630 (proposed price x 3 months).

³⁴⁰2 Cl. Ct. 384 (1983).

³⁴¹3 Cl. Ct. 615 (1983).

³⁴²*Walsky*, 3 Cl. Ct. at 619.

³⁴³*Id.*; see D.J. Barclay & Co., Inc., ASBCA No. 28908, 85-1 BCA ¶ 17,922, at 89,741; see also Todd Pacific Shipyards Corp., DOT BCA No. 2023, 89-3 BCA ¶ 21,920 (improper splitting of claims); Insurance Co. of the West, ASBCA No. 35253, 88-3 BCA ¶ 21,056 (separate claims upheld); Sarbo, Inc., ASBCA No. 34292, 87-3 BCA ¶ 20,176 (separate claims upheld); Zinger Const. Co., ASBCA No. 28788, 86-2 BCA ¶ 18,920 (separate claims upheld); Dalton Const. Co., ASBCA Nos 30833 et al., 86-1 BCA ¶ 18,604 (separate claims upheld); G.S. and L. Mechanical and Const., Inc., DOT CAB No. 1640, 85-3 BCA ¶ 18,383 (separate claims upheld).

³⁴⁴See City of El Centro, 17 Cl. Ct. 794, 801 (1989), and cases cited therein. *But see* Placeway Const. Co. v. United States, 18 Cl. Ct. 159, 166 (1989) (citing Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 591-92 (Fed. Cir. 1987)), wherein the court held that it is the claim presented to the contracting officer that is determinative of certification requirements, not the format or claim fragmentation set forth in the complaint.

³⁴⁵ENG BCA No. 5554, 89-2 BCA 121,765.

tractor's part to circumvent the certification requirements by splitting its claims. In summary, whether or not a contractor has split a claim into several smaller claims to avoid the monetary threshold for certification involves a case-by-case factual analysis.

D. REVISION OF CLAIMS

The necessity for certification is determined by the amount of the contractor's claim at the time of submission to the contracting officer. Accordingly, uncertified claims subsequently may be increased beyond the \$50,000 threshold, without the need for certification, if based upon new information or continued contract performance.³⁴⁷ Accretion will not be permitted (absent certification and resubmission to the contracting officer) when the contractor, at the time of initial presentment of the claim, knew, or reasonably should have known, of the additional facts underlying the increase in the claim.³⁴⁸ As the proponent of the claim, the contractor bears the

³⁴⁶*Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); see also *John R. Glenn v. United States*, 858 F.2d 1577 (Fed. Cir. 1988).

³⁴⁷See *Tecom*, 732 F.2d at 937 (increase based upon the intervening prolongation of the contract and the experience of actual operation). The policy consideration underlying this rule is set forth in the following quote: "It would be most disruptive of normal litigation procedure if any increase in the amount of a claim based on matters developed in litigation before the court [or board] had to be submitted to the contracting officer before the court [or board] could continue to final resolution on the claim." *Id.* at 937-38 (quoting *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46, 54 (1983)); see also *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 591 (Fed. Cir. 1987) (increase reasonably based on further information); *Dawco Const., Inc. v. United States*, 18 Cl. Ct. 682, 703 (1989) (court held that the fact that the dollar values changed during the course of contract administration, thereby changing the amount finally claimed, was immaterial); *Cartel Enterprises, Inc., VABCA No. 1966, 87-2 BCA ¶ 19,721* (initial claim reflected a change order proposal for an amount contractor sincerely believed was less than \$50,000, though claim was later adjusted upward as a result of a post-submission hearing); *G.S. and L. Mechanical and Const., Inc., DOT CAB No. 1640, 86-3 BCA ¶ 19,026* (increase in claim for extended home office overhead permitted because the result of an unexpectedly lengthy government suspension imposed while claim was being litigated).

³⁴⁸*LDG Timber Enterprises, Inc. v. United States*, 8 Cl. Ct. 445, 451 (1985); see 25 *New Chardon Street Ltd. Partnership v. United States*, 19 Cl. Ct. 208, 210 (1990) (withholding available amounts from the submission to the contracting officer is equivalent to understating the claim such as to constitute an evasion of the certification requirement); *Toombs and Co., Inc., ASBCA No. 35085, 89-3 BCA ¶ 21,997* (certification requirement too easily circumvented if contractor permitted to increase claim based on facts clearly known at the time of submission); *Fire Guard, Inc., ASBCA No. 32157, 86-3 BCA ¶ 19,151* (contractor knew of increase in claim prior to issuance of final decision, but made no attempt to inform the contracting officer); *E.C. Morris & Son, Inc., ASBCA No. 30385, 86-2 BCA ¶ 18,785* (contractor deliberately understated initial claim with the intention of increasing it on appeal if the contracting officer refused to settle); see also *Fireman's Fund Insurance Co., ASBCA No. 35284, 89-1 BCA ¶ 21,343* (contractor's reservation of possible future claim for impact costs did not invalidate claim absent evidence purpose was to avoid certification requirement). *But see Arnold M. Diamond, Inc., ASBCA No. 37370, 89-2 BCA 121,854* (Contractor certified only the amount it believed the government owed it while reserving a possible future claim on behalf of its subcontractor. Claim dismissed for failure to state a sum certain.)

burden of proof to show the increased amount of the claim was based on information not reasonably available at the time the initial claim was filed.³⁴⁹

Upward revisions to a claim also will be precluded if the additional evidence is viewed **as** establishing a new claim rather than merely supplementing the existing claim.³⁵⁰ Claims in excess of \$50,000 at the time of submission to the contracting officer are invalid for want of certification, even if subsequently reduced below the monetary threshold prior to **appeal**.³⁵¹ In *DeLoss* the contractor submitted an uncertified claim seeking damages in excess of \$50,000. The contracting officer issued a decision authorizing payment in an amount less than \$50,000 and made payment thereon. The contractor appealed, seeking the difference between the amount claimed and the amount received. The board held certification was not required because the amount the contractor now sought was below the monetary threshold. This result is wrong and must be regarded **as** an aberration. As noted by the board in *Building Systems*, the fact that the government was willing to pay a portion of the claim does not eliminate that amount from the claim.³⁵²

E. CLAIMS NOT INVOLVING QUANTUM

The certification requirement only applies to claims that exceed the \$50,000 threshold. Accordingly, nonmonetary claims need not

³⁴⁹*D.E.W. Incorporated*, ASBCA No. 35173, 89-3 BCA ¶ 22,008.

³⁵⁰*See SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612, 615 (1990); *Holk Development, Inc.*, GSBCA No. 9403-COM, 89-2 BCA 121,719; ~~East~~ *West Research, Inc.*, ASBCA No. 35401, 88-3 BCA 120,931; *Transco Contracting Co.*, ASBCA No. 28620, 85-2 BCA ¶ 17,977; *see also Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 418-19 (1987).

³⁵¹*See Building Systems Contractors, Inc.*, VABCA Nos. 2749, 2779, 89-2 BCA ¶ 21,678. On appeal, the contractor argued that it had reduced its claim prior to the certification issue being raised, and that the reduction was solely to correct an inadvertent computational error and not to evade the certification requirement. *Id.* at 109,015. The board, in dismissing the appeal, left the contractor with the following words of solace:

We sympathize with Appellant's contention that dismissal of these actions will serve no practical purpose. It is true that Appellant's claim, **as** it now stands, would not require certification in order to be properly considered by the Contracting Officer and that dismissal will subject the Appellant to the inconvenience and expense of having to begin the process anew.

Id. at 109,017. *But see T.E. DeLoss Equipment Rentals*, ASBCA No. 35374, 88-1 BCA ¶ 20,497.

³⁵²*Id.* at 109,016 (citing *Clark Mechanical Contractors v. United States*, 12 Cl. Ct. 415, 416 (1987)).

be certified.³⁵³ When the essence of the claim is monetary in nature or is inextricably intertwined with a monetary claim, certification is required.³⁵⁴ In a similar vein, monetary claims have been dismissed when the board suspected that the contractor fragmented his claim in an effort to overcome the lack of certification.³⁵⁵ As previously noted, the law is unsettled as to whether or not requests for declaratory relief must be money-oriented for courts and boards to exercise jurisdiction.³⁵⁶ If held to be money-oriented, certification would appear to be required, although as a practical matter, the government would be hard-pressed to insist on technical compliance with the certification requirements (particularly as to the assertion that the amount requested be accurately stated) when the contractor is not seeking monetary relief. This confusion could be reduced, at least as to the agency boards,³⁵⁷ if the boards did not view bifurcated (entitlement separated from quantum) claims as attempts to circumvent the certification requirement.³⁵⁸ If a contractor seeks only a determination of entitlement, then the issue of entitlement should be the sole focus of the board. If, as a result of the board's entitlement decision, the contractor subsequently pursues a monetary claim, then, and only then, should the contractor be required to comply with the certification requirement.³⁵⁹

F. AUTHORIZED SIGNATURES

The Contract Disputes Act requires that the certificate be signed by the contractor,³⁶⁰ the contractor being defined as "a party to a

³⁵³See *Summit Contractors*, AGBCA No. 81-136-1, 81-1 BCA ¶ 14,872; see also *Sims Paving Corp.*, DOT BCA No. 1822, 87-2 BCA ¶ 19,928; *Schmalz Const. Ltd.*, AGBCA Nos. 86-207-1 et al. 87-1 BCA ¶ 19,575 (appeal from default termination not accompanied by monetary claim).

³⁵⁴See *Todd Pacific Shipyards Corp.*, DOT BCA No. 2023, 89-3 BCA ¶ 21,920 (contractor's appeal, which it characterized as a request for contract interpretation, dismissed because the uncertified claim was in effect a claim for money); *Reflectone, Inc.*, ASBCA No. 34093, 87-1 BCA ¶ 19,656 (board concluded claim was a claim for money masquerading as a claim for contract interpretation); *Mid-Continent Casualty Co.*, DOT BCA No. 1996, 89-3 BCA 122, 120 (certification required since request for declaratory relief inextricably intertwined with monetary claim).

³⁵⁵See *Shirley Const. Corp.*, ASBCA No. 35868, 89-2 BCA ¶ 21,590.

³⁵⁶See, e.g., *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Claude E. Atkins Enterprises v. United States*, 15 Cl. Ct. 644, 647 n.4 (1988).

³⁵⁷As already discussed in the second chapter, the Claims Court believes its jurisdiction is limited to suits for money judgments. Accordingly, the concern that the contractor has fragmented its claim to avoid certification is not present.

³⁵⁸See, e.g., *Newell Clothing Co.*, ASBCA No. 24482, 80-2 BCA ¶ 14,774.

³⁵⁹In *Dewey Electronics Corp. v. United States*, 803 F.2d 650 (Fed. Cir. 1986), the court rejected the government's argument that entitlement and quantum must be decided jointly. The court concluded that such a requirement would reduce efficiency and flexibility, and place additional burdens on the parties, all of which might be unnecessary, if on appeal, the contractor does not prevail on the entitlement issue. *Id.* at 655-56.

³⁶⁰41 U.S.C. § 605(c)(1) (1988).

Government contract other than the Government.’’³⁶¹ FAR 33.207(c) provides more specific guidance:

- (1) If the contractor is an individual, the certification shall be executed by that individual.
- (2) If the contractor is not an individual, the certification shall be executed by—
 - (i) A senior company official in charge at the contractor’s plant or location involved; or
 - (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor’s affairs.

Most of the litigation in this area involves the second part of the FAR designation. Certification by the contractor’s attorney (whether retained or in-house counsel) uniformly has been declared defective.³⁶² Certification by only one member of a joint venture has been held defective,³⁶³ unless the individual meets the FAR criteria and has been duly authorized to make the certification on behalf of the joint venture.³⁶⁴ More difficult to categorize is certification by those occupying administrative or managerial positions. In *Triax Co. v. United States*³⁶⁵ claims certified by the secretary of the company and the financial vice president were held invalid. While both individuals were considered to be senior company officials, neither was in charge of the contractor’s plant or job site or had overall responsibility for the conduct of the contractor’s affairs. Likewise, in *Ball, Ball & Brosamer, Inc. v. United States*³⁶⁶ certification by the chief cost engineer was held defective because he was not the plant or onsite manager and there was no indication he possessed the general corporate authority referred to in the FAR guidance. In arriving at its conclusion, the court considered, but did not find persuasive, an affidavit from the corporation’s president which stated that the chief cost engineer had full authority to sign claim certifications on behalf

³⁶¹41 U.S.C. § 601(4) (1988).

³⁶²See *Romala v. United States*, 12 Cl. Ct. 411 (1987); *T.J.D. Services, Inc. v. United States*, 6 Cl. Ct. 257 (1984); *Chester P. Schwartz, Gary A. Mosko and Stanley H. Marks, VABCA No. 2856, 89-2 BCA ¶ 21,681*; *Space Age Engineering, Inc., ASBCA Nos. 25761 et al., 86-1 BCA ¶ 18,611*; *Sheet Metal & Machine Co., Inc., ASBCA No. 28917, 85-3 BCA ¶ 18,303. But see *Transamerica Insur. Co. v. United States*, 6 Cl. Ct. 367 (1984) (certification by attorney, who was also a company official with substantial involvement in the performance of the contract, held proper).*

³⁶³See *The Boeing Co., ASBCA No. 36612, 89-1 BCA ¶ 21,421*.

³⁶⁴*Eastern Car Const. Co., ASBCA No. 30955, 86-2 BCA ¶ 18,909*.

³⁶⁵17 Cl. Ct. 653 (1989).

³⁶⁶878 F.2d 1426 (Fed. Cir. 1989). The opinion of the Interior Board, which led to the appeal, is set forth at 88-3 BCA ¶ 20,844.

of the corporation.³⁶⁷ In *Tracor, Inc.*³⁶⁸ certification by the director of contracts was upheld based on the board's determination that he was a knowledgeable official with overall responsibility for the company's contracting activities.³⁶⁹ While certification by the project manager has been upheld,³⁷⁰ such certifications have been held defective when the project manager was neither a senior company official³⁷¹ nor possessed overall responsibility for contract administration.³⁷² In analyzing the propriety of a certification signature, the courts look beyond mere titles to determine who possesses the ultimate responsibility to act in behalf of the contractor.³⁷³

The Court of Appeals for the Federal Circuit has described the FAR guidance as "unambiguous."³⁷⁴ Yet, the number of cases addressing the issue of authority to certify indicates that confusion does exist, either as a result of the wording of the regulation or the manner in which the courts and boards have chosen to interpret it.³⁷⁵ The argument that restricting the authority to certify to the highest level of company officials is more likely to assure compliance³⁷⁶ rings hollow.³⁷⁷ Revision of the FAR language to inquire only that the cer-

³⁶⁷*Compare* *Al Johnson Const. Co. v. United States*, 19 Cl. Ct. 732, 735 (1990) (court held that merely having authority to certify does not necessarily mean that person authorized to act by the company is legally permitted to certify claims) *with* *Dawson Const. Co.*, VABCA No. 1967, 84-2 BCA ¶ 17,383 (board relied on grant of authority to certify, which was conferred by company, rather than on the individual's status as project manager). The *Johnson* court regarded the *Dawson* holding as questionable in light of *Ball. Johnson*, 19 Cl. Ct. at 736.

³⁶⁸ASBCA No. 29912, 87-2 BCA ¶ 19,808.

³⁶⁹*See also* *Todd Building Co. v. United States*, 13 Cl. Ct. 587 (1987) (certification by general manager held proper); *Southwest Marine, Inc.*, ASBCA No. 35518, 88-3 BCA ¶ 20,982 (certification by manager of contracts held proper).

³⁷⁰*See* *Santa Fe, Inc.*, VABCA No. 1746, 85-2 BCA ¶ 18,069; *Christie-Willamette*, NASA BCA No. 1182-16, 85-1 BCA ¶ 17,930.

³⁷¹The Claims Court has stated that an individual's status as project manager is not, *per se*, sufficient to make him a senior company official. *Al Johnson*, 19 Cl. Ct. at 737.

³⁷²*See* *Al Johnson Const. Co. v. United States*, 19 Cl. Ct. 732 (1990); *Donald M. Drake Co. v. United States*, 12 Cl. Ct. 518 (1987).

³⁷³*Id.*

³⁷⁴*Ball*, 878 F.2d at 1429.

³⁷⁵Professor Nash, in criticizing the result in *Ball*, expressed the opinion that the certification requirement, itself, is not so onerous, but it is so precise that not all those involved in the contracting process can be expected to know the detailed rules. Nash, *Postscript: Continuing Problems with Certification of Claims*, The Nash & Cibinic Report, Oct. 1989, para. 75.

³⁷⁶*See* Nash, *Certifying Supporting Data: Some Second Thoughts*, The Nash & Cibinic Report, Jan. 1989, para. 7. Professor Nash believes the requirement has practical value since senior company officials will be loathe to sign a certification without assurances that the company is in full compliance.

³⁷⁷If the result of miscertification is civil or criminal liability for the signator, then whoever signs, regardless of position or title, would be motivated to ensure compliance. If the consequence of miscertification is dismissal of the claim, the low-level official who did not catch the error runs the very real risk of termination by his irate employer, which would seem to be sufficient motivation to ensure compliance.

tification be executed by an individual having the authority to certify would eliminate much of the litigation in this area, with no concomitant adverse effect on the operability of the certification requirement.³⁷⁸

G. SUBCONTRACTORS

Absent privity of contract between the government and a subcontractor, certification by the subcontractor is improper.³⁷⁹ Direct dealings between the government and a subcontractor will not overcome the lack of privity.³⁸⁰ Accordingly, when a contractor submits a claim in behalf of one of its subcontractors,³⁸¹ it assumes responsibility for certifying the claim.³⁸² Certification by the prime contractor that, in effect, merely refers the contracting officer to the subcontractor's certification is considered to be an impermissible qualification.³⁸³ The prime contractor need not believe in the certainty of the submitted claim, but, by its certification, must believe that good grounds for the claim exist.³⁸⁴ As a result of the *Turner* holding, the contractor's obligations, with regard to subcontractor claims, can be identified as follows:

1. The contractor must closely scrutinize the claim. The claim should not be certified unless the contractor has a good faith belief that reasonable grounds exist to support the claim.
2. The contractor must document its review of the subcontractor's claim by furnishing accurate and complete supporting data, to include data that may be useful to the government in defending against the claim.³⁸⁵

³⁷⁸See generally Nash, *supra* note 376.

³⁷⁹See *Johnson Controls, Inc. v. United States*, 713 F.2d 1541 (Fed. Cir. 1983); see also *Ward-Schmid Co. v. United States*, 18 Cl. Ct. 572 (1989); *The Triax Co.*, ASBCA No. 31974, 88-3 BCA ¶ 21,174; *Kaufman Contractors, Inc.*, VABCA No. 2357, 86-3 BCA ¶ 19,121; *Regan/Nager Const. Co.*, PSBCA No. 1070, 85-1 BCA ¶ 17,778.

³⁸⁰See *Fireman's Fund/Underwater Const., Inc.*, ASBCA No. 33018, 87-3 BCA ¶ 20,007.

³⁸¹Only when the prime contractor has been designated as an agent of the government, or where the government has agreed to be directly liable to the subcontractor, can the subcontractor bring a direct suit in its own name against the government. See, e.g., *General Coating, Inc.*, EBCA No. 218-8-82, 84-1 BCA ¶ 17,112.

³⁸²See *United States v. Turner Const. Co.*, 827 F.2d 1554 (Fed. Cir. 1987); see also *Continental Maritime of San Diego, Inc.*, ASBCA No. 36733, 89-1 BCA ¶ 21,249.

³⁸³See *Raymond Kaiser Engineers, Inc./Kaiser Steel Corp.*, a Joint Venture, ASBCA No. 34133, 87-3 BCA ¶ 20,140; *Cox Const. Co. and Haehn Management Co.*, a Joint Venture, ASBCA No. 31072-150, 85-3 BCA ¶ 18,507.

³⁸⁴See *Turner Const.*, 827 F.2d 1554, "The contractor is only required to believe at a minimum that there is good ground to support the subcontractor's claim. Good ground does not mean that the prime contractor must consider the claim certain; it merely means that the claim is made in good faith and is not frivolous or a sham." *Id.* at 1560 n.3 (quoting *Turner Const.* for and in behalf of *Industrotech Constructors, Inc.*, ASBCA No. 25447, 84-1 BCA ¶ 16,996, at 84,662).

³⁸⁵*Cibinic, Certifying Contractor Claims: Caught in the Middle*, The Nash & Cibinic Report, Oct. 1987, para. 78.

While the sponsorship requirement has both its supporters and detractors,³⁸⁶ the requirement is not onerous and provides another layer of review. By requiring the prime contractor to certify the claims of those it has employed to fulfill the prime contractor's contractual obligations, prime contractors have an added incentive to carefully select its subcontractors to avoid the problems inherent in reviewing and certifying poorly drafted or documented claims. Sponsorship of subcontractor claims is one aspect of the certification requirement that makes sense.

V. CONCLUSION

There is a saying, "There is many a slip 'twixt the cup and the lip."³⁸⁷ So it has been between the intent of the drafters of the Contract Disputes Act and the interpretations given the Act by the courts and boards. The original purpose of the Act was to produce a more streamlined, accessible process for the resolution of contract disputes. The Act, as written, could have achieved that goal; the language of the Act is sufficiently broad to have afforded those tasked with applying the Act the necessary latitude to fashion a more efficient system for resolving disputes. Instead, the construction given the Act has resulted in a process fraught with technical pitfalls that frustrates contractors and contracting officers. The unfortunate consequence of such a formalistic approach is that appeals from a final decision by the contracting officer are often returned to the contracting officer level on some technical basis that would not have prevented the tribunal's legal analysis of the matter in dispute. Moreover, dismissals based on minor procedural defects provide no guidance to the parties and serve only to increase the time and cost of the litigation. Time and expense are the government's allies, not the contractor's.

The solution to this technical morass called the Contract Disputes Act is fairly simplistic, though unlikely. As previously stated, the interpreters of the Act, and not its drafters, are primarily responsible for the creation of the current dispute resolution system. While, in hindsight, it can be said that the Act suffers from a failure to define key terms, a sparse legislative history, and the lack of more precise guidance, these same factors afford the courts and boards the freedom to develop and fine-tune a workable system. Instead, the

³⁸⁶See Lovitky, *supra* note 291, at 528 (favoring retention); Pachter, *Certification of Subcontractor Claims*, 19 Pub. Cont. Newsl. 3, 5, (1983) (favoring abolition).

³⁸⁷Magill's Quotations in Context 621 (1965) (speech by Lady Rohesia in *The Ingoldsby Legends*, by R.H. Barham).

resultant process is an inefficient procedural minefield. Obviously, legislation could rectify the situation, but there appears little likelihood of legislative corrections to the Act in the near future. In the interim, the responsibility falls to the courts and boards to de-emphasize form over substance in the resolution of disputes.

The ultimate goal of the dispute process must be to crystalize the disagreement between the contractor and the contracting officer into a cognizable claim that can be analyzed and resolved at the lowest possible level. Only those procedural defects that prevent a true understanding of the nature and extent of the dispute merit attention. The purpose behind the creation of the Contract Disputes Act was to resolve disputes, not simply make them go away.

MURDER WITHOUT INTENT: DEPRAVED-HEART MURDER UNDER MILITARY LAW

by Major Eugene R. Milhizer*

I. INTRODUCTION

Of all the forms of homicide proscribed by military law, perhaps the most enigmatic is the military's version of depraved-heart murder, otherwise known as "murder while doing an act inherently dangerous to others." This offense is unique among the forms of homicide recognized under military law for several reasons.

First among these reasons is the extraordinary analytical premise upon which the crime is based. Depraved-heart murder was created for the pragmatic purpose of filling a perceived void in the law of murder, so that especially heinous killers could be characterized and punished as murderers even though they lacked a specific intent to kill or even injure. As originally conceived, the offense was premised on the legal fiction of implied malice. Thus, depraved-heart murder had as an element of proof a fictional mens rea requirement imposed by law so that the crime would be more consistent with the traditionally recognized forms of murder.

The evolution of the analytical underpinnings for depraved-heart murder is also remarkable. Over time, the type of malice necessary for depraved-heart murder was redefined so that the fiction of an

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¹A violation of Uniform Code of Military Justice art. 118(3), 10 U.S.C. § 918(3) (1988) [hereinafter UCMJ].

implied malice was generally no longer required, at least in terms of the original meaning of that concept. This fundamental change in the basic premise of a form of homicide is also unique.

Finally, depraved-heart murder is distinctive in its rarity. Of the 331 separate specifications alleging all forms of homicide charged at courts-martial in the Army from 30 June 1986 through the end of 1988, only ten involved the military's counterpart to depraved-heart murder.² Of these ten specifications, none resulted in a conviction for murder while doing an act inherently dangerous to others.³ The dearth of trials involving charges under article 118(3) has, in turn, resulted in scarce and often contradictory appellate guidance regarding the basic requirements and parameters of the offense under military law.

The significance and complexity of depraved-heart murder under military law recently was illustrated by the Court of Military Appeals' initial decision and its opinion on reconsideration in *United States v. Berg*.⁴ The court in *Berg* addressed a variety of issues pertaining to murder under article 118(3). The opinions provide useful guidance as to the scope and substance of this unusual form of homicide. The opinions also leave unanswered some important questions pertaining to the offense and, in some respects, may even create further uncertainty about this crime.

This article will explore some of the important issues associated with the military's version of depraved-heart murder. Specifically, the evolution of the offense in the armed forces will be reviewed and several unresolved questions pertaining to the current status of depraved-heart murder under military law will be discussed. First, the civilian origins and development of the offense will be examined briefly.

²The charging of other forms of homicide during this period was as follows: premeditated murder, UCMJ art. 118(1)—124 specifications; unpremeditated murder, UCMJ art. 118(2)—64 specifications; felony murder, UCMJ art. 118(4)—25 specifications; voluntary manslaughter, UCMJ art. 119(1)—three specifications; involuntary manslaughter, UCMJ art. 119(2)—73 specifications; negligent homicide, UCMJ art. 134—29 specifications. Statistics provided by the Clerk of Court, the United States Army Court of Military Review. The author would like to thank Mr. William S. Fulton, Jr. for his assistance in providing these statistics.

³*Id.* Of the ten specifications, pleas of not guilty were entered for two of them; one of the specifications was dismissed; and the other resulted in a finding of guilty of involuntary manslaughter in violation of UCMJ art. 119(2). In the eight other cases, the accused entered pleas of guilty to lesser included offenses of which they were found guilty. On no occasion was an accused convicted of murder under article 118(3) as a lesser included offense of premeditated or felony murder. *Id.*

⁴30 M.J. 195 (C.M.A.), *on reconsideration*, 31 M.J. 38 (C.M.A. 1990).

11. THE CIVILIAN ORIGINS OF DEPRAVED-HEART MURDER

Homicide,⁵ at common law, was divided into four broad categories: murder, manslaughter, excusable homicide, and justifiable homicide.⁶ The common law described murder as being an unlawful homicide with malice aforethought.⁷ As usually defined, murder was constituted "where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the commonwealth or sovereign, with malice prepense or aforethought, either express or implied."⁸

"Malice aforethought"⁹ evolved into the *sine qua non* for murder; it was the requirement that distinguished murder from all other forms of homicide.¹⁰ The term "malice," as ordinarily understood, conveyed "some notion of hatred, grudge, ill-will, or spite . . ."¹¹ Malice toward

⁵The term homicide "embraces every mode by which the life of one person is taken by another, and does not necessarily import crime." F. Wharton, *The Law of Homicide* § 1 (3d ed. 1907) (footnotes omitted) [hereinafter *Homicide*]. It has been defined as "the killing of one human being by another or by others; or the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another." *Id.* (footnotes omitted). Blackstone wrote that homicide is the destroying of life or the killing of any human creature. Blackstone Commentaries 177 (n.d.) [hereinafter *Blackstone*].

⁶Homicide, *supra* note 5, at § 1.

⁷See Stat. Book: 13 Rich. 2, s. 2, c. 1, 4 Hen. 8; Coke, Third Inst. (6th ed. 1680) 47; Commonwealth v. Green, 1 Ashm. 289 (Pa. 1826), cited in Note, *The Negligent Murder*, 28 Ky. L.J. 53 n.2 (1940); R. Perkins & R. Boyce, *Criminal Law* 57 (3d ed. 1982); 2 Wharton's Criminal Law § 137 (C. Torcia 14th ed. 1979) [hereinafter Wharton]. Murder is defined similarly by many present state statutes. See Wharton, § 137 n.1.

⁸Homicide, *supra* note 5, § 2. Professor Wharton has compiled an extensive listing of early decisional and scholarly authority defining murder under the common law.

⁹Actually, the term "aforethought" does little to describe or limit the term malice when used in this context. Although the term "aforethought" was originally added to "malice" to indicate that the accused's homicide was planned or designed, the requirement evolved to mean little more than "it must not be an *afterthought*." R. Perkins & R. Boyce, *supra* note 7, at 58 (emphasis in original). As at least one court has recognized, the use of the term aforethought has now become little more than a convention to express the concept of murder. *State v. Christener*, 71 N.J. 55, 362 A.2d 1153 (1976).

¹⁰Note, *The Negligent Murder*, *supra* note 7, at 54 (1940); see generally Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 702-17 (1937). "At common law, homicide was 'without malice' and consequently manslaughter and not capital even though intentional, if committed in the heat of passion upon adequate provocation." Wechsler & Michael, *supra* at 717. Over time, the law has "gradually whittled away the original meaning" of the term aforethought. R. Perkins & R. Boyce, *supra* note 7, at 57.

¹¹R. Perkins & R. Boyce, *supra* note 7, at 58. Webster defines malice, in part, as follows: "Malice may apply either to a deep-seated, often unjustified, innate desire to bring pain and suffering to others or to enjoy contemplating it . . ." Webster's Third New International Dictionary of the English Language Unabridged 1367 (P. Gove 14th ed. 1961). The legal definition of malice traditionally has been recognized as being more expansive. *E.g.*, *Bromage v. Prosser*, 4 Barn. & Cress 247, 255 (1825) ("Malice . . . in its legal sense means a wrongful act done intentionally, without just cause or excuse.").

the victim was clearly present—that is, express—in most murders, such as where the perpetrator premeditated or intended to kill without adequate provocation.¹² Indeed, an early development of American statutory law was the creation of degrees of murder to limit the application of the death penalty to especially malicious homicides (those with premeditation and deliberation) and to felony murder.¹³ Express malice also was apparent when the perpetrator harbored an intent to injure another grievously and acted upon that intent and death resulted, such as when the perpetrator deliberately shoots at a victim's leg intending to wound him but unintentionally kills the victim.¹⁴

Some homicides, however, were so aggravated and outrageous that the law sought to characterize and punish the perpetrator as a murderer, even though he harbored no specific intent to kill, injure, or commit another felony.¹⁵ Thus, the phrase "malice aforethought" developed over time into a term of art that meant "neither 'malice' or 'forethought' in the popular sense."¹⁶ Malice was said to be "implied" in all sorts of circumstances where the emotion, as it is commonly understood, was not present. Malice was implied "even though there [was] no animosity, enmity, or ill-will toward the victim, and even though there [was] no desire to take human life."¹⁷ As one author has put it, "because of the unfortunate choice of this phrase 'malice aforethought' to distinguish the offense [of murder from other homicides], it had subsequently to be twisted out of its ordinary and logical sense into a peculiar, technical connotation."¹⁸

The concept of "implied malice" has been colorfully described in a variety of ways, mostly having coronary references. A murderer

¹²See generally Homicide, *supra* note 5, at § 2.

¹³In 1794, Pennsylvania was the first state to limit the use of the death penalty by statutory means. Laws 1794, c. 257, §§ 1 and 2. Virginia enacted similar provisions within two years. 2 Stat. At Large (Shepherd, 1796) pp. 5-6, §§ 1 and 2. The purpose of these and other early statutes was to limit the death penalty to only the most deserving class of murderers. See generally Pfau & Milhizer, *The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 Mil. L. Rev. 35, 47-48 (1982) (discusses principled bases for determining which murderers are most deserving of capital punishment).

¹⁴See K. Perkins & R. Boyce, *supra* note 7, at 59 (citing *State v. Calavrese*, 107 N.J.L. 115, 151 A. 781 (1930), and *Baldwin v. State*, 538 S.W.2d 615 (Tex. Cr. App. 1976)).

¹⁵See Note, *The Negligent Murderer*, *supra* note 7, at 55.

¹⁶Wechsler & Michael, *supra* note 10, at 707 (see the authorities collected at 707 n.21); see also *supra* note 4 (discussing "aforethought").

¹⁷Wharton, *supra* note 7, at § 137.

¹⁸Note, *The Negligent Murderer*, *supra* note 7, at 53. Indeed, one noted commentator critically characterized the dividing line between murder and manslaughter, which is based upon the presence or absence of "malice aforethought," as being "shadowy." Wechsler & Michael, *supra* note 10, at 721.

who killed with implied malice was said to have acted with “a wicked, depraved, and malignant heart”;¹⁹ with “a general malignity of heart”;²⁰ and with “the heart regardless of social duty and deliberately bent on mischief.”²¹

Murder based upon an implied malice was found in a variety of circumstances. A good early example is *Rex v. Holloway*.²² In that case, a boy who trespassed into a park to steal wood was caught and beaten by a groundkeeper, who then tied the boy to a horse’s tail. When the horse ran away the boy was dragged across the ground. The boy later died from the injuries he sustained. Malice on the part of the groundkeeper was implied from the surrounding circumstances; in other words, the court applied an objective standard to the groundkeeper’s conduct and determined that it warranted a conviction for murder.²³

The more recent trend has been to abandon the fiction of implied malice.²⁴ Generally, modern law no longer resorts to the convention of finding that the perpetrator implicitly intended to harm the victim in all cases of murder. Most statutes and courts now frankly characterize a homicide as murder if the killer acted with a reckless and wanton disregard of an obvious risk to human life.²⁵ Malice is said to be expressed by the reckless and wanton attitude of the perpetrator. Modern statutes and courts tend to favor the term “depraved heart” as describing this state of mind.²⁶

Virtually every modern statutory and decisional variation of depraved-heart murder has as its gravamen two components: that the perpetrator cause the death of another by an act that 1) has a very high degree of risk of death or serious bodily injury to another,

¹⁹Blackstone, *supra* note 5, at 198.

²⁰1 East, Pleas of the Crown 268 (1803).

²¹Foster, Crown Law 262 (3d ed. 1809).

²²Cro. Car. 131 (1628).

²³See Note, *The Negligent Murder*, *supra* note 7, at 59 (discussing *Rex v. Holloway*, Cro. Car. 131 (1628)).

²⁴R. Perkins & R. Boyce, *supra* note 7, at 60.

²⁵*E.g.*, *People v. Farmer*, 28 Ill.2d 521, 192 N.E.2d 916 (1963). For a good collection of early cases discussing murder under this theory, see R. Perkins & R. Boyce, *supra* note 7, at 60.

²⁶Note, *The Negligent Murder*, *supra* note 7, at 54; see W. LaFave & A. Scott, *Handbook on Criminal Law* § 70 (1972). Some commentators and modern statutes prefer instead to characterize the perpetrator as having a “depraved mind.” 1 O. Warren & B. Bilas, *Warren on Homicide* § 80 (perm. ed. 1938).

and 2) is unjustified.²⁷ As to the first component, the degree of risk is not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, or at least should reasonably be apparent and known by him.²⁸ For example, conducting target practice in the direction of a group of campers could be extremely risky behavior. If their presence is unknown and not reasonably foreseeable to the gunman, however, any resulting homicide would not amount to a depraved-heart murder.²⁹

As to the second component, because the perpetrator's justification or lack of it are pertinent to his culpability for a depraved-heart murder, the perpetrator's motives for engaging in risky behavior are necessarily relevant in assessing his guilt.³⁰ Put another way, the real or intended social utility of the perpetrator's conduct that caused the homicide are considered in determining whether he acted with a depraved heart.

Three examples will illustrate this point. First, assume that a person drives a truck carefully but quickly through a crowded pedestrian mall to remove a powerful bomb that is about to explode. If the driver strikes and kills a pedestrian while engaging in this undeniably risky behavior, he might nonetheless be entitled to a complete defense of necessity or lesser evils because of the overriding social utility of his conduct.³¹ Second, assume the driver's purpose for speeding through

²⁷See W. LaFave & A. Scott, *supra* note 26, at § 70. The authors point out that this requirement for a very high degree of risk distinguishes depraved-heart murder from manslaughter and other homicides involving less risky behavior, such as negligent homicide. UCMJ art. 134; see Manual for Courts-Martial, United States, 1984, Part IV, para. 85 [hereinafter MCM, 1984]; see generally TJAGSA Practice Note, *Negligent Homicide and a Military Nexus*, The Army Lawyer, Slay 1991, at 28. The authors characterize these different levels of risk as being "matters of degree," and thus "there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another." W. LaFave & A. Scott, *supra* note 26, at 542.

²⁸See generally Milhizer, *Involuntary Manslaughter and Drug Overdose Deaths: A Proposed Methodology*, The Army Lawyer, Mar. 1989, at 10 (discussed evaluating risky behavior in the context of homicide).

²⁹W. LaFave & A. Scott, *supra* note 26, at 542. Professors LaFave and Scott give the following example to illustrate this point: the actual risk of death to another is exactly the same if one fires into the window of what appears to be an abandoned cabin in a deserted mining town as if one shoots the same bullet into a window of a well-kept city home, when in fact in each case the room into which the shot is fired is occupied by one person. If the occupant of the cabin is killed this may not amount to depraved-heart murder. If the occupant of the house dies, on the other hand, this may constitute such a crime under some statutory versions of depraved-heart murder. *Id.*

³⁰*Id.*

³¹See generally Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988).

the mall is instead to cause the people there to scatter about and become frightened. This extremely risky behavior has no social utility and thus the driver who engages in it has a depraved heart. Under these circumstances, the driver would be guilty of murder if he struck and killed a pedestrian. Third, assume the driver's purpose for speeding through the mall is to chase and capture a shoplifter. Although the driver's purpose is socially useful, it is insufficiently weighty to justify taking such a high risk of serious harm. If the driver strikes and kills a pedestrian under these circumstances, he may be guilty of some lesser form of criminal homicide, although lacking the depraved heart required for murder.³²

Civilian courts have found that a wide variety of conduct, given the surrounding circumstances, can constitute a depraved-heart murder; that is, conduct that creates a very high risk of death or serious bodily harm without justification. Examples include³³ throwing a beer mug at a woman who was carrying a lighted oil lamp, thereby causing her to burn to death;³⁴ shooting into the caboose of a passing freight train³⁵ or into a moving automobile;³⁶ shooting toward a person riding a horse to scare the horse so that the rider would be thrown, but instead shooting and killing the rider;³⁷ shooting at a point near another person without aiming directly at him;³⁸ driving an automobile in a reckless manner while intoxicated and thereby striking and killing someone;³⁹ playing "Russian roulette" with another person;⁴⁰ and shaking an infant so long and hard that he cannot breathe.⁴¹

***Professor's LaFave and Scott conclude:

Since the amount of risk which will do for depraved-heart murder varies with these two variable factors—the extent of the defendant's knowledge of the surrounding circumstances and the social utility of his conduct—the mathematical chances of producing death required for murder cannot be measured in terms of percentages.

W. LaFave & A. Scott, *supra* note 26, at 542-43.

³³The following examples were taken from two sources: W. LaFave & A. Scott, *supra* note 26, at 543; Note, *The Negligent Murder*, *supra* note 7, at 57-59. Additional cases are collected in 2 Wharton, *supra* note 7, at 195-97.

³⁴*Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698 (1883).

³⁵*Banks v. State*, 85 Tex. Crim. 165, 211 S.W. 217 (1919).

³⁶*Wiley v. State*, 19 Ariz. 346, 170 P. 869 (1918).

³⁷*State v. Smith*, 2 Strob. 77, 47 Am. Dec. 589 (S.C. 1847).

³⁸*Myrick v. State*, 199 Ga. 244, 34 S.E.2d 36 (1945).

³⁹*Reed v. State*, 225 Ala. 219, 142 So. 441 (1932); *State v. Weltz*, 155 Minn. 143, 193 N.W. 42 (1923); *State v. Trott*, 190 N.C. 674, 130 S.E.2d 27 (1925); *Ware v. State*, 47 Okla. Crim. 434, 288 P. 374 (1930).

⁴⁰*Commonwealth v. Malone*, 354 Pa. 180, 47 A.2d 445 (1946).

⁴¹*Regina v. Ward*, [1956] 1 Q.B. 351.

In summary, society traditionally has sought to punish those who perpetrate the most evil homicides as murderers. In most cases, the perpetrator of an especially evil homicide desires to kill or seriously injure the victim. Indeed, it is this express malice toward the victim that generally makes a homicide so serious that it is classified as a murder. On some occasions, however, an especially egregious homicide will be perpetrated without express malice toward the victim. At first, the law created the fiction of implied malice to hold the perpetrator accountable as a murderer. Over time, the law favored directly characterizing such malevolence as malice in a legal sense, and thus permitted a conviction for murder based upon a depraved-heart rationale. This form of murder was, in essence, a gap filler; it ensured that all offenders who commit especially serious homicides could be convicted and punished as murderers even when they harbored no specific intent to kill or injure the victim.

This brief overview of the development of depraved-heart murder at common law and in civilian jurisdictions does not, of course, address the more detailed and specific issues concerning the crime. For example, must the death result from an intentional act on the part of the perpetrator? Must the perpetrator have actual knowledge of the very high risk of death or grievous bodily harm caused by his behavior? Must more than one person be placed at risk by the perpetrator's conduct? Can the perpetrator's animus, if any, be directed solely at the victim? The manner in which the military justice system has responded to these and other specific questions will be discussed next.

111. THE DEVELOPMENT OF THE MILITARY'S EQUIVALENT OF DEPRAVED-HEART MURDER: MURDER WHILE DOING AN ACT INHERENTLY DANGEROUS TO OTHERS

Not surprising, the military counterpart of depraved-heart murder has undergone some significant changes over the last several decades. The ninety-second article of the 1917 Articles of War gave only a cursory definition of murder, providing in part that "[a]ny person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct" ⁴² An

⁴²10 U.S.C. § 1564 (1917). The remainder of the article provided "but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." *Id.*

early version of the Manual for Courts-Martial, borrowing from federal statutory definitions, described murder as “the unlawful killing of a human being with malice **aforethought**.”⁴³ Military law recognized that malice aforethought could be satisfied under a depraved-heart rationale as follows:

Malice aforethought may exist when the act [of killing] is unpremeditated. It may mean any one or more of the following states of mind . . . (b) knowledge that the act which causes the death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused⁴⁴

Of course, this state of mind must precede or coexist with the act or omission causing death to satisfy the “aforethought” requirement.⁴⁵

As in early civilian cases, the malice for depraved-heart murder under military law was said to be implied. Indeed, Colonel Winthrop wrote in his famous treatise that, “[i]n every case of apparently deliberate and unjustifiable killing, the law *presumes* the existence of the malice necessary to constitute murder, and devolves upon the accused the *onus* of rebutting the presumption.”⁴⁶ Colonel Winthrop observed further that “where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law.”⁴⁷ This concept of implied

⁴³Manual for Courts-Martial, United States, 1917, 249 [hereinafter MCM, 1917]. Military decisional law later recognized, as had civilian law, that “malice is the element in murder which differentiates that crime from manslaughter.” United States v. Maxie, 25 C.M.R. 418 (C.M.A. 1958).

⁴⁴MCM, 1917, at 250-51. Other states of mind sufficient to constitute malice included

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); . . . (c) intent to commit any felony(;)(d) an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed.

id.

⁴⁵*Id.* at 250.

⁴⁶W. Winthrop, *Military Law and Precedents* 673 (2d ed. 1920) (emphasis in original).

⁴⁷*Id.*

malice for murder based upon a depraved heart remained essentially unchanged in all succeeding versions of the Manual prior to 1950.⁴⁸

With the enactment of the Uniform Code of Military Justice in 1950,⁴⁹ the military murder statute substantially assumed its current form. Article 118 provided, in pertinent part, that “[a]ny person subject to this code who, without justification or excuse, unlawfully kills a human being, when he . . . is engaged in an act which is inherently dangerous to others and evinces a wanton disregard for human life . . . is guilty of murder.”⁵⁰ The commentary to article 118(3) described it as “a codification of the well settled common-law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender’s conduct was imminently dangerous to others and evinced a wanton disregard of human life.”⁵¹ The commentary observed further that article 118(3) “is intended to cover those cases where the acts resulting in death are calculated to put human lives in jeopardy, without being aimed at any one in particular.”⁵²

The 1951 Manual for Courts-Martial⁵³ elaborated upon the state of mind required for murder under article 118(3). It provided that the accused must evince “[s]uch disregard [as] characterized by a heedlessness of the probable consequences of the act or omission, an indifference that death or great bodily harm may ensue.”⁵⁴ Unlike earlier versions of the Manual for Courts-Martial,⁵⁵ however, the 1951

⁴⁸See Manual for Courts-Martial, United States, 1949, para. 179a [hereinafter MCM, 1949]; Manual for Courts-Martial, United States, 1928, para. 148a [hereinafter MCM, 1928]; Manual for Courts-Martial, United States, 1921, para. 442 [hereinafter MCM, 1921]; see also Naval Courts and Boards, United States, 1937, § 53 [hereinafter NCB, 1937].

⁴⁹50 U.S.C. §§ 551-736 (1950) [hereinafter UCMJ, 1950].

⁵⁰UCMJ, 1950, art. 118. Other forms of murder proscribed by article 118 were premeditated murder, unpremeditated murder (where the perpetrator had a specific intent to kill or inflict grievous bodily harm), and felony murder (limited to certain, enumerated felonies). *Id.* Homicides occurring in connection with opposing an official acting in a law enforcement capacity were eliminated as a distinct basis for murder. See Congressional Record - Senate (1950), at 1307; see also MCM, 1917, at 250-51. A mandatory punishment to life confinement and the availability of the death penalty was limited to premeditated murder and felony murder only. UCMJ, 1950, art. 118.

⁵¹Uniform Code of Military Justice, 1950, Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense (“Morgan Draft”), at 144.

⁵²*Id.* The legislative history to article 118(3) reflects that at least some observers believed that “Article 118, section 3, as written, provides too much latitude to be passed as written. As the witness sees it, a drunken driver could be convicted of murder under this section.” Statement of John J. Finn, 1 Index and Legislative History. Uniform Code of Military Justice 1950.

⁵³Manual for Courts-Martial, United States, 1951 [hereinafter MCM, 1951].

⁵⁴MCM, 1951, para. 197f.

⁵⁵See *supra* note 48.

Manual provision contained no requirement that the accused have actual knowledge of the dangerousness of his **actions**.⁵⁶

The 1951 Manual also provided several illustrative examples of murder under an article 118(3) theory. These included “throwing a live grenade toward another in jest, or flying an aircraft very low over a crowd to make it **scatter**.”⁵⁷ Another contemporary example of depraved-heart murder under article 118(3) was “secreting unmarked boxes of ammunition in a warm part of a vessel”⁵⁸

About a dozen reported military cases address article 118(3) in some useful detail. The first important military case was *United States v. Davis*.⁵⁹ The accused in *Davis* was charged with felony murder by shooting and killing the victim while perpetrating an armed robbery.⁶⁰ The accused was found guilty, by exceptions, to unpremeditated murder of the named victim. At the court-martial, the law officer instructed upon murder under an article 118(3) theory.⁶¹ The defense on appeal attacked the propriety of this instruction, contending that article 118(3) requires that the accused evince a wanton disregard of human life in general. The defense argued that the evidence did not support such a finding **as** to the accused, whose animus was directed solely at the victim.

The Court of Military Appeals agreed with the defense in *Davis*. The court first observed that the defense’s position was supported by the greater weight of civilian authority addressing the animus issue.⁶² The court also relied upon a short reference to article 118(3) in the legislative history to the UCMJ, which said that article 118(3) “is intended to cover those cases where the acts resulting in death are calculated to put human lives in jeopardy, without being aimed at any one in **particular**.”⁶³ Based upon the foregoing authority, the court reversed the accused’s murder conviction, finding that the instruction **as** to article 118(3) was erroneous and prejudicial. The court concluded that the conduct proscribed by article 118(3) “is only that which is ‘inherently dangerous to others’ in that it is directed towards

⁵⁶See MCM, 1951, para. 197f.

⁵⁷*Id.*

⁵⁸J. Snedeker, *Military Justice Under the Uniform Code* § 3402j (1953).

⁵⁹10 C.M.R. 3 (C.M.A. 1953).

⁶⁰*Id.* at 5.

⁶¹*Id.* at 8.

⁶²See cases cited *id.*

⁶³Index and Legislative History, Uniform Code of Military Justice, HH1231, *quoted in Davis*, 10 C.M.R. at 8-9.

persons in general rather than against a single individual in particular—that is, where the actor has evinced a ‘wantondisregard of human life’ in the general or multiple sense.’⁶⁴

The holding in *Davis* was apparently modified by *United States v. Sandoval*.⁶⁵ The accused in *Sandoval* was convicted for the murder of another soldier under an article 118(3) theory. The evidence showed that the accused visited the home of a Korean prostitute, where he was denied entry because the prostitute was entertaining another soldier.⁶⁶ The accused left in an angry mood, returned to his unit where he consumed beer and obtained a carbine, loaded the weapon, and returned to the house.⁶⁷ The accused ordered the other soldier out of the premises and then fired into a doorway of the house in the direction of those to his immediate front.⁶⁸ The other soldier was struck by a bullet and later died.⁶⁹

In affirming the accused’s conviction for murder under article 118(3), the Court of Military Appeals observed that the “accused cared little whose life he endangered,” and that he “fired into the house with the malicious intent of killing someone.”⁷⁰ Significantly, the court apparently expanded its holding in *Davis*, finding that while the accused “may have intended specifically to kill one particular person, his acts were inherently dangerous to others. Accordingly, we hold the finding of guilty of unpremeditated murder is adequately supported by the evidence.”⁷¹

⁶⁴*Id.* at 9.

⁶⁵15 C.M.R. 61 (C.M.A. 1954). In the interim, the Court of Military Appeals decided *United States v. Holsley*, 10 C.M.R. 52 (C.M.A. 1953), which did little more than reassert the holding in the *Davis* case. In *Holsley*, the accused was convicted of unpremeditated murder for fatally stabbing another enlisted soldier with whom he was arguing. *Id.* at 53. The court concluded that the accused’s conviction could not be sustained under an article 118(3) theory, as that theory of murder is available only in those cases where the accused endangered the lives of more than one person and the victim received the fatal injury without the dangerous act being specifically directed at him. *Id.* at 55-56.

⁶⁶*Sandoval*, 15 C.M.R. at 63.

⁶⁷*Id.* at 68-64, 66.

⁶⁸*Id.* at 63, 67.

⁶⁹*Id.* at 63-64, 67.

⁷⁰*Id.*

⁷¹*Id.* The next case addressing article 118(3) was *United States v. McDonald*, 15 C.M.R. 130 (C.M.A. 1954). *McDonald* follows the rationale of *Sandoval* rather than *Davis*. The accused in *McDonald* was convicted of unpremeditated murder for the shooting death of another soldier. The evidence showed that the accused had earlier had an argument with the victim, which led to the accused deliberately firing a pistol at the victim in the close confines of a crowded tent. *Id.* at 131-32. The accused was charged with murder under both an article 118(2) (intentional but unpremeditated murder) and article 118(3) theory. The court concluded that the accused could be guilty under an article 118(3) theory in these circumstances, even if he intended to kill the victim, as his acts were dangerous to others in the tent and in the immediate vicinity. *Id.* at 133.

The next major case to address murder under an article 118(3) theory was *United States v. Dacanay*.⁷² The accused in *Dacanay* was tried for unpremeditated murder under both an article 118(2)⁷³ and article 118(3) theory.⁷⁴ The evidence showed that the accused and a fellow worker had both developed an intimate physical relationship with the same woman.⁷⁵ Ultimately, all three parties agreed that the accused and the woman would continue their relationship, and the co-worker would seek intimate companionship elsewhere. When it appeared that the woman and the co-worker had not ended their relationship, the accused went to the woman's residence and waited for her. The accused brought a pistol with him, which he placed under a pillow. When the woman later returned in the company of the co-worker, a confrontation between the accused and the co-worker ensued. During the confrontation, the accused shot and killed the co-worker with the pistol.

The accused claimed that he feared being assaulted by the co-worker, who had aggressively approached him, and did not intend to kill the victim when the weapon discharged. The accused explained that he took the pistol to the woman's residence as a protection against thieves who had recently victimized a neighbor there.⁷⁶ The accused also emphasized his close personal friendship with the victim,⁷⁷ and several defense witnesses testified as to the accused's character for peacefulness.

At the conclusion of the evidence, the law officer in *Dacanay* instructed on both the article 118(2) and 118(3) theories of unpremeditated murder.⁷⁸ The members returned findings of guilty to unpremeditated murder without specifying the theory or theories of guilt. The Court of Military Appeals determined that the law of-

⁷²15 C.M.R. 263 (C.M.A. 1954).

⁷³Under this theory, the accused must have the specific intent to kill or seriously injure the victim, but need not premeditate. UCMJ, 1950, art. 118(2).

⁷⁴*Dacanay*, 15 C.M.R. at 264-65.

⁷⁵*Id.* at 264. In fact, the accused and the co-worker, "by mutual agreement, . . . shared [the woman's] affections on alternate nights." *Id.*

⁷⁶The accused testified that his "knowledge of the firearm was meager." *Id.*

⁷⁷Defense witnesses testified favorably as to the accused's veracity as a witness. *Id.*

⁷⁸The law officer instructed in pertinent part as follows:

The court is advised that to find the accused guilty of the Specification of the Charge, it must be satisfied . . . : (1) That the victim named is dead; (2) That his death was caused by an unlawful act or omission of the accused, as alleged; (3) That, at the time of the killing, the accused intended to kill or inflict great bodily harm or was engaged in an act inherently dangerous to others and evincing a wanton disregard of human life.

Id. at 265 (emphasis added).

ficer's instruction was erroneous, as only the article 118(2) theory of murder was raised by the evidence. The court observed that the article 118(3) theory of murder was not supported by the evidence, because more than one person must be endangered by the accused's actions to constitute that type of homicide. The court wrote that "[t]he evidence in the case at bar makes abundantly clear that the accused's acts were directed solely against the deceased, . . . and that no other life or limb was placed in jeopardy."⁷⁹ As some or all of the members thus may have returned a finding of guilty to unpremeditated murder based upon a theory of guilt not supported by the evidence, the Court of Military Appeals reversed the accused's conviction.⁸⁰

United States v. Stokes,⁸¹ the next significant military decision that addressed depraved-heart murder, considered two important issues pertaining to article 118(3). The accused in *Stokes*, who had previously consumed a large quantity of alcohol,⁸² was riding in the back seat of a jeep that was occupied by a total of five persons.⁸³ Earlier, the accused had brandished a pistol, which he had put away when instructed to do so by one of the passengers. At a later point, the accused fired the pistol in the direction of the front seat, killing one of the passengers sitting there. The accused had displayed no ill-will toward any of the jeep's occupants and no discernable reason for firing the pistol was apparent. Approximately two minutes after the shooting, the accused left the jeep, asking "'Who shot who?'—and almost immediately lapsed into sleep or unconsciousness . . ."⁸⁴

The Court of Military Appeals in *Stokes* first addressed whether article 118(3) requires that the accused have actual knowledge of the dangerousness of his actions. The court found, in this regard, that Congress intended no fundamental change in the previous definition of malice aforethought in enacting article 118(3).⁸⁵ Therefore, the 1949 Manual for Court-Martial and its previous editions⁸⁶—which

⁷⁹*Id.*

⁸⁰*Id.* at 266.

⁸¹19 C.M.R. 191 (C.M.A. 1955).

"The court described the beverage as "native wine." *Id.* at 193. The accused was assigned to Korea.

⁸³*Id.* at 193-94.

⁸⁴*Id.* at 194.

⁸⁶*Id.* at 195. The court cited its opinion in *United States v. Craig*, 10 C.M.R. 148 (C.M.A. 1953), where it observed that Congress's intent in article 118 was to separate the different states of mind that can serve as a basis for murder so as to be more easily dealt with in the trial of cases.

⁸⁶*See* MCM, 1949, para. 179a; MCM, 1928, para. 442; *see also* NCB, 1937, § 53.

provide that actual knowledge of dangerousness by the accused is required—would be followed, rather than the 1961 Manual for Courts-Martial provision, which did not explicitly require such knowledge.⁸⁷ In short, the court interpreted article 118(3) to require that the accused have “knowledge that death or grievous bodily harm is a probable consequence of the act [which resulted in death].”⁸⁸

The court in *Stokes* also addressed whether voluntary intoxication could act as a partial defense to murder under an article 118(3) theory.⁸⁹ The issue was raised because, as a general rule, voluntary intoxication can negate the actual knowledge requirement for several offenses under military law.⁹⁰ The court concluded, however, that voluntary intoxication could not operate to negate the knowledge requirement for murder under article 118(3).⁹¹ The court noted that this result was consistent with the military law’s refusal to permit voluntary intoxication as a partial defense to unpremeditated murder under an article 118(2) theory, even though such a state-of-mind defense logically should negate the specific intent element of that crime.⁹² The court in *Stokes* concluded candidly that

Perhaps it will be said that “knowledge” is no more than fictive, once it is conceded that an accused is thoroughly intoxicated. If so, suffice it to say that we are committed to this legal fiction It may be added that intent or malice may be equally supposititious if an accused is very drunk. Yet it appears that voluntary drunkenness—not amounting to legal insanity—will not in military law negate that general criminal intent, the malice, required for a conviction of unpremeditated murder.⁹³

The next important case to discuss murder under an article 118(3) theory of murder was *United States v. Judd*.⁹⁴ The accused in *Judd*

⁸⁷*Stokes*, 19 C.M.R. at 194-95. The court acknowledged that it may consider discussions of substantive offenses found in the Manual for Courts-Martial in arriving at the meaning of punitive articles in the UCMJ; however, the Manual provision must give way to the UCMJ when the two conflict. *Id.* at 195-96 (citing *United States v. Greer*, 13 C.M.R. 132 (C.M.A. 1953), and *United States v. Rosato*, 11 C.M.R. 143 (C.M.A. 1953)).

⁸⁸*Stokes*, 19 C.M.R. at 196.

⁸⁹*Id.* at 196-97.

⁹⁰See generally Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 150-51 (1990). At notes 111 to 122 and the accompanying text, the author discusses the application of the voluntary intoxication defense to offenses having a special mens rea requirement for knowledge.

⁹¹*Stokes*, 19 C.M.R. at 196-97.

⁹²See *United States v. Craig*, 10 C.M.R. 148 (C.M.A. 1953); *United States v. Roman*, 2 C.M.R. 150 (C.M.A. 1952).

⁹³*Stokes*, 19 C.M.R. at 197.

⁹⁴27 C.M.R. 187 (C.M.A. 1959).

was convicted of unpremeditated murder for the shooting death of his wife. The evidence showed that the accused shot his wife at close range in the family trailer while she was holding their infant son.⁹⁵ The accused variously claimed that he was playing around with the revolver, cleaning it, or in the process of loading or unloading it when it discharged and struck his wife; the accused expressly denied aiming at or intending to kill his wife.⁹⁶ The evidence also indicated that the accused was familiar with firearms in general and was well acquainted with the operation of the model involved in the homicide.⁹⁷

The board of review concluded on these facts that the accused could not be convicted of murder under an article 118(3) theory. The board reasoned that because the evidence failed to show the accused deliberately pointed the weapon at his wife and child, his misconduct was no more than culpably negligent as a matter of law.⁹⁸

The Court of Military Appeals disagreed. The court in *Judd* found that, regardless of whether the accused aimed at any particular individual, his conduct of knowingly triggering a weapon pointed in the general direction of two persons located only a few feet away and directly in his line of vision was sufficiently risky to supply the malice required for murder under article 118(3).⁹⁹ Moreover, the court implicitly found that the accused, because of his familiarity with weapons and his awareness of the proximity of his family, had the requisite knowledge of the dangerousness of his actions to satisfy the knowledge requirement for this form of murder.

*United States v. Hartley*¹⁰⁰ was the next significant case to discuss murder under an article 118(3) theory.¹⁰¹ The evidence in *Hartley* showed that the accused deliberately loaded a pistol and placed it in his pocket prior to leaving the barracks with some friends.¹⁰² Later,

⁹⁵*Id.* at 189.

⁹⁶*Id.* at 189-90. The accused explained that he purchased the gun originally for protection against his father-in-law, whom the accused believed did not "like" him. As it turned out, the father-in-law's assumed antagonism was based on good reason. *Id.* at 190.

⁹⁷*Id.* at 190.

⁹⁸*See id.* at 191. Curiously, the board acknowledged that the accused's misconduct satisfied the legal standard for murder under article 118(3) in "layman's language," but it did not satisfy the requirements for article 118(3) as "established by decisional law." *Id.* (quoting the board of review's opinion below).

⁹⁹*Id.* at 193.

¹⁰⁰36 C.M.R. 405 (C.M.A. 1966).

¹⁰¹In the interim, the Court of Military Appeals decided *United States v. Cook*, 30 C.M.R. 173 (C.M.A. 1961). In *Cook*, the court concluded that the law officer did not improperly inject an article 118(3) theory of murder into his instructions on the elements of unpremeditated murder under article 118(2). *Id.* at 175-76.

¹⁰²*Hartley*, 36 C.M.R. at 409. The accused, who was right-handed, placed the pistol in his left-hand jacket pocket. The accused's right hand was in a cast.

the accused intervened and helped end a fight between two of his companions in the presence of at least ten other people. When the fight renewed, the accused stated, “If there’s going to be any more fighting, you will have to fight me, and the first man hits me, I’ll kill him.”¹⁰³ The accused then stepped between the two quarreling men while reaching into his pocket and cocked the pistol. The accused fell during the course of the struggle and, as he tried to get up, was grabbed by the deceased. The accused managed to work himself free and, as he fell again, fired a shot that struck the deceased and killed him. The accused immediately admitted that he had fired the fatal bullet, albeit unintentionally. He then threatened to shoot anyone else who made a move at him while he fled the area.¹⁰⁴

The most significant aspect of the Court of Military Appeal’s opinion in *Hartley* concerns its discussion of the accused’s intent with respect to the killing act. The court wrote that “in murder by engaging in an act inherently dangerous to another it is required that death result from an *intentional act of the accused*.”¹⁰⁵ The court concluded that, under the facts present in *Hartley*, the law officer failed to adequately instruct on this requirement—that is, that he failed to instruct that the fact-finder must conclude the accused intentionally pulled the trigger to convict him of murder under article 118(3). Because of this infirmity in the instructions, the accused’s conviction for the greater offense of murder was reversed.¹⁰⁶

The next case to discuss article 118(3), *United States v. Jacobs*,¹⁰⁷ is troubling. The accused in *Jacobs* was convicted of murder under an article 118(3) theory for the shooting death of a rival for his wife’s affection. The evidence showed that the accused’s child was in the

¹⁰³*Id.*

¹⁰⁴*Id.* at 409-10. The accused later denied pulling the trigger, claiming instead that he was holding the pistol by the butt when it discharged. *Id.* at 410. Expert testimony indicated, however, that the weapon did not have a hair trigger; that it would have to have been dropped from a height of at least ten feet to discharge accidentally; and that the pistol had a trigger pull of five and one-quarter pounds, which was considered safe. *Id.*

¹⁰⁵*Id.* at 412 (emphasis in original). Interestingly, the court wrote without citation to authority that “all of the authorities agree” with the intentional-act requirement for depraved-heart murder. *Id.* No military case prior to *Hartley*, however, expressly imposed such a requirement.

¹⁰⁶In the decretal paragraph, the court returned the record of trial to The Judge Advocate General of the Army, with instructions that a “board of review may affirm the offense of manslaughter and reassess the sentence or a rehearing may be ordered.” *Id.* Chief Judge Quinn dissented, finding that the law officer’s instruction was adequate in advising the members that in order to convict the accused of murder under article 118(3), they would have to find beyond a reasonable doubt that the accused deliberately fired the pistol. *Id.* (Quinn, C.J., dissenting).

¹⁰⁷9 M.J. 794 (N.C.M.R. 1980).

same area as the victim when the fatal shot was fired.¹⁰⁸ The circumstantial evidence suggested that the accused intentionally fired the weapon and that he probably knew that the victim and his wife were lovers.

The Navy Court of Military Review, citing *United States v. Davis*,¹⁰⁹ determined that the accused could not be convicted under these facts for article 118(3) murder because his conduct was not “directed towards persons in general rather than against a single individual.”¹¹⁰ The court commented further:

From our review of the evidence we cannot find beyond a reasonable doubt that [the accused] intended to “scare” the victim by actually firing a round in the general vicinity of the deceased, an act which could foreseeably be seen as dangerous to “others” through ricocheting action, or for that matter, through penetration to the upper level of the house where the wife was making beds, given the facts before us.¹¹¹

Surprisingly, the court in *Jacobs* did not discuss, or even cite, the earlier Court of Military Appeals decisions in *United States v. Sandoval*¹¹² and *United States v. McDonald*.¹¹³ The higher court expressly held in these cases that an accused may be convicted of murder under article 118(3), even if he specifically intended to kill only one particular person, provided that his actions were inherently dangerous to others. In this regard, the court of review in *Jacobs* did not indicate whether its reversal of the accused’s murder conviction signaled a departure from the teaching of *Sandoval* and *McDonald*, or instead was consistent with those decisions because of the particular factual posture of the case.¹¹⁴ Judge Michel concurred in the result in *Jacobs* (affirming the accused’s conviction of the lesser included offense of involuntary manslaughter),¹¹⁵ stating without further elaboration that he disagreed with the majority’s analysis of the article 118(3) concept of “inherently dangerous to another.”¹¹⁶

¹⁰⁸*Id.* at 796.

¹⁰⁹10 C.M.R. 3 (C.M.A. 1953).

¹¹⁰*Jacobs*, 9 M.J. at 796.

¹¹¹*Id.* at 797.

¹¹²15 C.M.R. 61 (C.M.A. 1954).

¹¹³15 C.M.R. 130 (C.M.A. 1954).

¹¹⁴For example, the court of review in *Jacobs* may have determined *sub silentio* that the accused’s actions were directed toward the victim in such a way that others in the vicinity were not placed in sufficient jeopardy to satisfy the requirements of article 118(3).

¹¹⁵A violation of U.C.M.J. art 119(b).

¹¹⁶*Jacobs*, 9 M.J. at 798 (Michel, J., concurring in the result).

A more recent case addressing article 118(3) is *United States v. Vandenack*.¹¹⁷ The accused in *Vandenack*, who had never been issued a valid driver's license, took a car from a parking lot in Germany without the owner's knowledge or permission.¹¹⁸ He proceeded to drive at a high rate of speed in excess of posted limits,¹¹⁹ eventually colliding with the rear of a passenger car stopped at a red light.¹²⁰ The accused then sped away¹²¹ from the scene of the accident, running at least three more red lights and, at times, driving on the wrong side of the road.¹²² Ultimately, the accused approached another intersection where a car was making a left turn across his path. The accused ran the red light at this intersection, which he admitted seeing, and crashed into the other car, killing the driver. The force of the impact sent the other car skidding over forty yards. At least five other cars were in the vicinity of the intersection at the time of the collision.¹²³

During the providence inquiry in *Vandenack*, the accused admitted that he knowingly drove through the red light at a high rate of speed; that he should have known his actions could have killed somebody; that death was a probable consequence of his misconduct, which he disregarded; and that his actions were inherently dangerous to other persons and demonstrated a wanton disregard for human life.¹²⁴ The accused also stated, however, that he did not realize at the time that his misconduct could lead to someone's death.¹²⁵

The Court of Military Appeals in *Vandenack* seemed to apply an objective standard in assessing the recklessness of the accused's actions for purposes of an article 118(3) murder. The court affirmed the accused's conviction, concluding that any reasonable person in the accused's place would have recognized the inherently dangerous and life-threatening nature of his conduct. This aspect of the court's opinion appears to be inconsistent with its earlier holding in *United States v. Stokes*,¹²⁶ which required that the accused subjectively have

¹¹⁷15 M.J. 230 (C.M.A. 1983).

¹¹⁸*Id.* at 231.

¹¹⁹Although the posted speed limit was 70 kilometers (43 miles) per hour, the accused drove at various rates ranging from 100 to 130 kilometers (62 to 81 miles) per hour. *Id.*

¹²⁰The accused's vehicle struck the car with sufficient force to send it spinning into the intersection, where it came to rest after colliding with a truck. *Id.*

¹²¹He drove between 62 and 74 miles per hour in a 43 mile-per-hour zone. *Id.*

¹²²The accused indicated that part of his motivation for leaving the scene of the accident was that he had no valid operator's license and was driving a vehicle he did not own. *Id.*

¹²³*Id.*

¹²⁴*Id.* at 231-32.

¹²⁵*Id.* at 232.

¹²⁶19 C.M.R. 191 (C.M.A. 1955).

knowledge of the dangerousness of his actions to be guilty of murder under article 118(3).¹²⁷ Unfortunately, *Stokes* is neither cited nor distinguished by the court in *Vandenack*, and thus its resolution of this issue is unclear.

Vandenack is the last decision by the Court of Military Appeals to address article 118(3) prior to the 1984 Manual for Courts-Martial. The current military statute and guidance in the Manual for Courts-Martial pertaining to article 118(3), as well as latest decision by the Court of Military Appeal addressing this form of murder, will be considered next.

IV. THE CURRENT MILITARY STATUTE FOR DEPRAVED-HEART MURDER AND SUBSEQUENT GUIDANCE IN THE MANUAL AND CASE LAW

The present statutory language of article 118(3) has not changed from that found in the 1950 UCMJ. It provides: "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life . . . is guilty of murder" ¹²⁸

The 1984 Manual for Courts-Martial reflects that depraved-heart murder under military law has five elements of proof:

- (a) That a certain named person is dead;
- (b) That the death resulted from the intentional act of the accused;
- (c) That this act was inherently dangerous to others and showed a wanton disregard for human life;
- (d) That the accused knew that death or great bodily harm was a probable consequence of the act; and
- (e) That the killing was unlawful.¹²⁹

¹²⁷See *supra* notes 85-88 and accompanying text.

¹²⁸UCMJ art. 118(3).

¹²⁹MCM, 1984, Part IV, para. 43b(3). The 1969 Manual listed only three elements for the offense: "(a) That the victim named or described is dead; (b) that his death resulted from the unlawful act or omission of the accused, as alleged; and (c) that the accused was engaged in an act inherently dangerous to others, evincing a wanton disregard of human life." Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 197d [hereinafter MCM, 1969].

The analysis to the **1984** Manual indicates that the second element of proof—requiring that the death be the result of an intentional act by the accused—has been modified in response to the Court of Military Appeal’s decision in *United States v. Hartley*.¹³⁰

The **1984** Manual defines the term “wanton disregard for human life” as follows:

Intentionally engaging in an act inherently dangerous to others —although without **an** intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm.¹³¹

The Manual provides two illustrative examples of wanton disregard for human life that could support a conviction for murder in violation of article **118(3)**: “throwing a live grenade toward others in jest or flying an aircraft very low over a crowd to make it scatter.”¹³²

The **1984** Manual also elaborates on the knowledge required for article **118(3)** murder. The Manual explains that the accused “must know that death or great bodily harm was a probable consequence of the inherently dangerous act.”¹³³ The analysis to the **1984** Manual refers to the Court of Military Appeals’ opinion in *Stokes*¹³⁴ as the basis for its discussion about the knowledge requirement.¹³⁵

The sole reported military case to discuss depraved-heart murder during the last several years is *United States v. Berg*.¹³⁶ The opinions in *Berg* are the only instances in which the military appellate courts have addressed article **118(3)** since the **1982** amendments to the UCMJ and the **1984** Manual for Courts-Martial.

¹³⁰MCM, **1984**, Part IV, para. 43 analysis at A21-95 (citing *Hartley*, 36 C.M.R. 405 (C.M.A. 1966)).

¹³¹MCM, **1984**, Part IV, para. 43c(4)(a). The analysis to the **1984** Manual refers to *Vandenack*, 15 M.J. 428 (C.M.A. 1983), in connection with this subparagraph. *Id.*, Part IV, para. 43 analysis at A21-95.

¹³²MCM, **1984**, Part IV, para. 43c(4)(a).

¹³³*Id.*, Part IV, para. 43c(4)(b). The Manual indicates further that “[s]uch knowledge may be proved by circumstantial evidence.” *Id.*

¹³⁴19 C.M.R. 191 (C.M.A. 1955).

¹³⁵MCM, **1984**, Part IV, para. 43 analysis at A21-95.

¹³⁶28 M.J. 567 (N.M.C.M.R. 1989), *aff’d*, 30 M.J. 195 (C.M.A.) *on reconsideration*, 31 M.J. 38 (C.M.A. 1990).

The accused in *Berg* resided in a apartment with the victim, who also was a member of the Navy, and her two children.¹³⁷ The victim was killed in her apartment bedroom by a gunshot wound to her head from a revolver owned by the accused. No one witnessed the killing except the accused.

At trial, the government proceeded upon two alternative theories of murder. The government first asserted that the accused intentionally killed the victim by firing the fatal shot at her head.¹³⁸ In the alternative, the government alleged that the accused engaged in an act inherently dangerous to others by firing a weapon in an inhabited apartment building, because the bullet was capable of penetrating the ceiling and striking a resident in the upstairs apartment.¹³⁹

In support of the first theory, the government presented evidence that showed that the accused had previously threatened the victim because she had talked about a former boyfriend in her sleep. Government witnesses testified that the accused was a violent person with a bad temper, who previously had threatened a former girlfriend with a gun because of her nocturnal admissions.¹⁴⁰ Others testified on behalf of the government concerning the stormy relationship between the accused and the victim, and that the two had argued shortly before the killing.¹⁴¹ The government also presented scientific evidence that suggested the murder weapon was fired at close range, with the revolver placed against the victim's head.

The evidence in support of the article 118(3) theory of murder was less comprehensive. Scientific evidence demonstrated that a bullet fired from the murder weapon was capable of penetrating the apartment ceiling. No evidence was presented, however, showing that any bullets were fired through the ceiling by anyone that evening. Moreover, the expert testimony was inconclusive as to whether the fatal bullet travelled in the direction of the ceiling or parallel to the floor.¹⁴²

¹³⁷*Id.*, 30 M.J. at 196.

¹³⁸These facts would support a conviction for unpremeditated murder under UCMJ article 118(2), which requires that the accused specifically intend to kill or inflict great bodily harm.

¹³⁹*Berg*, 30 M.J. at 196.

¹⁴⁰*Id.* at 196-97.

¹⁴¹*Id.* at 197.

¹⁴²For his part, the accused denied that he intentionally shot the victim. He testified that the victim had been emotionally upset for some time and had attempted suicide when she was a teenager. The accused claimed that while he and the victim were arguing, the victim walked to the bedroom and obtained the accused's revolver. The accused, saying that he feared the victim might "do something stupid," tried to disarm her. According to the accused, the victim fatally shot herself during their struggle for the weapon. *Id.*

The military judge instructed upon both the article 118(2) and 118(3) theories of unpremeditated **murder**.¹⁴³ The members ultimately returned a general **verdict**¹⁴⁴ of guilty to unpremeditated murder, without specifying the particular theory or theories of guilt upon which it was **based**.¹⁴⁵

The Navy-Marine Corps Court of Military Review found in *Berg* that the factual circumstances of the case fell exclusively within the scope of article 118(2), and not within the parameters of article 118(3).¹⁴⁶ The court wrote that to constitute a violation of article 118(3), “the evidence must show that the conduct of an accused is inherently dangerous to others in that it endangers the lives of more than one and that the victim received the fatal injury without the dangerous act being specifically directed at him.”¹⁴⁷

In a related matter, the court also found that the “evidence tended to show that another person could have been endangered by the [accused’s] actions”¹⁴⁸ The court of review nonetheless concluded that the evidence was insufficient as a matter of law to support a conviction under article 118(3), because the accused’s alleged animus was directed solely at the victim.

The court of review held, therefore, that the military judge made a prejudicial error by instructing the members on murder under an article 118(3) theory, because a “court-martial cannot be permitted to find an accused guilty of an offense not reasonably raised by the evidence.”¹⁴⁹ As the court of review was unable to determine on which theory or theories of unpremeditated murder the accused was convicted, it set aside the findings of guilty and the sentence.

The Court of Military Appeals, in its initial *Berg* opinion, agreed with the court of review below that the evidence did not support giving an instruction for murder under an article 118(3) theory. Unlike the rationale of the court of review, however, the conclusion of the

¹⁴³The defense objected to the members being instructed upon the article 118(3) theory of murder. The objection was denied and the military judge instructed upon both article 118(2) and 118(3). The defense later requested that the military judge give further clarifying instructions, arguing that the two theories of unpremeditated murder relied upon by the government were mutually inconsistent as to the accused’s intent. This request was also denied by the military judge. *Id.*

¹⁴⁴Only military judges are authorized to make special findings. See R.C.M. 918(b).

¹⁴⁵*Berg*, 30 M.J. at 197.

¹⁴⁶*Berg*, 29 M.J. at 568.

¹⁴⁷*Id.* (emphasis omitted) (citing *Davis*, 10 C.M.R. 3 (C.M.A. 1953); *Holsey*, 10 C.M.R. 52 (C.M.A. 1953); *Jacobs*, 9 M.J. 794 (N.M.C.M.R. 1980)).

¹⁴⁸*Id.* at 569.

¹⁴⁹*Id.* at 569.

Court of Military Appeals was based upon the failure of the evidence to show that any person other than the victim was placed in danger by the accused's actions.¹⁵⁰ The Court of Military Appeals noted the lack of evidence of any of the following: 1) that any bullets had been fired through the victim's ceiling; 2) that the accused had a wanton disregard for human life in a general or multiple sense; 3) that the accused knew that someone was inside the apartment above his that night; or 4) that he intentionally had fired the gun in that direction.¹⁵¹ In other words, the Court of Military Appeals affirmed the court of review's decision to set aside the findings and sentence, but that affirmation was based upon the completely different rationale that the judge's instructions were not factually supported by the evidence.¹⁵²

The Court of Military Appeals went on to discuss the significance of the accused's animus. This discussion is, unfortunately, unclear at best and perhaps contradictory.¹⁵³ Early in its opinion, the court

¹⁵⁰*Berg*, 30 M.J. at 198 (citing *Davis*, 10 C.M.R. at 9). The Court of Military Appeals wrote expressly that it did not "necessarily agree with the court below that there was evidence to show that the accused's conduct was inherently dangerous to others." *Id.* at 199.

¹⁵¹*Id.* at 199. The court observed in this regard that the government's case was primarily directed toward the article 118(2) theory. Indeed, the court wrote that to conclude that article 118(3) murder was raised by the evidence would necessarily mean that this theory would be raised for "every homicide in which a gun is intentionally fired at a specific individual inside a multiple-family dwelling, regardless of the circumstances" *Id.* The court specifically declined to establish such a precedent.

¹⁵²This holding in *Berg* raises important questions regarding the Court of Military Appeal's scope of review. Clearly, the Court of Military Appeals is not empowered to find facts *de novo*. UCMJ art. 67(d) ("The Court of Military Appeals shall take action only with respect to matters of law."); see *United States v. Odegard*, 25 M.J. 140, 141 (C.M.A.), cert. denied, 108 S. Ct. 1017 (1987) (the Court of Military Appeals reviews questions of sufficiency of the evidence from which a court-martial may find or infer beyond a reasonable doubt those facts required by law for a conviction). Service courts of review, on the other hand, have independent fact-finding powers. UCMJ art. 66(c); *United States v. Baldwin*, 37 C.M.R. 336 (C.M.A. 1967); *United States v. Remele*, 33 C.M.R. 149 (C.M.A. 1963). Moreover, factual determinations by a court of review are supposed to be binding upon the Court of Military Appeals. *United States v. Johnson*, 30 M.J. 930, 934 n.2 (A.C.M.R. 1990). Indeed, the Court of Military Appeals has held that it "may not overturn a truly factual determination based upon the evidence of record made by intermediate appellate bodies possessed of fact-finding jurisdiction." *United States v. Alaniz*, 26 C.M.R. 313, 317 (C.M.A. 1958), quoted in *Johnson*, 30 M.J. at 934 n.2. In the view of some, the Court of Military Appeals has, "from time to time and not without self-criticism, . . . released itself from this legal straightjacket." *Johnson*, 30 M.J. at 934 n.2 (citing *United States v. Loukas*, 29 M.J. 385, 396 (C.M.A. 1990) (Everett, C.J., dissenting), and *United States v. Brown*, 3 M.J. 402, 404 (C.M.A. 1977) (Fletcher, C.J., dissenting)). Whether the Court of Military Appeals in *Berg* has performed an escape from this figurative straightjacket, and thus exercised independent fact-finding powers to find facts contrary to the court of review, is beyond the scope of this article.

¹⁵³Indeed, the court explained in its opinion on reconsideration of *Berg* that it sought to "eliminate any possible confusion" caused by its initial opinion in that case. *Berg*, 31 M.J. at 39.

wrote that article 118(3) murder may be constituted even though the accused's animus was directed solely at the victim.¹⁵⁴ The court later seemed to contradict itself, holding that depraved-heart murder requires that the accused's animus be directed at persons generally and not toward a single individual.¹⁵⁵

Less than three months after its initial opinion in *Berg*, the Court of Military Appeals published an opinion of the court on reconsideration in that case. The court explained that it was responding to the government's contention, in its petition for reconsideration, that "under [the government's] interpretation of Article 118(3), it did not need to show that 'others' were endangered, but only that another was endangered by the accused's actions."¹⁵⁶

The court reiterated its position that "the legislative history, as well as military case law, provide ample precedent for the view that a conviction under Article 118(3) requires that an accused's conduct must always be 'inherently dangerous to others and evince a wanton disregard for human life *in general*.'"¹⁵⁷ The court explained that the military's formulation of depraved-heart murder might be less "incongruous" if its scope was expanded to include situations in which the accused's inherently dangerous conduct, which results in the death of another, threatens only the victim.¹⁵⁸ The court concluded, however, that this change could properly be accomplished only through legislative action and not by judicial interpretation.¹⁵⁹ Accordingly, the court adhered to its prior decision in *Berg*, which set aside the findings and sentence.¹⁶⁰

V. UNSETTLED ISSUES PERTAINING TO ARTICLE 118(3)

Despite the recent decisions in *Berg* and the 1984 Manual for Courts-Martial's enumeration of the elements for murder under article 118(3), with accompanying explanations and analysis, several issues pertaining to depraved-heart murder under military law are not fully resolved. These issues are addressed below.

¹⁵⁴*Berg*, 30 M.J. at 198-99.

¹⁵⁵*Id.* at 200.

¹⁵⁶*Berg*, 31 M.J. at 39.

¹⁵⁷*Id.* at 40 (emphasis in original) (citations omitted).

¹⁵⁸*Id.* at 40-41.

¹⁵⁹*Id.* at 41 (citing W. LaFave & A. Scott, Substantive Criminal Law § 7.4, at 203 n.29 (1986)).

¹⁶⁰*Id.* at 42.

A. THE INTENTIONAL ACT REQUIREMENT

The title of this article may be misleading, as depraved-heart murder under military law does have one element of proof related to intent.¹⁶¹ Although the consequences of the accused's actions (for example, the death of the victim) need not be intended by the accused as a prerequisite for guilt under article 118(3),¹⁶² the decisional law has required that the victim's death be the result of an intentional act by the accused. The precise meaning of this intentional act requirement, however, is unclear.

Specifically, the second element of proof for unpremeditated murder under article 118(3) provides that "the death result from the intentional act of the accused."¹⁶³ As noted earlier, the analysis to the Manual for Courts-Martial¹⁶⁴ indicates that this element is based on *United States v. Hartley*,¹⁶⁵ wherein the Court of Military Appeals expressly held that article 118(3) murder requires that the victim's death be the result of an intentional act by the accused.¹⁶⁶

Hartley is not particularly helpful, however, in describing the precise meaning of this requirement for an intentional act. Virtually every homicide that potentially constitutes murder under article 118(3) can be traced to one or more intentional acts by the accused. The issue, therefore, is not whether the accused committed an intentional act that resulted in the victim's death. Rather, the relevant question is whether the ultimate act—that is, the killing act—must be intentional, or whether the intentional commission of an earlier act contributing or leading to the homicide will suffice. Moreover, assuming that the intentional commission of an earlier act can be sufficient for murder under article 118(3), the question remains as to how far removed this act can be from the homicide and still satisfy the intentional act requirement. These two queries beg a third question—how to define "the ultimate or killing act."

¹⁶¹Of course, all crimes, including depraved-heart murder, require at least a general criminal intent. See generally Milhizer, *Mistake of Fact and Carnal Knowledge*. The Army Lawyer, Mar. 1990, at 3 (discussing different criminal intent requirements, including the intent needed for so-called "strict liability" offenses). It should also be noted, tangentially, that military decisional law holds that attempted depraved-heart murder under UCMJ article 80 requires that the accused have a specific intent to kill. *United States v. Koa*, 12 M.J. 210 (C.M.A. 1982).

¹⁶²Indeed, a substantial body of the military's decisional law has interpreted article 118(3) so that an accused is precluded from being found guilty of this form of unpremeditated murder if he intended to kill.

¹⁶³MCM, 1984, Part IV, para. 43b(3)(b).

¹⁶⁴MCM, 1984, Part IV, para. 43b analysis, app. 21, at A21-95 (hereinafter MCM, 1984, Part IV, para. 43b analysis).

¹⁶⁵36 C.M.R. 405 (C.M.A. 1966).

¹⁶⁶*Id.* at 412.

These issues can best be illustrated in a factual context. Assume, for example, that the accused is tried for murder under article 118(3) for the shooting death of a person who was standing in a crowded room. If the accused intentionally pulled the trigger while deliberately aiming in the general direction of the crowd to cause it to scatter, black letter military law would hold that he satisfied the intentional act requirement of article 118(3). Suppose instead that the accused intentionally handled the gun in an unsafe manner, by twirling it in his hand knowing that it was loaded, that it had a hair trigger, and that the safety was not engaged. Assume further that the accused was deliberately performing these acts to frighten people in the crowd when the weapon unintentionally discharged, killing a spectator. The accused's conduct in the latter situation is intentional in one respect, in that he deliberately exposed the crowd to a high degree of risk without justification. Yet, his act of firing the pistol also could be viewed as being unintentional, as he intended only to scare the others by brandishing the weapon without meaning to fire it.

Hartley can be interpreted to hold that the accused in the second example is not guilty of murder under article 118(3) because he did not intentionally pull the trigger. Indeed, the Court of Military Appeals reversed the accused's conviction in *Hartley* because the law officer failed to instruct, pursuant to a defense request, that the members must find the accused knowingly and deliberately intended to fire the weapon to convict him of murder under an article 118(3) theory. Proponents of this narrow interpretation of the intentional act requirement could argue that it is consistent with the general philosophy that murder and its severe penal sanctions should be reserved for only the most serious of homicides—when the accused intentionally commits the killing act.¹⁶⁷

Such a narrow interpretation of *Hartley* and the intentional act requirement, however, is too restrictive. The purpose for the intentional act requirement is satisfied when the evidence establishes that the accused evidenced a wanton disregard for human life and intentionally engaged in an act knowing that it is inherently dangerous to others. This intentional act need not be the ultimate act or even

¹⁶⁷Military law has, in other circumstances, adopted a particularly restrictive interpretation of murder and its associated punishments. For example, although the Supreme Court has authorized the death penalty for felony murder when the defendant either killed the victim or had the specific intent to kill, *Edmund v. Florida*, 458 U.S. 782 (1982), military law allows the death penalty for felony murder only if the accused was the actual perpetrator of the killing. R.C.M. 1004(c)(8).

the penultimate act, provided that the accused intentionally engaged in conduct that satisfies the gravamen for a depraved-heart murder—that is, the knowing creation of a very high degree of risk of death or serious bodily harm without justification.¹⁶⁸ In fact, military law traditionally has recognized that the accused can be guilty of murder under article 118(3) even when death was not intended or desired, provided the accused knew that his misconduct was especially risky and unjustified.¹⁶⁹

For example, assume that an actor intentionally handles a powerful and sensitive explosive in an extremely risky manner for the purpose of scaring several observers. If he drops the material and causes an explosion that kills a bystander, his conduct should satisfy the intentional act requirement of article 118(3), regardless of whether the explosive was dropped intentionally.¹⁷⁰ In other words, the intentional act requirement can be met in some circumstances even when the ultimate act leading to the homicide—such as dropping an explosive—is not deliberate or intended. Speaking metaphorically, the actor need not intentionally pull the trigger to be guilty of murder under article 118(3) if, by his intentional actions, he knowingly created a very high and unjustified risk that someone would be shot and killed.

Adopting the more restrictive view suggested by *Hartley*—that the ultimate or killing act must be intentional—could lead to illogical hair-splitting and incorrect results. For example, suppose the accused intends to pull the trigger but does not intend that the weapon discharge. Under the narrow interpretation of the intentional act requirement suggested by *Hartley*, such conduct leading to the death of another might be insufficient as a matter of law for guilt under article 118(3) because an “act” more proximate to the victim’s death was not intended by the accused. This conclusion can be rejected easily, because it confuses the concepts of “intended acts” and “intended consequences.” As noted earlier, article 118(3) requires that the consequences of the accused’s actions be known to the accused, but not necessarily intended by him.

A more subtle problem exists, however, with the narrow interpretation. Even if the ultimate act—as distinguished from ultimate consequence of the act—by the accused is unintended, he nonetheless could be guilty of murder under article 118(3), depending on the surrounding circumstances. When the accused’s intentional acts pro-

¹⁶⁸See *supra* notes 27-32 and accompanying text

¹⁶⁹See MCM, 1917, at 250-51

¹⁷⁰See MCM, 1984, Part IV. para 43c(4)(a)

ceeding the final act are so depraved and wanton that they satisfy the malice required by article 118(3), and when a sufficient nexus exists between the intentional acts and the homicide, the accused can be guilty of depraved-heart murder under military law, regardless of whether his final act was intended or negligent. If such depravity, wantonness, and knowledge is lacking, the accused may be guilty of a homicide no more serious than involuntary manslaughter.¹⁷¹

Whether a sufficient nexus can be shown between the earlier intentional acts and the homicide is a factual question. As with all factual questions, the fact-finder must resolve this issue on case-by-case basis; no litmus test is possible for distinguishing between intentional acts that are “merely preparatory” from those that have an adequate nexus to the homicide. Although such line drawing is always problematic,¹⁷² the military’s approach to analyzing the overt act requirement for attempt offenses¹⁷³ provides a useful analogy.

In *United States v. Byrd*¹⁷⁴ the Court of Military Appeals addressed whether the accused’s conduct amounted to a sufficient overt act for attempted distribution of marijuana. The court, quoting from a Second Circuit case,¹⁷⁵ held that to be guilty of the charged attempt, the accused “must have engaged in conduct which constitutes a substantial step toward the commission of the crime.”¹⁷⁶ The Court of Military Appeals, again quoting the Second Circuit court, explained that “[a] substantial step must be conduct strongly corroborative of the firmness of the [accused’s] criminal intent.”¹⁷⁷

Translated into the context of depraved-heart murder, to constitute an intentional overt act required by article 118(3), the accused intentionally must have engaged in conduct that constitutes a substantial step toward the commission of the homicide. Additionally, the substantial step must be strongly corroborative of the depravity and wantonness of the accused’s heart. With these guideposts to aid fact-

¹⁷¹A violation of UCMJ art. 119(b); see MCM, 1984, Part IV, para 44c(2)(a). See generally Milhizer, *supra* note 28; TJAGSA Practice Note, *Involuntary Manslaughter Based Upon an Assault*, The Army Lawyer, Aug. 1990, at 32.

¹⁷²As Justice Oliver Wendell Holmes once observed in a different context, “[W]hile I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall.” *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926).

¹⁷³Violations of UCMJ art. 80.

¹⁷⁴24 M.J. 286 (C.M.A. 1987).

¹⁷⁵*United States v. Jackson*, 550 F.2d 112, 116(2d Cir.), *cert. denied*, 434 U.S. 941 (1977).

¹⁷⁶*Byrd*, 24 M.J. at 290 (quoting *Jackson*, 550 F.2d at 116).

¹⁷⁷*Id.*

finders, their determination of whether a sufficient nexus has been proven should be no more difficult than the myriad of other factual issues they are routinely called upon to resolve.

B. THE KNOWLEDGE REQUIREMENT

A second important issue concerns the knowledge requirement for murder under article 118(3). As discussed earlier, the fourth element of proof for depraved-heart murder under military law provides "that the accused *knew* that death or great bodily harm was a probable consequence of the act . . ."¹⁷⁸ Depraved-heart murder, however, has not always required such knowledge.

Indeed, whether the defendant's realization or knowledge¹⁷⁹ of the risk he created should be required for depraved-heart murder has been debated by legal scholars for over a century. The English judge and noted legal historian Sir James F. Stephen took the view that one should not be guilty of depraved-heart murder unless he was subjectively aware of the risk he created.¹⁸⁰ Justice Oliver Wendell Holmes took a contrary position¹⁸¹ believing that guilt should be based on an objective assessment of the risk created, regardless of whether the perpetrator actually realized it.¹⁸¹ Although some courts have followed Holmes's view,¹⁸² most courts¹⁸³ and commentators¹⁸⁴ ex-

¹⁷⁸MCM, 1984, Part IV, para. 43b(3)(d) (emphasis added).

¹⁷⁹Black's Law Dictionary defines "knowledge" as "[a]cquaintance with fact or truth." Black's Law Dictionary 1012 (4th ed. 1968).

¹⁸⁰J. Stephen, *History of Criminal Law in England* 22 (1883). Stephen classified the English law of murder into four categories, the second of which involved the following:

Malice aforethought . . . may consist in . . . knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

J. Stephen, *Digest of the Criminal Law* art. 315(b) (7th ed. 1926). *quoted in* Note, *Homicide—Is Knowledge & Danger Necessary in Murder by a Dangerous Act?*, 28 Ky. L.J. 474 (1940).

¹⁸¹O. Holmes, *The Common Law* 53-54 (1881); *accord* *Commonwealth v. Chance*, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899).

¹⁸²*E.g.*, *Regina v. Ward*, [1956] 1 Q.B. 351 (approved an instruction that if the defendant's conduct was such that a reasonable person would have realized that death or serious bodily injury was likely to result, the defendant would be guilty of murder) (cited in *W. LaFave & A. Scott, supra* note 26, at 544); *see generally* Note, *The Negligent Homicide, supra* note 7, at 56-69.

¹⁸³*E.g.*, *Commonwealth v. McLaughlin*, 293 Pa. 218, 142 A. 213 (1928) (the defendant's conduct after the vehicular homicide—stopping and taking the victim to the hospital—is relevant to whether he was subjectively aware of the risk created by his conduct).

¹⁸⁴*E.g.*, *W. LaFave & A. Scott, supra* note 26, at 544-45; Note, *Homicide—Is Knowledge of Danger Necessary in Murder by a Dangerous Act?*, *supra* note 175, at 474.

pressly addressing the issue have favored Stephen's position.¹⁸⁵ One commentator has opined that Stephen's view "has a better foundation in logic and practicality," because it serves the preeminent phenological purpose of fitting the punishment to the crime.¹⁸⁶ As two noted scholars similarly have observed, "On balance, it would seem that, to convict of murder, with its drastic penal consequences, subjective realization should be required."¹⁸⁷

Consistent with Stephen's view, the Court of Military Appeals unequivocally has held in *United States v. Stokes*¹⁸⁸ that the accused must have "knowledge that death or grievous bodily harm is a probable consequence of the act [which resulted in death]" to be guilty of murder under article 118(3).¹⁸⁹ This knowledge requirement was reiterated in every edition of the Manual for Courts-Martial prior to 1951.¹⁹⁰ As noted, the 1984 Manual for Courts-Martial incorporates this requirement from *Stokes* in the definitional section of paragraph 43, explaining that "[t]he accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act"¹⁹¹ to be guilty of murder under article 118(3).

In the more recent *Vandenack*¹⁹² case, however, the Court of Military Appeals was confronted with an accused who said during the providence inquiry that he did not realize at the time of his misconduct that it could lead to someone's death.¹⁹³ The court nonetheless affirmed his conviction for murder under an article 118(3) theory,

¹⁸⁵As Professors LaFave and Scott have observed, however,

Most of the cases are ambiguous on the matter; they tend to speak of conduct which "evinces" or "manifests" or "shows" a depraved heart, without spelling out whether [the defendant] must actually possess this depraved heart (i.e., have a subjective realization of the risk) or whether it is enough that a reasonable man would have realized the risk and so would have had a depraved heart.

W. LaFave & A. Scott, *supra* note 26, at 544.

¹⁸⁶Note, *Homicide—Is Knowledge of Danger Necessary in Murder by a Dangerous Act?*, *supra* note 173, at 478-79.

¹⁸⁷W. LaFave & A. Scott, *supra* note 26, at 544. The authors point out that if one is too absent-minded or feeble-minded to realize the risk—and, therefore, cannot be guilty of murder—he could still be found guilty of manslaughter and thus not escape criminal punishment altogether. *Id.* at 545.

¹⁸⁸19 C.M.R. 191 (C.M.A. 1955).

¹⁸⁹*Id.* at 196; *see supra* notes 85-88 and accompanying text.

¹⁹⁰*See* MCM, 1949, para. 179a; MCM, 1928, para. 442; *see also* NCB, 1937, § 53.

¹⁹¹MCM, 1984, Part IV, para. 43c(4)(b); *see* MCM, 1984, Part IV, para. 43c analysis (stating that this subparagraph of the Manual is based on *Stokes*). The Manual provides further that "[s]uch knowledge may be proved by circumstantial evidence." MCM, 1984, Part IV, para. 43c(4)(b).

¹⁹²15 M.J. 230 (C.M.A. 1983).

¹⁹³*Id.* at 232.

seeming to apply an objective standard for assessing the dangerousness of his conduct.¹⁹⁴

The obvious temptation is to dismiss *Vundenuck* as a classic example of a tough case making bad law; the accused's misconduct was especially egregious,¹⁹⁵ the opinion emphasized the outrageous facts of the case,¹⁹⁶ and neither *Stokes* nor its underlying rationale was distinguished or even discussed. Yet, *Vundenuck* remains as one of the more recent pronouncements by the Court of Military Appeals on article 118(3), and its apparent inconsistency with earlier decisional law cannot be ignored.

One way of resolving this apparent inconsistency is to conclude that the court found the providence inquiry in *Vundenack*, considered in its entirety, adequately demonstrated the accused had the requisite, subjective knowledge of the risk he created at the time of his misconduct to be guilty of murder under article 118(3). This conclusion is supported by the court's reliance on numerous portions of the providence inquiry to demonstrate the adequacy of the inquiry as a whole,¹⁹⁷ and its characterization of the accused's statement denying knowledge as being no more than an equivocation.¹⁹⁸ *Vandenack* also might be explained by the court's preoccupation with addressing whether a vehicular homicide can rise to murder under article 118(3),¹⁹⁹ rather than focusing on whether subjective knowledge is required for that crime. In any event, *Vandenack* should not be construed to do away with the well-settled and favored requirement for knowledge under article 118(3).

The Court of Military Appeals' recent opinions in *Berg*²⁰⁰ indirectly support the requirement for actual knowledge. The court, in both *Berg* opinions, favorably quoted the legislative history to article 118(3), which reflects that Congress intended the statute "to cover those cases where the acts resulting in death are *calculated* to put human lives in jeopardy, without being aimed at any one in particular."²⁰¹ Such calculations on the part of an accused presupposes that he has actual knowledge of the danger being risked.

¹⁹⁴*Id.* at 233-34; see also *Judd*, 27 C.M.R. at 192-93 (seeming to apply an objective standard).

¹⁹⁵See *supra* notes 117-23 and accompanying text.

¹⁹⁶*Vandenack*, 15 M.J. at 234.

¹⁹⁷*Id.* at 231-32.

¹⁹⁸*Id.* at 233.

¹⁹⁹*Id.* at 234.

²⁰⁰30 M.J. 195 (C.M.A. 1990).

²⁰¹*Id.* at 199; 31 M.J. at 40 (quoting Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services 81st Cong., 1st Sess. 1231 (1949)) (emphasis added) [hereinafter Hearing on H.R. 2498].

It follows, therefore, that the defense of partial mental responsibility,²⁰² which can negate special mens rea requirements including actual knowledge,²⁰³ should be recognized as a partial defense to an article 118(3) murder.²⁰⁴ Commentators have argued persuasively that an actor who is too feeble-minded or absent-minded to realize the seriousness of the risk, although not insane, ought not be held guilty of murder under a depraved-heart theory.²⁰⁵ These commentators point out that such a person ordinarily would not escape all criminal responsibility for his actions, and thus could be convicted of manslaughter or some other lesser form of homicide.²⁰⁶ No reported military case has addressed this issue.²⁰⁷

Black letter military law states that “[w]here ‘actual knowledge’ is an element of an offense, the defense of voluntary intoxication can operate to negate that element.”²⁰⁸ The traditional relationship of voluntary intoxication and offenses having actual knowledge as an element has been described as follows:

Actual knowledge is always at issue when the accused’s recognition of the status of the victim is an element of the charged offense. The accused’s knowledge of the victim’s status is an element of several common offenses under military law, including disrespect to a superior commissioned officer; assaulting or willfully disobeying a superior commissioned officer; and insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.²⁰⁹

Although military decisional authority has heretofore generally evaluated voluntary intoxication in the context of negating the ac-

²⁰²See UCMJ art. 50(a); MCM, 1984, R.C.M. 916(k)(2).

²⁰³R.C.M. 916(k)(2).

²⁰⁴*Cf.* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (partial mental responsibility can negate the specific intent requirements for murder under article 118(2)); United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989).

²⁰⁵W. LaFave & A. Scott, *supra* note 26, at 544.

²⁰⁶*Id.*

²⁰⁷See generally United States v. Tilley, 25 M.J. 20 (C.M.A. 1987), *cert. denied*, 108 S.Ct. 1015 (1988).

²⁰⁸Milhizer, *supra* note 90, at 150 (citing MCM, 1984, R.C.M. 916(1)(2)).

²⁰⁹*Id.* (citations omitted).

cused's knowledge about the status of certain individuals,²¹⁰ the defense logically should operate with equal force to negate the distinct knowledge requirement for murder under article 118(3).²¹¹ Accordingly, if a soldier is so intoxicated that he does not realize the potential risks of recklessly handling a loaded weapon in a crowded barracks, it then follows that he should be entitled to the defense of voluntary intoxication if charged with murder under article 118(3) for killing a bystander by unintentionally shooting him.

²¹⁰The military appellate courts and boards have uniformly permitted voluntary intoxication to operate as a defense to crimes having as an element that the accused has knowledge of the status of the victim or some other person. For example, voluntary intoxication can act as a defense to a disrespect charge, as the accused must be aware of the victim's status when the offense is perpetrated. *See* *United States v. Lucy*, 27 C.M.R. 238 (C.M.A. 1958); *United States v. Miller*, 7 C.M.R. 70 (C.M.A. 1953); *United States v. Brown*, 11 C.M.R. 332 (A.B.R. 1953); *United States v. Higgins*, 10 C.M.R. 453 (A.B.R. 1953); *United States v. O'Neil*, 8 C.M.R. 669 (A.F.B.R. 1953); *United States v. Shirley*, 3 C.M.R. 839 (A.F.B.R. 1952). The accused must likewise be aware of the status of the person issuing a military order for obedience to be required, so voluntary intoxication will be permitted as a defense to a charge of disobeying a lawful order. *See* *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963); *United States v. Lucy*, 27 C.M.R. 238 (C.M.A. 1958); *United States v. Miller*, 7 C.M.R. 70 (C.M.A. 1953); *United States v. Roberts*, 12 C.M.R. 477 (A.B.R. 1953); *United States v. Alexander*, 11 C.M.R. 489 (A.B.R. 1953); *United States v. Brown*, 11 C.M.R. 332 (A.B.R. 1953); *United States v. Higgins*, 10 C.M.R. 453 (A.B.R. 1953); *United States v. Carpenter*, 5 C.M.R. 248 (A.B.R. 1952). Certain aggravated assault offenses also require that the accused be aware of the victim's status, and thus voluntary intoxication is a recognized defense in these cases. *See* *United States v. Johnson*, 15 C.M.R. 149 (C.M.A. 1954) (alleged assault upon a commissioned officer); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963) (assault upon a commissioned officer); *United States v. Roberts*, 12 C.M.R. 477 (A.B.R. 1953) (lifting a weapon against a superior commissioned officer in the execution of his duties); *United States v. Clipner*, 12 C.M.R. 364 (A.B.R. 1953) (assault upon a commissioned officer); *United States v. Owens*, 11 C.M.R. 747 (A.F.B.R. 1953) (assault upon a superior noncommissioned officer); *United States v. Brown*, 11 C.M.R. 332 (A.B.R. 1953) (assault upon a commissioned officer); *United States v. Randolph*, 5 C.M.R. 779 (A.F.B.R. 1952) (assault upon a person in the execution of air police duties); *see also* *United States v. Stone*, 13 C.M.R. 906 (A.F.B.R. 1953) (to be guilty of resisting apprehension, the accused must know status of air policeman trying to apprehend him; accordingly, voluntary intoxication can act as a defense to resisting apprehension); *United States v. Noriega*, 20 C.M.R. 893 (A.F.B.R. 1955) (to be guilty of provoking words, the accused must know the victim was subject to the UCMI; accordingly, voluntary intoxication can act as a defense to provoking words).

²¹¹Special knowledge requirements unrelated to the status of others can be negated by voluntary intoxication. Examples include breach of arrest, *United States v. Clipner*, 12 C.M.R. 364 (A.B.R. 1953) (accused must know he was placed under arrest, so voluntary intoxication can act as a defense by negating that knowledge requirement); failure to go, *United States v. Gilbert*, 23 C.M.R. 914 (A.F.B.R. 1957) (accused must have specific knowledge of the time and place of the duty, so voluntary intoxication can act as a defense by negating that knowledge requirement); and fraudulent enlistment, *United States v. Stevens*, 7 C.M.R. 838 (A.F.B.R. 1953) (accused must knowingly make a false representation or intentionally conceal a fact which, if known, would prevent enlistment, so voluntary intoxication can act as a defense by negating that knowledge requirement).

As noted previously, however, the Court of Military Appeals, in *United States v. Stokes*,²¹² reached the conclusion that voluntary intoxication would not operate as a partial defense to murder under an article 118(3) theory. This result, which the court candidly acknowledged was based upon a legal fiction,²¹³ parallels the general rule under military law that voluntary intoxication will not reduce murder to manslaughter or some other lesser offense.²¹⁴ The author previously has criticized the military law's refusal to permit voluntary intoxication as a partial defense to murder under an article 118(2) theory as being illogical, inconsistent, and based upon a faulty premise.²¹⁵ These criticisms apply with equal force to the military's refusal to allow the defense for depraved-heart murder, when the actor is so intoxicated that he lacks the knowledge required for that offense.

This refusal to permit the partial defense of voluntary intoxication for unpremeditated murder—while permitting the defense of partial mental responsibility to act as a partial defense—probably reflects the general belief that “a person who unconsciously creates risk because he is voluntarily drunk is perhaps morally worse than one who does so because he is sober but mentally deficient.”²¹⁶ This comparative assessment of moral culpability also is reflected by the favored status of the defense of involuntary intoxication,²¹⁷ and it no doubt undergirds the decision of most courts²¹⁸ and the drafters

²¹²19 C.M.R. 191 (C.M.A. 1955).

²¹³*Id.* at 197.

²¹⁴MCM, 1984, R.C.M. 916(1)(2) discussion, and Part IV, para. 43c(2)(c); see *United States v. Judkins*, 34 C.M.R. 232 (C.M.A. 1964); *United States v. Roman*, 2 C.M.R. 150, 158 (C.M.A. 1952); *United States v. Seeloff*, 15 M.J. 978 (A.C.M.R.), *pet. denied*, 17 M.J. 18 (C.M.A. 1983); *United States v. Trower*, 2 M.J. 492 (A.C.M.R. 1976); *United States v. Jackson*, 40 C.M.R. 355 (A.B.R. 1968), *pet. denied*, 39 C.M.R. 293 (C.M.A. 1969); *United States v. Sims*, 6 C.M.R. 236 (A.B.R. 1952), *pet. denied*, 7 C.M.R. 84 (C.M.A. 1953).

²¹⁵See generally Milhizer, *supra* note 90, at 161-67.

²¹⁶W. LaFave & A. Scott, *supra* note 26, at 545.

²¹⁷One writer has observed that

the defense of involuntary intoxication reflects the societal view that one should not be held criminally responsible for actions over which one has no rational control. Indeed, the involuntarily intoxicated defendant is usually a far more sympathetic figure. . . . [He] is the normally law-abiding, mentally balanced citizen who, through no fault of his or her own, has been rendered “temporarily insane” through the fraud, contrivance, duress, or mistake of another.

Kaczynski, “*I Did What?*” *The Defense of Involuntary Intoxication*, *The Army Lawyer*, Apr. 1983, at 1, 2-3.

²¹⁸*E.g.*, *State v. Trott*, 190 N.C. 674, 130 S.E. 627 (1925).

of the Model Penal Code²¹⁹ to disallow the defense for depraved-heart murder.

This comparative assessment of moral culpability does not, however, always withstand scrutiny. Suppose, for example, that soldier A attempts to commit suicide because of extreme financial difficulties and job-related pressures. As a result of his failed attempt to kill himself, soldier A temporarily impairs his mental faculties such that he is unable to realize the life-threatening consequences of his subsequent conduct. While still under this impairment, soldier A unintentionally kills another while exposing many to the risk of death. Soldier B, facing the same financial and job-related pressures, consumes a large quantity of alcohol. While similarly unable to realize the recklessness of his actions, soldier B also unintentionally kills someone while exposing many to the risk of death. No principled basis exists for distinguishing between soldiers A and B as to their guilt for murder under article 118(3). Indeed, the guilt of each soldier should be determined by focusing upon his particular *mens rea* with respect to knowledge, or lack of it, and not by examining the voluntary acts performed by each which shaped and limited that *mens rea*.²²⁰ These latter concerns are more properly the subject of extenuation and mitigation.²²¹

Of course, even the most ardent proponent of reexamining the voluntary intoxication relative to unpremeditated murder would agree that the defense has limits. For example, an accused should not be entitled to the voluntary intoxication defense for an article 118(3) murder if he drinks heavily to gain the nerve to engage in life-threatening conduct.²²² Similarly, an accused who becomes voluntarily intoxicated knowing that he likely will perform acts that are inherently dangerous to others clearly would not be entitled to the

²¹⁹Model Penal Code § 2.08(2) provides that "[w]hen recklessness established an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial." Arguments for and against this rule are found in the Commentaries to § 2.08(2) (Tent. Draft No. 9, 1959).

²²⁰The author has used a similar hypothetical to criticize the military's refusal to permit voluntary intoxication as a partial defense to unpremeditated murder under article 118(2). See Milhizer, *supra* note 90, at 166.

²²¹See generally R.C.M. 1001(c)(1).

²²²See R. Perkins, Criminal Law 1008 n.4 (1985); See generally MCM, 1984, Part IV, para. 43c(3)(a) (permissible inference can be drawn that a person is responsible for the natural and probable consequences of his intentional acts); United States v. Varaso, 21 M.J. 129 (C.M.A. 1985), and United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (permissible inference applied to the specific intent requirement of article 118(2) murder)

defense for an article 118(3) charge.²²³ In each case, the accused would have the requisite knowledge for article 118(3) murder, regardless of his state of intoxication at the time he perpetrated the killing act.

C. THE REQUIREMENT FOR DANGEROUSNESS TO “OTHERS”

A third difficult issue concerns what is meant by the requirement that the accused’s acts must be “inherently dangerous to *others*.”²²⁴ Specifically, does article 118(3) murder contemplate that persons other than the victim must be placed at risk of death or great injury?

Some civilian courts, in construing statutory language similar to that found in article 118(3), have concluded that the killing act be dangerous to “others” in a multiple sense.²²⁵ Other civilian courts have taken the contrary position that, despite the use of the term “others,” depraved-heart murder does not require that more than one person be put in jeopardy.²²⁶ Of course, even under the latter interpretation, “the situation may be such that the risk of death is too slight for murder where only one person is endangered by [the] defendant’s conduct, whereas the risk is sufficient where several are thus hazarded”²²⁷ For example, “it may not be murder for a hunter to shoot a deer with one lone hunting companion nearby, though unluckily the companion is killed; whereas the same conduct in a wooded area filled with hunters (one of whom is killed) may amount to murder.”²²⁸

Military decisional law pertaining to article 118(3) uniformly has required that the accused’s misconduct be dangerous to others in a multiple sense. On at least five separate occasions prior to *Berg*, the military appellate courts have interpreted article 118(3) to require that at least one person besides the victim face a very high risk of death or great bodily harm because of the accused’s conduct.²²⁹

²²³See generally 2 P. Robinson, *Criminal Law Defenses* § 162(d) (1984) (discussing *Fain v. Commonwealth*, 78 Ky. 183 (1879)); TJAGSA Practice Note, *Epileptic Seizures and Criminal Mens Rea*, The Army Lawyer, Feb. 1990, at 65.

²²⁴MCM, 1984, Part IV, para. 43b(3)(b) (emphasis added).

²²⁵*E.g.*, *People v. Ludkowitz*, 266 N.Y. 233, 194 N.E. 688 (1935).

²²⁶*State v. Lowe*, 66 Minn. 296, 68 N.W. 1094 (1896); see *Alvarez v. State*, 41 Fla. 532, 27 So. 40 (1899); *Hogan v. State*, 36 Wis. 226 (1874).

²²⁷*W. LaFave & A. Scott, supra* note 26, at 543.

²²⁸*Id.*

²²⁹*Dacanay*, 15 C.M.R. at 266; *McDonald*, 15 C.M.R. at 133; *Sandoval*, 15 C.M.R. at 67; see *Hartley*, 36 C.M.R. at 409; *Stokes*, 19 C.M.R. at 197-98.

This interpretation of article 118(3) is consistent with the general rule, expressly followed by the Court of Military Appeals, that criminal statutes should be construed strictly consistent with their plain and ordinary meaning.²³⁰ In this regard, the word "other" has been defined as meaning a "different person or thing" or that which is "the second of two."²³¹ Another authoritative source defines "other" as being "different or distinct from the one or ones mentioned or implied."²³² Thus, allowing the term "others" its plain and ordinary meaning, article 118(3) has been interpreted properly to require that someone distinct and different from the victim be placed in jeopardy. Had Congress meant otherwise, it would have used different words in the statute—such as "victim," "decendent," or "another person"²³³—rather than using the word "others."²³⁴

Nevertheless, some individuals might argue that "others" should be construed as meaning someone other than the perpetrator. Under this interpretation, placing only the victim at risk would be sufficient for guilt under article 118(3). The military statute, however, uses the term "others," the plural form of "other." "Others" is defined as meaning "other persons or things."²³⁵ Thus, the unambiguous statutory language of article 118(3) clearly expresses the requirement that the victim and at least one other person be placed in jeopardy by the accused's actions.

²³⁰See generally *Murphy v. Garrett*, 29 M.J. 469, 471 (C.M.A. 1990) (statutory language "active duty" should be given its plain and ordinary meaning); *United States v. Stottemire*, 28 M.J. 477, 478-79 (C.M.A. 1989) (Court of Military Appeals first looks to the language of the statute to determine if congressional intent is expressly stated).

²³¹Funk & Wagnalls New Standard Dictionary of the English Language 175% (1952).

²³²The Random House College Dictionary 941 (J. Stein, ed. 1982 rev. ed.).

²³³In its second *Berg* opinion, the Court of Military Appeals used a venerable state case to illustrate this point. In *Derry v. People*, 10 N.Y. 120 (1854), the New York Court of Appeals was faced with interpreting the then-existing state second-degree murder statute. 2 N.Y. Stat. pt. IV, chap. 1, tit. 1, § 5 (1829). The statute defined depraved-heart murder, in part, as "any act imminently dangerous to *others*." *Id.* (emphasis added). The New York appellate court concluded that the legislature's use of the word "others" imposed the requirement that the defendant's acts be dangerous to persons besides the victim. The state legislature later revised the New York statute, in essence substituting the words "another person" for "others." N.Y. Penal Law § 125.25(2) (McKinney 1967). This change reflected the legislature's intent to enlarge the scope of depraved-heart murder under state law to reach those homicides where only the victim was placed at risk by the defendant's wanton conduct.

²³⁴Had Congress intended that only the victim need be placed in jeopardy, this could be conveyed clearly by statutory language providing as follows: "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . is engaged in an act which is inherently dangerous to the (*victim decendent another person*) and evinces a wanton disregard of human life . . . is guilty of murder . . ."

²³⁵The Random House College Dictionary, *supra* note 232, at 941.

When the statutory language is unclear, the Court of Military Appeals has not hesitated to turn to the legislative history to discern congressional intent.²³⁶ The legislative history of article 118(3) likewise indicates that Congress intended that more than one person be placed at risk. The legislative history reflects that article 118(3) “is intended to cover those cases where the acts resulting in death are calculated to put human *lives* in jeopardy, without being aimed at any one in particular.”²³⁷ Accordingly, even if the plain meaning of article 118(3) is found to be ambiguous, its legislative history supports the military’s restrictive interpretation of the term “others.”²³⁸

The Navy-Marine Corps Court of Military Review concluded in *Berg*²³⁹—and the Court of Military Appeals apparently agreed²⁴⁰—that this rule might lead to “incongruous results.”²⁴¹ The court of review illustrated its concern as follows:

Assume an accused is alone in a room with another person, deliberately fires a gun, and kills that person. Under the law as we understand it, if he intended only to scare the other person, and had no intent to kill or wound, and no others were endangered by the act of firing the gun, he could not be convicted of murder. However, if there are two persons present in the room with him, and our accused then fires a gun intending only to scare the both of them, but through mischance kills one of them, the accused may be found guilty of murder under Article 118(3). Notwithstanding the disparate results, the accused’s act, intent, and the consequences are the same in both instances ~ . ~ ~ ~

The court’s concern is based on a false premise; the accused’s act, intent, and consequences are not the same in both instances. The second case is more aggravated because the accused killed one victim *and* placed a second victim at risk of death or serious injury. Indeed, it was the endangering of persons in a multiple sense that tradi-

²³⁶*E.g.*, *Stottlemire*, 28 M.J. at 479.

²³⁷Hearing on H.K. 2498, *supra* note 194, at 1231 (emphasis added).

²³⁸*Berg*, 30 M.J. at 199; *Davis*, 10 C.M.R. at 8-9. *But see* Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445, 446-47 (1946); *Radej v. State*, 152 Wis. 503, 140 N.W. 21 (1913) (both cited in *Berg*, 31 M.J. at 41 n.2).

²³⁹*Berg*, 28 M.J. at 569 n.1.

²⁴⁰30 M.J. at 200; 31 M.J. at 40.

²⁴¹These courts are not alone in their concern about incongruous results. *See, e.g.*, Model Penal Code and Commentaries, Part II, § 210.2 at 18n.24 (1950); Gegan, *A Case of Depraved Mind Murder*, 49 St. Johns L. Rev. 417 (1975) (the latter two sources cited in *Berg*, 31 M.J. at 41).

²⁴²*Id.* at 569 n.1.

tionally supplied the required malice for murder when death or serious injury was not intended.²⁴³

Accordingly, article 118(3)'s requirement that more than one person be placed in jeopardy represents a rational legislative determination to restrict murder to only the most aggravated homicides. Congress has apparently concluded that manslaughter²⁴⁴ is a sufficient sanction when a perpetrator having no intent to kill or injure engages in conduct that is dangerous to only one person. Although "incongruous results" may occur in unusual cases, this criterion for distinguishing between murder and manslaughter seems sound.²⁴⁵ As the Court of Military Appeals explained in *Berg*, if Congress reevaluates its position or becomes concerned with "incongruous results," it can amend article 118(3) accordingly.²⁴⁶

D. THE ANIMUS REQUIRED

A final issue concerns whether a military accused, whose conduct otherwise satisfies all the elements of proof for article 118(3), can be guilty of depraved-heart murder if his animus is directed solely at the victim. Although military case law can be found to support both sides of the issue, the better view is that article 118(3) murder is not foreclosed merely because the accused kills while having animus focused exclusively upon a single person.

"Animus," as used in common parlance, means a "hostile feeling or attitude" or "antagonism."²⁴⁷ Black's Law Dictionary defines "animus" as relating to "mind; intention; disposition; design; [and] will."²⁴⁸ These definitions accurately describe the term "animus" as it is generally used in connection with depraved-heart murder.

The controversy concerning the required animus for article 118(3) arises in circumstances such as the following. An actor, motivated by hostility toward a particular individual, begins shooting at him in a crowded room. Although the actor is aware of the other people and subjectively realizes that his conduct places their lives in jeopardy, he continues to fire anyway. The intended victim is eventually killed, but no one else is injured.

²⁴³See *supra* notes 15-26 and accompanying text.

²⁴⁴A violation of UCMJ art. 119.

²⁴⁵See W. LaFave & A. Scott, *supra* note 26, at 543.

²⁴⁶*Berg*, 31 M.J. at 41. In this regard, the Joint Service Committee on Military Justice has recommended that article 118(3) be changed by substituting the word "another" for the word "others."

²⁴⁷The Random House College Dictionary, *supra* note 232, at 53.

²⁴⁸H. Black, *supra* note 179, at 111.

Surprisingly, many commentators who have addressed the issue conclude that a defendant cannot be guilty of depraved-heart murder under such circumstances. For example, Professor Wharton has commented that for a perpetrator to be guilty of depraved-heart murder, “it is necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged.”²⁴⁹ Civilian decisional law generally has reached a similar conclusion.²⁵⁰

Military case law is unclear whether an accused can be guilty of murder under an article 118(3) theory if his actions endanger more than one person but his animus is directed solely at the victim. Early decisions by the Court of Military Appeals—specifically *Davis*²⁵¹ and *Holsey*²⁵²—seem to indicate that the accused cannot be guilty of murder under article 118(3) if the dangerous act is directed solely at a particular person. Later decisions by the Navy-Marine Corps Court of Military Review, relying on *Davis* and *Holsey*, have applied a similar limitation to the scope of article 118(3).²⁵³ Arguably, the pertinent explanatory paragraph in the 1984 Manual is also consistent with this authority.²⁵⁴

Later decisions by the Court of Military Appeals addressing the issue have taken a different view. In both *Sandoval*²⁵⁵ and *McDonald*,²⁵⁶ for example, the court focused its examination on whether the accused’s acts were dangerous to others in a multiple sense. Finding that they were, the court affirmed the convictions for murder under article 118(3), even though the killing act in each case was directed at a particular individual.

In its initial opinion in *United States v. Berg*,²⁵⁷ the Court of Military Appeals extensively discussed the legal import of the accused’s animus. The court first observed that it was “somewhat confused”

²⁴⁹Wharton, *supra* note 5, at 216; accord O. Warren & B. Bilas, *supra* note 26, at 403.

²⁵⁰*E.g.*, State v. Lowe, 66 Minn. 296, 68 N.W. 1094 (1896).

²⁵¹10 C.M.R. 3 (C.M.A. 1953).

²⁵²10 C.M.R. 52 (C.M.A. 1953).

²⁵³*Berg*, 28 M.J. at 568-69; *Jacobs*, 9 M.J. at 796.

²⁵⁴MCM, 1984, Part IV, para. 43c(4)(a) (“Intentionally engaging in an act inherently dangerous to others—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life.”). On the other hand, a fair interpretation of the words “although without” in the preceding quote is that the absence of an intent to cause death or great bodily harm does not preclude a conviction under article 118(3).

²⁵⁵15 C.M.R. 61 (C.M.A. 1954).

²⁵⁶15 C.M.R. 130 (C.M.A. 1954).

²⁵⁷30 M.J. 195 (C.M.A. 1990).

by the court of review's holding in *Berg* that article 118(3) murder required that the accused's animus not be directed solely at the victim.²⁵⁸ The Court of Military Appeals wrote that "[t]he fact that [the] accused's 'animus' may have been directed toward one specific victim does not preclude an instruction or finding under Article 118(3), so long as his conduct constitutes 'an act inherently dangerous to' others and shows a 'wanton disregard of human life in general.'"²⁵⁹ The court, in other words, seemingly concluded that an accused's ill-will toward a specific person does not preclude an article 118(3) conviction.

Later in its opinion, however, the Court of Military Appeals agreed with the court of review below that "incongruous results" could be obtained because of the military's strict requirements for depraved-heart murder relating to the accused's animus.²⁶⁰ The Court of Military Appeals thus apparently adopted the court of review's restrictive interpretation of the type of animus permitted under article 118(3). Relying upon congressional silence and *stare decisis*, the Court of Military Appeals wrote that it "saw no reason to abandon the adopted rule that murder by an act inherently dangerous to others requires 'a wanton disregard of human life' in general, without the actions of the accused 'being aimed at any one in particular.'"²⁶¹ The court seemingly concluded that an accused's ill-will toward a specific person precludes an article 118(3) conviction.

The self-contradictory language in *Berg* may amount to nothing more than an inartful choice of words. If the word "without" in the above-quoted language is construed as meaning "without regard to whether,"²⁶² then the court's decision in *Berg* would hold unambiguously that animus directed at the victim alone would not preclude a conviction for murder under article 118(3). This interpretation is consistent with the logical assumption that the Court of Military Appeals did not intend to contradict itself within the span of two pages in a single opinion.

Moreover, this interpretation of *Berg* is consistent with the original intent of the drafters of the crime of depraved-heart murder. As

²⁵⁸*Id.* at 198-99.

²⁵⁹*Id.* at 199 (emphasis omitted) (quoting *Hartley*, 36 C.M.R. at 410).

²⁶⁰See *supra* notes 239-41 and accompanying text.

²⁶¹*Berg*, 30 M.J. at 200; see also *id.*, 81 M.J. at 40 (favorably quoting the same language)

²⁶²The quote would then read essentially as **follow**: "There is no reason to abandon the adopted rule that murder by an act inherently dangerous to others requires a wanton disregard for human life in general, *without regard to whether* the actions of the accused are aimed at anyone in particular."

noted, depraved-heart murder was first recognized to close the gap in the traditional law of murder so that it could reach an accused who engaged in especially risky conduct without excuse or justification. The accused's motivation or intent was not relevant to depraved-heart murder, except that an intent to kill or seriously injure was unnecessary for the crime.

Indeed, the historic controversy surrounding animus may be a matter of semantics. Knowingly engaging in life-threatening conduct, without justification or excuse, clearly evinces animus of some sort. Viewed in this light, anyone guilty of murder under article 118(3) must, *a fortiori*, have animus directed both at the victim and at least one other person. The particular type or types of animus held by the accused is simply not dispositive of guilt under article 118(3), so long as the accused's conduct satisfies all the elements of proof²⁶³—including that the “act was inherently dangerous to others and showed a wanton disregard to human life.”²⁶⁴

In any event, the conflicting interpretations of the animus usually would have little, if any, practical effect on the extent of the accused's culpability or the potential punishment he faces. For example, assume an accused specifically intends to kill A and ultimately does so under circumstances where both A and B are placed at great risk of death. Under the more expansive view reflected in cases like *Sandoval* and *McDonald*, the accused could be found guilty of murdering A under either an article 118(2) or 118(3) theory. Under the more restrictive view of depraved-heart murder reflected in *Davis* and *Holsey*, the accused would be guilty of the unpremeditated murder of A under article 118(2). Moreover, if the accused's animus was directed at A, but B “unintentionally” was killed, the law will transfer the accused's specific intent to kill from A to B and the accused, therefore, can be found guilty of murdering B under article 118(2).²⁶⁵ Because the potential punishment for murder under article 118(2) and 118(3) is identical,²⁶⁶ the issue of the accused's guilt under article 118(3) when his animus is directed only at the victim has little practical

²⁶³*Supra* note 129 and accompanying text.

²⁶⁴MCM, 1984, Part IV, para. 43b(3)(c).

²⁶⁵*Id.*, Part IV, para. 43c(2)(b); *see* United States v. Black, 11 C.M.R. 61 (C.M.A. 1963) (one who kills a person in a malicious effort to kill another is guilty of murder).

²⁶⁶MCM, 1984, Part IV, para. 43e(2).

²⁶⁷This issue would potentially have some significance where the accused is charged with murder under article 118(2) and 118(3) in the alternative, and the military judge arguably instructs upon a theory which is not raised by the evidence. For example, assume the evidence shows that the accused killed A as he specifically intended, under circumstances where several people were placed at risk of death. If the judge under these circumstances instructs on **both** an article 118(2) and 118(3) theory of murder,

V. CONCLUSION

As the foregoing discussion indicates, many of the fundamental concepts of the military's version of depraved-heart murder remain unresolved. These continuing contradictions can be explained, in part, by the relative infrequency with which this crime is seen. They are also a product, however, of the many unique characteristics of the offense. These singularly distinctive aspects of depraved-heart murder include the pragmatic purpose for its creation; its initial, fictitious mens rea requirement; and its evolution into an offense that now punishes wanton and especially risky behavior as murder even when the perpetrator has no specific intent to kill or injure. Given the consequences at stake (including possible confinement for life) and the interrelationship of depraved-heart murder to other criminal homicides, military trial and appellate practitioners should become better acquainted with, and seek to resolve the many subtle nuances of, this remarkable crime.

his instructions pertaining to article 118(3) would not be supported by the evidence consistent with one view of the offense. Of course, if the judge were to instruct conservatively—that is, only on an article 118(2) theory of murder—the accused could be convicted of murder pursuant to unassailable instructions and face a similarly harsh punishment including life imprisonment. **Also**, the aggravated circumstances surrounding the murder, including the fact that others were exposed to a great risk of death, could come before the sentencing authority for its consideration. *See* Rule for Courts-Martial 1001(b)(4), *Evidence in aggravation*.

ENFORCEMENT OF STATE ENVIRONMENTAL CRIMES ON THE FEDERAL ENCLAVE

by H. Allen Irish¹

I. INTRODUCTION

Throughout this nation's history, military installations, naval bases, and other federal enclaves effectively have remained islands untouched by the changing tides of federal-state relations! States seldom have attempted to enforce their criminal laws on federal installations. Moreover, a number of federal court decisions have held that states are powerless to do so.² Nevertheless, the widely-held perception that activities occurring on federal enclaves have been granted blanket immunity from state regulation and state criminal jurisdiction probably is based on a misunderstanding of the constitutional basis of federal control of these enclaves. In the area of environmental regulation, recent court decisions have opened the door to expanded state control over activities occurring on the federal enclave—a control that potentially could include criminal enforcement.

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¹As used in this article, the term "federal enclave" refers to real property obtained and held by the federal government pursuant to art. I, § 8, cl. 17 of the United States Constitution.

²See, e.g., *United States v. Unzueta*, 281 U.S. 138 (1930).

11. PRINCIPLES OF FEDERAL JURISDICTION

The federal government's power to hold lands³ for military installations and for carrying out certain of its designated powers is contained in article I, section 8, clause 17, of the United States Constitution, which reads as follows:

The Congress shall have the power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;⁴

Obviously, however, the nature of forts, magazines, and arsenals has changed drastically since that provision was considered at the Constitutional Convention in 1787. Originally consisting of modest stone and wood fortifications and drilling grounds for a small number of federal troops, the United States Army, Navy, Air Force, and Marines have evolved into enormous enterprises consisting of hundreds of thousands of structures and millions of men and women⁵ operating on military installations covering a combined area larger than many of the original thirteen states.⁶ The drafters of the Constitution could not have envisioned that the changing nature of warfare would, in the future, produce military facilities on the size and scale of Fort Hood, Texas, or Fort Irwin, California. Nor would the founders have been able to anticipate that the environmental impact of the activities taking place on those installations and on their surrounding

³In addition to land it holds pursuant to art. I for use as forts, magazine\$ and arsenals, the United States holds vast quantities of land pursuant to powers granted it by article IV, section 3, clause 2, which provides that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" Lands held pursuant to this power will not be the focus of this article, however.

⁴U.S. Const. art. I, § 8, cl. 17.

⁵At the end of fiscal year 1988, the Department of Defense owned approximately 316,000 buildings containing approximately 1896 million square feet of interior space. Additionally, there were 2,247,000 active duty personnel in the United States armed services, as well as 1,123,000 civilians directly employed by the three military departments. Statistical Abstract of the United States 322, 335 (1989).

⁶In 1987, the Department of Defense owned approximately 31 million acres of land (approximately 40,625 square miles). Statistical Abstract of the United States 375 (1989). By comparison, the State of Kentucky covers 39,650 square miles. Book of the States 636 (Gardner ed. 1980).

communities would be greater than an overly loud bugle call or noise from drilling soldiers.

Relatively little discussion of article I, section 8, clause 17, is recorded in the annals of the Constitutional Convention. The history of the Convention reveals that most of the few recorded debates of the delegates concerning this clause dealt with the establishment of a seat of government for the new federal government.⁷ As noted by James Madison, the meager discussion by the delegates about the portion of the provision that addresses forts, magazines, and arsenals involved a fear that providing the power of exclusive legislation to Congress would enable it to “enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [general] government.”⁸ This fear was allayed by including a requirement that the legislature of the state provide its consent to these purchases. Madison, in addressing this provision in *The Federalist*, argued that because public funds were expended on forts, magazines, and arsenals, it would not be “proper for the places on which the security of the entire union may depend, to be any degree dependent on a particular member of it.”⁹ As further noted by commentators such as Joseph Story, the prime motivator of those delegates who favored the granting of the right of exclusive legislation to Congress—particularly with regard to the issue of the proposed new seat of government—was to provide to the federal government the means and ability to protect itself against criminals, agitators, or ruffians. The other goal was to even the balance between the powerful states and the historically weak central government of the Confederation.¹⁰ Story also contended that because public money collected from all of the states would be expended on forts, magazines, and arsenals, those facilities “should be exempted from state authority.”¹¹

Despite the apparent agreement by the delegates to the Constitu-

⁷J. Madison, 2 Debates in the Federal Convention, 332, 382, 420, 512-13 (Hunt & Scott eds. 1987).

⁸*Id.* at 513 (quoting Elbridge Gerry of Massachusetts).

⁹The Federalist, No. 43, at 228-90 (J. Madison).

¹⁰Joseph Story, in his *Commentaries*, in discussing art. 1, § 8, cl. 17, refers to several incidents in which the Confederation Congress, while sitting at Philadelphia, was “surrounded and insulted by a small, but insolent body of mutineers of the continental army.” He indicated that although Congress asked the Commonwealth of Pennsylvania for aid, none was forthcoming. The Congress then moved to Princeton, New Jersey, hoping it would be more hospitable, and subsequently moved its proceedings to Annapolis, Maryland. J. Story, *Commentaries on the Constitution* 3, § 1214 (1833).

¹¹*Id.* § 1219. Story’s argument addressed overt and oppressive state control of and interference with federal activities taking place on the federal property, and would not necessarily condemn more benign forms of state influence over an enclave within its borders.

tional Convention that article I, section 8, clause 17, would function as a “shield” for federal activities, the “exclusive legislation” clause most typically has been used as a “sword” by the courts. As pointed out by one commentator, St. George Tucker, “the exclusive right of legislation granted to Congress by [article I, section 8, clause 17] . . . is a power, probably, more sensitive than it was in the contemplation of the framers of the constitution to Grant”¹²

The first judicial rulings construing article I, section 8, clause 17, dealt with the portion of the clause establishing the seat of the federal government. Foreshadowing what came to be known as the “state within a state theory” of the federal enclave, the courts concluded that the federal capital district had ceased to be a part of any state.¹³ When the courts came to apply the same clause to forts, magazines, and arsenals, they reached similar conclusions. Chief Justice Story, in an early federal decision, *United States v. Cornell*,¹⁴ indicated that when the federal government purchased land for a fort and the state legislature had given its consent, “the land so purchased by the very terms of the constitution *ipsosfacto* falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted.”¹⁵ He concluded that “exclusive jurisdiction” necessarily follows from “exclusive legislation,” although he also ruled in the case that mere purchase by the United States does not “oust the jurisdiction of sovereignty of such state,”¹⁶ but that the sovereignty of the State remains until the State has “relinquished its authority,” either expressly or by implication.¹⁷ This theory, however, which frames the transaction in contractual terms, does not wholly comport with his ruling that all lands purchased with the consent of the state for one of the enumerated purposes *necessarily* eradicates all state jurisdiction.¹⁸

¹²St. George Tucker, 1 Blackstone’s Commentaries App. 276-78 (1803), *reprinted in* 3 The Founder’s Constitution 229 (P. Kurland and R. Lerner eds. 1988).

¹³*See, e.g.,* United States v. More, 7 U.S. (3 Cranch) 159 (1805); Reilly v. Lamar, 6 U.S. (2 Cranch) 344 (1805). *But see* Commonwealth v. Clary, 8 Mass. 72 (1811) (Chief Justice Sewall indicated that although “the laws of the commonwealth have no force within this [federal] territory, . . . [we] are agreed that no such consequence [the loss of civil or political privileges under the law of Massachusetts] is thereby imposed on those inhabitants”

¹⁴25 F. Cas. 646 (C.C.D.R.I. 1819) (No. 14,867).

¹⁵*Id.* at 648 (emphasis added).

¹⁶*Id.*

¹⁷*Id.*

¹⁸Although the Chief Justice’s comments may appear somewhat inconsistent, undoubtedly he believed that the consent of the state legislature involved necessarily carries with it an implicit grant of exclusive jurisdiction, although he appears to concede with reluctance that a state explicitly could reserve certain jurisdictional powers. He noted, however, that the argument that a state which fails explicitly to cede jurisdiction to the federal government retains jurisdiction by implication “stands repudiated by the express terms of the constitution.” *Id.* In *Cornell*, because the state had failed expressly to retain jurisdiction, the Chief Justice concluded that it lacked concurrent jurisdiction over the site in question.

In the same vein, even the earliest litigation concerning the “exclusive legislation” clause shows that the provision has been read as being equivalent to “exclusive jurisdiction.” In his exhaustive treatise dealing with jurisdictional issues involving federal lands,¹⁹ David Engdahl noted that use of the term “exclusive legislation” rather than exclusive jurisdiction is “inexplicable.” Engdahl suggests that the language was “an attempt to provide for something other than political severance from the State . . . and [to establish something] other than the vesting in the United States of exclusive governmental jurisdiction.”²⁰ The members of the Constitutional Convention were familiar with the term and concept “jurisdiction” and understood its meaning. In fact, the term “jurisdiction” is used throughout the Constitution.²¹ While it is not clear why the word “legislation” was used in place of the word “jurisdiction,” normal rules of statutory interpretation lead to an inference that the Convention delegates intended that the federal power over such enclaves would not, by its own weight, remove all state jurisdiction; rather, they intended that the central government merely would be empowered to preempt state authority when necessary to effectuate its federal function.²²

In any event, in construing the “exclusive legislation” clause, courts, unhesitatingly read that provision as conferring exclusive *jurisdiction* upon the federal government. Even state courts adopted this view. In *Commonwealth v. Clary*²³ the Massachusetts Supreme Court concluded that offenses committed within the geographical bounds of an arsenal located in Springfield were *not* “committed against the laws of this commonwealth; nor can such an offense be punishable by the courts of the commonwealth, unless the congress of the United States should give to the said courts [state]jurisdic-

¹⁹Engdahl, *State and Federal Power Over Federal Property*, 18 *Ariz. L. Rev.* 283 (1976).
²⁰*Id.* at 289 n.10.

²¹*See, e.g.*, U.S. Const., art. III, § 2.

²²For a number of years, the issue of the authority of the states to reserve to themselves various elements of jurisdiction over lands purchased by the federal government under *art. I*, § 8, cl. 17, was litigated. This issue was resolved by Congress' passage in 1940 of a statute (Act of Oct. 9, 1940, chap. 793, § 355, ¶ 8, 54 Stat. 1083, *codified at* 40 U.S.C. § 255 (1988)), which provided that until a proffer of exclusive jurisdiction was accepted by the federal government, it would be “conclusively presumed” that no such jurisdiction ever was accepted. This act also allowed the federal government to accept less than exclusive jurisdiction; that is, it provided for proprietary or concurrent jurisdiction.

²³8 Mass. 72 (1811).

tion thereof."²⁴ Story, in his Commentaries, also adopted the position that such federal enclaves are completely separate from the state surrounding them, a view that has since been described as the "state within the state" theory.²⁵

The view that federal enclaves are not subject in any way to the jurisdictional powers of the state in which they lay was not challenged for many years. The landmark case of *Howard v. Commissioners*,²⁶ however, brought about a reanalysis of the law of federal jurisdiction. *Howard* involved the annexation of a federal enclave (a naval ordnance facility) by the City of Louisville, Kentucky, an action that appeared to be motivated, at least in part, by the city's desire to enhance tax revenues.²⁷ The annexation was challenged as being inconsistent with the facility's existing status as a federal enclave over which the federal government had exclusive jurisdiction. The court, in refusing to void the annexation, adopted a rationale that was equivalent to a supremacy clause analysis.²⁸ The court measured the annexation to determine whether it interfered

²⁴Interestingly, the *Clary* court's sophisticated reading of art. I, § 8, cl. 17, implies that state criminal jurisdiction over such an enclave can be retroceded or returned by the federal government to the state. This appears to be consistent with a contractual theory of jurisdiction, by which, in giving its assent, a state would either explicitly or implicitly give up its inherent jurisdictional rights. Retrocession of federal property to the state from which it was acquired has since been provided for by statute (10 U.S.C. § 2683 (1988)).

²⁵For example, in *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973), the Supreme Court quoted approvingly the district court opinion, which stated that the federal enclave in question was to the State of Mississippi "as the territory of one of her sister States or foreign land." *Id.* at 378 (quoting from the district court opinion below).

²⁶344 U.S. 624 (1953).

²⁷Annexation of military installations by neighboring cities has proven to be fertile ground for litigating the meaning of art. I, § 8, cl. 17. For example, in *United States v. City of Leavenworth*, 443 F. Supp. 274, 286 (D. Kan. 1977), the district court rejected the Army's argument that the planned annexation of Fort Leavenworth by the City of Leavenworth, Kansas, was merely an attempt by the city to gain additional revenues without incurring additional services. *See also* *United States v. City of Bellevue*, 334 F. Supp. 881 (D. Neb. 1971), *aff'd*, 474 E2d 473 (8th Cir. 1972), *cert. denied*, 414 U.S. 827 (1973). *But see* *United States v. McGee*, 714 F.2d 607 (6th Cir. 1983), in which the Court of Appeals decided that an Ohio statute barring a municipality from annexing a portion of a military base without the consent of the Secretary of Defense precluded the annexation at issue in that case. Significantly, the court upheld the district court's finding that the potential for friction between the military installation and the municipality constituted a sufficient basis for enjoining the annexation. *Cf.* *Board of County Commis'sns v. City of Junction City (Kansas)*, No. 82C-306 (Dist. Ct., Riley County, Oct. 29, 1982).

²⁸U.S. Const., art. VI, § 2; *see, e.g.*, *McCullough v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) (Chief Justice Marshall pronounced that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government").

with the federal function taking place on the enclave. In finding that the state action did not, the court held that

the fiction of a State within a State can have no validity to prevent the State from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heat.²⁹

The *Howard* opinion resoundingly rejected the classic “state within the state” theory, which, if it had been applied, would have blocked any attempt by the Commonwealth of Kentucky or its instrumentality, the city of Louisville, to effectuate any change in the status of the federal enclave.

Nevertheless, the Supreme Court’s ruling in *Howard* has not consistently been applied in the years since it was handed down. Although a committee organized to assess the issue of federal jurisdiction, the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (Interdepartmental Committee), predicted that the decision in *Howard* “would make untenable the premise of [federal enclave] extraterritoriality,”³⁰ courts subsequently have failed to apply the apparently clear meaning of *Howard* consistently in resolving competing state and federal jurisdictional interests on federal enclaves—even those involving municipal annexation of federal enclaves.³¹

The factor that has proven to be most clearly predictive of the resolutions fashioned by various courts that have considered jurisdictional issues affecting federal enclaves has been whether the litigation involved the extension of any of the various benefits of state citizenship to residents of the enclave.³² In such cases, in contrast to those involving the extension of state control of activities occurring on the enclave, almost all courts have been receptive to the no-

²⁹*Howard*, 344 U.S. at 627.

³⁰*Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II: A Text of the Law of Legislative Jurisdiction*, at 242.

³¹*See, e.g.*, cases discussed *supra* note 24.

³²*Cf. In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1214 (W.D. Ky. 1987) (“Contrary to the defendant’s assertions, Kentucky does have an interest in actions of military personnel based within Kentucky Kentucky courts in other situations have recognized benefits accruing to personnel based on a federal enclave.”)

tion that the enclave is a part of its surrounding state.³³ As noted, however, when the issue presented to the courts has been characterized as one of alleged state interference with federal activities on the enclave, the courts have been decidedly less congenial to state interests.

For example, in *Evans v. Cornman*³⁴ the Supreme Court considered the right of federal enclave inhabitants to register and vote in Maryland state elections. The Court declared that the federal enclave³⁵ did not cease to be a part of the State of Maryland when that state ceded the property to the national government. Accordingly, persons residing within the boundaries of the enclave are citizens of the State of Maryland and are therefore entitled to exercise their right to vote. Similarly, in *Freeholders of Burlington County v. McCorkle*³⁶ a state court perceptively noted,

It does appear to be settled law that the cession or purchase of territory [by the federal government] does not create an absolute exclusive sovereignty within the federal enclave—as contradictory as the term may appear.

The modern view is that the term “exclusive” as used in U.S. Const., Art. I, Sec. 8, cl. 17, relates to protection of the federal government against conflicting regulations.

The fact that the United States acquires exclusive jurisdiction over property purchased with the consent of a state does not necessarily divest the state of all power with respect to it; on the contrary, so long as it in no way interferes with the jurisdiction asserted by the federal government, the state may continue to exercise its power.³⁷

While the court there concluded that residents of Fort Dix and McGuire Air Force Base were entitled to the benefit of state welfare laws, its stated rationale goes well beyond mere “protection” of

³³The California Court of Appeals, in *In re Terry Y.*, 101 Cal. App. 3d 178, 181, 161 Cal. Rptr. 452, 453 (Ct. App. 1980), observed, “in the area of the rights of federal enclave residents to state benefits, there has been a trend in state courts to hold that the exclusive jurisdiction of Congress does not deprive residents of benefits which could otherwise be theirs.”

³⁴398 U.S. 419 (1970).

³⁵In *Evans* the enclave in question consisted of National Institute of Health properties in Montgomery County, Maryland, which were ceded to the federal government in 1953 under the provisions of article I of the United States Constitution.

³⁶98 N.J. Super. 451 (Law Div. 1968).

³⁷*Id.* at 460-61.

enclave residents to an analysis of the underlying issues of federalism and the interrelationship of state and federal authority.³⁸

In another application of Howard to the issue of enclave residents' rights, *Arapahoe Board of County Commissioners v. Donoho*,³⁹ the Colorado Supreme Court ruled that because the granting of the power of "exclusive legislation" does not

operate as an absolute prohibition against state laws but has for its purpose the protection of federal sovereignty, we conclude that it does not operate to prohibit the payment of relief to a resident of [the federal enclave, since] [t]he conferring of a benefit required by federal law cannot be construed as an act which undermines the federal sovereignty.⁴⁰

Although the outcome in that case appears to have been determined by the existence of a significant civil right, the court nevertheless framed its opinion in terms of the effect of state action on federal sovereignty.⁴¹ Clearly, had the court found this right to be fundamental, it could have addressed its opinion to that issue without discussing in any detail the underlying issues of federalism.⁴²

Post-Howard decisions addressing state regulation of activities occurring on federal enclaves have failed, however, to carry that case

³⁸In this case, the issues were whether juveniles resident on the enclave were entitled to the appointment of a guardian by the (then) Bureau of Children's Services, and whether mentally ill enclave residents were entitled to be admitted to a state institution.

³⁹356 P.2d 267 (Colo. 1960).

⁴⁰*Id.* at 273.

⁴¹In *Terry Y.* the California Court of Appeals used a more "result-oriented" approach and, while affirming the jurisdiction of a juvenile court over a minor living on Fort Ord, California, noted that "there has been a trend in state courts to hold that the exclusive jurisdiction of Congress does not deprive enclave residents of *benefits which would otherwise be theirs.*" *In re Terry Y.*, 101 Cal. App. 3d at 181, 161 Cal. Rptr. at 453 (emphasis added). Other rights for which enclave inhabitants have been ruled to be eligible include the holding of public office, *Adams v. Londeree*, 139 W. Va. 748, 83 S.E.2d 127 (1954), and "tuition-free" public education, *United States v. Onslow County Bd. of Educ.*, 728 F.2d 628 (4th Cir. 1984).

⁴²The *Donoho* Court also quoted approvingly the dissenting opinion of Justice Frankfurter in *Pacific Coast Dairy v. Department of Agric.*, 318 U.S. 285 (1943). In that case, the court had ruled that federal authority over the enclave had removed any possibility of the exercise of state power. Justice Frankfurter argued in dissent that the "so-called exclusive jurisdiction has, as a matter of historical fact, become increasingly less and less exclusive." *Id.* at 299. His analysis indicated that state action affecting an enclave generally would be viewed as valid, in the absence of federal preemptive action (which he referred to as "congressional assertion of overriding authority"). He also concluded that the term "'exclusive jurisdiction' more often confounds than solves problems due to our federal system." *Id.* at 300.

to its logical conclusion. In *Paul v. United States*⁴³ the Supreme Court, in addressing the question of whether California's milk price control laws would apply to sales of milk to commissaries and nonappropriated fund instrumentalities, determined that there were no conflicting federal laws or policies regulating this issue. Nevertheless, the Court observed that while certain laws of the State of California not otherwise interfering with federal sovereignty may remain in effect to provide some basic law to the enclave, they must have predated the federal purchase of the enclave.⁴⁴ Thereafter, the Court ruled, a state may not legislate with respect to the federal enclave unless it had reserved the right to do so when it gave its consent to the purchase by the United States.⁴⁵

III. STATE ENVIRONMENTAL CRIMES

The area that offers the greatest potential for state criminal prosecutions on federal enclaves is the recently emerging practice area of environmental criminal law. As recently as ten years ago, environmental crimes were not widely prosecuted, either on the federal or the state level.⁴⁶ The federal government itself has implemented criminal provisions in a wide range of environmental and quasi-environmental statutes.⁴⁷ Moreover, in addition to the enactment of federal environmental criminal statutes, each of the fifty states has

⁴³371 U.S. 245 (1963).

⁴⁴In ruling on this issue, the Court relied upon the decision in *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940), in which the court decided that laws in existence at the time of the transfer of sovereignty remained in effect, to assure that the enclave would not "be left without a developed legal system for private rights." *Id.* at 100.

⁴⁵Applying this rule to a situation such as that faced in *Evans* logically would mean that changes in state laws occurring subsequent to the federal purchase that beneficially enlarged the civil rights of enclave inhabitants could not be claimed by them. Such a result, of course, is ludicrous.

⁴⁶For example, the United States Department of Justice's efforts to prosecute environmental offenders systematically under federal environmental statutes date only to approximately 1982. Stan; *Countering Environmental Crimes*, 13 B.C. Env. Aff. L. Rev. 379, 388 (1986).

⁴⁷The following generally are considered to be the primary environmental enactments containing statutes imposing criminal liability: the Comprehensive Environmental Compensation & Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988); the Resource Conservation & Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1988); the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2671 (1988); the Hazardous Substances Act, 15 U.S.C. §§ 1271-1276 (1988); the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1988); the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407 (1988); the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1988); the Federal Aviation Act, 49 U.S.C. §§ 1301-1542-12 (1988); the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988); and the Medical Waste Tracking Act of 1988, 42 U.S.C. §§ 6901-6987 (1988).

enacted environmental criminal statutes of varying degrees of severity.⁴⁸ Relatively few prosecutions have ensued as a result of the commission of environmental crimes on federal enclaves. Nevertheless, the intersection of two trends—stricter and more comprehensive state environmental criminal statutes, **as well as** increasing emphasis on the identification and prosecution of environmental crimes, with its accompanying greater allocation of resources to that task and increased public awareness and intolerance of environmental violations—may lead to increased state and local efforts to prosecute those violating state environmental criminal statutes, even when the violation takes place on a federal enclave.

One significant characteristic of environmental violations (and environmental problems generally) is that the effects ignore political boundaries. For example, the disposal of a pollutant that enters the groundwater at one location inevitably will affect groundwater at some distance from its entry point.⁴⁹ Similarly, even small amounts of commonly found hazardous wastes, if allowed to enter an aquifer, can pollute enormous quantities of **groundwater**.⁵⁰ Obviously, environmental violations taking place on federal enclaves can and will affect the surrounding civilian communities.

Many states assert criminal jurisdiction over criminal activities taking place outside their political boundaries when the effects of the criminal activities are felt within the state. New Jersey, for example, has enacted a statute that asserts state jurisdiction in certain circumstances over criminal acts taking place outside New Jersey. It declares that “a person may be convicted under the law of this State of an offense committed by his own conduct . . . if: (1) either

⁴⁸For a comprehensive listing and discussion of various states' environmental criminal statutes, see DeCicco and Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for the Effective Enforcement of Existing and Proposed Laws*, 9 *Crim. Just. Qtrly.* 216 (1988).

⁴⁹This distance/time equation is unique for each occurrence. The spread of groundwater contaminants, or the “plume,” depends variously on the type and composition of the aquifer (e.g., whether it is composed of sand and gravel, limestone, sandstone and conglomerate, or crystalline and metamorphic rock), its porosity and permeability, its infiltration and runoff, or its draw-off (e.g., from wells), and physiographic factors, such as the **slope** of the land surface. For a discussion of these various factors, see Geraghty & Miller, *The Fundamentals of Groundwater Contamination* (1988).

⁵⁰For example, the federal drinking water standard for trichloroethene (TCE), a commonly used solvent, is five parts per billion (ppb). 52 *Fed. Reg.* 25690-25717 (Jul. 8, 1987). In practical terms, this means that one gallon of TCE, if dissolved in water, has the potential to contaminate up to **292,000,000** gallons of water (if diluted to 5 ppb, the federal drinking water standard), which would form a cube of water **339** feet on each side.

the conduct which is an element of the offense or the *result* which is such an element occurs within this state.”⁵¹ Clearly, many environmental offenses taking place on a federal enclave inevitably will cause a forbidden result in the surrounding state.⁵² Jurisdiction inferred from this analysis is quite consistent with the pre-*Howard* view that a federal enclave becomes a “state within the state” and thereby is made extraterritorial to the state from which it was carved. Statutes like New Jersey’s assert that the state’s prosecutorial power exists with respect to actions that, although occurring outside the state in another jurisdiction, have an effect within the prosecuting state. Clearly, if a New York factory engaged in polluting a stream that subsequently entered New Jersey, New Jersey authorities could undertake to prosecute based on jurisdiction conferred by this statute.⁵³ Why, then, should a similar analysis not support New Jersey’s authority to bring charges against the polluter of a stream flowing from Fort Dix into the rest of the state?⁵⁴

Asserting criminal jurisdiction over violations taking place on a federal enclave, as contrasted to the same assertion with regard to another state, has been viewed as a substantially different undertaking. This is because a state’s relationship to the federal government is significantly different than its relationships with its sister

⁵¹N.J. Stat. Ann. § 2C:1-3 [West 1990] (emphasis added). This statute was drawn from the Model Penal Code, which has served as a source of guidance for the criminal law of many states. See also Restatement of Conflict of Laws § 425 (1934) [provides for jurisdiction where either regulated conduct or its results occur within the state’s territory].

⁵²This analysis clearly applies more to “midnight dumping” activities than to more technical violations of the various state environmental laws and regulations. Moreover, prosecuting environmental offenses occurring on an enclave as if they were, in effect, extraterritorial, ignores the fact that a clean and healthy environment may be one of the benefits of state citizenship that should be provided to enclave residents under the analysis adopted by the Supreme Court in *Evans*. *Evans*, 398 U.S. at 419.

⁵³Cases in which acts occurring in one state were not made criminal, or were explicitly permitted by that state, but were nevertheless crimes under the laws of the affected state (e.g., State A permitted a discharge of material into stream flowing into State B, even though such discharges would, without exception, constitute crimes under the laws of State B), pose a dilemma under this analysis. Principles of comity, however, appear to preclude such prosecution. Note also that the legality of the permitted activity in the state in which it occurred would make it difficult if not impossible for the charging state to secure the defendant’s extradition, even if an indictment or accusation were to issue. If the same scenario took place with respect to a federal enclave, particularly where such activities were explicitly sanctioned, permitted, or directed by a competent authority, application of the Supremacy Clause effectively would bar any such attempt to prosecute.

⁵⁴Interestingly, in a Supreme Court decision addressing a related issue, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court ruled that under the CWA states may apply their permit systems only to in-state sources of water pollution. This, however, does not resolve the jurisdictional issues posed by a criminal act occurring in another jurisdiction that affects the prosecuting jurisdiction.

states. It is a relationship of unequal sovereigns, because under the terms of the United States Constitution, the Constitution and federal treaties and statutes are the supreme law of the land.⁵⁵ It is important to remember, however, that unlike a state's assertion of its authority to prosecute criminal acts occurring outside its borders, a state's prosecution of a defendant based upon acts committed within a federal enclave lying within the borders of that state clearly would have a geographic basis, but for the effect of article I, section 8, clause 17.

Environmental regulation also can be viewed differently than the regulation of, for example, milk or liquor prices.⁵⁶ Congress has expressed in a number of ways its willingness to allow the states to assume greater roles in addressing environmental problems that occur on federal installations. This has included empowering the states to regulate federal activities on federal facilities that affect the environment.⁵⁷ Such a grant of authority to the states to restrain federal agency activities by environmental regulation may provide authority to the states to exercise their criminal prosecutory powers against those on federal enclaves who violate criminal provisions of state environmental enactments.

Congress has declared in many of its environmental enactments that states may enforce properly established environmental standards against federal entities located within that state. For example, the Resource Conservation and Recovery Act (RCRA) contains the following provision:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, *State, interstate, and local* requirements, both substantive and procedural . . . respecting control and

⁵⁵U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

⁵⁶*See, e.g.*, Paul v. United States, 371 U.S. 245 (1963); North Dakota v. United States, 58 U.S.L.W. 4574 (May 22, 1990).

⁵⁷**Environmental** problems involving federal facilities are many and varied, and have created substantial federal-state friction, which has been reflected in the significant Congressional activity on this subject. As of November 21, 1989, no less than 79 of the approximately 900 sites on the National Priorities List (NPL) were federal facilities. ABA Section of Natural Resources, Energy, and Environmental Law, *The Year in Review*: 1989, at 211.

abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, **as** any person is subject to such requirements Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.⁵⁸

Similarly, in the Federal Water Pollution Control Act (FWPCA),⁵⁹ federal installations, and their officers, agents, and employees, are required to comply with state and local “requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity”⁶⁰ This requirement, the provision continues, applies to “any process and sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply notwithstanding *immunity* of such agencies, officers, agents, or employees under any law or rule of law.”⁶¹

Whether this statutory language is indicative of congressional intent to allow states to institute criminal prosecutions of environmental offenses on federal installations is unsettled. The thrust of the provisions cited above is to waive some measure of the sovereign immunity ordinarily claimed by the federal government, its agencies, and employees. Sovereign immunity is only one possible basis to preclude state efforts to regulate activities occurring on federal enclaves and does not necessarily dispense with that measure of immunity from state regulation conferred by the exclusive jurisdiction/legislation clause of article I, section 8, clause 17. While some federal installations affected by such a waiver of sovereign immunity are not enclaves established pursuant to article I, section 8, clause 17, many clearly are.

⁵⁸42 U.S.C. § 6961 (1988) (emphasis added). Actually, under RCRA, while a state must enact a regulatory scheme that meets certain federally-imposed minimum standards to administer the state’s hazardous waste program in lieu of the Environmental Protection Agency (EPA), it is empowered to establish more stringent requirements than those set by the federal government, including requiring that certain wastes be considered **as** hazardous, even if they would not be so classified under federal standards. For example, New Jersey regulates most waste oils **as** hazardous wastes, while the United States Environmental Protection Agency does not. N.J. Admin. Code tit. 7, § 26-8.13.

⁵⁹33 U.S.C. §§ 1251-1387 (1988).

⁶⁰*Id.* § 1323(a).

⁶¹*Id.* Another major enactment, CERCLA, also addresses the issue of federal facilities’ compliance. It provides, “State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States” 42 U.S.C. § 9620(a)(4) (1988).

To date, the battle lines between state regulators and federal facilities generally have been drawn around the extent of the congressional waiver of sovereign immunity with respect to state-imposed civil penalties. The legislative history of at least one important enactment, the Clean Air Act (CAA), appears to demonstrate that the waiver of sovereign immunity in that enactment was intended to extend to criminal sanctions. In reporting on the legislation that was to become the CAA, the House Committee statement indicated that the waiver of immunity reflected the committee's desire to subject federal facilities to all federal, state, and local requirements:

The amendment is also intended to resolve any question about the sanctions to which noncomplying federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners and operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), *to civil or criminal penalties*, and to delayed compliance penalties.⁶²

In spite of the committee report's somewhat confusing language,⁶³ it is highly unlikely that Congress meant to subject the federal government itself to criminal prosecution;⁶⁴ it is similarly unlikely that Congress intended the installation or agency to itself be prosecutable. The most logical reading of the provision would be that federal employees or federal contractors who violate state criminal environmental provisions are subject to state prosecution, particularly in light of the clear indications of legislative intent that any federal employee immunity extend only to civil sanctions.⁶⁵ Presumably, exempting acts that were committed on federal enclaves would

⁶²H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, 200, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1279. The passage cited also indicated that officers and employees "may not be held liable personally." *Id.* The conference agreement on the Clean Air Act, however, indicated that such officers and employees "are not made personally liable for civil penalties." *Id.* at 1518 (emphasis added).

⁶³The portion of the CAA that addresses federal facilities reads as follows: "This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable." 42 U.S.C. § 7418(a) (1988).

⁶⁴Such an action would, of course, necessarily violate the doctrine of intergovernmental immunities, which recently was addressed by the Supreme Court in *North Dakota v. United States* 58 U.S.L.W. 4574, 4577 (May 22, 1990).

⁶⁵See *supra* note 59.

frustrate congressional intent to subject those federal facilities to state regulation, particularly because a significant number of the federal facilities that are affected by such statutes operate on federal enclaves. Moreover, if Congress intended to allow state regulation and sanctioning of federal employees on federal enclaves, it would be anomalous to conclude that federal employees who violate state environmental laws are made subject to state prosecution under this type of provision, but that private citizens may not be so prosecuted.⁶⁶

IV. MANIFESTATIONS OF ENVIRONMENTAL CRIME

There are various ways in which environmental crime may manifest itself on a federal enclave. At one end of the spectrum is the federal officer or employee who, while in the scope of his employment, violates state environmental law pursuant either to explicit federal guidance, the instructions of superiors, or the perceived requirements of a stated mission. At the other end lies the interloper or trespasser, who illegally enters a federal installation to dispose of hazardous waste in violation of state or federal law. This article will discuss environmental crimes in various guises, analyzing the effect that the nature of the criminal acts and the identity of the actor have on state power to prosecute criminal actions on the federal enclave.

A. *THE FEDERAL EMPLOYEE*

Significant numbers of federal employees, particularly within the Departments of Defense and Energy, have job responsibilities and duties that implicate state and federal environmental statutes. These employees range from full-time environmental compliance professionals to individual soldiers working in battalion motor pools or airmen working in flight maintenance shops. Although these employees clearly have responsibilities affected by environmental regulation, the extent of their exposure to state enforcement actions, including criminal prosecution, remains unresolved.

Several cases in the past few years have made clear that federal employees are subject to federal criminal charges for violations of

⁶⁶Of course, the issue of a waiver of sovereign immunity is irrelevant to a state prosecution of a nonfederal defendant, even if the criminal activities occurred on a federal enclave, since only the federal government or its agents may claim benefit of sovereign immunity.

environmental provisions.⁶⁷ Some commentators have argued that these prosecutions are unfair because federal budget constraints place federal employees in an untenable position.⁶⁸ Moreover, because of considerations of federalism, the susceptibility of federal employees to state prosecution for violations of criminal provisions in state—as opposed to federal—environmental enactments may depend upon the context of the alleged offenses.

The clearest case is that of a federal employee who is carrying out one of his clearly assigned responsibilities in a manner that, while technically violative of state environmental law or regulation, is directed by, or at least not inconsistent with, federal law, regulation, or policy.⁶⁹ The proposition that the Supremacy Clause shields a federal employee performing his mission in a way consistent with his job description, federal policy, or even, in a limited way, instructions from a competent superior⁷⁰ would seem to be indisputable.⁷¹ Moreover, such state prosecutions generally would be removable to

⁶⁷In recent years, Department of the Army employees at Aberdeen Proving Ground, Maryland, and Fort Drum, New York, have been convicted by federal prosecutors of various environmental crimes. See *Army Civilian Managers at Aberdeen Convicted of Pollution Charges*, *Army Times*, Mar. 6, 1989, at 10; see also Fugh, Issacson, and Rouse, *The Commander and Environmental Compliance*, *The Army Lawyer*, May 1990, at 3.

⁶⁸One such view is expressed in a recent article that suggests that although federal officials are subject to budgetary constraints which may hamper their ability to comply with various environmental requirements, federal prosecutors have nevertheless made them "whipping boys" for environmental problems which may be beyond their effective control. Brown, Harris & Younger, *The Liability of the Employee of a Federal Agency Charged with Criminal Environmental Violations Do the Rules of Fair Play Apply to the Football?* 35 Fed. B. News J. 442 (1988).

⁶⁹As a general rule, states are permitted to adopt more (but not less) stringent regulations than the federal law or regulation's baseline standard. Accordingly, an act that would be permissible under federal law or regulation could violate stricter state standards. Such violations would, in all likelihood, be technical in nature, and the state in which a federal facility is located would be unlikely to have an interest in prosecution of such a case.

⁷⁰One caveat: arguably, a federal employee has a duty to refrain from performing clearly illegal acts, even if directed by his supervisor, just as soldiers have a duty to disobey orders violative of the Laws of War.

⁷¹The case of *In re Neagle*, 135 U.S. 1 (1890), established that a state court has no jurisdiction to try an agent of the federal government for conduct violative of state criminal provisions if the federal agent was performing an act which was authorized under federal law and if, in performing that act, the agent did no more than that which was necessary and proper. See also *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977). Note that the Supremacy Clause is not an absolute shield to state prosecution for illegal conduct by a federal officer. *Connecticut v. Marra*, 528 F. Supp. 381, 387 (D. Conn. 1981); cf. *Kentucky v. Long*, 837 F.2d 727, 750 (6th Cir. 1989) (setting out a procedure by which a claim of federal agent immunity should be resolved by the district court).

federal court,⁷² and the employee might be entitled to receive legal representation from the Department of Justice.⁷³

The federal employee or federal contractor⁷⁴ who acts in contravention of both federal and state law, particularly in the absence of contrary guidance from a superior, however, may stand in a different

⁷²28 U.S.C. § 1442(a)(1) (1988), provides in pertinent part, "A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States . . . [a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office . . ." While there is some dispute as to the scope of this provision, it is undisputed that federal employees who claim a defense under federal law—such as invoking the Supremacy Clause—are entitled to removal. For a discussion of the history and application of the right of removal, see *Note: Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 *Colum. L. Rev.* 1098 (1988).

⁷³The Justice Department may provide representation to a federal officer or employee, including military personnel, when those persons have been charged with violations of state or local criminal laws as a result of the performance of their duties. Representation generally will be provided when the employee was acting in the scope of his employment and when the representation is in the interest of the United States. See 28 C.F.R. § 50.15. The Department of Justice considers representation justified if a substantial federal interest is involved. This includes situations in which state regulatory requirements result in prosecution because there is a potential impact of the federal government if "such requirements are unnecessarily in derogation of federal authority." *Department of Justice Manual*, § 4-13.320. When the Department provides counsel, it generally takes action to remove the case to federal court. *Id.*; see *supra* note 69.

⁷⁴The federal contractor may stand in a somewhat more precarious position than someone actually employed by the federal government because the defense of sovereign immunity is not available to contractors in most cases. *Cf.* *Boyle v. United Technologies Corporation*, 108 S. Ct. 2510 (1988). *But cf.* *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174. In *Goodyear* the Supreme Court, noting that the Department of Energy was empowered statutorily to contract with a private party to operate its facilities, indicated that federally-owned facilities performing a federal function (e.g., a government-owned, contractor-operated [GOCO] were shielded by the doctrine of sovereign immunity from state interference. 108 S. Ct. at 1710 n. 2. The Environmental Protection Agency's own enforcement strategy, however, clearly distinguishes nonfederal operators of federal facilities from federal entities in the context of state enforcement actions or the "unitary executive" theory. See Hoard, *Impacts of Government Agency - Contractor Relationships on Enforcement Actions*, 1 *Fed. Facilities Env. J.* 155, 157 (1990). The author of that article noted that each congressional waiver of sovereign immunity contained in the environmental enactments "in one respect or another, distinguishes between federal and private entities -particularly when it comes to paying state agency-imposed fines and penalties." *Id.* at 158; see also *Federal Facilities Compliance Strategy*, Environmental Protection Agency (November 1988). One may analogize that whatever degree of protection may be afforded by the Supremacy Clause to a federal contractor is less than that available to a federal employee. For an overview of environmental liability issues faced by government contractors, see Steinbeck, *Liability of Defense Contractors for Hazardous Waste Cleanup Costs*, 125 *Mil. L. Rev.* 55 (1989).

position.⁷⁵ While a federal interest in prosecuting such an employee for acting in an *ultra vires* manner may exist, states also have a significant interest in the enforcement of their laws, particularly inasmuch as the health of the public of the state may have been placed at risk. Of course, both sovereigns may take action to prosecute violations of their applicable laws, provided no provision exists that would preclude double prosecution, and as long as neither sovereign agreed to defer to the other. In actual practice, the question of which of two sovereigns having jurisdiction over an offense actually prosecutes the matter normally is resolved by such factors as which sovereign first detects the offense, which sovereign's interests are harmed most directly by the violation, the aggressiveness of the competing prosecutors, and the existence or extent of public pressure.⁷⁶

B. THE INTERLOPER

Clearly, one can articulate a rationale that would shield the violator who is a federal employee from state prosecution, particularly if he is performing under some color of authority. On the other hand, it is difficult to find any substantial reason to prevent a state from prosecuting a mere interloper for his unlawful acts.⁷⁷ *State v. Ingram*⁷⁸ is an excellent example of the type of case in which federal authorities would have difficulty articulating why they, rather than state authorities, should prosecute. *Ingram* was a New Jersey criminal prosecution brought pursuant to several state hazardous waste statutes

⁷⁵Having been instructed by a superior to ignore applicable environmental regulations, for whatever reason, would not be a defense, unless it raised an issue of duress sufficient to constitute an affirmative defense. Nevertheless, given the vast complexity of environmental regulation, one can articulate a federal interest in shielding an employee who violated state environmental regulation as a result of complying in good faith with an arguably lawful direction from a superior from state prosecution. *See, e.g., Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988). In *Long* the Sixth Circuit ruled that the Supremacy Clause required dismissal of an indictment of a federal agent (for burglary) where that agent was performing an act which was authorized by federal law. This outcome however, should result from balancing the significant federal interests in assuring that its employees comply with applicable regulations and directions from their superiors with the state's interest in enforcing its laws. It should not be the result of a fortuitous happenstance that the location of the offense was a federal enclave.

⁷⁶In cases in which the state brings a prosecution, the federal employee still may receive the benefit of federal representation and removal to federal district court if a federal question exists. Of course, if the actions were unquestionably *ultra vires*, the employee would be "on his own." *See supra* note 70.

⁷⁷While federal authorities may indeed wish to institute their own prosecutions of these interlopers to protect the federal installation against criminal activity, this is not necessarily a cogent reason to preclude the state from prosecuting environmental crimes. The federal and state governments routinely resolve issues of overlapping criminal jurisdiction amicably.

⁷⁸226 N.J. Super. 680, 545 A.2d 268 (Law Div. 1988).

generally patterned after RCRA. At *Ingram*'s trial, a state court judge dismissed two counts of a state grand jury indictment that alleged unlawful abandonment and disposal of hazardous waste at an Army Corps of Engineers' site⁷⁹ in Salem County, New Jersey.⁸⁰ The court concluded that the state had failed to prove jurisdiction over the offenses. Relying primarily on *Walters*, the court concluded that section 6001 of RCRA⁸¹ does not provide for a "blanket relinquishment of jurisdiction" by the federal government over federal land. The court reasoned that New Jersey had acted to cede its jurisdiction over *crimes* occurring on the enclave to the federal government, necessarily agreeing thereby "to foreclose [enforcement of] state statutes which would conflict with federal laws."⁸² *Ingram* and cases like it demonstrate not only the need for cooperative law enforcement on the enclave in cases affecting the environment, but also the necessity for broad state jurisdiction over environmental offenses. *Ingram*, in particular, was a prosecution in which absolutely no federal interests were implicated. The enclave was one used solely by the Corps of Engineers for the dumping of dredge spoils, and no other federal activities took place thereon.⁸³ Moreover, the counts involved were but a part of a broader prosecution of *Ingram* for offenses occurring in a number of New Jersey locations.⁸⁴

Ingram illustrates quite clearly that the question of state power to prosecute environmental offenses on a federal enclave is not dependant solely on the extent of waiver of sovereign immunity. In-

⁷⁹The site in question was a federal enclave that originally had been a coastal defense facility. At the time of the offense, negotiations between the state and the United States were underway to retrocede jurisdiction to the state.

⁸⁰The defendant, Albert Ingram, was a mere interloper who undoubtedly chose the federal land to dispose of hazardous waste in ignorance of its jurisdictional status. As the court noted, the drums of hazardous waste were "found abandoned ¼ mile down a dirt road off of Route #130 in Oldmans Township, N.J." *Id.* at 686.

⁸¹42 U.S.C. § 6961 (1988).

⁸²226 N.J. Super. at 689-90. Clearly, the New Jersey statute under which *Ingram* was prosecuted did not conflict with any federal statute. In fact, federal authorities had manifested no interest in the matter whatsoever and were undoubtedly unaware even of the fact of the incident's occurrence. Although the court in *Ingram* appears to have determined that any waiver of sovereign immunity contained in RCRA applied only to federal entities, the facts as set forth in *Ingram* highlight the absurdity of concluding that states, while they may enforce their environmental laws against the federal government, are powerless to do so against persons who use federal enclaves as convenient dumping grounds.

⁸³The property's status as a federal enclave appears to have been a vestige of its previous use for more typical defense purposes during the first World War. Although the site was no longer used for the normal purposes set out in the exclusive legislation clause, no action had been taken to retrocede jurisdiction to the state.

⁸⁴Possibly, the court in *Ingram* would not have dismissed the counts in question had there not been a number of other counts of which *Ingram* had been convicted.

gram obviously could not claim any benefit from the doctrine of sovereign immunity. Nor could one articulate any cogent reason to preclude a state prosecution of such an offender. Ingram and other such interlopers generally do not implicate federal interests to any greater extent than those of the state. In fact, frequently a state prosecutor has a greater interest and ability to bring a prosecution against these interlopers, but for the impediment of exclusive federal legislative jurisdiction.⁸⁵

VI. THE ISSUE OF RETROCESSION

Clearly, Congress may retrocede or abandon jurisdiction over a federal enclave.⁸⁶ Although this intent should be stated explicitly,⁸⁷ it may arise by implication.⁸⁸ While the district court in *United States v. Fallbrook Public Utility District*⁸⁹ concluded that exclusive jurisdiction pursuant to article I, section 8, clause 17, was wholly exclusive, regardless of the actual use to which the enclave was put, it nevertheless observed that "[t]he only exception exists in those instances wherein, either by general law, or by a special cession statute, *certain laws are allowed to coexist with the federal law—there being no inconsistency between the two.*"⁹⁰ While it is not clear that Congress has indicated explicitly its intent to retrocede that portion of exclusive legislation/jurisdiction pertaining to environmental offenses occurring on federal enclaves, the language contained in the various environmental statutes dealing with federal compliance with state law suggests that Congress may have done so. It is less of an intrusion on federal sovereignty to allow states in which federal enclaves are located to prosecute a violator who uses those

⁸⁵Most judicial analysis to date of the legislative history of such statutes as RCRA has focused on whether a waiver of sovereign immunity exists. That doctrine only applies where the federal government or its agents are named as defendants.

⁸⁶*Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *see also Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part I, (1956) at 18 ("Congress may waive any immunities accruing to the United States under an exclusive jurisdiction status . . ."); *cf.* *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir. 1987); *see also* 10 U.S.C. § 2683 (1988) (providing a procedure by which Congress may, by enactment, retrocede jurisdiction over an enclave to a state).

⁸⁷376 U.S. at 374.

⁸⁸*See* *United States v. Goings*, 504 F.2d 809 (8th Cir. 1974), in which the return of federal enclave territory to the state, reserving future use by the federal government during presidentially or congressionally declared emergencies contained with it, under the circumstances of the conveyance, a divestiture of exclusive jurisdiction.

⁸⁹108 F. Supp. 72 (S.D. Cal. 1952).

⁹⁰*Id.* at 86 (emphasis added). The controversy in *Fallbrook Public Utility District* involved the extent of the riparian rights to the Santa Margarita River in California obtained by the United States as a result of having acquired property on the river for use as a marine base.

enclaves as convenient locations for their crimes than to allow the state to proceed directly against the federal facility or against a federal employee acting in the scope of his employment for non-compliance. The latter power, however, is exactly what Congress explicitly has provided the states in a number of measures.⁹¹

The ability of the states to enforce their environmental statutes against federal facilities through a criminal prosecution was addressed by the Ninth Circuit in *People v. Walters*.⁹² In that case, a California municipal court prosecution was instituted against the administrator of the Veterans' Administration Medical Center, as well as against the hospital itself, for criminal violations of California's medical waste laws.⁹³ The Ninth Circuit determined that, although section 6001 of RCRA⁹⁴ appears to waive sovereign immunity for sanctions (including criminal) used to enforce injunctive relief, no express waiver of sovereign immunity exists with respect to criminal sanctions that are not used to enforce injunctive relief.⁹⁵ The *Walters* court cautioned, however, that its decision was "compelled by the parties' agreement that the action is essentially one against the United States." It continued, "[o]ur holding in this case does not necessarily apply in all cases to prosecutions against federal officers of federal agencies."⁹⁶ It seems clear that the court in *Walters* found criminal sanctions to be essentially enforcement mechanisms and not "requirements" under RCRA. What the court perhaps failed to recognize is that sanctions to enforce injunctive relief merely are set out as illustrating one permissible sanction among the several "re-

⁹¹*E.g.*, RCRA, the Clean Water Act, the Clean Air Act, and the Safe Drinking Water Act. Additionally, the President has directed the heads of all executive agencies to comply with all applicable pollution control standards, including those established by the states, "that would apply to a private person." Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978).

⁹²751 F.2d 977 (9th Cir. 1984).

⁹³The case was removed to federal court pursuant to 28 U.S.C. § 1442(a) (1988). Interestingly, although California, at that time, regulated certain types of medical waste as hazardous, the United States Environmental Protection Agency had decided not to regulate medical waste, although authority to do so was contained in RCRA. While it appears clear from the legislative history of RCRA and other major environmental statutes that states may impose upon the federal government more stringent standards than those contained in the basic federal law, the court never reached the question of whether there is any constitutional impediment in doing so.

⁹⁴Codified as amended at 42 U.S.C. § 6961 (1988).

⁹⁵*Walters*, 751 F.2d at 978.

⁹⁶*Id.* at 979. Note that the doctrine of sovereign immunity traditionally has not shielded federal officers and employees when their actions were either beyond the scope of their statutory authority, or they exercised their granted powers in a constitutionally void manner. *McQueary v. Laird*, 449 F.2d 608, 609 (10th Cir. 1971).

quirements” states may impose on federal facilities.⁹⁷ In this regard, *Walters* provides no substantive guidance to assist the courts in distinguishing between those enforcement mechanisms that are permissible and those that are not.⁹⁸

As discussed earlier, the power of states to enforce their environmental quality standards against federal facilities within their borders depends on the specific waiver of sovereign immunity involved.⁹⁹ Following the Supreme Court’s decision in *Hancock v. Train*,¹⁰⁰ Congress quickly passed amendments to the Solid Waste Disposal Act (SWDA),¹⁰¹ Clean Air Act (CAA),¹⁰² Federal Water Pollution Control Act (CWA),¹⁰³ and the Safe Drinking Water Act (SDWA).¹⁰⁴

⁹⁷The statute provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (*including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*) . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

⁹⁸42 U.S.C. § 6961 (1988) (emphasis added). Additionally, while there was no conference committee or conference report on RCRA, in floor debates on the bill which emerged from the conference committee, the Senate and House floor managers explained that the Senate version of this section was adopted to subject federal facilities to state laws and regulations. 122 Cong. Rec. 32,599,33,817 (daily ed. Sept. 27, 1976).

⁹⁸The decision in *Walters* was criticized strongly in a subsequent ruling in *Maine v. Department of the Navy*, No. 86-0211-P (D. Me. Nov. 16, 1987) (Magistrate’s Recommended Decision on Defendant’s Motion for Partial Summary Judgment), *adopted*, 702 F. Supp. 322 (D. Me. 1988). The Magistrate noted that “[t]o hold now that the procedural category does *not* include enforcement [actions] ignores the Supreme Court’s analysis in *Huncock*.” 702 F. Supp. at 335 n.5. The district court in that case noted that it “wholeheartedly” concurred with the Magistrate’s ultimate conclusion: that “an intelligent person reading the statute would think the message plain: federal facilities will be treated the same as private institutions so far as enforcement of the solid waste and hazardous waste laws are concerned . . . it is hard to imagine clearer language short of listing every possible variation of such requirements.” *Id.* at 326.

⁹⁹The standards that states have sought to impose on such federal facilities were adopted, in many cases, at the express direction of the federal government. In all of these federally-mandated environmental programs, the legislation that brought them into being actually contain minimum standards below which the states’ own regulatory and statutory standards may not fall (although states, however, are generally allowed to adopt more stringent requirements). *See, e.g.*, 42 U.S.C. §§ 6926(b), 6929 (1988). “426 U.S. 167 (1976).

¹⁰¹Resource Conservation and Recovery Act, Pub. L. No. 94-580, § 2, 90 Stat. 2821 (1976) (codified as amended at 42 U.S.C. § 6961 (1988)).

¹⁰²Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 118, 91 Stat. i11 (codified at 42 U.S.C. § 7418 (1988)).

¹⁰³Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598 (codified at 42 U.S.C. § 1323 (1988)).

¹⁰⁴Safe Drinking Water Act Amendments of 1977, Pub. L. No. 95-190, § 8(a), 91 Stat. 1396 (codified at 42 U.S.C. § 300j-6(a) (1988)).

Reacting to the Court's invitation in *Hancock* to clarify its intent,¹⁰⁵ Congress included new and broader waivers of sovereign immunity in these amendments.

The amendments expressly made federal agencies subject to state permit requirements.¹⁰⁶ Nevertheless, federal agency liability for state fines and penalties resulting from noncompliance with state regulatory requirements remains a hotly contested issue.

A recent action brought by the State of Ohio under RCRA has dealt with the issue of the nature of the waiver of sovereign immunity considered by *Walters*. In *Ohio v. United States Department of Energy*¹⁰⁷ the court ruled that the State of Ohio could seek civil penalties from the Department of Energy (DOE) for violations occurring at DOE's Feed Materials Production Center at Fernald, Ohio. The court, after analyzing the rationale used by the Ninth Circuit in *Walters*, noted that "'*Walters* held that section 6001 [42 U.S.C. § 6961] does not waive sovereign immunity to state imposition of criminal sanctions because such sanctions are enforcement devices rather than a 'substantive or procedural requirement.' We decline to follow the reasoning of *Walters* or its progeny."¹⁰⁸ A review of the legislative history of the amendments to RCRA that came about in reaction to *Hancock* led the court to the conclusion that the state "requirements" of RCRA to which federal facilities are subject include civil penalties that are *not* related to the enforcement of injunctive relief (only civil penalties were at issue in *Ohio v. United States Department of Energy*).

The tenor of the district court's analysis, particularly in light of its stated repudiation of *Walters*, inevitably suggests that the court also would approve the imposition of state criminal sanctions against federal violators of state environmental provisions, although the

¹⁰⁵"Should . . . [waiver] . . . be the desire of Congress, it need only amend the act to make its intention manifest." *Hancock*, 426 U.S. at 198.

¹⁰⁶*See, e.g.*, 42 U.S.C. § 6961 (1988) ("Each . . . agency . . . shall be subject to, and comply with, all . . . State . . . requirements, both substantive and procedural (including any requirements for permits . . .)").

¹⁰⁷27 E.R.C. 1377 (S.D. Ohio 1988).

¹⁰⁸*Id.* at 1380.

court did not need to reach that issue.¹⁰⁹

Similarly, another Ohio federal court, in *Ohio ex rel. Celebrezze v. Department of the Air Force*¹¹⁰ determined that Congress waived sovereign immunity regarding state environmental enforcement, including penalties. The court found that the waiver of sovereign immunity found in the Clean Air Act (CAA) was made, not only with respect to civil penalties imposed by a court for violations of a court order, but also to all penalties imposed for civil violations. In analyzing the legislative history of the CAA (particularly the section regarding compliance with state regulation)¹¹¹ and comparing it to similar provisions in other environmental enactments, the court was able to determine that Congress clearly intended that federal facilities and personnel be subject to state enforcement, including fines.¹¹² The court rejected defendants' argument that "sanctions" was a term of art referring to penalties imposed to enforce court-ordered injunctive relief, ruling that "'sanctions' . . . includes penalties or fines without limitation to use in connection to court ordered injunctive relief."¹¹³

The reasoning used by the court in *Ohio v. United States Department of Energy*, however, was challenged directly by the Ninth Cir-

¹⁰⁹In another recent case, *Colorado v. U.S. Dep't of the Army*, 707 F. Supp. 1562 (D. Colo. 1989), the Army, faced with an enforcement action by Colorado under RCRA, did not attempt to dispute the issue of whether the act waived sovereign immunity. Rather, it unsuccessfully disputed the state's right to pursue such a remedy when the EPA was supervising an ongoing cleanup of most of the same site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court concluded that if a state were not permitted to pursue its RCRA action, the Army would be unchecked by any party whose interests were adverse, because it and the EPA are both federal agencies. The court concluded that "[h]aving the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup." *Id.* at 1570. See Breslin, *Colorado Case Turns on Jurisdiction Over Hazardous Waste Cleanup*, 21 Env. Rptr. 523 (July 20, 1990).

¹¹⁰17 E.L.R. 21210 (S.D. Ohio 1987).

¹¹¹42 U.S.C. § 7418 (1988).

¹¹²The court placed particular reliance upon the House committee's statement (the House version of § 113 of the Clean Air Act, *codified* at 42 U.S.C. § 7418 (1988), which was adopted by the conference committee) that "[s]anctions means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunctions), to civil or criminal penalties, and to delayed compliance penalties." H.R. Rep. No. 294, 95th Cong., 1st Sess. 200, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1279 (emphasis added).

¹¹³*Id.* at 1213. *Accord*, *Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208 (M.D. Ala. 1986). The court held that the Clean Air Act waived sovereign immunity with respect to state enforcement of state sanctions against a federal facility for clean air violations; *cf.* *County of Milwaukee v. Veterans Admin.*, 357 F. Supp. 192 (E.D. Wisc. 1973) (Clean Air Act waived sovereign immunity with respect to citizen suits against federal facilities for air pollution violations).

cuit in another recent case. In *United States v. State of Washington*¹¹⁴ the Ninth Circuit Court of Appeals reexamined *Walters* and indicated that it would adhere to what it considered to be *Walters*' narrow interpretation of section 6001 of RCRA.¹¹⁵ In ruling that Congress intended to waive sovereign immunity in RCRA only for "court-ordered sanctions for a violation of an injunction," the court concluded that, "under the law of this circuit, criminal prosecution is not an enforcement mechanism covered under section 6961."¹¹⁶ Although, as noted earlier, the interpretation given *Walters* by the Ninth Circuit may be broader than necessary,¹¹⁷ the conclusion the Ninth Circuit reached in *United States v. State of Washington* is not necessarily that of all the circuits.¹¹⁸

Moreover, as pointed out by the court in *Ohio ex rel. Celebrezze v. Department of the Air Force*, while certain distinctions may be drawn between the legislative histories of the various provisions contained in several environmental statutes, it is illogical to conclude that Congress really intended there to be different outcomes to state enforcement actions, depending upon whether hazardous waste, clean air, or clean water is at stake. The clear and stated intent of all the various amendments to the federal environmental statutes is the repudiation of *Hancock v. Train* and, ultimately, the submission of federal entities to state environmental enforcement. This is a reaction to the historical fact that federal facilities often were perceived as "bad neighbors" in the states in which they are located and also have been viewed as generally intransigent regarding com-

¹¹⁴872 F.2d 874 (9th Cir. 1989).

¹¹⁵42 U.S.C. § 6961 (1988).

¹¹⁶872 F.2d at 880. The court's pronouncements concerning criminal sanctions were *dicta*, however, because only civil sanctions were at issue. Moreover, the court acknowledged that the decision in *Ohio v. United States Department of Energy* had rejected the line of reasoning it used to reach its conclusions.

¹¹⁷See *supra* text accompanying notes 92-98.

¹¹⁸See *supra* note 98. *But see* *New Mexico Health and Env't Dep't v. Air Force Dep't*, No. 89-2223 (C.A. 10, May 21, 1990), reported in 21 *Env. Rptr.* 314 (June 8, 1990). The 10th Circuit Court of Appeals ruled that the State of New Mexico is precluded from assessing a \$5000 RCRA penalty against the Air Force under the doctrine of sovereign immunity. The court concluded that § 6001 of RCRA did not "unambiguously include civil penalties" in its waiver of sovereign immunity.

pliance with state environmental regulation.¹¹⁹ As noted by Senator Stafford in debates concerning amendments to CERCLA, lack of CERCLA enforcement against federal facilities by EPA and the Department of Justice has led to a federal cleanup program that responds “slowly and tentatively to the most notorious situations.”¹²⁰

¹¹⁹Many state and local officials have become outspoken critics of federal facilities’ compliance records, particularly in the past few years. A National Governor’s Association/National Association of Attorneys General (NGA/NAAG) Task Force on Federal Facilities recently reported,

Over the past forty years, various federal agencies have carried out their respective missions with little regard for the environment. . . . Chief among these agencies are the Department of Defense and the Department of Energy, which over the last several decades have routinely used and improperly stored and disposed of fuels, oils, solvents, paints, acids, heavy metals, and other hazardous chemicals’ in their daily operations. . . . Despite state and federal regulations governing the use and disposal of these waste products, federal agencies have engaged in improper storage and disposal practices, including dumping in unlined pits, lagoons, and landfills, and using sewer drains for disposal.

From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities (Report of the NGA-NAAG Task Force on Federal Facilities) (Jan. 1990). In announcing the consent decree reached between Ohio and the United States Department of Energy concerning the Fernald Feed Materials Production Center, Ohio Attorney General Celebrezze stated, “[m]y challenges were to overcome legal theories, and outright bureaucratic entrenchments designed to prevent the Department of Energy and its private contractors from being held accountable for their misdeeds.” Remarks Prepared for Delivery, Attorney General Anthony J. Celebrezze, Jr., Fernald Feed Material Production Center News Conference (Dec. 2, 1988). Moreover, all criticism of federal facilities’ environmental problems has not emanated from the states. EPA regional administrators and Congress itself have been quite critical of environmental management on military facilities in particular. See Shabekoff, *Military Is Accused Of Ignoring Rules On Hazardous Waste*, N.Y. Times, Jun. 14, 1988, at C4, col. 1. As a result, in part of the growing awareness of environmental problems associated with federal facilities, the EPA in greatly expanding its enforcement efforts, reorganized its Office of Enforcement and Compliance Monitoring (OECM) in April, 1990, renaming it the Office of Enforcement (OE). Part of the reorganization involved the creation of a “multimedia” (i.e., air, water, hazardous waste, etc.) Office of Federal Facilities Enforcement (OFFE) within OE.

¹²⁰132 Cong. Rec. S14902 (daily ed. Oct. 3, 1986). Much of the lack of aggressive federal enforcement activity aimed at federal facilities is attributable to what is referred to as the “unitary executive” theory. Its basic premise is that one arm of the executive branch, such as the Department of Justice, may not act adversely to another arm of the executive, such as the Department of Defense, because they are the same entity. As a result of the barrier this theory has placed in the way of effective enforcement, the Department of Justice has adopted a strategy that converts federal-federal enforcement actions into something akin to formal inter-departmental dispute resolution. For example in the RCRA, CERCLA (“Superfund”), and enforcement areas, EPA and DOD have developed model language to use in Federal Facility Compliance Agreements (FFCA). These FFCA’s were adopted recently and implemented in a DA-EPA negotiation concerning a munitions facility in Missouri (In the Matter of United States Department of the Army, Lake City Army Ammunition Plant). *Enforcement Accomplishments Report: FY 1989*, U.S. Environmental Protection Agency (Feb. 1990), at 30. This approach has a number of limitations and may well hinder aggressive environmental enforcement. For a more comprehensive discussion of this issue, see Moore, *Enforcement Against Federal Facilities: The Unitary Executive Theory*, 1 Fed. Facilities Env. J. 143 (1990).

Congress, in responding to its constituents, clearly intended that federal facilities comply with the environmental requirements of the surrounding states and assigned to the states a leading role in enforcing those requirements.¹²¹

The notion of federal sovereign immunity differs from that of federal exclusive jurisdiction (legislation) over federal enclaves. Nevertheless, one might argue that Congress's actions in implementing its stated intention—that the states be empowered to enforce their environmental standards against federal facilities—suggests that Congress's actions are tantamount to a return or retrocession of a portion of its exclusive jurisdiction to the states, at least that slice of exclusive jurisdiction concerning environmental offenses.¹²² In distinct contrast, in addressing the analogous issue of state jurisdiction over Indian Reservations,¹²³ Congress has, in a number of environmental statutes, explicitly excepted such tribal enclaves from the reach of state authority.¹²⁴ To conclude that federal enclaves nevertheless are exempt from state regulation and enforcement activities (including criminal enforcement) as a result of their status under article I, section 8, clause 17, evades the broad waiver of sovereign immunity concerning state sanctions and defeats the intent of Congress to subject federal facilities to state environmental

¹²¹As a result of the congressional action in this area, federal agencies, particularly the Department of Defense, have given a significantly greater emphasis to cooperation with state regulators and compliance with state requirements in recent years. *See, e.g.*, Fugh, Isaacson & Rouse, *suprn* note 67. at 3; *see also* Memorandum from the Commander of the U.S. Army Corps of Engineers, Lt. Gen. Hatch (Feb. 14. 1990). *reprinted in* The Army Lawyer, May 1990, at 7.

¹²²Examples exist of Congress providing for retrocession of certain subject matters, rather than geographic units. For example, 16 U.S.C. § 457 retrocedes to the states civil jurisdiction over actions for death or personal injury.

¹²³Indian reservations, like federal enclaves, have been considered "in but not of" states in which they are contained, with the reservation's governing body retaining, in many ways, elements of sovereignty *vis-a-vis* the surrounding state. For an examination of the relationship between states and Indian reservations, particularly as it relates to environmental protection issues, see Royster and Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581 (1989).

¹²⁴*See, e.g.*, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Pub. L. No. 99-499, § 207(e), 100 Stat. 1706 (codified at 42 U.S.C. § 9626 (1988)), which provides that Indian governments "shall be afforded substantially the same treatment as a state." *See also* Clean Water Act Amendments of 1987, Pub. L. No. 110-4, § 506, 101 Stat. 77 (codified at 33 U.S.C. § 1377 (1988)). Additionally, state programs authorized in lieu of federal programs, such as those authorized under RCRA, have been ruled to be inapplicable to Indian reservations. *See* Washington Dep't of Ecology v. United States Envtl. Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

regulation and enforcement.¹²⁵

One may further conclude that retrocession of the slice of exclusive jurisdiction relating to environmental crimes, particularly with respect to nonfederal defendants, generally would benefit the federal government.¹²⁶ The federal government, while having quite large environmental and prosecutorial staffs overall, frequently does not have the resources in a particular state to prosecute all environmental offenses that would otherwise merit prosecution.¹²⁷ Further, insofar as the state may be advancing a federal interest in doing so, it is not unheard of for a state to bring a criminal prosecution in a case in which the federal government was the victim.¹²⁸ Moreover, as previ-

¹²⁵Although virtually no law exists on the issue of implied retrocession, the generally held view is that allowing state laws to operate on federal enclaves is not a form of retrocession, because the federal government has not surrendered its residual jurisdiction and retains the capacity to revoke such waivers. In the environmental enforcement area, of course, Congress has not addressed the issue of enclave jurisdiction at all. This makes analysis of congressional intent difficult, because one can only infer what that intent was contextually. Explicitly retroceding enclave jurisdiction would remove one impediment to the clear intent of Congress that authority to enforce environmental compliance on federal facilities resides with the states as well as the federal government. Federal facilities located upon federal enclaves undoubtedly comprise a significant proportion of federal facilities affected by the various waivers of immunity in federal environmental legislation.

¹²⁶While Congress, in waiving sovereign immunity, did not address the issue of interlopers upon federal enclaves (as it likewise failed to address the jurisdictional issues concerning federal enclave status directly). If one concludes that the portion of jurisdiction over the enclave concerning environmental offenses has been retroceded to the states, then a state prosecution of such an interloper may be undertaken. It is ludicrous to suggest, in any event, that a state may prosecute a federal employee who violates a state environmental provision, but not an interloper.

¹²⁷For example, in New Jersey, the United States Attorney's office only has one attorney and one FBI agent devoted to criminal environmental enforcement, while the State of New Jersey has a large statewide environmental prosecutions bureau, with an authorized strength of 13 attorneys and 30 investigators, as well as a number of prosecutors at the county level who prosecute environmental offenses from time to time. Federal efforts in this area are expanding, however. A rider to recent legislation concerning fish and wildlife, H.R. 3338 (Pub. L. No. 101-593), which recently was enacted by Congress, increases the number of Environmental Protection Agency criminal investigators from 50 to 200 and creates a National Enforcement Training Institute for lawyers, inspectors, and investigators. See *Bill to Quadruple Number of EPA Criminal Investigators Clears Congress*, Inside EPA, Nov. 16, 1990, at 14. Moreover, the passage of federal sentencing guidelines in 1987 generally has increased "white-collar" sentences in federal trials and made imprisonment much more likely for federal environmental offenders.

¹²⁸See, e.g., *State v. Kelly*, No. SGJ187-87-1 (1987), a New Jersey prosecution in which Kelly pleaded guilty to an indictment charging him with attempting to defraud the Veterans' Administration Medical Center in Philadelphia (attempted theft by deception) by entering into an agreement to dispose of the hospital's medical waste in accordance with Pennsylvania law by transporting it to an incinerator in Ohio. Instead, Kelly fraudulently transported it to New Jersey, where he was discovered rebagging it in preparation for disposal nearby (at the time, this did not constitute an offense under New Jersey law). Interestingly, the U.S. Attorney for the District of New Jersey carried out a simultaneous prosecution of Kelly for counterfeiting and was fully aware of the contemporaneous state charges.

ously discussed, the view that federal enclaves are “extraterritorial” with respect to the state in which they sit is an outmoded one. In light of the change to the law applying to federal enclaves brought about by *Howard*, no cogent reason exists to preclude a state prosecution that does not otherwise interfere with federal supremacy.¹²⁹

The benefits to the public in allowing state enforcement of environmental laws on federal enclaves, particularly the employment of criminal sanctions, is obvious. The presence of state authorities on the enclave, although it may be viewed by some as an infringement of federal preeminence, should not present any real problems to the regulated community. State and federal prosecutors routinely are able to resolve questions of overlapping jurisdiction.¹³⁰ One thing is clear. While “midnight dumpers,” including those operating on federal enclaves, will continue to face increasingly tough prosecution, federal officers and employees who violate environmental statutes will face criminal liability as well. Stringent environmental enforcement on federal enclaves involving a higher level of federal-state cooperation is the only way to resolve Congress’s concerns that led to the significant waivers of sovereign immunity in most federal environmental laws.

¹²⁹In part, for the reasons noted herein, the Department of Defense’s policy is that only the minimum level of jurisdiction necessary for the mission accomplishment is to be retained, with the remainder retroceded to the state. Department of Defense Directive 5160.63, para. D1 (June 3, 1986).

¹³⁰As a practical matter, when both jurisdictions wish to engage in a prosecution, the federal authorities’ interest appears to be greater in prosecuting federal employee/violators. Logic would dictate that states, on the other hand, should have priority over “midnight dumpers,” as such criminal activity imperils state residents’ (as well as enclave residents’) water supplies, but seldom directly interferes with the federal facilities’ missions.

ENVIRONMENTAL CRIMES: UPPING THE ANTE FOR NONCOMPLIANCE WITH ENVIRONMENTAL LAWS

by Captain James P. Calve*

“Well, is it possible, Mr. Dee, that when [the environmental coordinator] raised those issues that you simply turned off your ears because environmental compliance was not something that was important to your mission?”

– *United States v. Dee*¹

“Federal employees are not above the law.”

– *United States v. Dee*²

I. INTRODUCTION

Environmental prosecutions are a threat to federal employees. In addition to adverse administrative personnel actions that may result from violation of environmental laws, federal employees face the possibility of felony conviction and jail.

On June 15, 1988, a federal grand jury in the Northern District of New York returned a forty-two count indictment against a Department of Army civilian employee at Fort Drum, New York, for illegally disposing of old cans of waste paint. On October 14, 1988, a jury found him guilty of failing to report the disposal.³

On June 28, 1988, a federal grand jury in the District of Maryland indicted three civilian managers at Aberdeen Proving Grounds on felony charges for illegally storing and disposing of toxic chemicals.⁴ The trial generated a great deal of publicity and acrimony. The Assis-

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¹Record of Trial at 3729, *United States v. Dee*, No. HAR-99-0211 (D. Md. May 11, 1989) (government's cross examination of Mr. William Dee).

²*Army Times*, Mar. 6, 1989, at 10, col. 3 (statement of Mr. Breckenridge L. Willcox, United States Attorney, Baltimore, Maryland).

³*United States v. Can*; No. 88-CR-36 (N.D.N.Y. Oct. 14, 1988).

⁴*Brown, Harris & Cox, The Liability of the Employee of a Federal Agency Charged with Criminal Environmental Violations: Do the Rules of Fair Play Apply to the Football?*, 35 Fed. Bar News & J. 441, 442 (1988).

tant United States Attorney who tried the case charged the defendants with abandoning their responsibility to comply with environmental laws. The defendants countered with allegations that the government was conducting a witch hunt.⁵ On February 23, 1989, a jury returned guilty verdicts against each defendant on various counts of the indictment.⁶ On January 24, 1991, a federal jury convicted Mr. Richard Pond, the Aberdeen wastewater treatment facility operator, of nine counts involving violations of the Clean Water Act.⁷ He was convicted of violating permit requirements and making false statements in monitoring reports.

These cases are not aberrations. Protection of the environment is a topic of great concern to many Americans.⁸ Americans annually generate three to four billion tons of waste.⁹ Besides consuming limited resources, this activity, if unregulated, threatens human health and the environment. The federal government has begun to use criminal sanctions to protect the public and the environment from persons who ignore environmental regulations.

The federal government finds itself on both sides of the issue. In its role as regulator, the federal government enacts and enforces air, water, hazardous waste, and other environmental laws. As the national government, it owns almost one-third of the land in the United States and operates 27,000 installations and 387,000 facilities.¹⁰ Although these facilities perform missions that are vital to the country, they also pollute the environment!

⁵Baltimore Sun, Jan. 11, 1989, at B3, col. 1, B8, col. 1.

⁶United States v. Dee, No. HAR-88-0211 (D. Md. May 11, 1989).

⁷United States v. Pond, CR 590-0420 (D. Md. Jan. 24, 1991).

⁸A survey of 60,000 people ranked environmental crimes seventh in seriousness among all crimes. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, January 1984, cited in Starr, *Countering Environmental Crimes*, 13 B.C. Env'tl. Aff. L. Rev. 379, 380 n.1 (1986).

⁹H.R. Rep. No. 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6239; see also U.S. Congress, Office of Technology Assessment, *From Pollution to Prevention: A Progress Report on Waste Reduction—Special Report OTA-ITE-347* 19 (1987) (estimating that one billion tons of hazardous waste are generated each year), cited in Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 Val. U.L. Rev. 385, 387 n.6 (1988) (noting that the Environmental Protection Agency believes that Americans improperly dispose of 90% of their hazardous waste).

¹⁰U.S. Environmental Protection Agency, *Federal Facilities Compliance Strategy III-1* (Dec. 1988); Council on Environmental Quality, *Environmental Trends 75* (1989) (land use for the national defense accounts for four percent of all land in the United States).

¹¹See, e.g., *Hazardous Waste: Federal Civil Agencies Slow to Comply With Regulatory Requirements* (GAO/RCED-86-50, Dec. 26, 1985).

Of course, pollution at federal facilities does not just occur; it results from the conscious actions and decisions of federal employees. Accordingly, Executive Order 12088 directs federal agencies and their employees to comply with federal, state, and local environmental laws.¹²

Most states actively regulate pollution. Federal supremacy and sovereign immunity have shielded federal activities from state regulation and enforcement. In the past decade, Congress has waived federal supremacy and sovereign immunity to many state regulatory requirements. The waivers also allow states to enforce their standards against federal agencies with suits for injunctive and civil relief.

State environmental prosecutions are just over the horizon. Like the federal government, state and local governments increasingly prosecute environmental crimes.¹³ They want the power to prosecute federal employees.¹⁴ The Medical Waste Tracking Act of 1988, which expired in June 1991, allowed states to prosecute federal employees. Congress soon may amend other federal environmental laws to allow states to prosecute federal employees for violating state air, water, and hazardous waste laws.

The Aberdeen and Fort Drum prosecutions are not the final chapter of federal employee liability for environmental crimes. At least they are not the final chapter if federal employees disregard the message that federal employees, like other citizens, are not above the law. The job of every federal employee includes environmental compliance.

Environmental crimes are a particular threat because they punish conduct that many people, including the defendants at Aberdeen and Fort Drum, consider "innocent" behavior. If the defendants recognized their behavior as incorrect, they viewed it as a regulatory offense and not a crime. The defendants in the Aberdeen and Fort Drum cases were outstanding federal employees. Now they are convicted felons, because the prosecution proved that they neglected their responsibilities under environmental laws.

¹²Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978).

¹³See Rich, *Getting Tough on Environmental Crime*, Resources, Oct. 1989, at 11 (noting that the theme of the National District Attorneys Association's (NDAA) July 1989 conference was the environment as crime victim and that the NDAA leadership wants to promote environmental prosecutions); McElfish, *State Hazardous Waste Crimes*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,465 (1987).

¹⁴See Resolution, National District Attorneys Association, July 16, 1989 (urging Congress to subject federal facilities and employees to the same standards of accountability as states, local governments, and private industry and specifically requesting the ability to prosecute federal employees for state environmental crimes).

This article examines federal employees' potential liability to federal, state, and local environmental criminal prosecution. Part I of the article explains the reasons for the federal government's use of criminal sanctions to enforce environmental laws. **Part II** discusses the unique legal theories under which these statutes impose criminal liability and the way in which those theories affect federal employees. Part III examines federal employees' criminal liability under particular federal environmental statutes. **Part IV** explores their criminal liability under state environmental laws.

Part V recommends ways that federal employees can avoid criminal prosecution while doing their jobs and accomplishing their federal missions. Environmental compliance requires a "combined arms" approach involving employees with widely varying skills. Federal employees must plan for environmental compliance. Finally, environmental compliance requires a change in attitude.

11. FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS

Environmental laws increasingly regulate every aspect of society. Environmental compliance is often expensive.¹⁵ The cost and perceived unimportance of many environmental laws create incentives to avoid compliance. Given this reality, environmental statutes provide a variety of administrative, civil, and criminal sanctions to enforce compliance. Federal employees must understand criminal sanctions within this context.

A. ADMINISTRATIVE SANCTIONS

The Environmental Protection Agency (EPA) has broad administrative authority to promote compliance with environmental laws. When **EPA** discovers a violation, it can notify the offender of the nature of the violation, a proposed schedule for compliance, and the penalty for noncompliance. If the violation continues, EPA can file a com-

¹⁵See, e.g., *Hazardous Waste: Corrective Action Cleanups will Take Years to Complete* 22 (GAO/RCED-88-48, Dec. 9, 1987) (estimating that cleanup at Superfund sites may cost \$22.7 billion); *Hazardous Waste Problems at Department of Defense Facilities: Hearing Before the House Committee on Government Operations, Subcommittee on Environment, Energy and Natural Resources*, 100th Cong., 2d Sess. 57, 76 (1987) (statement of Mr. Carl J. Schafer, Jr., Deputy Assistant Secretary of Defense (Environment), that DOD, through the Defense Environmental Restoration Account, spent over \$350 million per year in fiscal years 1986 and 1987 and that the president's budget for fiscal years 1988 and 1989 requested over \$400 million per year).

pliance order or a complaint assessing penalties.¹⁶ During fiscal year 1989, EPA issued 4,017 administrative orders.¹⁷

B. CIVIL SANCTIONS

If violators ignore administrative sanctions, EPA can seek civil sanctions. Civil sanctions, normally assessed per day of violation, eliminate the economic incentive to evade regulatory requirements!^{*} Some statutes authorize a penalty directly related to the benefit gained by noncompliance.¹⁹ In fiscal year 1989, EPA referred 364 civil cases to the Department of Justice (DOJ) for enforcement, and courts assessed \$24 million in civil penalties.²⁰

The unitary executive theory limits EPA's ability to impose administrative and civil sanctions on federal agencies. Under this theory, DOJ refuses to litigate interagency disputes for constitutional, ethical, and practical reasons.²¹ Although the unitary executive theory insulates federal agencies and employees from civil and administrative sanctions, it leaves criminal sanctions as the only means to enforce compliance at federal facilities.

¹⁶EPA sometimes can effectively close a facility that is not in compliance with environmental regulations by revoking its permit to operate. RCRA § 3005(d), 42 U.S.C. § 6925(d) (1988). It can issue compliance orders that establish timetables for bringing a facility into compliance with applicable pollution control standards. CAA § 113(a), 42 U.S.C. § 7413(a) (1988); CWA § 309(a), 33 U.S.C. § 1319(a) (1988). See generally Walker, *High Stakes on a Fast Track: Administrative Enforcement at EPA*, 35 Fed. B. News & J. 453 (1988) (discussing EPA's use of administrative sanctions).

¹⁷ Address by William K. Reilly, Administrator, Environmental Protection Agency, *The Turning Point: An Environmental Vision for the 1990s*, Marshall Lecture to the Natural Resources Defense Council (Nov. 27, 1989) [hereinafter Address by W. Reilly], reprinted in 20 Env't Rep. (BNA) 1386, 1387 (1989).

¹⁸ McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 18 Land Use & Env't. L. Rev. 427, 430 (1987) (Mr. Ramsey was Chief of the Department of Justice's Environmental Enforcement Section); Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side* 17 Env't. L. Rep. (Env't. L. Inst.) 10,478 (1987) (The author was the Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice.).

¹⁹CAA § 120, 42 U.S.C. § 7420 (1988).

²⁰Address by W. Reilly, *supra* note 17, at 1387. EPA referred 372 civil cases to DOJ in fiscal year 1988. Environmental Protection Agency, Fiscal Year 1988 Enforcement Accomplishments Report 1 (December 1988), cited in Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) 337, 337 n.1 (1989).

²¹DOJ believes that the "case or controversy" requirement of Article III of the United States Constitution prevents lawsuits between executive branch agencies. DOJ would also face ethical problems if it represented both parties to the same lawsuit. Federal law prohibits the use of private counsel to represent a federal agency, and DOJ has successfully rebuffed federal agencies' efforts to litigate matters in federal court without the assistance of DOJ. See Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Env't. L. Rep. (Env't. L. Inst.) 10,114, 10,114-15 (1987).

Congress has considered legislation to circumvent the unitary executive theory.²² Until Congress acts, the unitary executive theory may give federal employees a false sense of security. If they misconstrue the absence of civil and administrative regulatory pressure as a *carte blanche* to disregard environmental laws, they set themselves up for criminal prosecution.

C. CRIMINAL SANCTIONS

The ultimate goal of criminal sanctions is deterring intentional violations of environmental laws.²³ Civil sanctions penalize the corporate entity, and ultimately the shareholder or consumer. Consequently, corporate officers, whose policies and decisions determine whether the corporation complies with environmental laws, often view civil penalties as a cost of doing business.²⁴ That attitude is incompatible with the purpose of environmental laws—protecting public health and the environment.

Criminal sanctions address this problem. They punish the person responsible for violating the law. They drive home the fact that non-compliance is often a crime rather than a business decision.²⁵ The adverse publicity and the stigma of a criminal prosecution provide additional incentives to comply with environmental laws.²⁶ Criminal sanctions get the attention of the regulated community and persuade

²²The unitary executive theory may not insulate federal agencies much longer. H.R. 3782, introduced during the first session of the 100th Congress, would create a "special environmental counsel" who could sue federal agencies that violate federal hazardous waste laws. See Brown, Harris & Cox, *supra* note 4, at 443.

²³Starr, *supra* note 8, at 382; see also Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1235-36 (1979) (arguing that criminal sanctions are most effective against the calculated decision making of corporate officials, who weigh compliance with regulations in terms of its costs and benefits).

²⁴See Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 Am. Crim. L. Rev. 835, 836 (1973) (noting that it is often less expensive to pay fines than it is to install equipment and comply with environmental laws); Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 Land & Water L. Rev. 93, 95, 106 (1985) [hereinafter *Putting Polluters in Jail*] (quoting a corporate manager's statement that "[i]t's cheaper to pay claims than it is to control fluorides").

²⁵Remarks by Dick Thornburgh, Attorney General of the United States, before the National Association of District Attorneys, in Portland, Maine (Jul. 19, 1989); Reisel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,065, 10,067 (1985) (Mr. Reisel was formerly Chief, Environmental Protection Unit, United States Attorneys Office, Southern District of New York).

²⁶Glenn, *supra* note 24, at 857-58; Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. Det. L. Rev. 659, 670 (1985).

it to obey the law. If the Aberdeen prosecution provides any indication, criminal sanctions have the same effect on federal employees.²⁷

Despite the recognized deterrent value of criminal sanctions, federal officials did not rely on them until very recently. Several factors account for this apparent anomaly.

1. *Criminal Enforcement at EPA*

The EPA did not exist until 1970.²⁸ Its first task was to administer new, complex statutes, all of which required regulatory implementation. The compliance deadlines for the Clean Air and Clean Water Acts did not arrive until 1977. In 1976, Congress enacted the Resource Conservation and Recovery Act, which imposed new regulatory requirements upon EPA. Finally, EPA spent a great deal of time defending itself against lawsuits that attacked its efforts to enforce compliance and implement the statutes.²⁹

When it began to enforce compliance with environmental statutes, EPA initially relied on administrative and civil sanctions.³⁰ Civil sanctions were easier to impose, because the burden of proof was lower.³¹ Also, the breadth and complexity of the recently enacted and amended statutes necessitated a grace period for the regulated community to understand its obligations and for courts to gain experience in civilly enforcing the statutes.³²

²⁷After the Aberdeen prosecution, DOJ received many inquiries from federal employees concerning compliance with environmental laws. Nat'l Env'tl. Enforcement J. 41-42 (Nov. 1989) (testimony of Richard Stewart, Assistant Attorney General, DOJ, Before House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce); see also Rich, supra note 13, at 10 (discussing the affect of the Aberdeen prosecution on federal employees' attitudes and noting an Aberdeen public affairs specialist's statement that "[p]eople are worried about whether or not they're doing something they shouldn't be—double checking all their work to make sure it's going right").

²⁸Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970).

²⁹See generally McMurry & Ramsey, supra note 18, at 428-30. EPA still defends itself against lawsuits challenging its implementation and enforcement activities. See Address by W. Reilly, supra note 17, at 1386 (noting that he is named as a defendant in 489 lawsuits).

³⁰McMurry & Ramsey, supra note 18, at 428. When the same activity violates the criminal and civil provisions of environmental statutes, DOJ may institute parallel civil and criminal proceedings. See generally Marzulla, *Guidelines for Civil and Criminal Parallel Proceedings*, Land and Natural Resources Division Directive, No. 5-87, Oct. 13, 1987, reprinted in 4 *Department of Justice Manual* § 5-1.301A (1990) [hereinafter *DOJ Manual*]. Administrative and civil enforcement actions are not prerequisites to criminal prosecution. See *United States v. Frezzo Brothers Inc.*, 602 F.2d 1123, 1126 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

³¹McMurry & Ramsey, supra note 18, at 430 (noting that the government could request injunctive relief by relying on reports that corporations filed under environmental statutes).

³²See Habicht, supra note 18, at 10,479.

On January 5, 1981, EPA created the Office of Criminal Enforcement within its Office of Enforcement and Compliance Monitoring.³³ Emphasis on criminal enforcement as part of EPA's overall compliance effort increased accordingly.³⁴ In March 1982, the Federal Bureau of Investigation (FBI) and EPA executed a memorandum of understanding in which the FBI agreed to investigate thirty environmental crimes per year.³⁵ In October 1982, EPA hired its first criminal investigators, allowing the agency to investigate its own cases in addition to those investigated by the FBI.³⁶ DOJ subsequently deputized them as United States Marshals, authorized to carry weapons and execute search and arrest warrants.³⁷ EPA also created the Office of Criminal Investigations (OCI) within its National Enforcement Investigations Center (NEIC) in Denver, Colorado. The OCI has ten offices that serve EPA's ten regional offices. Each regional office has a "criminal contact person" who advises United States Attorneys and others in criminal cases.³⁸ To strengthen state enforcement, the NEIC funds four regional organizations, which forty states have joined.³⁹ In FY 1988, EPA referred fifty-nine criminal cases to DOJ.⁴⁰

2. Criminal Enforcement at DOJ

At the same time that EPA focused resources on criminal enforcement, DOJ created the Environmental Crimes Unit (ECU) within the Environmental Enforcement Section of its Environment and Natural Resources Division.⁴¹ DOJ subsequently elevated the ECU to the status of a section within the Environment and Natural Resources

³³The Office of Criminal Enforcement is responsible for policy development, program guidance, and liaison with DOJ. McMurry & Ramsey, *supra* note 18, at 434, 438.

³⁴Reisel, *supra* note 25, at 10,065-66.

³⁵Habicht, *supra* note 18, at 10,479.

³⁶Starr, *supra* note 8, at 381.

³⁷Habicht, *supra* note 18, at 10,479 (noting that EPA has over 50 investigators who operate out of EPA's ten Regional Offices).

³⁸Address by David Bullock, trial attorney, Environmental Crimes Section, DOJ, *Criminal Prosecution for Environmental Prosecution: A Novelty No Longer*, Environmental Hazards Houston Conference (Sept. 1989) (Mr. Bullock was an attorney in DOJ's Environmental Crimes Section) [hereinafter Address by D. Bullock].

³⁹See generally Wills & Murray, *State Environment Enforcement Organizations*, Nat'l. Envtl. Enforcement J. 3, 4-5 (Aug. 1989) (the regional organizations help state and local investigators, regulators, and prosecutors build strong criminal enforcement programs in each state. They also provide computerized information sharing systems to facilitate communication among states. The NEIC assigns a Special Agent in Charge to each regional organization).

⁴⁰Environmental Protection Agency, Fiscal Year 1988 Enforcement Accomplishments Report 1 (1988), cited in Seymour *supra* note 20, at 337.

⁴¹McMurry & Ramsey, *supra* note 18, at 434-35. See generally 4 D W Manual, *supra* note 30, § 5-11.000.

Division.⁴² It staffed the Environmental Crimes Section with fifteen attorneys, who soon developed the expertise to handle increasingly complex cases.⁴³

Initially, DOJ received little assistance from the field, because United States Attorneys Offices (USAO) lacked the expertise and interest to prosecute environmental crimes.⁴⁴ This situation has changed, however. Many USAOs have prosecutors working full-time on environmental crimes.⁴⁵

DOJ prosecutes all cases. Depending upon the complexity of a case, attorneys of DOJ's Environmental Crimes Section have sole responsibility with administrative support from USAOs, joint responsibility with the USAOs, or monitoring responsibility.

Statistics reflect the increased emphasis on prosecuting environmental crimes. During the 1970's, DOJ prosecuted twenty-five cases.⁴⁶ Prosecutions arose as ancillary matters in compliance cases, or they stemmed from particularly egregious conduct.⁴⁷ In contrast to these earlier efforts, from 1983 through January 1990, DOJ in-

⁴²Memorandum from F. Henry Habicht II, Assistant Attorney General, to employees of the Lands and Natural Resources Division (May 7, 1987) (explaining that separation of civil and criminal environmental functions in DOJ will allow better management of both sections), *reprinted in 4 D W Manual supra* note 30, § 5-3.710A.

⁴³Address by D. Bullock, *supra* note 38 (stating that the Environmental Crimes Section has over twenty attorneys and continues to expand).

⁴⁴In this respect, the Aberdeen prosecution was an aberration; the case proceeded largely because the Assistant United States Attorney who tried the case previously worked for EPA. Interview with Ms. Jane F. Barrett, Assistant United States Attorney, Maryland, in Charlottesville, Virginia (Jan. 11, 1989) [hereinafter Interview with Ms. Jane F. Barrett] (discussing Ms. Barrett's prosecution of the Aberdeen case).

⁴⁵As prosecution of environmental crimes received greater media and public attention and as Assistant United States Attorneys developed environmental law expertise, USAOs began to handle more cases without assistance from DOJ. Address by D. Bullock, *supra* note 38; 4 D W Manual, *supra* note 30, § 5-11.312 (only attorneys employed by DOJ, or authorized by DOJ to represent the United States, may prosecute environmental criminal cases); § 5-3.721 (primary responsibility for handling cases is determined on a case-by-case basis but DOJ monitors all prosecutions).

⁴⁶Habicht, *supra* note 18, at 10,479.

⁴⁷See McMurry & Ramsey, *supra* note 18, at 431-32; see, e.g., United States v. Distler, 9 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,700 (W.D. Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir. 1980) (illegal discharge of chemical pollutants into Louisville sewer system forced city employees to abandon the wastewater treatment plant and resulted in the release of the pollutants and approximately 100 million gallons of untreated sewage per day into the Ohio River for over two months).

dicted almost 600 individual and corporate defendants for environmental crimes and convicted over 450 of those indicted.⁴⁸

3. Criminal Enforcement Policies

Despite EPA and DOJ's increased emphasis on prosecuting environmental crimes, violations exceed both agencies' ability to investigate and prosecute.⁴⁹ As a result, EPA and DOJ have investigative priorities that address violations which present the greatest threat to public health and the environment.⁵⁰ These priorities explain, in part, the Aberdeen and Fort Drum prosecutions.

Investigators first try to identify persons who disregard the regulatory system, such as "midnight dumpers," who dispose of hazardous wastes without a permit.⁵¹ A hazardous waste "recycler" who outfits a truck with a 750 gallon tank and spray nozzle so that his employees can drive the truck down rural country roads spraying PCBs onto the ground falls within this category.⁵² Another example of this group of high priority prosecutions is the Aberdeen case. The defendants routinely disposed of highly toxic chemicals in a sump that could not neutralize them. The defendants, who were chemists, used a "sniff test" to determine which substances the sump would neutralize. If the substances did not smell "hazardous," the defendants disposed of them in the sump, which ultimately discharged the untreated chemicals through a sewer system into a stream.⁵³

⁴⁸See Memorandum from Peggy Hutchins, Environmental Crimes Section, to Joseph Block, Chief Environmental Crimes Section (January 2, 1990)(Statistics FY83 Through FY90). This memorandum notes the following information:

(FY)	Fines Imposed	Jail Terms		Actual Confinement	
83	341,100	11 yrs		5 yrs	
84	384,290	5 yrs	3 mos	1 yr	7 mos
85	565,850	5 yrs	5 mos	2 yrs	11 mos
86	1,917,602	124 yrs	2 mos	31 yrs	4 mos
87	3,046,060	32 yrs	4 mos	14 yrs	9 mos
88	7,091,876	39 yrs	3 mos	8 yrs	3 mos
89	12,750,330	51 yrs	28 mos	36 yrs	14 mos
90	335,161	13 yrs	7 mos	2 yrs	11 mos
	\$26,432,269	280 yrs	49 mos	100 yrs	59 mos

⁴⁹"For every case of criminal pollution that is detected and prosecuted, dozens, even hundreds, continue undetected and unabated." Starr, *supra* note 8, at 383

⁵⁰See Habicht, *supra* note 18, at 10,480.

⁵¹*Id.* at 10,481-82; *see, e.g.*, United States v. Hamel, 551 F.2d 107, 108 (6th Cir. 1977) (defendant illegally discharged gasoline onto ice-covered lake from dispenser on a pier); United States v. Ralston Purina Co., 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,257 (W.D. Ky. 1982) (release of hexane into city sewer system caused explosion under a major highway and millions of dollars of damage).

⁵²United States v. Ward, 676 F.2d 94 (4th Cir.), *cert. denied*, 459 U.S. 835 (1982).

⁵³"Address by Ms. Jane F. Barrett, Contract Law Symposium The Judge Advocate General's School, Charlottesville, Virginia (Jan. 11, 1990).

Because environmental regulation relies heavily on self-monitoring and reporting, the next priority is persons who disregard regulatory requirements and cover their actions through false reporting.⁵⁴ The Fort Drum prosecution is an interesting twist on this problem. The defendant ordered several employees to dispose of five-gallon cans of waste paint in a man-made pit that had filled with water. Several weeks later he directed another employee to use a tractor to cover the pond and the paint cans with dirt. The jury convicted him of failing to report the disposal.⁵⁵

When it investigates an environmental crime, DOJ tries to identify, prosecute, and convict the highest ranking person responsible for the violation.⁵⁶ The government wanted to indict the commander of Aberdeen Proving Grounds, but could not gather enough evidence to try him with the other defendants.⁵⁷

Commentators have criticized the lenient sentences that courts impose on persons convicted of environmental crimes. Many defendants serve little or no time in jail.⁵⁸ The federal sentencing guidelines, recently upheld by the Supreme Court,⁵⁹ may eliminate much of that criticism.⁶⁰ Under the guidelines, persons convicted of "serious" offenses serve a minimum period of confinement.⁶¹ Environmental crimes are "serious" offenses under the guidelines.⁶² Had they been sentenced under the guidelines, the Aberdeen defendants would

⁵⁴Habicht, *supra* note 18, at 10,482; *see, e.g.*, United States v. A. C. Lawrence Leather Co., No. 82-37-01-L (D.N.H. Apr. 7, 1983) (company concealed its illegal disposal of untreated wastes into a nearby river through false reports, including reports required by EPA under a grant program, which the company applied for, and received, to study the success of its wastewater treatment plant in removing pollution from its industrial waste).

⁵⁵United States v. Carr, 880 F.2d 1550, 1551 (2d Cir. 1989).

⁵⁶Habicht, *supra* note 18, at 10,480. As one attorney in DOJ's Environmental Crimes Section stated, "[we]'re working our way up the corporate ladder We learned on the small fry and now we're trying to move up to the bigger fry." Rich, *supra* note 13, at 9 (quoting Paul Rosenzweig, trial attorney in DOJ's Environmental Crimes Section).

⁵⁷Interview with Ms. Jane F. Barrett, *supra* note 44.

⁵⁸*See Putting Polluters in Jail*, *supra* note 24, at 95-99 (discussing the reluctance of courts to punish corporate criminals).

⁵⁹*Mistretta v. United States*, 109 S. Ct. 647 (1989) (upholding sentencing guidelines against challenge that they are an unconstitutional delegation of legislative authority).

⁶⁰U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (West 1988).

⁶¹*Id.* § 5C1.1 (if the minimum term of imprisonment listed in the Sentencing Table is zero, the court may impose no confinement. If the minimum term of imprisonment is one to ten months, the court may impose intermittent confinement, community confinement, or home detention in conjunction with probation. If the minimum term of imprisonment is more than ten months, the defendant must serve at least the minimum term.)

⁶²*Id.* Part Q.

have served a minimum of fifteen months in jail; Mr. Pond was sentenced to eight months in prison.⁶³

Federal employees have another incentive to avoid criminal prosecution. Although the court sentenced each of the Aberdeen defendants to three years of probation and 1,000 hours of community service, they collectively spent over \$100,000 defending themselves. DOJ does not represent federal employees in federal criminal prosecutions, and the federal government will not provide funds for private counsel.⁶⁴

111. CORPORATE LIABILITY UNDER PUBLIC WELFARE STATUTES

Environmental crimes impose liability under controversial legal theories. Criminal liability normally requires the concurrence of a *mens rea* (guilty mind) and an *actus reus* (guilty act).⁶⁵ Environmental crimes erode both bases of liability while, in most cases, imposing felony sanctions.

A. PUBLIC WELFARE STATUTES

Environmental crimes punish persons who lack the *mens rea* typically associated with felonies such as murder and larceny. Mr. Dee was the father of binary chemical weapons. His work was important to national security. The government never alleged that Mr. Dee intended to commit an environmental crime in the sense that a murderer intends to kill his victim. The government simply proved that he ignored his duties under environmental laws.

The government wanted to indict the commander of Aberdeen Proving Grounds, not because he personally took any of the illegal actions, but because he knew of, or should have known of, the defendants' illegal activities. He had a duty to ensure that his command complied with environmental laws.⁶⁶

⁶³*Id.* §§ 2.135, 5.2 (the continuous release or mishandling of hazardous or toxic substances results in an offense level of fourteen, for which the Sentencing Table requires a minimum sentence of fifteen months). Mr. Pond was also sentenced to one year of supervised probation, four months of home detention, and sixty hours of community service. *United States v. Pond*, CR 590-0420 (D. Md. Apr. 17, 1991).

⁶⁴See Bartus, *Federal Employee Personal Liability Under Environmental Law: New Ways for The Federal Employee to Get in Trouble*, 31 A.F.L. Rev. 45, 46, 52 (1989).

⁶⁵"Even a dog distinguishes between being stumbled over and being kicked." *Morissette v. United States*, 342 U.S. 246, 250-52 n.9 (1951) (quoting O. Holmes, *The Common Law* (1881)); see also W. LaFare & A. Scott, *Criminal Law* §§ 3.1, 3.11(a) (1986).

⁶⁶Interview with Ms. Jane F. Barrett. *supra* note 44.

1. *Traditional Criminal Liability*

To prevent the criminalizing of innocent conduct, the common law required proof that a *mens rea* or guilty mind motivated the defendant's conduct.⁶⁷ Courts and commentators also refer to *mens rea as scienter* or criminal intent. The terms that defined *mens rea* at common law—"malicious," "fraudulent," "felonious," "with intent to," "willful and corrupt"—clearly conveyed the sense of culpability based on a guilty or "criminal" mind.⁶⁸

Crimes that require specific intent or subjective fault most closely embody the traditional *mens rea*. The person who purposely^s or knowingly⁷⁰ commits a criminal act has much the same appearance of guilt as the person who acted maliciously or feloniously at common law.⁷¹

The requirement of subjective intent or fault begins to erode with general intent, or "objective fault," crimes.⁷² These statutes impose a duty of care and punish acts committed negligently or recklessly in regard to that duty. A defendant's subjective state of mind is irrelevant to guilt or culpability.⁷³

2. *Strict Criminal Liability*

With the emergence of "public welfare offenses," legislatures imposed strict criminal liability without requiring proof of subjective or objective fault. Not surprisingly, the statutes became the subject of strong debate because they offended the deeply-rooted principle

⁶⁷"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrisette*, 342 U.S. at 250-51, quoted in *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978).

⁶⁸W. LaFare & A. Scott, *supra* note 65, § 3.4(a).

⁶⁹"A person acts purposely . . . [if] it is his conscious object to engage in conduct of that nature or to cause such a result . . ." Model Penal Code § 2.02(2)(i) (Proposed Official Draft 1962).

⁷⁰"A person acts knowingly . . . [when] he is aware that it is practically certain that his conduct will cause such a result." *Id.* § 2.02(b)(ii).

⁷¹See *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985) ("We have also recognized that the mental element in criminal law encompasses more than the two possibilities of "specific" and "general" intent.) (citing *United States v. Bailey*, 444 U.S. 394, 403-07 (1980); Model Penal Code § 2.02 (Proposed Official Draft 1962)).

⁷²*Morrisette*, 342 U.S. at 251 n.8 ("Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty.")

⁷³See W. LaFare & A. Scott, *supra* note 65, § 3.4(a).

that criminal liability must be based on a guilty or criminal **mind**.⁷⁴ As a result, absent clear legislative intent, courts will not construe a statute to impose strict criminal **liability**.⁷⁵

Although they do so at a high cost to individual defendants, strict liability public welfare statutes serve an important purpose. They regulate activities that threaten the public welfare—activities involving food, narcotics, industrial safety, traffic, and the environment.⁷⁶ They are Congress's response to the dangers that exist in a modern, industrial society.

Public welfare statutes impose strict liability to force the regulated community to learn of, and comply with, the law. "In the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public **danger**."⁷⁷ Congress weighed the equities and chose to put the risk on the regulated community, which can inform itself of the dangerous conditions that it creates, rather than on an innocent public, helpless to protect itself.⁷⁸

Imposing strict criminal liability under complex public welfare statutes does not offend due process when the statutes impose *misdeemeanor* sanctions. The emphasis of the statutes is on achieving some

⁷⁴"This case stirs large questions—questions that go to the moral foundations of the criminal law. Whether postulated as a problem of "mens rea," or "willfulness," or "criminal responsibility," or of "scienter," the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice." *United States v. Int'l Mineral & Chem. Corp.*, 402 U.S. 558, 565 (1971) (Harlan, J., Brennan J. & Stewart J., dissenting). "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Smith v. California*, 361 U.S. 147, 150 (1959) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

⁷⁵"Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so." *Morissette*, 342 U.S. at 254 n.14.

⁷⁶*Morissette*, 342 U.S. at 252-56 (discussing the origin of public welfare statutes as a legislative response to the dangers created by the industrial revolution—powerful and complex machinery, automobiles, traffic, crowded cities and quarters, and the wide distribution of food, drink, and drugs). *See generally* Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

⁷⁷*United States v. Dotterweich*, 320 U.S. 227, 281 (1943).

⁷⁸*Id.* at 284-85; *see also* *Balint v. United States*, 258 U.S. 251, 254 (1921) (The purpose of the Narcotics Act was "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.").

social good—protecting the public health and welfare—rather than on punishing criminal conduct in the traditional sense involving *malum in se* offenses such as murder, robbery, and arson.⁷⁹

3. *Public Welfare Hybrids*

Sacrificing individual liberties to the public welfare does not support public welfare statutes that impose *felony* sanctions. When they impose felony sanctions, as most environmental statutes do, public welfare statutes no longer involve minor regulatory offenses. They are bona fide criminal statutes. Regulators and prosecutors view environmental crimes as serious offenses; they seek criminal sanctions to punish and deter that conduct.

To avoid due process problems, environmental statutes that impose felony sanctions also require “knowing” violations. Unfortunately, this *mens rea* requirement does not provide much protection to federal employees. These so-called public welfare hybrids fall somewhere between strict liability public welfare offenses and traditional felonies.

4. *Element Analysis*

Analysis of public welfare hybrids requires not only an interpretation of *mens rea*, but also an analysis of the extent to which that *mens rea* requirement—the terms “purpose,” “knowledge,” “recklessness,” or “negligence”—modifies each element of an offense.⁸⁰ Commentators term this approach “element analysis.”⁸¹

The majority of courts treat public welfare hybrids more like strict liability public welfare statutes than traditional felony crimes. They impose strict liability for some elements of the offense and require a reduced “knowledge” or *scienter* as to others.⁸²

In traditional felony crimes, “knowledge” and “willfulness” require proof of specific intent or knowledge of one’s actions and their

⁷⁹See *Balint*, 258 U.S. at 252.

⁸⁰*Freed*, 401 U.S. at 612-4 (Brennan, J., concurring) (explaining that “mens rea is not a unitary concept, but may vary as to each element of a crime. . . . To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove. . . .”).

⁸¹See Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681 (1983).

⁸²See Note, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. Envtl. Aff. L. Rev. 53 (1988).

consequences. In public welfare hybrids, “knowledge” and “willfulness” correspond to general intent or awareness of one’s actions but not their consequences.⁸³

The Aberdeen prosecution illustrates this distinction. Prosecutors only had to prove that the defendants were aware that they disposed of harmful substances. Prosecutors did not have to prove that the defendants knew that the substances were hazardous as defined by federal law, that the disposal was illegal, that the disposal polluted a nearby stream and threatened the environment, or that the law required a permit to dispose of the substances.

5. *Ignorance of the Law*

Although ignorance of the law does not excuse criminal conduct, defendants routinely argue that the *mens rea* in public welfare hybrids requires proof that a defendant knew that his conduct violated the law. The Aberdeen defendants raised this defense.⁸⁴ Should the defendants at Aberdeen have known that pouring toxic chemicals into a sump that did not neutralize them was a crime? Should the defendant at Fort Drum have known that throwing paint cans into a pond was a crime? Conversely, should society expect them to know this or should it allow their ignorance to excuse their conduct when that conduct threatens the public welfare?

Traditionally, “ignorance of the law” does not excuse criminal behavior. To the extent that an accused murderer can not cite the statute that he violated, his “ignorance of the law” does not excuse his conduct. Moreover, to the extent that he claims ignorance of the law’s proscription against the act of killing another, he has no defense.⁸⁵

Courts extend this principle to public welfare hybrids, despite the fact that such statutes regulate activities that are not inherently immoral.⁸⁶ This interpretation does not offend due process, because

⁸³Habicht, *supra* note 18, at 10.483.

⁸⁴Appellants’ Brief, *United States v. Dee*, No. 89-5606 at 31-38 (4th Cir. Oct. 16, 1989).

⁸⁵“If the ancient maxim that ‘ignorance of the law is no excuse’ has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy.” *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan J., concurring).

⁸⁶*See, e.g., Int’l Minerals & Chem. Corp.*, 402 U.S. at 563 (construing a public welfare hybrid and holding that “[i]t is too much to conclude that in rejecting strict liability the House was also carving out an exception to the general rule that ignorance of the law is no excuse”).

public welfare hybrids regulate activities that a reasonable person should realize is subject to regulation.⁸⁷

The Supreme Court recognized ignorance of the law as a defense in *Lambert v. California*.⁸⁸ In *Lambert* the Court struck down a criminal ordinance that required convicted felons who resided in Los Angeles for more than five days to register with the police. The ordinance, however, was not a public welfare statute. Thus, *Lambert* represents less of an exception to the rule that ignorance of the law is no excuse than it does a logical extension of the due process considerations underlying public welfare statutes. If a criminal statute does not involve activity that affects the public welfare, it may not impose strict liability consistent with due process notice requirements, because it punishes "innocent" conduct.⁸⁹

The principle that ignorance of the law does not excuse criminal behavior does not apply when knowledge of a legal requirement is an element of an offense.⁹⁰ For example, Congress could require knowledge of a facility's permit status as an element of a hazardous

⁸⁷"Where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Int'l Mineral and Chem. Corp.*, 402 U.S. at 563; see also *Freed*, 401 U.S. at 607-11 (rejecting argument that conviction for possessing unregistered hand grenades required knowledge of the law because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act").

⁸⁸*Lambert v. California*, 355 U.S. 225, 229-30 (1957).

⁸⁹*Id.* at 228 (holding that the ordinance was not a public welfare statute and that the failure to register was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed"); see *Freed*, 401 U.S. at 613 n.4 (Brennan, J., concurring) (noting *Lambert* as precedent that due process concerns limit a legislature's ability to create strict liability offenses). Cf. *Liparota*, 471 U.S. at 426-28, 432-33 (holding that a statute punishing illegal possession of food stamps required knowledge-of-illegality and noting that Congress could have intended to impose strict liability as to knowledge of the regulatory requirements and rely upon prosecutors to exercise their discretion to avoid harsh results, but the lack of clear legislative intent or public welfare benefit precluded such an interpretation because the statute would otherwise "criminalize a broad range of apparently innocent conduct"). *SPP generally Note, Ignorance of the Law as an Excuse*, 86 Colum. L. Rev. 1392 (1986) (arguing that due process requires a mistake of law defense for laws that criminalize ordinary behavior and noting the reluctance of the Supreme Court to impose constitutional limitations upon a legislature's ability to create criminal offenses). *But see Powell v. Texas*, 392 U.S. 514, 535 n.27 (1968) ("It is **not** suggested that *Lambert* established a Constitutional doctrine of *mens rea* . . .").

⁹⁰"It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." *Freed*, 401 U.S. at 615-16; see also *W. LaFave & A. Scott, supra* note 65, § 5.1(d).

waste disposal crime. The prosecution would not have to prove that the defendant knew of the law proscribing his actions. Nor would the prosecution have to prove knowledge of the requirement to have a permit; knowledge of the law's requirements is presumed.

The prosecution would have to prove that the defendant disposed of hazardous waste knowing that the disposal exceeded the facility's permit conditions or that the facility lacked a permit. The prosecution could not convict a person who reasonably believed that the disposal complied with permit conditions or that the facility had a permit authorizing the disposal.

Courts are reluctant to interpret knowledge of a statutory requirement as an element of a public welfare hybrid offense. This judicial approach requires the regulated community to learn the requirements affecting its activities and to ensure that its activities comply with those requirements.⁹¹

B. RESPONSIBLE CORPORATE OFFICER DOCTRINE

The duty to learn of, and comply with, the requirements of public welfare statutes extends to federal employees at all levels. Public welfare statutes impose criminal liability on federal employees and supervisors who fail to comply. Their method of imposing liability differs from traditional principles of corporate liability.

Under the doctrine of *respondeat superior*, an organization is liable for the crimes of its employees who act within the course and scope of their employment.⁹² Its *officers*, however, are not criminally liable under that doctrine.

⁹¹*Freed*, 401 U.S. at 609. *Cf.*, *United States Gypsum Co.*, 438 U.S. at 441 n.17 (noting that "in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose . . .").

⁹²*See* *United States v. A & P Trucking Co.*, 358 U.S. 121, 125-27 (1958) (imputing criminal liability to a partnership for the acts of its employees); *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir.) (imputing employee's knowledge of oil spill to corporation to hold it criminally liable under the Clean Water Act), *cert. denied*, 429 U.S. 827 (1976). *Cf.*, *W. LaFave & A. Scott*, *supra* note 65, § 3.10(b) (criticizing courts' unquestioning application of the tort principle *respondeat superior* to corporations without regard to the positions and authority of the employees involved).

To incur criminal liability under traditional theories, corporate officers must perform or direct the criminal activity.⁹³ Imposing liability on a supervisor who orders subordinates to dispose of waste paint in a pond is an example of traditional corporate criminal liability. Environmental laws and other public welfare statutes impose liability under this theory.

They also extend criminal liability to corporate officers and supervisors who have not taken, and may not even be aware of, the prohibited activities.⁹⁴ They eliminate *actus reus* as a basis of liability. Convicting a supervisor for improperly storing hazardous waste that belongs to his directorate but over which he exercises no direct control is an example of the additional liability that public welfare statutes impose. The supervisor is liable for failing to learn of hazardous waste storage requirements and for failing to ensure that his directorate complies with those requirements.

1. "Responsible Share"

The Supreme Court recognized that the literal enforcement of public welfare statutes in a large organization "might operate too harshly by sweeping within its condemnation any person however remotely entangled" in the activity.⁹⁵ In *United States v. Dotterweich*⁹⁶ it limited liability to employees who have a "responsible share in the furtherance of the transaction which the statute outlaws."⁹⁷ The Court did not define the categories of employees who have a "responsible share"⁹⁸ in corporate transactions.

⁹³*Nye & Nissen v. United States*, 336 U.S. 613, 619-20 (1949); *United States v. Amrep Corp.*, 560 F.2d 539, 545 (2d Cir.), cert. denied, 434 U.S. 1015 (1977). See generally Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 Vand. L. Rev. 1337, 1338-1342 (1982) (discussing theories under which courts hold corporate officers criminally liable).

⁹⁴"There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation." *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

⁹⁵*Id.* at 284-85.

⁹⁶320 U.S. 227 (1943).

⁹⁷*Id.*

⁹⁸"To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress . . . would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted." *Id.* at 285.

In *United States v. Park*⁹⁹ the Court elaborated on its earlier holding in *Dotterweich*.¹⁰⁰ Responsible corporate officers—those with a "responsible share" in the criminal transaction—include all employees who have the responsibility and authority to prevent violations of public welfare statutes.¹⁰¹

The holding of *Park* is important to senior federal employees. It illustrates that public welfare statutes impose legal duties on supervisors who are far-removed from the day-to-day operations of large organizations. In *Park*, the government convicted Acme Markets and its president and chief executive officer (CEO), Mr. John R. Park, of allowing rodents to contaminate food in Acme's Baltimore warehouse. The contamination violated the Food, Drug, and Cosmetic Act, a strict liability public welfare statute. The government convicted Mr. Park despite the fact that Acme was a national retail food chain with approximately 36,000 employees, 874 retail outlets, and sixteen warehouses.¹⁰²

Park also illustrates the ease with which the government establishes liability for violations of a public welfare statute. Although the opinion does not address how the responsible corporate officer doctrine applies to a public welfare hybrid, it provides a good indication. Mr. Park's liability resulted from two factors: 1) the duty imposed by the Act to seek out and prevent violations; and 2) Mr. Park's corporate responsibility and authority, which enabled him to meet that duty.¹⁰³ These factors should enable the government to impose criminal liability on commanders and supervisors under environmental laws.

2. *Park* and Public Welfare Hybrids

The addition of *mens rea* in public welfare hybrids, such as environmental laws, would not affect the first factor—a supervisor's authority and responsibility. Authority and responsibility depend on corporate or organizational structure and not on a statute's *mens rea* requirements.

⁹⁹421 U.S. 658 (1975).

¹⁰⁰*Id.* at 660.

¹⁰¹*Id.* at 672.

¹⁰²*Id.* at 660.

¹⁰³"The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability." *Id.* at 674.

The government established Mr. Park's responsibility and authority through Acme's by-laws, as interpreted by Acme's vice president for legal affairs. Mr. Park's duties included "general and active supervision of the affairs, business, offices and employees of the company." As CEO, Mr. Park delegated normal operating duties, including sanitation, but retained the "big, broad, principles of the operation of the company" and the responsibility of seeing that they work together.¹⁰⁴

The Court emphasized that Mr. Park's liability arose not from his corporate position *per se*, but from the responsibility and authority that his position gave him to prevent violations of the Act.¹⁰⁵ The distinction is virtually meaningless, however, because corporate presidents and CEOs are normally responsible for the overall operation of a corporation.

Commanders and supervisors have similar authority and responsibility. Agency regulations, directives, and policies delineate responsibility and authority in broad terms. Job descriptions further define responsibilities. In addition, commanders have inherent authority over, and responsibility for, the activities on their installation.¹⁰⁶ Their authority and responsibility extends to environmental compliance.¹⁰⁷

Whether these general delineations of authority and responsibility are sufficient to establish culpability is a question of fact.¹⁰⁸ The Aberdeen prosecutors used local regulations and civilian job descriptions to establish Mr. Dee's responsibility and authority for the illegal storage and disposal of hazardous waste within his directorate.¹⁰⁹

¹⁰⁴*Id.* at 662-63 n. 7. When questioned on cross examination, Park conceded that his overall responsibilities encompassed sanitary conditions at Acme's warehouses. *Id.* at 664-65.

¹⁰⁵*Id.* at 675.

¹⁰⁶*See* Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

¹⁰⁷*See, e.g.*, Army Reg. 200-1, Environmental Protection and Enhancement, para. 1-6i (15 June 1982).

¹⁰⁸*Park*, 421 U.S. at 676 (noting that juries may demand more evidence than corporate by-laws before they find that a corporate officer has the requisite authority and responsibility for criminal liability).

¹⁰⁹After Mr. Dee equivocated about his responsibility for managing hazardous wastes generated within his directorate, the prosecutor introduced his job description into evidence. His responsibilities included "life cycle design," which required him to manage the chemical warfare agents that his directorate developed from design to disposal. Local regulations imposed additional hazardous waste management responsibilities. Record of Trial, United States v. Dee, No. 88-CR-36, 3661-68, 3719-20.

3. *Willful Ignorance*

The second factor in *Park* — the duties imposed by a public welfare statute — is more problematic. The issue is whether a public welfare hybrid imposes a duty to seek out violations and a duty to prevent violations from occurring. If it does, ignorance of violations within a person's authority and responsibility is not a defense when the ignorance results from a failure to meet those duties.

The Court's treatment of objective impossibility as a defense to violations of public welfare statutes strongly suggests that willful ignorance is not a defense to violations of public welfare hybrids.¹¹⁰ Mr. Park, in effect, raised the defense by arguing that, as CEO of a large corporation, he delegated many duties to subordinates whom he considered dependable.¹¹¹ He relied on his subordinates to meet his obligations under the Act. Mr. Park argued that the violations occurred despite his authority and responsibility.¹¹²

The government introduced evidence of Mr. Park's knowledge of the violations for the limited purpose of "rebutting" his defense of relying on subordinates. The government proved that regulators informed Park of violations at Acme's Philadelphia warehouse in April 1970. When Mr. Park learned of his subordinates' failure to prevent violations at the Philadelphia warehouse, he "knew" that he could not rely on his subordinates to prevent contamination at Acme's other warehouses.¹¹³ He was not powerless to prevent violations that occurred at Acme's Baltimore warehouse two years later; he failed to supervise his subordinates.¹¹⁴ Thus, supervisors cannot delegate away responsibility and wait until they learn of violations.¹¹⁵

¹¹⁰*Park*, 421 U.S. at 673 (noting that "[t]he theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation . . .").

¹¹¹*Id.* at 677 (noting that Park did not request an instruction on the impossibility defense and thus not deciding whether his testimony entitled him to one).

¹¹²*Id.* at 677.

¹¹³*Id.* at 677-78.

¹¹⁴Assuming *arguendo* that it would be objectively impossible for a senior corporate agent to control fully day-to-day conditions in 874 retail outlets, it does not follow that such a corporate agent could not prevent or remedy promptly violations of elementary sanitary conditions in 16 regional warehouses." *Id.* at 677, n.1; *see also* *United States v. Starr*, 535 F.2d 512, 515-16 (9th Cir. 1976) (holding that a corporate officer could not delegate his responsibility to subordinates and that the standard of foresight and vigilance imposed on responsible corporate officers included a duty to anticipate and counteract the shortcomings of delegates, including willful disobedience of orders;).

¹¹⁵*Cf.* *Boyce Motor Lines v. United States*, 344 U.S. 337, 342 (1952) (holding that willful ignorance of corporate compliance with the requirements of a public welfare statute establishes knowledge).

4. Duty to Supervise Subordinates

The duty to supervise subordinates is a hallmark of military command. Abandoning that obligation can have dire consequences as illustrated by *In re Yamashita*.¹¹⁶ The holding in *In re Yamashita* parallels the responsible corporate officer doctrine in *Park*.¹¹⁷ The Articles of War imposed a duty on General Yamashita, who commanded Japanese forces in the Philippines, to control the soldiers of his command to protect prisoners of war and civilians. His failure to take measures within his authority to meet that duty was culpable.¹¹⁸

5. Duties Under Hybrids

Although their obligations vary with their authority and responsibility, all federal employees face liability for environmental crimes. They are liable as principals if they perform, command, or authorize a criminal act.¹¹⁹ They also have a duty to disobey improper orders, such as an order to dump paint cans into a pond. If prosecutors had indicted the employees who actually dumped the paint cans into the pond, the employees could not have avoided liability by claiming that they acted within the course of their employment or pursuant to orders.¹²⁰

Commanders and supervisors do not have a duty to inspect every facility or warehouse within their control for criminal violations of environmental laws. They do have an obligation to institute policies and procedures to ensure that their organizations comply with environmental laws. They also must supervise their subordinates. They cannot assume that their subordinates flawlessly will perform assigned duties.

¹¹⁶*In re Yamashita*, 327 U.S. 1 (1945) (failure of commander of occupying force in the Philippines during World War II to control his subordinates resulted in death and injury to over 25,000 people and his sentence to death under the Articles of War).

¹¹⁷See Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 Alb. L. Rev. 61, 74 (1972) (analogizing the responsibilities of a military commander to those of a corporate officer under the responsible corporate officer doctrine of *Park*).

¹¹⁸*In re Yamashita*, 327 U.S. at 13-17 (noting that the defendant never argued that performing these duties was beyond his control).

¹¹⁹See *Nye & Nissen*, 336 U.S. at 619; *United States v. Ward*, 676 F.2d 94 (4th Cir.) (holding defendant liable for aiding and abetting the illegal disposal of toxic substances). *cert. denied*, 459 U.S. 835 (1982).

¹²⁰See *Park*, 421 U.S. at 670 (noting the established principle that a corporate agent, through whose act the corporation commits a crime, is individually guilty of that crime): *United States v. Wise*, 370 U.S. 405, 409 (1962) (refusing to exculpate corporate officers from criminal liability when they act in a representative capacity for a corporation).

IV. LIABILITY UNDER FEDERAL ENVIRONMENTAL STATUTES

Federal regulators impose criminal penalties under a wide variety of environmental laws that regulate air, water, hazardous waste, and other types of pollution. With one exception, the statutes require proof of *mens rea*. They also impose a positive duty on the regulated community to know their requirements. Most impose felony penalties, and Congress continues to amend the statutes to increase their penalties. Courts struggle to balance the statutes' public welfare status, which supports stricter criminal liability, against their requirement of *mens rea* and their felony sanctions.

A. RESOURCE CONSERVATION AND RECOVERY ACT

Prosecution under the Resource Conservation and Recovery Act (RCRA), which regulates hazardous waste, presents the greatest threat to federal employees. Federal activities generate and dispose of large quantities of hazardous waste.¹²¹ The number of cases involving hazardous waste crimes indicates regulators' emphasis on prosecuting hazardous waste crimes. The Aberdeen and Fort Drum prosecutions involved hazardous waste offenses.

1. Requirements of RCRA

Congress enacted RCRA as an amendment of the Solid Waste Disposal Act.¹²² The Act's stated findings, objectives, and legislative history indicate Congress's intent to protect public health and the

¹²¹EPA's Federal Agency Hazardous Waste Compliance Docket lists hundreds of federal facilities that regulators must evaluate for possible hazardous waste contamination. Although the Docket focuses on the cleanup of hazardous waste at federal facilities, it illustrates the number of federal facilities that generate and handle hazardous waste. EPA Federal Agency Hazardous Waste Compliance Docket, 53 Fed. Reg. 4,280 (1988), amended by, 53 Fed. Reg. 46,364, corrected by, 53 Fed. Reg. 49,375 (1988), reprinted in, 41 Env't. Rep. (BNA) 3361 (1989).

¹²²Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2796 (codified as amended at 42 U.S.C. §§ 6901-6991i (1988)).

environment by regulating “hazardous waste”¹²³ generation, treatment, storage, and disposal.¹²⁴

RCRA creates a cradle-to-grave regulatory scheme to accomplish this objective. RCRA requires EPA to identify and list hazardous wastes.¹²⁵ EPA also must promulgate recordkeeping, labeling, and reporting requirements for hazardous waste generators. Most importantly, RCRA requires the use of a manifest system to track hazardous waste from its generation to its treatment, storage, and disposal.¹²⁶ Hazardous waste transporters must comply with labeling and manifesting standards.¹²⁷ Operators of hazardous waste treatment, storage, and disposal facilities must comply with recordkeeping, inspection, and monitoring requirements.¹²⁸ They also must obtain operating permits from EPA.¹²⁹

Section 3008(d) contains RCRA’s criminal provisions. It imposes felony sanctions¹³⁰ for “knowing” violations of RCRA’s cradle-to-

¹²³“The term ‘hazardous waste’ means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” RCRA § 1004(5), 42 U.S.C. § 6903(5) (1988). “The term ‘solid waste’ means any garbage, refuse, . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities but does not include solid or dissolved material in domestic sewage” RCRA § 1004(27), 42 U.S.C. § 6903(27) (1988).

¹²⁴RCRA § 1002, 42 U.S.C. § 6901 (1988) (noting the ever-increasing amounts of solid and hazardous waste generated by society and the threat that unregulated disposal of such wastes presents to public health and welfare). RCRA § 1003, 42 U.S.C. § 6902 (1988) (declaring the national policy to reduce the generation of hazardous waste and regulate its treatment, storage, and disposal to minimize the threat to human health and the environment); *see also* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2-4, 11, *reprinted in* 1976 US. Code Cong. & Admin. News 6238, 6238-41, 6249.

¹²⁵RCRA § 3001, 42 U.S.C. § 6921 (1988); *see* 40 C.F.R. pt. 261 (1990) (Subpart B lists criteria for identifying hazardous wastes; Subpart C lists characteristics of hazardous wastes by ignitability, corrosivity, reactivity, and toxicity characteristics; Subpart D identifies particular substances that EPA considers hazardous).

¹²⁶RCRA § 3002(a)(5), 42 U.S.C. § 6922(a)(5) (1988); *see* 40 C.F.R. pt. 262 (1990); *United States v. Hayes Int’l Corp.*, 786 F.2d 1499, 1501 (11th Cir. 1986).

¹²⁷RCRA § 3003, 42 U.S.C. § 6923 (1988); *see* 40 C.F.R. pt. 263 (1990).

¹²⁸RCRA § 3004, 42 U.S.C. § 6924 (1988); *see* 40 C.F.R. pts. 264-267 (1990).

¹²⁹RCRA § 3005(a), 42 U.S.C. § 6925(a) (1988); *see* 40 C.F.R. pt. 270 (1990).

¹³⁰Persons who violate § 3008(d) are subject to a maximum fine of \$50,000 for each day of violation, imprisonment for two years (five years for a violation of subparagraphs (1) or (2)), or both. The maximum punishment doubles for a second conviction. RCRA § 3008(d), 42 U.S.C. § 6928(d) (1988)

grave regulatory scheme.¹³¹ Congress increased section 3008(d)'s penalties in 1984 to indicate its intent to treat criminal violations harshly and to provide adequate enforcement authority to EPA and DOJ.¹³² Section 3008(e) imposes severe felony sanctions on persons

¹³¹Section 3008(d) punishes

[a]ny person who—

(1) *knowingly* transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.],

(2) *knowingly* treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.]; or

(B) in *knowing* violation of any material condition or requirement of such permit; or

(C) in *knowing* violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) *knowingly* omits material information or makes any false material statement or representation in any applications, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter:

(4) *knowingly* generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who *knowingly* destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) *knowingly* transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest:

(6) *knowingly* exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) *knowingly* stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under subchapter—

(A) in *knowing* violation of any material condition or requirement of a permit under this subchapter; or

(B) in *knowing* violation of any material condition or requirement of any applicable regulations or standards under this chapter.

RCRA § 3008(d), 42 U.S.C. § 6928(d) (1988).

¹³²Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 232(a)(3), 98 Stat. 3256; see H.R. Rep. No. 198, 98th Cong., 2d Sess. 55, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5614.

who commit violations and who knowingly endanger the life of another person.¹³³

2. RCRA and Federal Employees

The Aberdeen defendants argued that RCRA's criminal provisions do not apply to federal employees. RCRA's general definition of "person" applies to section 3008(d).¹³⁴ "Person" includes "individuals,"¹³⁵ RCRA separately defines federal agency.¹³⁶ The Aberdeen defendants argued that the omission of federal agency from RCRA's definition of "person" indicated Congress's intent to exempt federal agencies from criminal prosecution. That exclusion should protect federal employees who commit RCRA violations in the performance of their official duties.¹³⁷

Their argument failed on two counts. First, RCRA does not include "corporate employee" or "responsible corporate officer" within its definition of "person." Yet, courts liberally construe the term "person," in light of RCRA's public welfare status, to include low-level corporate employees and responsible corporate officers.¹³⁸

Second, courts treat federal employees who violate *federal crimi-*

¹³³ "Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both . . ." RCRA § 3008(e), 42 U.S.C. § 6928(e) (1988).

¹³⁴ See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (3d Cir. 1984), cert. denied 469 U.S. 1208 (1985).

¹³⁵ "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, Municipality, commission, political subdivision of a State, or any interstate body." RCRA § 1004(15); 42 U.S.C. § 6903(15) (1988).

¹³⁶ "The term 'federal agency' means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office." RCRA § 1004(4); 42 U.S.C. § 6903(4) (1988).

¹³⁷ Memorandum in Support of Defendants' Joint Motion to Dismiss Counts of Indictment Alleging Violations of the Resource Conservation and Recovery Act, *United States v. Dee*, Cr. No. HAR-88-0211 at 11-13 (Aug. 29, 1988); see also *Brown, Harris & Cox, supra* note 4, at 442-43.

¹³⁸ *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 745 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) ("As defined by the statute, the term 'person' includes both individuals and corporations and does not exclude corporate officers and employees."); *Johnson & Towers, Inc.*, 741 F.2d at 664-65.

nal laws as individuals.¹³⁹ Sovereign immunity, which may protect federal employees from *state* criminal prosecution or *civil* suit, is inapplicable to a federal criminal prosecution.¹⁴⁰ In other words, the federal government does not pay its employees to violate federal criminal laws.¹⁴¹

3. Element Analysis

A knowing violation of RCRA requires proof of a general intent. RCRA does not define “knowingly.” Congress left that task to the courts under “general principles.”¹⁴² While traditional crimes define “knowingly” as knowledge of one’s actions and their consequences, public welfare hybrids define “knowingly” to require only awareness of one’s actions.¹⁴³

By implication, RCRA’s “knowing endangerment” offense supports this view. Section 3008(f) defines the “knowledge” required for

¹³⁹See Government’s Consolidated Responses to Defendant’s Motions, United States v. Dee, Cr. No. HAR-88-0211 at 10-12 (Sept. 16, 1988) [hereinafter Government’s Response]; United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1974) (“We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government, they do not exempt the members of those branches ‘from the operation of the ordinary criminal laws.’”).

¹⁴⁰“Whatever may be the case with respect to civil liability generally. . . we have never held that the performance of the duties of judicial, legislative, or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights On the contrary, the judicially fashioned doctrine of official immunity does not reach ‘so far as to immunize criminal conduct proscribed by an Act of Congress’” (emphasis in original), United States v. Gillock, 445 U.S. 360, 372 (1980) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Gravel v. United States*, 408 U.S. 606, 627 (1972)); see Government’s Response *supra* note 139, at 10-11 (citing *O’Shea and Gravel*).

¹⁴¹See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (“This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of criminal law”); United States v. Claiborne, 727 F.2d 842, 848 (9th Cir. 1984) (“[C]riminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operation of a branch of government.”) (quoting *Isaacs*, 493 F.2d at 1144).

¹⁴²S. Rep. No. 172, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. Code Cong. & Admin. News 5019, 5038.

¹⁴³See *Johnson & Towers, Inc.*, 741 F.2d at 669. Cf., *Hayes Int’l Corp.*, 786 F.2d at 1504 (relying on precedent that construed “knowledge” in criminal statutes that were not public welfare statutes).

"knowing endangerment" as specific intent—knowledge of the nature of one's actions and their consequences.¹⁴⁴

RCRA's public welfare status provides the best basis for analyzing the elements of a RCRA offense. Section 3008(d)'s language is ambiguous. Courts construing the same provision reach opposite conclusions. Their opinions demonstrate the futility and danger of relying on section 3008(d)'s language to determine the elements that require proof of knowledge.

The first element concerns the activity. Courts require proof that a defendant knowingly transported, treated, stored, or disposed of hazardous waste.¹⁴⁶ This interpretation follows from defining "knowingly" as a general intent, requiring awareness of one's actions.

Proving knowledge of this element is relatively straightforward when it involves persons who order or perform an illegal disposal.¹⁴⁷ A jury can infer knowledge from circumstantial evidence and the past practice of ordering disposals with seemingly innocuous language.¹⁴⁸ Corporate officers' knowledge of company operations provides evidence of their knowledge of the disposal of hazardous waste.¹⁴⁹

The second element concerns the substance. Although the government must prove that the material is "hazardous waste" as defined

¹⁴⁴"A person's state of mind is knowing with respect to—(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury RCRA § 3008(f)(1), 42 U.S.C. § 6928(f)(1) (1988); see also H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. Code Cong. & Admin. News 5038 (choosing to define "knowledge" as Congress defined it in the Criminal Code Reform Act).

¹⁴⁶Cf. *Hoflin*, 880 F.2d at 1037-38 (holding that the addition of "knowing" in subsections 3008(d)(2)(B) and (C) requires knowledge of the permit status of a facility for those offenses but not for subsection 3008(d)(2)(A) where Congress omitted the term) with *Johnson & Towers, Inc.*, 741 F.2d at 668-69 (holding that the omission of "knowing" in 3008(d)(2)(A) was either inadvertent or that "knowingly" in section 3008(d)(2) applies to subsection 3008(d)(2)(A)).

¹⁴⁶*United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir. 1988); *Johnson & Towers, Inc.*, 741 F.2d at 668.

¹⁴⁷See *Hoflin*, 880 F.2d at 1033 (upholding conviction of defendant who ordered an employee to bury paint drums); *Johnson & Towers, Inc.*, 741 F.2d at 664.

¹⁴⁸*Greer*, 850 F.2d at 1451 (proving the defendant's knowledge of illegal disposal through his statements to the plant manager to "keep the drum count down," "a rainy day is a good day to get your drum count down," and "you handle it" where local ordinances limited the company to 1,300 drums in which it could store hazardous waste).

¹⁴⁹*Hayes Int'l Corp.*, 786 F.2d at 1504.

by RCRA, it must prove that the defendant knew the substance was harmful to others or to the environment.¹⁵⁰ Ignorance of RCRA's definition of "hazardous waste" is not a defense. A person who believes in good faith that he disposed of water, however, is not criminally liable.¹⁵¹

Ignorance of RCRA's permit requirement should not be a defense. Ignorance of the law is not an excuse. With the exception of the Third Circuit, courts impose strict liability as to this element.¹⁵² The Third Circuit's opinion in *Johnson & Towers* raises an interesting issue. The court recognized that prosecuting low-level managers for disposing of hazardous wastes without a permit, or in violation of permit conditions, may lead to harsh results. These employees often lack the authority and ability to obtain a RCRA permit.¹⁵³

Although the court raised an important concern, its holding ignores the well-established principle that ignorance of the law is not a defense.¹⁵⁴ The holding ignores the fact that employees who are not responsible corporate officers also have a duty to obey the law. The court confused the manner in which employees at various levels in a corporation fulfill that duty. Owners and operators must obtain a permit. Mid-level managers, such as the defendants in *Johnson & Towers*, must know whether their supervisors have obtained a permit.¹⁵⁵

¹⁵⁰*Greer*, 850 F.2d at 1452; *Hayes Int'l Corp.*, 786 F.2d at 1505.

¹⁵¹"A person thinking in good faith that he was [disposing of] distilled water when in fact he was [disposing of] some dangerous acid would not be covered." *Johnson & Towers, Inc.* 141 F.2d at 668 (quoting *International Minerals & Chem. Corp.*, 402 U.S. 558, 563-64 (1971)); *Hoflin*, 880 F.2d at 1039.

Similarly, "knowingly" modifies RCRA's false statement offense in § 3008(d)(3). A person must know that the statement is false. H.R. Rep. No. 198, 98th Cong., 2d Sess. 54-55, reprinted in 1984 U.S. Code Cong. & Admin. News 5613-14 (failing to file material information due to accident or mistake is not a criminal violation); H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036 (explaining that the addition of "knowingly" in § 3008(d)(4) excludes accidental and inadvertent document destruction or alteration from § 3008(d)'s reach).

¹⁵²See *Hoflin*, 880 F.2d at 1039; *Hayes Int'l Corp.*, 786 F.2d at 1503. But see *Johnson & Towers, Inc.*, 741 F.2d at 669 (holding that "jury must find that each defendant knew that Johnson & Towers was required to have a permit").

¹⁵³The opinion does not explicitly frame the issue in this manner. This interpretation of the court's motives follows from its holding that RCRA's criminal provisions apply to all corporate employees and not just owners and operators of hazardous waste treatment, storage, and disposal facilities and its framing of the issue as being "whether the criminal provision may be applied to the individual defendants who were not in the position to secure a permit . . ." *Johnson & Towers, Inc.*, 741 F.2d at 664-65, 666.

¹⁵⁴The Third Circuit held that the government must prove knowledge of RCRA's permit requirement but that a jury could infer such knowledge from their corporate positions. *Id.* at 669.

¹⁵⁵See discussion *supra* at note 120 (noting that actions on behalf of the corporations are not a defense to criminal prosecution).

The court could have reached the same result by requiring knowledge of a facility's permit *status*, as it did, and then recognizing a mistake of fact defense. Employees could avoid liability by proving that they questioned orders to illegally dispose of hazardous wastes and received reasonable assurances—which later proved untrue—that the company had a **permit**.¹⁵⁶

Requiring knowledge of the permit status of a facility would not excuse deliberate ignorance, because RCRA requires persons who handle hazardous waste to know the permit status of a **facility**.¹⁵⁷ Juries may infer knowledge from a person's corporate position or from circumstantial evidence, such as the abnormally low price of a disposal contract or the corporation's failure to manifest wastes as it would have to do if the facility were properly **permitted**.¹⁵⁸

RCRA's public welfare status also supports the imposition of strict liability for this **element**.¹⁵⁹ A permit is an essential prerequisite to regulating hazardous waste. Strict liability does not place an unacceptable burden on the regulated community; it simply requires persons who generate or handle hazardous waste to request a copy of a facility's permit and verify the permit with **EPA**.¹⁶⁰ They have a duty to comply with RCRA's permit **requirements**.¹⁶¹ They, rather than an innocent public, should bear the risk of mistake.

4. *Knowing Endangerment*

RCRA's "knowing endangerment" offense creates a two-step inquiry. First, the defendant must knowingly violate one of section 3008(d)'s criminal provisions. Second, the defendant must do so

¹⁵⁶See *Hayes Int'l Corp.*, 786 F.2d at 1505-06 (noting that a mistake of fact defense also protects a person who reasonably believes that a facility **has** a permit but has been misled by people at the site).

¹⁵⁷"[I]n this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility." *Id.* at 1504.

¹⁵⁸*Johnson & Towers, Inc.*, 741 F.2d at 670; *Hayes Int'l Corp.*, 786 F.2d at 1504 ("It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at **an** unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.").

¹⁵⁹See *Hoflin*, 880 F.2d at 1039.

¹⁶⁰*Hayes Int'l Corp.*, 786 F.2d at 1505.

¹⁶¹*Hoflin*, 880 F.2d at 1038; see H.R. Rep. No. 198, 98th Cong., 2d Sess. 54, reprinted **in** 1984 U.S. Code Cong. & Admin. News 5613 (emphasizing duty that RCRA places on hazardous waste generators to arrange for the transportation and disposal of waste at a permitted facility).

knowing that the violation places another person in imminent danger of death or "serious bodily injury."¹⁶²

Only one reported case construes RCRA's knowing endangerment provision. In *Protex Industries*,¹⁶³ the Tenth Circuit upheld the conviction of a corporation for knowingly endangering the lives of three of its employees who worked in the company's drum recycling facility.¹⁶⁴

Protex Industries recycled 55-gallon drums to store and ship products that it manufactured. Many of the drums previously contained toxic chemicals. The company's safety provisions in the recycling facility did not protect the employees from solvent poisoning, which causes permanent brain damage. Two employees suffered permanent injuries from their exposure to the toxic chemicals.¹⁶⁵

The decision should be a warning to federal agencies that handle hazardous wastes. An employer can knowingly endanger the lives of its employees, as well as those of the public. The offense might have reached the Aberdeen defendants who stored hazardous wastes in a shed that became so fouled with their fumes that employees could not enter it.¹⁶⁶

Protex also demonstrates that criminal prosecutions can arise without warning. State regulators conducted annual inspections of Protex's facility in 1984 and 1985, as required by RCRA. The regulators took soil samples but did not report the results to Protex. In March 1986, federal investigators executed search warrants at Protex's drum recycling facility. A federal grand jury subsequently returned a nineteen count indictment against Protex.¹⁶⁷

¹⁶²The term 'serious bodily injury' means—

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." RCRA § 3008(f)(6), 42 L.S.C. § 6928(f)(6) (1988).

¹⁶³874 F.2d 740 (10th Cir. 1989).

¹⁶⁴*Id.* at 746 (rejecting the argument that the offense is unconstitutionally vague).

¹⁶⁵*Id.* at 741-42 (the employees' developed Type 2-A psychoorganic syndrome, in which a person suffers changes in personality, has difficulty controlling impulses, engages in unplanned and unexpected behavior, lacks motivation, and usually experiences severe mood swings).

¹⁶⁶Address by Ms. Jane F. Barrett, *supra* note 53.

¹⁶⁷*Protex Indus., Inc.*, 874 F.2d at 741-42.

The Tenth Circuit rejected Protex's argument that the regulators' failure to notify Protex of the results of their soil analysis, as RCRA section 3007(a) required them to do, relieved Protex of liability. RCRA imposed an independent duty on Protex to ensure that its operations complied with RCRA's civil and criminal provisions. Even if the government had notified Protex of the test results, Protex's subsequent remedial measures would not have abrogated its criminal liability.¹⁶⁸

B. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁶⁹ as a complement to RCRA. RCRA regulates existing hazardous waste practices. CERCLA addresses the clean up of improperly disposed waste. CERCLA created a five-year, \$1.6 billion trust fund (Superfund) to clean up waste sites and future releases of hazardous substances.¹⁷⁰

CERCLA also addresses the threat of future releases of hazardous substances. It requires persons in charge of vessels or facilities to notify the National Response Center¹⁷¹ of the release (other than a federally permitted release) of "reportable quantities" of hazardous substances.¹⁷² Section 103(b) imposes felony sanctions on persons who

¹⁶⁸*Id.* at 745-46.

¹⁶⁹Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at, 42 U.S.C. §§ 9601-9675 (1988); see H.R. Rep. No. 1016, 96th Cong., 2d Sess., at 17-18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6119-20.

¹⁷⁰Congress extended CERCLA for five years with the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (increasing Superfund to \$8.5 billion). CERCLA requires former and current owners and operators of hazardous waste facilities to notify EPA of unpermitted facilities, the types and amounts of hazardous substances found there, and any known or suspected releases. Any person who *knowingly* fails to do so is subject to fines of up to \$10,000 and imprisonment for one year. CERCLA § 103(c), 42 U.S.C. § 9603(c) (1988).

CERCLA also required EPA to develop recordkeeping requirements for these facilities. Knowing violation of these requirements results in fines and imprisonment for not more than three years (five years in the case of a second conviction). CERCLA § 103(d), 42 U.S.C. § 9603(d) (1988).

¹⁷¹See 40 C.F.R. pt. 302 (1990).

¹⁷²CERCLA § 103(a), 42 U.S.C. § 9603(a) (1988); see 40 C.F.R. pt. 302 (1990).

A "reportable quantity" is one pound or the amount specified in § 1321 of the Clean Water Act. CERCLA § 102(b), 42 U.S.C. § 9602(b) (1988); see 40 C.F.R. § 117.3 (1990) (listing reportable quantities for the Clean Water Act).

CERCLA specifically excludes "federally permitted releases" from its reporting requirements. This exemption excludes properly permitted releases under the Clean Water Act, Clean Air Act, RCRA, Marine Protection, Research and Sanctuaries Act, Safe Drinking Water Act, and Atomic Energy Act from CERCLAs reporting requirement. CERCLA § 101(10), 42 U.S.C. § 9601(10) (1988).

know of releases and fail to report them.¹⁷³ It also provides use immunity to persons who comply with its requirement.¹⁷⁴

CERCLA broadly defines "hazardous substance" to include substances listed under RCRA, the Clean Water Act, and other environmental laws.¹⁷⁵ The term includes additional substances designated by EPA.¹⁷⁶ Although the government must prove that the substance is a "hazardous substance" as defined by CERCLA, it must prove that the defendant knew the substance had the potential to be harmful.¹⁷⁷

CERCLA defines "release"¹⁷⁸ and "facility"¹⁷⁹ broadly enough to include any type of release within its reporting requirement. In *United States v. Carr*,¹⁸⁰ CERCLAs reporting requirement covered

¹⁷³Any person—

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management of the United States . . . and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has *knowledge* of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

CERCLA § 103(b), 42 U.S.C. § 9603(b) (1988).

¹⁷⁴CERCLA § 103(b); 42 U.S.C. § 9603(b) (1988).

¹⁷⁵CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988).

¹⁷⁶CERCLA § 102, 42 U.S.C. § 9602 (1988).

¹⁷⁷*See* *United States v. Greer*, 850 F.2d 1447, 1452-53 (11th Cir. 1988).

¹⁷⁸"The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988).

"The term 'environment' means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States . . . and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." CERCLA § 101(8), 42 U.S.C. § 9601(8) (1988).

¹⁷⁹"The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988).

¹⁸⁰880 F.2d 1550 (2d Cir. 1989).

waste paint thrown from a truck into a pond.¹⁸¹ In *United States v. Greer*,¹⁸² it covered trichloromethane poured onto the ground from a truck.¹⁸³

CERCLA's broad sweep makes identification of the "persons in charge," who must report a release, crucial. Neither CERCLA nor its implementing regulations defines the term. Courts use the responsible corporate officer doctrine to define the term, which includes persons who have responsibility for a "facility" and who are in a position to detect, prevent, and abate the release of hazardous substances.¹⁸⁴ Thus, "persons in charge" will vary with the "facility." When the "facility" is a hazardous waste recycling plant, the term includes an owner or operator.¹⁸⁵ When the "facility" is a truck, the term includes a relatively low-level employee.¹⁸⁶

Carr demonstrates that supervisors at all levels have responsibilities under CERCLA. Mr. Carr was a "person in charge" because he was the maintenance foreman of Fort Drum's firing range and "in charge" of the truck from which the release occurred.¹⁸⁷ CERCLA's reporting requirements would be less effective if they only applied to senior commanders and supervisors who often do not know of a release. Such a construction would "frustrate congressional purpose by exempting from the operation of the [statute] a large class of persons who are uniquely qualified to assume the burden imposed by it."¹⁸⁸

C. CLEAN WATER ACT

The Clean Water Act is the third area in which federal employees face the prospect of criminal liability. The CWA attained its present form when Congress enacted the Federal Water Pollution Control Act Amendments of 1972.¹⁸⁹ Congress wanted to "restore and maintain

¹⁸¹*Id.* at 1551.

¹⁸²850 F.2d 1447 (11th Cir. 1988).

¹⁸³*Id.* at 1451.

¹⁸⁴*Carr*, 880 F.2d at 1554; see also *Kelly, et rel. Michigan Natural Resources Commission v. ARCO Indus. Corp.*, No. K87-372-CA4 (W.D. Mich. Sept. 27, 1989) (defining "person in charge" in terms of the person's corporate position, responsibility, and authority to prevent or abate a hazardous waste discharge), *reported in*, Nat'l Env'tl. Enforcement J., Nov. 1989, at 23-24.

¹⁸⁵*Greer*, 850 F.2d at 1453.

¹⁸⁶*Carr*, 880 F.2d at 1553-54.

¹⁸⁷The district court instructed the jury that "[i]f you find that [Carr] had any authority over either the vehicle or the area, this is sufficient [to convict], regardless of whether others also exercised control." *Id.* at 1554.

¹⁸⁸*Id.* at 1554 (quoting *Mobil Oil*, 464 F.2d at 1127).

¹⁸⁹Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387) (1988).

the chemical, physical, and biological integrity of the Nation's waters."¹⁹⁰ To achieve this objective, it required EPA to develop "effluent limitations"¹⁹¹ for "point sources"¹⁹² based on the best practicable control technology currently available.¹⁹³

1. Requirements of CWA

To enable EPA to enforce effluent limitations, the CWA established the National Pollution Discharge Emission System (NPDES).¹⁹⁴ The NPDES translates the generally applicable effluent limitations and standards of Title III into specific obligations for each point source. An NPDES permit prescribes discharge limits, compliance schedules, and monitoring requirements.¹⁹⁵ The discharge of any pollutant into the navigable waters of the United States without, or in violation of, an NPDES permit is illegal.¹⁹⁶

Title III provides standards for particular sources. Section 302 allows EPA to impose more stringent effluent limitations on point sources that threaten water quality at prescribed effluent limitations.¹⁹⁷ Section 306 allows EPA to establish effluent limitations for new sources.¹⁹⁸ Section 307 prescribes special effluent limitations for toxic pollutants and pre-treated wastes introduced into publicly-owned waste treatment plants.¹⁹⁹

Section 308 authorizes EPA to establish reporting, monitoring, and inspection standards.²⁰⁰ EPA also can prescribe effluent standards for aquaculture projects²⁰¹ and sewage sludge.²⁰² Section 301(f)'s pro-

¹⁹⁰CWA § 101(a), 33 U.S.C. § 1251(a) (1988) (Congress intended to eliminate the discharge of pollutants into navigable waters by 1985).

¹⁹¹"The term 'effluent limitation' means any restriction established by . . . the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . ." CWA § 502(11), 33 U.S.C. § 1362(11) (1988).

¹⁹²"The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." CWA § 502(14), 33 U.S.C. § 1362(14) (1988).

¹⁹³CWA § 301(b), 33 U.S.C. § 1311(b) (1988).

¹⁹⁴CWA § 402, 33 U.S.C. § 1342 (1988); see 40 C.F.R. pt. 122 (1990).

¹⁹⁵See *Env'tl. Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205-08 (1976) (discussing the NPDES).

¹⁹⁶"Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a) (1988).

¹⁹⁷CWA § 302, 33 U.S.C. § 1312 (1988).

¹⁹⁸CWA § 306, 33 U.S.C. § 1316 (1988).

¹⁹⁹CWA § 307, 33 U.S.C. § 1317 (1988).

²⁰⁰CWA § 308, 33 U.S.C. § 1318 (1988).

²⁰¹CWA § 318, 33 U.S.C. § 1328 (1988).

²⁰²CWA § 403, 33 U.S.C. § 1345 (1988).

hibition against the discharge of radiological, chemical, and biological warfare agents into navigable waters is particularly important to federal employees who handle those substances.²⁰³

Section 309(c) contains the CWA's criminal provisions. It punishes negligent and knowing violations of Title III and NPDES permit standards. Subsection 309(c)(4) contains the Act's false statement provision.²⁰⁵ Congress amended section 309(c) in 1987 to increase its penalties.²⁰⁶ Congress also added a "knowing endangerment" offense.²⁰⁷ Section 311(b)(5) requires persons in charge of vessels or

²⁰³CWA § 301(f), 33 U.S.C. § 1311(f) (1988).

²⁰⁴Section 309(c)(1) punishes

[a]ny person who—

(A) *negligently* violates §§ 1311, 1312, 1316, 1317, 1321(b)(3), 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this Act by the Secretary of the Army or by a State; or

(B) *negligently* introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State (emphasis added)

CWA § 309(c)(1), 42 U.S.C. § 1319(c)(1) (1988).

Section 309(c)(2) punishes "knowing" violations of the same provisions. CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1988).

²⁰⁵"Any person who *knowingly* makes any false material statement, representation, or certification in any application, information, record, report, plan, or other document filed or required to be maintained under this Act or who *knowingly* falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both (emphasis added)." CWA § 309(c)(4), 33 U.S.C. § 1319(c)(4) (1988) (penalties double for subsequent convictions).

²⁰⁶Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 42-45.

"Negligent" violations can result in fines of \$25,000 per day of violation and imprisonment for one year. The maximum punishment doubles for subsequent convictions. CWA § 309(c)(1), 42 U.S.C. § 1319(c)(1) (1988).

"Knowing" violations can result in fines of \$50,000 per day of violation and imprisonment for three years. The maximum punishment doubles for subsequent convictions. CWA § 309(c)(2), 42 U.S.C. § 1319(c)(2) (1988).

²⁰⁷"Any person who *knowingly* violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who *knows* at that time that he thereby places another person in *imminent danger* of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both (emphasis added)." CWA § 309(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A) (1988) (punishment doubles for subsequent violations).

facilities to report the release of oil or a hazardous substance into navigable waters.²⁰⁸

2. *Element Analysis*

The CWA's definition of "person" reaches employees at all levels of an organization. Section 309(c) incorporates the Act's general definition, which includes individuals and corporations.²⁰⁹ Section 309(c) also includes any "responsible corporate officer" within its definition of persons liable for criminal violations.²¹⁰

Consequently, the responsible corporate officer doctrine of *Park* applies to CWA offenses. Corporate officers have a duty to seek out and prevent violations of the CWA.²¹¹ The owners of a mushroom composting operation could not discharge pollutants into a stream in ignorance of the CWAs permit requirement. They had a duty to learn the requirements of the CWA and to apply for a permit.²¹²

²⁰⁸ Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has *knowledge* of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (c) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both (emphasis added).

CWA § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1988).

²⁰⁹ CWA § 309(c)(3), 42 U.S.C. § 1319(c)(3) (1988). "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." CWA § 502(5), 33 U.S.C. § 1362(5) (1988).

²¹⁰ CWA § 309(c)(6), 33 U.S.C. § 1319(c)(6) (1988). Although the CWA's legislative history is silent regarding the definition of responsible corporate officer, Congress relied on this language in its 1977 amendments of the Clean Air Act so that "criminal penalties [will] be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source." *A Legislative History of the Clean Air Act Amendments of 1977*, Serial No. 90-16, Aug. 1978, Volume 6, at 4741.

²¹¹ See *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1129-30 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States v. A.C. Lawrence Leather Co.*, No. 82-01-07-L (D.N.H. 1982) (convicting president and vice president's for failure to seek out, discover, and stop the company's illegal practice of bypassing its wastewater treatment plant and discharging untreated waste into a river), explained in Starr, *supra* note 8, at 391-92.

²¹² *Frezzo Bros., Inc.*, 602 F.2d at 1128.

Its broad definitions of key terms make the CWAs criminal provisions far-reaching. "Discharge" includes "any addition of any pollutants."²¹³ The CWA further defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the water."²¹⁴ The CWA defines "navigable waters" as all waters of the United States.²¹⁵ Congress wanted courts to give "navigable waters" the broadest constitutional interpretation under the Commerce Clause and not limit jurisdiction to the traditional test of navigability.²¹⁶ Courts include wetlands within the CWA's definition of "navigable waters" because they "play a key role in protecting and enhancing water quality."²¹⁷

Combining the Clean Water Act's broad definitions with the responsible corporate officer doctrine allows prosecution of senior corporate officers for relatively innocent acts.²¹⁸ In *Marathon Development Corporation*²¹⁹ the government convicted a corporation and its senior vice-president for bulldozing five acres of wetlands and filling them with gravel to build a shopping mall.²²⁰ Although the defendants in *Marathon* ignored an Army Corps of Engineers notice that they needed a permit to fill in the wetlands, the CWAs general intent requirement would allow prosecution of any person who fills in wetlands without a permit.²²¹

The *Marathon* decision discusses a potential defense to CWA criminal prosecutions. The Army Corps of Engineers, which regulates the discharge of dredged or fill material into navigable waters, issues nationwide permits for activities that do little or no harm to the environment. Nationwide permits allow persons who engage in those activities to discharge dredged or fill material into navigable waters

²¹³CWA § 502(12), 33 U.S.C. § 1362(12) (1988). "The term 'pollutant' means any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewer sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal and agricultural waste discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6) (1988).

²¹⁴CWA § 502(19), 33 U.S.C. § 1362(19) (1988). Congress added the definition to "refine the concept of water quality measured by the natural chemical, physical and biological integrity." See S. Rep. No. 92-414, *reprinted in* 1972 U.S. Code Cong. & Admin. News, 3668, 3742.

²¹⁵CWA § 502(7), 33 U.S.C. § 1362(7) (1988).

²¹⁶United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-39 (1985); see also S. Rep. No. 92-1236, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News, 3776, 3822.

²¹⁷*Riverside Bayview Homes, Inc.*, 474 U.S. at 133, 131-39.

²¹⁸United States v. Marathon Development Corp., 867 F.2d 96 (1st Cir. 1989).

²¹⁹*Id.*

²²⁰*Id.* at 97; see also United States v. Key West Towers, Inc., 696 F. Supp. 1467 (S.D. Fla. 1988).

²²¹*Key West Towers, Inc.*, 696 F. Supp. at 1468.

without a permit.²²² Marathon's defense failed because Massachusetts refused to recognize the nationwide permit under its state water pollution control program.²²³

As with CERCLA, criminal prosecutions under the CWA arise without warning. EPA does not have to pursue administrative or civil remedies or notify a person before it institutes criminal proceedings under the CWA.²²⁴ The government successfully prosecuted the owners of a mushroom growing operation for illegally discharging pollutants into a stream. The discharge resulted from the runoff of excess waste water that the defendants sprayed onto their irrigation fields. The excess waste water flowed into the stream through a break in a berm that surrounded the field.²²⁵ The defendants who were responsible corporate officers failed to seek out and prevent the violations.

The CWAs criminal provisions provide a threat equal to that of RCRA. Prosecutors indicted the Aberdeen and Fort Drum defendants for negligently discharging pollutants into navigable waters without an NPDES permit. Many federal facilities discharge "pollutants" into "navigable waters." If they do so without, or in violation of an NPDES permit, they risk criminal prosecution.

D. CLEAN AIR ACT

The Clean Air Act (CAA) attained much of its present form when Congress amended it in 1977.²²⁶ Congress's recent amendments further tightened its strictures.²²⁷ The Act's stated purpose is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."²²⁸

²²²CWA § 404, 33 U.S.C. § 1344 (1988). 33 C.F.R. pt. 330 (1990); see *Marathon Dev. Corp.*, 867 F.2d at 97-98; see also *Frezza Bros.*, 546 F. Supp. at 717-19 (discussing nationwide permits issued by EPA).

²²³*Marathon Dev. Corp.*, 867 F.2d at 102; see also *Key West Towers, Inc.*, 696 F. Supp. at 1469 (rejecting the defense because defendants failed to raise it pretrial).

²²⁴*Frezza Bros.*, 602 F.2d at 1126-27; see also *Oxford Royal Mushroom Prod.*, 487 F. Supp. at 855 (rejecting defendant's argument that the United States Attorney's failure to initially refer the matter to EPA violated fundamental fairness).

²²⁵*Oxford Royal Mushroom Prod.*, 487 F. Supp. at 854 (rejecting defendants' argument that the discharge was from a "nonpoint source" because it involved surface runoff).

²²⁶Clean Air Act Amendments of 1977. Pub. L. No. 95-95, 91 Stat. 686

²²⁷Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2684 (1990).

²²⁸CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1988).

In support of this goal, Congress charged EPA with developing national ambient air quality standards (NAAQS) for each air quality control region in the country.²²⁹ The Act also charged EPA with developing standards of performance for new stationary sources²³⁰ and hazardous air pollutants.²³¹ EPA may prescribe recordkeeping and reporting requirements.²³² EPA must also establish performance standards for solid waste incineration units.²³³

Congress amended section 113(c) to impose felony penalties for "knowing" violations of these and other provisions.²³⁴ Section 113(c) also punishes persons who knowingly make false statements or tamper with monitoring devices to evade the Act's monitoring requirement. Section 113(c) punishes the negligent releases of hazardous air pollutants and other extremely hazardous substances.²³⁶ It also punishes persons who knowingly fail to pay fees required by the CAA.²³⁷ Finally, Congress added a knowing endangerment provision to section 113(c).²³⁸ Defendants may raise general and affirmative defenses to a knowing endangerment offense.²³⁹ To encourage reports

²²⁹CAA § 107, 42 U.S.C.A. § 7407 (West Supp. 1991). Primary NAAQS are necessary to protect the public health. Secondary NAAQS are needed to protect the public welfare from known or anticipated effects of air pollutants. CAA § 109, 42 U.S.C. § 7409 (1988).

²³⁰CAA § 111, 42 U.S.C.A. § 7411 (West Supp. 1991).

²³¹CAA § 112, 42 U.S.C.A. § 7412 (West Supp. 1991).

²³²CAA § 114, 42 U.S.C.A. § 7414 (West Supp. 1991).

²³³CAA § 128, 42 U.S.C.A. § 7429 (West Supp. 1991).

²³⁴Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661(b)(c) of this title (relating to permits) or any requirement or prohibition of subchapter IV of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed five years or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. CAA § 113(c)(1), 42 U.S.C.A. § 7413(c)(1) (West Supp. 1991).

²³⁵CAA § 113(c)(2), 42 U.S.C.A. § 7413(c)(2) (West Supp. 1991).

²³⁶CAA § 113(c)(4), 42 U.S.C.A. § 7413(c)(4) (West Supp. 1991).

²³⁷CAA § 313(c)(3), 42 U.S.C.A. § 7413(e)(3) (West Supp. 1991).

²³⁸CAA § 113(c)(5), 42 U.S.C.A. § 7413(c)(5) (West Supp. 1991).

²³⁹CAA § 113(c)(5)(D), 42 U.S.C.A. § 7413(c)(5)(D) (West Supp. 1991).

of violations, Congress added a "bounty provision, which authorizes EPA to pay up to \$10,000 to persons who provide information that leads to a criminal conviction under the Act."²⁴⁰

Like prosecutions under other environmental laws, liability depends upon the CAA's definition of key terms. In *Adamo Wrecking Co. v. United States*²⁴¹ the government charged the defendant with violating a national emission standard for asbestos when it demolished a building. The district court dismissed the indictment because the standard that the defendant allegedly violated was a "work-practice" standard. Violation of a "work-practice" standard did not subject the defendant to criminal sanctions under section 113(c)(1)(c), which only applied to "emissionstandards."²⁴²

The Court's holding avoided the more difficult issue of review preclusion. Environmental statutes preclude review of standards promulgated by EPA after a statutorily specified period of time.²⁴³ In criminal cases, review preclusion may violate due process, because it denies affected persons the ability to challenge a pollution control standard. Courts balance the need for finality in rule-making and uniformity in regulatory standards against the right of persons to influence standards that affect them in a criminal proceeding.²⁴⁴

E. TOXIC SUBSTANCES CONTROL ACT

Congress enacted the Toxic Substances Control Act (TSCA) to regulate toxic chemicals whose manufacture, distribution, use, and disposal present an unreasonable risk of injury to public health and the environment.²⁴⁵ After it identifies such chemicals, EPA may prohibit their manufacture or regulate them through monitoring and recordkeeping requirements.²⁴⁶ Section 16(b) imposes misdemeanor

²⁴⁰CAA § 313(f), 42 L.S.C.A. § 7413(f) (West Supp. 1991). Federal employees are ineligible for this award. *Id.*

²⁴¹*Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

²⁴²*Id.* at 277-78.

²⁴³CAA § 307(b), 42 U.S.C.A. § 7607(b) (West Supp. 1991) (precluding review 60 days after EPA approves or issues a standard); CWA § 509(b), 33 U.S.C. § 1369(b) (1988) (120 days); RCRA § 7006(b), 42 U.S.C. § 6976(b) (1988) (90 days).

²⁴⁴*Id.* at 289-91 (Powell, J., concurring). Review preclusion involves analysis of issues that are beyond the scope of this article. For a detailed discussion of those issues see Aurelius, Letton, Macbeth, Menotti, & Lentin, *Review of Criminal Provisions in Environmental Law: Task Force Report*, 40 Bus. Law 761 (1984).

²⁴⁵Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 L.S.C. §§ 2601-2671 (1988)); see also Council on Environmental Quality, *Environmental Trends 139* (1989) (estimating that 50,000 different chemicals are in use in the United States).

²⁴⁶TSCA § A, 15 U.S.C. § 2605 (1988). The best-known substance regulated under the TSCA is polychlorinated biphenyls (PCBs), 40 C.F.R. pt. 761 (1990).

penalties on persons who knowingly or willfully violate specified provisions of TSCA.²⁴⁷ As with other environmental crimes, the TSCA only requires proof of a general intent to impose liability.²⁴⁸

F. FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulates pesticides, herbicides and agricultural chemicals.²⁴⁹ Section 14, which contains FIFRA's criminal provisions, punishes knowing violations of the Act.²⁵⁰ "Knowingly" requires a general intent to do the acts that violate FIFRA's regulatory requirements.²⁵¹

G. RELATED OFFENSES

1. Title 18 Criminal Offenses

Persons who commit environmental crimes also face liability under traditional federal criminal laws.²⁵² Prosecutors may charge defendants with conspiracy,²⁵³ aiding and abetting,²⁵⁴ false statements,²⁵⁵

²⁴⁷ "Any person who knowingly or willfully violates any provision of section 2614 of this title, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than \$25,000 for each day of violation, or to imprisonment for not more than one year, or both (emphasis added)." TSCA § 16(b), 15 U.S.C. § 2615(b) (1988).

²⁴⁸ *United States v. Ward*, 676 F.2d 94, 96 (4th Cir.), *cert denied*, 459 U.S. 835 (1988).

²⁴⁹ Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified as amended at 7 U.S.C. § 136 (1988)).

²⁵⁰ (1)(A) Any registrant, applicant for a registration, or producer who knowingly violates any provision of this subchapter shall be fined not more than \$50,000 or imprisoned for not more than 1 year, or both.

(B) Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both.

(2) Any private applicator or other person not included in paragraph (1) who knowingly violates any provision of this subchapter shall be guilty of a misdemeanor and shall on conviction be fined not more than \$1,000, or imprisoned for not more than 30 days, or both.

FIFRA § 14(b), 7 U.S.C. § 136l(b) (1988).

²⁵¹ *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 519 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

²⁵² See McMurry & Ramsey, *supra* note 18, at 443-45.

²⁵³ 18 U.S.C. § 371 (1988).

²⁵⁴ 18 U.S.C. § 2 (1988) (aiders and abettors are liable as principals); see *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984) (aiding and abetting illegal disposal of hazardous wastes in violation of RCRA), *cert. denied* 469 U.S. 1208 (1985); *United States v. Ward*, 676 F.2d 94 (4th Cir.) (aiding and abetting illegal disposal of PCBs in violation of TSCA), *cert. denied*, 459 U.S. 835 (1988).

²⁵⁵ 18 U.S.C. § 1001 (1988).

or mail fraud²⁵⁶ in addition to any charges brought under individual environmental statutes.

2. *Uniform Code of Military Justice*

Soldiers may incur liability under the Uniform Code of Military Justice (UCMJ) as well. A memorandum of understanding between DOJ and the Department of Defense grants military authorities the first opportunity to prosecute crimes committed on an installation by persons subject to the UCMJ.²⁵⁷

Commanders and officers who avoid criminal liability under environmental statutes by claiming ignorance of violations within their commands and sections could face charges for dereliction of duty.²⁵⁸ Soldiers and officers may face charges under article 92 for violating an order or a regulation regarding pollution control.²⁵⁹ They also may face charges for false statements,²⁶⁰ and damage or destruction of government property.²⁶¹

V. LIABILITY UNDER STATE ENVIRONMENTAL STATUTES

Federal environmental laws recognize EPA's role in establishing national standards and states' roles in regulating water, air, and hazardous waste pollution within their territories.²⁶² This federal-state partnership relieves EPA of the impossible task of regulating pollution nationwide and allows states to protect their environments. Federal supremacy and sovereign immunity limit the ability of states to regulate pollution from federal facilities. These limitations should protect federal employees from criminal liability under state environmental laws.

²⁵⁶18 U.S.C. § 1341 (1988); see *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (indicting corporation and its officers for making false representations to EPA).

²⁵⁷Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation of Crimes Over Which the Two Departments have Concurrent Jurisdiction, Section 1 (Jul. 19, 1955) (*reprinted in* Manual for Courts-Martial, United States, Appendix 3, 1984).

²⁵⁸Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1988) ([hereinafter UCMJ art. 92]).

²⁵⁹*Id.*

²⁶⁰UCMJ art. 107.

²⁶¹UCMJ art. 108.

²⁶²See generally DeCicco & Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 9 *Crim. Just. Q.* 216, 222 (1988) (listing the criminal provisions and penalties in state air, water, and hazardous waste pollution control programs at appendix); McElfish, *State Hazardous Waste Crimes*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,465 (1987) (listing state hazardous waste offenses, scienter requirements, and penalties).

A. FEDERAL SUPREMACY

The Constitution and laws of the United States are the supreme law of the land.²⁶³ The Supremacy Clause shields the United States, and its activities, from direct state regulation unless Congress provides “clear and unambiguous” authorization for state regulation.²⁶⁴

Congress may waive federal supremacy to all, or specific, state regulations. For example, Congress may require federal activities to comply with state pollution control standards yet shield federal activities from state civil or criminal enforcement of those requirements. As the Supreme Court stated in *Hancock v. Train*:

Given agreement that section 118 makes it the duty of federal facilities to comply with state-established air quality and emission standards, the question is . . . “whether Congress intended that the *enforcement mechanisms* of federally approved state implementation plans, in this case permit systems, would be” available to the States to enforce that duty.²⁶⁶

Congress may determine that “incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.”²⁶⁷

B. SOVEREIGN IMMUNITY

Federal employees also receive protection from state prosecution under the doctrine of sovereign immunity. Sovereign immunity is a judicially-created doctrine; it is not based on the Supremacy Clause.²⁶⁸ The United States and its instrumentalities are immune

²⁶³U.S. Const. art. IV, cl. 2; see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, (18 9) (“[T]hey control the constitution and laws of the respective States, and cannot be controlled by them.”).

²⁶⁴*Hancock*, 426 U.S. at 178-79 (quoting *Mayo v. United States*, 319 U.S. 441, 445, 447 (1943)). Supremacy Clause analysis varies with the activity. When analyzing state regulation of private activities, courts consider whether federal law pre-empts the relevant state regulation. When analyzing state regulation of federal activities, courts focus on the extent to which Congress authorized state regulation of federal activities. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.1 (1988).

²⁶⁵See *Hancock*, 426 U.S. at 181, 198-99 (holding that the Clean Air Act’s waiver of sovereign immunity required federal facilities to comply with state air pollution standards but did not allow states to enforce their standards against the federal facilities by requiring federal facilities to apply for and obtain a state permit).

²⁶⁶*Hancock*, 426 U.S. at 183 (emphasis added).

²⁶⁷*Goodyear Atomic Corp.*, 486 U.S. at 186.

²⁶⁸*United States v. Shaw*, 309 U.S. 495, 501 (1939) (explaining that sovereign immunity has its roots in the legal philosophy which favors dignity and decorum, practical administration, and an impregnable government operating undisturbed by litigants); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) (holding that sovereign immunity finds its basis in the notion that “the king can do no wrong”).

from suit absent an express waiver of sovereign immunity by Congress.²⁶⁹ Sovereign immunity prevents all suits against the United States, including those by states.²⁷⁰ Courts strictly construe waivers of immunity in favor of the sovereign absent clear and unambiguous congressional intent to the contrary.²⁷¹

Although courts and commentators occasionally use the terms interchangeably, sovereign immunity and federal supremacy require separate analysis. Congress could waive federal supremacy to state regulation but retain sovereign immunity to state civil or criminal sanctions to enforce those regulations.²⁷²

C. FEDERAL FACILITIES PROVISIONS

Congress waived federal supremacy and sovereign immunity in varying degrees in the federal facilities provisions of each environmental statute. The language of the waivers, interpreted in light of each statute's purpose and legislative history, determines whether states can criminally enforce their environmental laws against the United States.

1. Resource Conservation and Recovery Act

RCRA establishes national standards for hazardous waste management and encourages states to implement programs.²⁷³ States may apply to EPA for approval to operate hazardous waste plans in lieu of the federal program.²⁷⁴ EPA approves state plans that are

²⁶⁹*Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

²⁷⁰*Bloch v. North Dakota*, 461 U.S. 273 (1983).

²⁷¹*Ruckelhaus v. Sierra Club*, 463 U.S. 680, 683-85 (1983).

²⁷²It is interesting to note that the Supreme Court, in analyzing section 118 of the Clean Air Act, did not address whether Congress also waived sovereign immunity to state suits to enforce permit standards against federal facilities. Perhaps the Court felt that its holding—that Congress did not waive federal supremacy to state permit requirements—obviated or mooted the need to explore whether section 118 also waived sovereign immunity to state civil suit to enforce permit requirements. Perhaps, it felt that Congress addressed both issues with the language in section 118. If Congress used language to address both concepts, it is interesting to note that Congress, when it amended section 118 to expressly waive federal supremacy to state permit requirements following *Hancock*, also added two sentences at the end of section 118(a), expressly waiving sovereign immunity to suit; see H. R. Rep. No. 294, 95th Cong., 1st Sess. 98, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1276 ("Adoption of section 118 of the Act was intended to remove all legal barriers to full Federal compliance The historic defense of sovereign immunity was waived by Congress.").

²⁷³See Bote, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion*, 4 Harv. Envtl. L. Rev. 307, 312 (1988).

²⁷⁴RCRA § 3006, 42 U.S.C. § 6926 (1988); see 40 C.F.R. pt. 271 (1990).

equivalent to RCRA, consistent with RCRA and approved state programs, and adequately enforced.²⁷⁵ States may enact more stringent standards than RCRA requires.²⁷⁶ State action under an EPA-approved program has the same force and effect as action taken by EPA.²⁷⁷ Over forty states have received final authorization for their RCRA programs.²⁷⁸

The federal-state partnership established by RCRA allows some argument that Congress authorized states to regulate federal facilities. However, neither RCRA's structure nor the language of its federal facilities provision indicates Congress's clear and unambiguous intent to subject federal agencies or their employees to state criminal prosecution.²⁷⁹

Section 6001, RCRA's federal facilities provision, waives federal supremacy to all state substantive and procedural **requirements**.²⁸⁰ Criminal penalties are not "requirements." They are "sanctions" or the *means* by which states enforce their requirements.²⁸¹

²⁷⁵RCRA § 3006(b), 42 U.S.C. § 6926(b) (1988); *see* 40 C.F.R. § 271.4 (1990). If a state does not establish its own program or if EPA does not approve a proposed state program, EPA continues to administer the federal program in that state. *Washington Dep't of Ecology v. Env'tl. Protection Agency*, 752 F.2d 1465, 1466-67 (9th Cir. 1985).

²⁷⁶RCRA § 3009, 42 U.S.C. § 6929 (1990); *see* 40 C.F.R. § 271.16(a)(3)(ii) (1990) (requiring criminal fines of at least \$10,000 per day of violation and at least six months imprisonment).

²⁷⁷RCRA § 3006(d), 42 U.S.C. § 6926(d) (1988).

²⁷⁸*DeCicco & Bonanno, supra* note 262, at 222.

²⁷⁹*California v. Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (per curiam).

²⁸⁰ Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local **requirements**, both substantive and procedural (including any **requirement** for permits or reporting or any provisions for injunctive relief and such **sanctions** as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any *process* or **sanction** of any State or Federal Court with respect to the enforcement of any such injunctive relief (emphasis added)

RCRA § 6001, 42 U.S.C. § 6961 (1988).

²⁸¹*Walters*, 751 F.2d at 978; *cf.*, *Romero-Barcelo v. Brown*, 643 F.2d 835, 854-56 (1st Cir. 1981) (holding that "requirements" in the federal facilities provision of the Noise Control Act referred to precise state standards and did not include a criminal nuisance statute), *rev'd on other grounds, sub nom.* *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1988).

Interpreting “sanctions” to mean criminal penalties follows from RCRA’s waiver of sovereign immunity in the second clause of section 6001. Congress clearly and unambiguously waived sovereign immunity only in those instances in which states use “process and sanctions” to enforce injunctive relief.²⁸² Thus construed, RCRA’s waiver of federal supremacy does not exceed its waiver of sovereign immunity.

Interpreting “requirements” to include criminal sanctions results in section 6001’s waiver of federal supremacy exceeding its waiver of sovereign immunity. Congress would subject federal facilities to all state criminal provisions but only waive sovereign immunity to state “sanctions” (criminal or civil) to enforce injunctive relief.²⁸³ Under this interpretation, federal facilities would be subjected to state criminal “requirements,” but states would have no recourse when federal facilities violated the criminal provisions.

The legislative history of RCRA establishes that Congress intended to waive sovereign immunity to injunctive relief and criminal and civil sanctions to enforce that relief.²⁸⁴ Congress drafted section 6001 to clarify the issues created by *Hancock v. Train*. In *Hancock*, the Court held that state Clean Air Act permits were “*procedural requirements*” and not within the Act’s waiver of federal supremacy, which Congress limited to state “*substantive requirements.*”²⁸⁵

Section 6001 waives federal supremacy to *all* substantive and *procedural* requirements. At most, section 6001’s language indicates Congress’s intent, following *Hancock*, to subject federal facilities to all state procedural requirements, such as permits, licenses, monitoring, and recordkeeping. It does not allow states to enforce those requirements against federal facilities with criminal sanctions.

²⁸²*Walters*, 751 F.2d at 978 (“Section 6961 [6001] plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.”).

²⁸³Although cases do not separately analyze the two clauses, they deserve separate treatment. Congress chose different language for each clause. The language referring to immunity in the latter clause clearly implies treatment of sovereign immunity. Also, sovereign immunity and federal supremacy are distinct concepts that merit separate treatment. If Congress treated them identically, the second clause discussing immunity is superfluous.

²⁸⁴“After considering all aspects of the jurisdictional enforcement problem, the Committee decided to retain sovereign immunity over federal facilities. However, in order to be an environmental leader in discarded materials and hazardous waste management, the Committee requires federal agencies to implement all standards developed by EPA pursuant to this Act in the treatment of wastes.” H.R. Rep. No. 1491, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6289.

²⁸⁵*Hancock*, 426 U.S. at 198-99.

The parenthetical modifying procedural requirements in section 6001's waiver of federal supremacy further demonstrates congressional intent. It specifically includes permits and reports within procedural requirements, indicating Congress's intent to overturn *Hancock*. It also waives federal supremacy to "sanctions" used to enforce injunctive relief, thus complementing the waiver of sovereign immunity to state injunctive relief and any sanctions needed to enforce injunctive relief.²⁸⁶

The Medical Waste Treatment Act's (MWTA) federal facilities provision provided conclusive evidence that Congress knows how to select "clear and unambiguous" language to waive sovereign immunity to state criminal penalties.²⁸⁷ Although the MWTA expired in June 1991, its language stood in stark contrast to that of section 6001. Section 6001 is not a "clear and unambiguous" waiver of federal supremacy or sovereign immunity to state criminal prosecution.²⁸⁸

Critics of the strict judicial treatment of federal supremacy and sovereign immunity waivers ignore the realities of a democratic form of government. Waivers of federal supremacy and sovereign immunity have important implications.²⁸⁹ Only Congress has the authority to waive federal supremacy and sovereign immunity.²⁹⁰

²⁸⁶*Walters*, 751 F.2d at 978. *Cf.*, *Meyer v. US. Coast Guard*, 644 F. Supp. 221, 223 (E.D.N.C. 1986) ("Congress did not intend for federal facilities to be subject to civil penalties. In fact Congress rejected a House of Representatives bill which specifically authorized the granting of civil penalties and instead chose to adopt the Senate bill which made no mention of waiving sovereign immunity for civil penalties."). *But see* *Ohio v. Dept. of Energy*, 689 F. Supp. 760, 764-65 (S.D. Ohio 1988).

²⁸⁷*See infra* note 312. "In short, Congress demonstrated that it knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends." *Parola*, 848 F.2d at 962 n.3 (discussing § 6001).

²⁸⁸While Congress chose language that clearly and unambiguously waived federal supremacy and sovereign immunity to state criminal sanctions in the MWTA, it used language almost identical to that in § 6001 when it added § 9007, RCRA's federal facilities provision pertaining to underground storage tanks, in 1984. RCRA § 9007, 42 U.S.C. § 6991f (1988).

²⁸⁹*See Note, Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 *Wm. & Mary L. Rev.* 513, 532-36 (1987) (discussing the House of Representatives' concern with subjecting federal agencies to a multitude of different State and local procedures, its reluctance to subject federal facilities to any state enforcement authority, and the adoption of the Senate's ambiguous waiver).

²⁹⁰States are not powerless to enforce their standards against federal facilities. If a state obtains injunctive relief against a federal facility, § 6001 allows a state court to impose civil and criminal "process" and "sanctions" against the federal facility to enforce the injunctive relief; *see* Stever, *supra* note 21, at 10,116-17 n.47.

Requiring the use of clear and unambiguous language ensures that the decision remains with Congress and not the courts.²⁹¹ It also enables interested parties to exert their influence through the legislative process. Considered in this light, Congress's inability or unwillingness to amend section 6001 with language that clearly and unambiguously waives sovereign immunity is telling.²⁹² It prevents courts from doing so via a contorted or novel construction.

Federal employees have little cause for celebration, however. Congress has considered amending section 6001's waiver of supremacy and immunity to allow state criminal prosecutions of federal employees. The language of H.R. 1056, introduced but not enacted during the 1st Session of the 101st Congress, clearly and unambiguously indicates congressional intent to subject federal employees to state criminal sanctions while retaining sovereign immunity for federal agencies.²⁹³

2. *Clean Water Act*

When it enacted the Clean Water Act, Congress expected states to bring the majority of enforcement actions.²⁹⁴ States that want to operate water pollution control programs submit plans to EPA for

²⁹¹"In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest." *Hancock*, 426 U.S. at 198. *Cf.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (holding that waivers of sovereign immunity will not be implied).

²⁹²See *Brown, Harris & Cox*, *supra* note 4, at 443 (discussing H.R. 3785, which would have expanded § 6001's waiver of supremacy and immunity to allow state criminal prosecutions of federal employees but which failed to pass the 1st Session of the 100th Congress).

²⁹³For purposes of enforcing any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order, or civil or administrative penalty or fine) against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under Federal or State solid or hazardous waste law with respect to any act or omission within the scope of his official duties. *An agent, employee or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law*, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanctions (emphasis added).

H.R. 1056, 101st Cong., 1st Sess. (1989).

²⁹⁴See S. Rep. No. 414, 92d Cong., 2d Sess., at 64. *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3730.

approval.²⁹⁵ States programs may impose more stringent standards than EPA requires.²⁹⁶ EPA retains the authority to monitor and enforce state permit programs.²⁹⁷ Approximately forty states operate EPA-approved programs.²⁹⁸

Section 313 waives federal supremacy to all state requirements, administrative authority, and process and sanctions.²⁹⁹ Congress qualified section 313's waiver of sovereign immunity so that federal employees are not personally liable for civil penalties. The United States is only liable for state civil penalties imposed to enforce a court order or process.

Section 313's language is ambiguous with respect to state criminal penalties. Congress could have intended to expose federal facilities to state criminal sanctions, but the language of section 313 does not clearly and unambiguously indicate this intent. Although the waiver of supremacy to process and sanctions might support such an assertion, the legislative history of section 313 indicates otherwise.

Congress amended section 313 to overturn the Supreme Court's holding in *Huncock v. Train*. Congress intended to waive federal

²⁹⁵CWA § 402(b), 33 U.S.C. § 1342(b) (1988); see 40 C.F.R. § 123.27 (1990) (listing the minimum criminal provisions required for a state program).

²⁹⁶CWA § 510, 33 U.S.C. § 1370 (1988); see *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989); *United States Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977).

²⁹⁷CWA § 309(a), 33 U.S.C. § 1319(a) (1988).

²⁹⁸As of April 1, 1988, thirty-eight states have federally approved NPDES programs. 52 Fed. Reg. 45,823 (1987), cited in *DeCicco & Bonnano, supra* note 262, at 228, n.117.

²⁹⁹Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court (emphasis added)

CWA § 313(a), 33 U.S.C. § 1323(a) (1988).

supremacy and sovereign immunity to the same extent that it waived them in section 6001 of RCRA.³⁰⁰ Despite language in section 313's waiver of supremacy subjecting federal facilities to process and sanctions, Congress only intended to subject federal facilities and employees to state injunctive relief and sanctions to enforce that relief. Section 313 does not subject federal employees to state criminal sanctions, except to enforce injunctive relief.³⁰¹

3. *Clean Air Act*

States have primary responsibility for regulating air pollution under the CAA. Once EPA established national ambient air quality standards, states submitted plans to implement, maintain, and enforce those standards in each air quality control region within the state.³⁰² The CAA preempts state regulation of new motor vehicles,³⁰³ motor vehicle fuels and additives,³⁰⁴ and aircraft and aircraft engines.³⁰⁵

Although a state implementation plan (SIP) may impose more stringent requirements than EPA requires, SIPs do not have to provide for criminal enforcement of their standards in order to receive EPA's approval.³⁰⁶ Consequently, several SIPs impose no criminal sanctions for air pollution. Others do not punish permit violations or emissions without a permit.³⁰⁷

As it did with the federal facilities provisions of RCRA and the CWA, Congress amended section 118 of the CAA, following *Huncock*, to

³⁰⁰"This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all the provisions of State and local pollution laws. Though this was the intent of Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent." Sen. R. No. 370, 95th Cong., 1st Sess., *reprinted in*, 1977 U.S. Code Cong. & Admin. News 4326, 4392.

³⁰¹*Id.* at 4392 (stating that the "[waiver of supremacy] includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief and the payment of reasonable charges."). *Cf.*, *California v. Dept. of Navy*, 846 F.2d 222 (9th Cir. 1988) (holding that a state cannot impose civil penalties on federal facilities that violate state water pollution discharge permits).

³⁰²CAA § 110(a), 42 U.S.C.A. § 7410(a) (West Supp. 1991).

³⁰³CAA § 209, 42 U.S.C.A. § 7543 (West Supp. 1991).

³⁰⁴CAA § 211, 42 U.S.C.A. § 7545 (West Supp. 1991).

³⁰⁵CAA § 233, 42 U.S.C. § 7573 (1988); *cf.* *California v. Department of the Navy*, 624 F.2d 885, 887 (9th Cir. 1980) (allowing state regulation of engine emissions from Navy jet engine test cells).

³⁰⁶CAA § 110(a), 42 U.S.C.A. § 7410(a) (West Supp. 1991) (subsection (a)(2)(A)-(M) lists the requirements that a SIP must meet to receive EPA approval).

³⁰⁷*See* DiCicco & Bonanno, *supra* note 262, at 231.

expand its waiver of federal supremacy and sovereign immunity.³⁰⁸ It chose language very similar to that of section 313 of the CWA. Congress further refined that language with its 1990 amendments to the CAA.³⁰⁹ Section 118's waiver of supremacy subjects federal facilities and employees to state and local requirements, fees, administrative authority, and to any process and sanctions.³¹⁰ Section 118's waiver of sovereign immunity is equally broad, with the qualification that federal employees are not personally liable for state civil penalties.

Section 118's language and legislative history do not specifically address criminal liability. The legislative history of section 118 indicates that Congress did not intend to make federal employees personally liable for state civil or criminal penalties.³¹¹ Whether Congress intended to treat criminal sanctions as it did civil liability, or never considered the issue, the result is the same. The language and history of section 118 do not indicate a clear and unambiguous intent to subject federal employees to state criminal sanctions.

³⁰⁸"The new section . . . is intended to overturn the Hancock case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements—procedural, substantive, or otherwise—process and sanctions." H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1278.

³⁰⁹Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(e), 104 Stat. 2409.

³¹⁰ Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government . . . and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal State, interstate, and local *requirements*, administrative authority, and *process and sanctions* respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever). (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program. (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any *process and sanction* whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable (emphasis added).

CAA § 118(a), 42 U.S.C.A. § 7418(a) (West **Supp.** 1991).

³¹¹S. Rep. No. 228, 101st Cong., 2d **Sess.** 23, *reprinted in* 1990 U.S. Code Cong. & Admin. News 3385, 3409; H.K. Conf. Rep. No. 564, 95th **Cong.**, 1st Sess. 137, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1502, 1517-18 (clarifying the intent of § 118 by adopting the Senate amendment, which ensures that federal employees are not held personally liable for civil penalties).

4. *Medical Waste Tracking Act*

Section 11006 of the Medical Waste Tracking Act (MWTa), which expired in June 1991, subjected federal employees to state criminal sanctions.³¹² It demonstrated Congress's ability to clearly and unambiguously waive federal supremacy and sovereign immunity to criminal sanctions. Although Congress has not waived federal supremacy and sovereign immunity to state criminal sanctions under the RCRA, CWA, or CAA, federal employees may not be able to rely on their federal facilities provisions much longer. Section 11006's waiver probably represents the future for federal employees. H.R. 1056 is further evidence of the legislative trend.

D. OFFICIAL IMMUNITY

Analysis of the federal facilities provisions in environmental statutes does not entirely resolve whether federal employees enjoy immunity from state criminal prosecution. A second issue is the degree to which federal supremacy—to the extent that Congress has not waived it—protects federal employees from state criminal prosecution.³¹³

Federal supremacy only shields federal officials from state criminal prosecution when their actions are necessary and proper to the per-

³¹² Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of medical waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders, civil, criminal, and administrative penalties, and other sanctions, including injunctive relief, fines, and imprisonment. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such order, penalty, or other sanction. For purposes of enforcing any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order, or civil, criminal, administrative penalty, or other sanction), against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States.

RCRA § 11006(a), 42 L.S.C.A. § 6992e(a) (West Supp. 1991).

³¹³ "Sovereign immunity does not *ipso facto* exempt federal agencies and officers from the operation of ordinary criminal laws" *California v. Walters*, 761 F.2d 977, 979 n.1. (9th Cir. 1984) (per curiam).

formance of their federal duties.³¹⁴ Although the majority of cases involve state criminal prosecutions of federal law enforcement officials carrying out their federal functions,³¹⁵ federal supremacy protects all federal employees.³¹⁶

To determine whether a federal employee was performing federal duties, courts look to several sources. A specific federal law authorizing the employee's duty will suffice.³¹⁷ Any duty derived from the general scope of an employee's duties under the laws of the United States is a "law" under the Supremacy Clause.³¹⁸ The only cases holding that federal law authorizes criminal activity *per se* are those involving federal agents engaged in undercover operations.³¹⁹

In the broadest sense, federal employees carrying out the federal function—training, maintenance, research and development, muni-

³¹⁴ "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [an officer] of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the state of California." *In re Neagle*, 135 U.S. 1, 75 (1890) (emphasis in original); *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1879) ("[The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the state, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection . . . the operations of the general government may at any time be arrested at the will of one of its members.").

³¹⁵ *In re Neagb*, 135 U.S. at 1 (deputy U.S. marshal accused of murder while protecting Supreme Court justice); *Kentucky v. Long*, 837 F.2d 727, 746 (6th Cir. 1988) (FBI agent accused of burglary for approving informant's participation in two burglaries as part of investigation of individuals involved in interstate transportation and sale of stolen property); *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984) (Drug Enforcement Agency agents).

³¹⁶ *See* *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (holding that governor of federal home for disabled soldiers was not subject to Ohio law that imposed criminal sanctions upon proprietors of eating establishments that served oleomargarine without posting notice); *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906) (Army officer charged with murder for the shooting death of a suspected felon while carrying out orders of his commander to guard the base).

³¹⁷ *Baucom v. Martin*, 677 F.2d 1346, 1350 & n.6 (11th Cir. 1982) (federal law authorized Attorney General to appoint FBI agents to "detect and prosecute crimes against the United States"); *In re McShane*, 235 F. Supp. 262, 270 (N.D. Miss. 1964) (federal marshal acting under express statutory authority of federal law that commits to the United States marshal of each district the authority to "execute all lawful writs, process and orders issued under authority of the United States" and subjects marshals to the supervision of the United States Attorney General who instructed McShane to execute two federal court orders).

³¹⁸ *In re Neagle*, 135 U.S. at 59 (duties of marshal).

³¹⁹ *See Long*, 837 F.2d at 747-749; *Baucom*, 677 F.2d at 1350 (FBI agent acted within his authority while participating in bribery scheme to expose public corruption in Georgia); *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980) (undercover FBI agent who participated in burglaries).

tions manufacturing—act pursuant to federal law though no specific statute or regulation authorizes their activity. Mr. Carr had no specific statutory authority for disposing of waste paint, but he did so pursuant to his duties as a range maintenance foreman. His work undoubtedly included the duty to clean up the firing range. The Aberdeen defendants generated and disposed of waste in the course of their federal duties developing chemical weapons.

The more difficult issue is whether federal employees can prove that they had an honest and a reasonable belief that their actions were necessary in the performance of their duties.³²⁰ Errors in judgment will not subject federal employees to state criminal prosecution.³²¹ A federal marshal's decision to release tear gas into a crowd causing a riot and the death of two persons did not subject him to state criminal prosecution though the decision may have been unwise. He had a reasonable belief that his actions were necessary to carry out his federal duties.³²²

Although errors in judgment do not subject an employee to state prosecution, the belief must be reasonable.³²³ Mr. Carr might have difficulty proving that his duty to maintain the Fort Drum firing range required him to dispose of waste paint in a pond. The Aberdeen defendants also might have difficulty justifying their actions in dumping hazardous wastes into chemical sumps and storing hazardous wastes in a shed as being reasonable actions to carry out their duties of testing and developing chemical weapons.

The issue will be one of first impression for the court that addresses it. It also will be fact-specific, and it may present enough difficulties to dissuade a state from prosecuting a federal employee for state environmental crimes absent a clear and unambiguous waiver of federal supremacy and sovereign immunity.

³²⁰*See, e.g.,* Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984).

³²¹*Baucom*, 677 F.2d 1346, 1350 (11th Cir. 1982) (noting that agent acted solely because he believed his duty required him to bribe state officials in sting operation and not for personal interest, malice, or actual criminal intent); Clifton v. Cox, 549 F.2d 722, 727 (9th Cir. 1977) (agent's mistaken belief that decedent shot his partner supported his action in shooting and killing suspect).

³²²*In re McShane*, 235 F. Supp. at 274.

³²³*Long*, 837 F.2d at 745.

E. STATE PROSECUTIONS ON FEDERAL ENCLAVES

Not all federal activities occur within the criminal jurisdiction of a state. Some activities occur on federal enclaves—areas over which the United States exercises exclusive legislative jurisdiction. In addition to any protection that they receive from federal supremacy and sovereign immunity, federal employees also receive protection from state prosecution when the alleged environmental crime occurs on a federal enclave.³²⁴

Legislative authority is a distinct concept from federal ownership interests in land. The United States exercises authority over land it owns under the Property Clause, but that authority does not prevent states from enforcing their criminal and civil laws on federal property when the laws do not conflict with federal law.³²⁵ Although the United States has only a proprietary interest in the vast majority of its land, many DOD activities occur on federal enclaves.³²⁶

Exclusive legislative authority also differs from federal supremacy to state regulation.³²⁷ Federal supremacy prevents a state from regulating federal activities that occur within its jurisdiction. Federal enclaves are not within a state's legislative authority even though they are physically situated within a state's territory.³²⁸ States lack authority to legislate, and thus regulate and sanction, activities that occur on federal enclaves.

³²⁴“The Congress shall have Power . . . [t]o exercise *exclusive Legislation* . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .” U.S. Const. art. I, § 8, cl. 17 (emphasis added); see *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930) (construing “exclusive legislation” as synonymous with exclusive jurisdiction). The enclave theory protects all persons on an enclave from state prosecution, because exclusive jurisdiction applies to the entire enclave and not just those portions used for federal purposes. *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir.), *cert. denied*, 484 U.S. 818 (1987).

³²⁵U.S. Const. art. IV, § 3, cl. 2; see *Kleppe v. New Mexico*, 426 U.S. 529, 541-43 (1976) (holding that legislative jurisdiction over lands within a State “has nothing to do with Congress’ powers under the Property Clause”).

³²⁶A “proprietary interest” indicates some ownership interest in the land. The United States has no legislative authority over the land; see *Fort Leavenworth R.R.*, 114 U.S. at 532-34 (discussing types of federal legislative jurisdiction); see also Shapiro, *Coastal Zone Management*, 7 Ecology L.Q. 1011, 1014 n.22 (1979) (the United States holds 95% of the 770 million acres that it owns in a proprietary capacity).

³²⁷*Cf.*, *Hancock*, 426 U.S. at 178 (noting that Plenary Powers Clause, art I, § 8, cl. 17, exemplifies the principle of federal supremacy).

³²⁸*United States v. Mississippi Tax Comm’n*, 412 U.S. 363, 378 (1973) (although situated within Mississippi, federal enclave is “to Mississippi as the territory of one of her sister states or a foreign land”) (quoting district court opinion).

Congress may adopt state law as federal law or allow state law and authority to operate on federal enclaves. It often does so to fill voids in federal law. When Congress adopts state law or allows states to enforce their laws on federal enclaves, it uses precise statutory language that differs from the language in the federal facilities provisions of environmental laws.³²⁹

The federal facilities provisions in federal environmental statutes do not explicitly allow state environmental programs to operate on federal enclaves. Implicitly, they may adopt state law, not because the concepts are synonymous, but because the considerations that motivate Congress to waive federal supremacy to state regulation also may cause it to adopt state law for federal enclaves.³³⁰

In *Howard v. Commissioners of Louisville*³³¹ the Supreme Court held that states may disregard the state-within-a-state fiction of enclaves if the exercise of state sovereignty does not interfere with exclusive federal jurisdiction on the enclave.³³² Although *Howard* places enclaves within the sovereignty of a state, exclusive jurisdiction over the enclave remains with the United States unless modified by statute.³³³

Howard involved the annexation of an ordnance plant in the City of Louisville. Louisville wanted to tax the income of government employees who worked at the plant. This exercise of state authority

³²⁹See *Goodyear Atomic Corp.*, 486 U.S. at 181-82 (construing 40 U.S.C. § 290 (1988), which provides that "States shall have the power and authority to apply [workmen's compensation] laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be . . .").

³³⁰The federal facilities provisions subject *each* federal department, agency, and instrumentality to state and local requirements. The phrase may indicate congressional intent to subject all federal facilities, including those located on enclaves, to state requirements; see *Hancock*, 426 U.S. at 178-81 (not distinguishing treatment of federal installations located on enclaves from those that are not).

The Supreme Court has held that federal law allowing application of state law on enclaves waives federal supremacy to state regulation of all federal facilities, wherever situated. *Goodyear Atomic Corp.*, 486 U.S. at 182 n.4 ("Although the language and history of Section 290 indicate that it is addressed to federal enclaves, areas over which the United States has assumed exclusive jurisdiction . . . both appellant and the Solicitor General concede, and we agree, that it authorizes the application of workers' compensation laws to federal facilities like the Portsmouth plant that are not federal enclaves.').

³³¹344 U.S. 624 (1953).

³³²*Id.*, at 627 (annexation of federal ordnance plant situated within the city boundaries of Louisville "did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property").

³³³*Id.* at 627, 629 (paraphrased).

over the enclave did not interfere with exclusive federal jurisdiction, because the Buck Act allows states to tax the income of federal employees who work on enclaves.³³⁴ *Howard* does not provide precedent for state annexations of federal enclaves.³³⁵

Nor does *Howard* provide precedent for the exercise of state criminal jurisdiction on federal enclaves. State prosecution of enclave activities interferes with exclusive federal jurisdiction.³³⁶ Congress has only allowed state civil laws to operate on enclaves. Although Congress adopted state fish and game laws as federal law on enclaves, the laws are criminally enforced by federal officials.³³⁷ State courts continue to recognize this limit on their inability to prosecute crimes that occur on enclaves.³³⁸ The limitation should apply with equal force to a state's prosecution of environmental crimes on an enclave.³³⁹

The government has used *Howard* to extend state benefits to residents of federal enclaves.³⁴⁰ Extending state citizenship to enclave residents to allow them to vote does not interfere with the exclusive legislative jurisdiction of the United States. State prosecution of enclave activities does. It forces activities under the exclusive jurisdiction of the federal government to comply with state regula-

³³⁴*Id.* at 627-29 (noting that Congress enacted the Buck Act to allow state taxation of income earned on enclaves).

³³⁵*See* *United States v. McGee*, 714 F.2d 607, 612 n. 1 (6th Cir. 1983) (holding that potential for friction in event of annexation of large military base was sufficient justification for permanent injunction and distinguishing *Howard* where United States did not challenge annexation and where potential for friction was much greater because annexation involved a key military base rather than a "mere ordnance plant").

³³⁶*Stewart & Co. v. Sadrakula*, 309 U.S. 94, 101 (1940) ("While exclusive federal jurisdiction attaches, state courts are without power to punish for crimes committed on federal property.").

³³⁷10 U.S.C. § 2671(c) (1988); *see generally* Dep't of Army, Pam 27-21, Military Administrative Law, para. 2-12 (1 Oct. 85) (discussing Congress's adoption of various state civil laws as state law or as federal law for federal enclaves).

³³⁸*See, e.g.*, *Hankins v. State*, 766 S.W.2d 467 (Mo. 1989) (state court had jurisdiction over homicide that occurred in national forest because defendant failed to prove that United States accepted tendered cession of jurisdiction from state); *Harris v. State*, 368 S.E.2d 527, 186 Ga. App. 756 (1988) (federal government did not have exclusive jurisdiction over robbery that occurred in U.S. Post Office because state retained criminal jurisdiction over persons when it ceded territory to federal government); *State v. Parker*, 294 S.C. 465, 366 S.E.2d 10 (1988) (state could prosecute murder and robbery provided that United States had not accepted exclusive jurisdiction over federal property on which body was found).

³³⁹*See* *State v. Ingram*, 226 N.J. Super. 680, 545 A.2d 268, 271-72, 274 (Law Div. 1988) (holding that territorial jurisdiction was an essential element of the offense of unlawful abandonment or disposal of hazardous waste and that New Jersey could not prosecute the illegal disposal of hazardous waste at Army Corps of Engineers' site because it failed to prove that the federal government, which had exclusive jurisdiction over some areas, did not have exclusive jurisdiction over the area in issue).

³⁴⁰*See, e.g.*, *Evans v. Corman*, 998 U.S. 419, 421-22 (1970) (voting rights).

tory requirements.³⁴¹ Assuming that federal facilities provisions indicate Congress's intent to subject federal activities on enclaves to state regulation, state criminal enforcement of those regulations does not necessarily follow.

Congress enacted the Assimilative Crimes Act (ACA) to fill gaps in the federal criminal code applicable to federal enclaves and to conform the criminal law of federal enclaves to that of the state in which the enclave exists.³⁴² The ACA recognizes a state's interest in controlling criminal activity within its territory by adopting state law for federal enclaves. It does not allow states to enforce their criminal laws on federal enclaves.³⁴³

Environmental crimes on federal enclaves do not escape punishment, as the Aberdeen prosecution illustrates. Federal environmental statutes and their criminal provisions reach enclaves. To the extent that federal facilities provisions subject federal activities on enclaves to state regulation, the provisions would allow the assimilation of state environmental criminal sanctions as the federal law of the enclave.³⁴⁴ They would not allow state criminal enforcement of those sanctions on the enclave.

F. EXTRATERRITORIAL STATE CRIMINAL PROSECUTIONS

The final way in which state environmental criminal prosecutions might reach federal employees on an enclave is extraterritorially. The issue would arise when pollution from an enclave harmed a surrounding community or an adjacent state. The affected state might at-

³⁴¹*Cf.*, *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 390 n.8 (1944) (noting the difficulties in assimilating penal laws that are part of a state regulatory system as federal law on an enclave because "[t]hese penal statutes are designed to enforce a system of licensing such imports by special permits issued by a state agency. Importation of liquors without a special permit is made penal. To hold, therefore, that the assimilative crimes statute adopts Oklahoma's penal liquor laws the Court might further have to hold that that statute compels federal officials on the Fort Sill Reservation to apply for and obtain state permits before they can lawfully import any liquors for any purpose. And a strong argument might be made that had Congress intended such drastic result, it would have considered the problem and used more express language") *cited in* *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977).

³⁴²18 U.S.C. § 13 (1988); *see* *United States v. Williams*, 327 U.S. 711, 718-19 (1946); *United States v. Sharpnack*, 355 U.S. 286, 290-93 (1958).

³⁴³*See* *Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937) ("Prosecutions under [the ACA] . . . are not to enforce the laws of the state, territory, or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference."); *see generally* Garver, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, *The Army Lawyer*, Dec. 1987, at 12.

³⁴⁴*See* *Yellow Cab Transit Co.*, 321 U.S. at 390.

tempt to assert its criminal jurisdiction extraterritorially over persons who caused the pollution on the enclave.

The scenario is likely to occur. The effects of pollution often extend beyond the immediate area in which it originates. Air pollution provides an obvious example because the illegally discharged pollutants will travel far beyond the enclave's boundaries. Illegal discharges of pollutants into navigable waters that run off of the enclave will reach communities outside the enclave. An illegal disposal of hazardous wastes also can affect surrounding communities when it contaminates underground aquifers from which surrounding communities draw their water supply.

States may have difficulty exercising criminal jurisdiction over persons on federal enclaves, despite the fact that the resulting harm or effect from enclave pollution occurs within the territory of a state. States exercise criminal jurisdiction over offenses that occur outside their territory if an essential element of the crime occurs within the state's jurisdiction. A typical statute allows the exercise of criminal jurisdiction if the conduct *or the result*, both of which are elements of the offense, occurs within the state.³⁴⁵

Although state courts liberally construe criminal elements to find some connection with the state,³⁴⁶ environmental statutes present unique problems. Federal environmental statutes, which serve as models for state programs, regulate pollution at its source. Congress structured the statutes in this manner to ease enforcement by eliminating the need to trace pollution from its result to its source.³⁴⁷

³⁴⁵See Model Penal Code § 1.03(1)(a) (Proposed Official Draft 1962) ("a person may be convicted under the law of this State . . . if either the conduct that is an element of the offense or the result that is such an element occurs within this State"); N.J.S.A. 2C:1-3 (" . . . a person may be convicted under the law of this State of an offense committed by his own conduct . . . if: (1) either the conduct which is an element of the offense or the result which is such an element occurs within this state."); see *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989) (Nebraska court has jurisdiction over crime when essential element is committed or occurs in Nebraska).

³⁴⁶*Cf.*, *State v. Sanders*, 230 N.J. Super. 233, 553 A.2d 354 (1989) (New Jersey had jurisdiction to try mother for endangering the welfare of a child because defendant boarded bus in New Jersey for express purpose of abandoning her baby in Philadelphia.); *People v. Harvey*, 174 Mich. App. 58, 435 N.W.2d 456 (1989) (Though defendant retained child in another state, Michigan had jurisdiction over parental kidnapping because effect of intentional retention of child in violation of custody order occurred in Michigan).

³⁴⁷See *Envtl. Protection Agency v. State Resource Control Bd.* *ex rel.* California, 426 U.S. 202, 203-07 (1976) (discussing Congress's complete dissatisfaction with former version of CWA and its decision to impose effluent limitations on point sources and thus "facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated"); see also Glenn, *supra* note 24, at 841-44 (discussing Refuse Act permit system, which was innovative for its time because it imposed specific effluent limitations on individual polluters).

The result of pollution would reach state territory. The issue is whether that result is an essential element of a state environmental crime.

Arguably, the elements of an environmental crime occur exclusively on the enclave. The criminal provisions in environmental statutes punish violations, including those involving knowing endangerment, irrespective of the “result.”³⁴⁸ Knowingly exceeding NPDES permit conditions, transporting or disposing of hazardous waste without a permit, and violating state air pollution control standards are crimes regardless of the harm or pollution that results. The injury, harm, or “result” caused by the violation is not an element of the offense.

The elements of an environmental crime involve violation of the regulatory scheme, regardless of the effect. That interpretation agrees with the general approach of public welfare statutes, which eliminate harm and causation as elements. They regulate activities that threaten the public welfare and punish violations that could harm the public in order to prevent actual harm from occurring.³⁴⁹

Allowing extraterritorial application of state criminal sanctions would subject activities on an enclave, or those in a state for that matter, to other states’ environmental standards. An enclave in Ohio would have to comply not only with Ohio’s requirements, but also with the requirements of adjoining states that pollution from the Ohio enclave might reach.

Federal environmental statutes create comprehensive regulatory schemes that preempt application of a state’s pollution control program to out-of-state sources. In *Ouellette*,³⁵⁰ the Supreme Court held that the Clean Water Act precluded application of Vermont’s nuisance

³⁴⁸See H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 38, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5038 (noting Congress’ concern in drafting RCRA’s knowing endangerment offense as carefully and precisely as possible because “no concrete harm need actually result for a person to be prosecuted”). *Cf.*, *State v. Lane*, 112 Wash.2d 464, 771 P.2d 1150 (1989) (state had jurisdiction over murder that occurred on federal enclave because premeditation and abduction of victim—essential elements of the offense—occurred outside enclave and within state’s jurisdiction).

³⁴⁹See *United States v. Morissette*, 342 U.S. 246, 256 (1951) (noting that violations of public welfare statutes “result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. . .”).

³⁵⁰*International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (“After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the ‘full purposes and objectives of Congress’ . . . we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.”).

statute to a New York pulp mill. Although *Ouellette* involved a common law nuisance suit against an out-of-state source, the rationale should at least apply to the extent that the pollution control program of the state exercising extraterritorial jurisdiction imposes more stringent standards. Control of interstate pollution is primarily a matter of federal law. An affected state may have remedies under the laws of the state in which the polluting activity is located.

VI. LIMITING LIABILITY

Federal employees have not been the subject of an inordinate number of prosecutions. DOJ has prosecuted eleven criminal enforcement actions against federal employees and government contractors. Of the five criminal prosecutions brought against federal employees, four resulted in conviction and one in acquittal.³⁵¹ On the other hand, these prosecutions probably do not represent the full criminal liability of the federal government.³⁵²

The Aberdeen and Fort Drum prosecutions might have been avoided. Both cases resulted from "whistleblowers."³⁵³ At Aberdeen an employee informed the installation's environmental coordinator of the violations that ultimately formed the basis of the indictment. When the violations continued, the employee went to the *Baltimore Sun* and the Maryland State Police. The installation commander learned of the violations when he read the newspaper.³⁵⁴

At Fort Drum the workers who disposed of the waste paint returned to the defendant at the end of the day and confronted him with their concerns about the illegality of the disposal. The defendant responded by ordering an employee to cover the waste paint and

³⁵¹Nat'l Env'tl. Enforcement J. at 41 (Nov. 1989)(excerpting the testimony of Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, DOJ, before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce).

³⁵²See *Hazardous Waste: New Approach Needed to Manage the Resource Conservation and Recovery Act 35* (GAO/RCED-88-115, Jul. 19, 1988)(noting the existence of many serious violations of hazardous waste laws at federal military and civilian facilities).

³⁵³Environmental laws have provisions that protect persons who report suspected violations. CAA § 322, 42 U.S.C. § 7622 (1988); CERCLA § 110, 42 U.S.C. § 9610 (1988); CWA § 507, 33 U.S.C. § 1367 (1988); RCRA § 7001, 42 U.S.C. § 6971 (1988); TSCA § 23, 15 U.S.C. § 2622 (1988). CERCLA goes one step further. When Congress amended CERCLA in 1986, it added a "citizen award" provision authorizing EPA to pay up to \$10,000 from the Superfund to any person who provides information of a criminal violation of CERCLA. CERCLA § 109(d), 42 U.S.C. § 9609(d) (1988); see 40 C.F.R. pt. 303 (1990).

³⁵⁴Address by Ms. Jane F. Barrett, *supra* note 53.

pond with dirt. Another worker subsequently reported the disposal to his brother-in-law, a special agent with the Department of Defense, and an investigation ensued.³⁵⁵

These incidents will recur if federal employees do not address the underlying issue that they raise. They indicate that environmental compliance was not part of the mission of those installations. In neither case did federal or state regulators target federal employees or activities for prosecution. They responded to the complaints of federal employees who did not have their concerns addressed by someone at the installation.

An effective environmental compliance program could have avoided these prosecutions. Although the decision to prosecute is essentially a discretionary judgment,³⁵⁶ federal regulators and prosecutors consider several factors in determining whether to proceed with criminal charges.³⁵⁷ A program that addresses these factors will not only protect federal employees from criminal prosecution, but also ensure that federal activities comply with environmental laws.

A. ENVIRONMENTAL COMPLIANCE PROGRAM

The first factor that prosecutors and regulators consider is evidence of knowledge or intent to avoid environmental laws. A notice of violation is evidence of knowledge, as it was in *United States v. Park* when the Food and Drug Administration notified the defendant of violations at the company's warehouses. Regulators can easily reach a commander or supervisor with a notice of violation. The prosecution in the Aberdeen case introduced evidence that state regulators

³⁵⁵*United States v. Carr*, 880 F.2d 1550, 1551 (2d Cir. 1989).

³⁵⁶DOJ issues very general guidance concerning the exercise of prosecutorial discretion. Federal prosecutors consider: (1) federal enforcement priorities; (2) the nature and seriousness of the offense; (3) the deterrent effect of the prosecution; (4) the person's culpability in connection with the offense; (5) the person's history with respect to criminal activity; (6) the person's willingness to cooperate in the investigation; (7) the probable sentence or other consequences if the person is convicted. U.S. Department of Justice, Principles of Federal Prosecution (1980); see also H. R. Rep. No. 198, 98th Cong., 2d Sess. 54, reprinted in 1984 U.S. Code Cong. & Admin. News 5613 (expressing Congress' intent to rely on DOJ to continue to wisely exercise its discretion in prosecuting cases under RCRA § 3008(d)'s potentially far-reaching language).

³⁵⁷Habicht, *supra* note 18, at 10,481 (discussing the factors that federal prosecutors weigh in deciding whether to proceed civilly or criminally against a violator); see also Memorandum from EPA Associate Administrator, Robert M. Perry, to Regional Councils, Regions I-X, entitled *Criminal Enforcement Priorities for the Environmental Protection Agency* (Oct. 12, 1982), reprinted in 13 *Env'tl Rep.* (BNA) 859 (1982) (emphasizing criminal enforcement as an important part of EPA's overall enforcement program and discussing the subjective considerations involved in seeking criminal sanctions).

informed the defendants of violations on several occasions. The defendants apparently ignored the notices.³⁵⁸

Some commanders have wondered whether they would be wiser to remain ignorant of violations at their installations in order to avoid criminal prosecution. The answer is an emphatic “No.” The responsible corporate officer doctrine and the public welfare status of environmental laws require commanders to seek out and prevent violations. Deliberate ignorance is evidence of knowledge. It is also a factor that DOJ considers in deciding whether to pursue criminal prosecution.³⁵⁹

Prosecutors consider the decisionmaking process and the information flow within an organization to determine whether responsible corporate officers set the standard for environmental compliance or whether they avoid their responsibilities—responsibilities that only they can fulfill because of their positions and authority. Commanders view proper information flow or the “chain of command” as vital to accomplishing their units’ missions.³⁶⁰ Commanders and supervisors must integrate environmental compliance into their decision-making process.

Commanders and supervisors must identify key players and their areas of responsibility. Key players include environmental coordinators, legal advisors, public affairs specialists, safety officers, preventive medicine specialists, and engineers.³⁶¹ Commanders must not only communicate with each person, but also ensure that the specialists communicate among themselves on environmental compliance issues. The specialists must attend training, installation planning, and commanders’ meetings to inject environmental considerations into agency decisionmaking.

Commanders and supervisors must actively supervise their subordinates to ensure that subordinates perform their assigned tasks.³⁶²

³⁵⁸Address by Ms. Jane F. Barrett. *supra* note 53.

³⁵⁹Habicht, *supra* note 18, at 10.481 (explaining that operating policies that encourage cutting corners, fail to meet regulatory standards, or shield managers from the facts are evidence of knowledge and support criminal liability).

³⁶⁰Army Reg. 600-20, Army Command Policy, para. 2-1 (30 Mar. 1988).

³⁶¹Address by Major General John L. Fugh, Acting The Judge Advocate General, Department of the Army, to the 38th Graduate Class, The Judge Advocate General’s School, Charlottesville, Virginia (Aug. 25, 1989).

³⁶²The U.S. Army Toxic Hazardous Material Agency (USATHAMA) publishes an excellent book entitled *Commander’s Guide to Environmental Compliance* (undated). In addition to explaining the various environmental statutes that regulate installation activities, the book provides questions for a commander, or supervisor, to ask specialists involved in environmental compliance.

Under *Park*, commanders and supervisors can delegate duties to dependable subordinates; they cannot delegate away their responsibility. Commanders and supervisors must seek information. They must also focus their subordinates' efforts on preventing violations involving hazardous wastes and the pollution of water sources—violations that are more likely to threaten human health and the environment and thus incur criminal prosecution.³⁶³

Key players, such as the environmental coordinators, need access to commanders. In fact, all employees with concerns about environmental compliance need access to commanders. Many commanders have boss-lines or phone numbers that persons may call. Commanders should open those lines to persons with complaints about environmental compliance. They should learn of violations from within their commands and activities and not from regulators or the newspaper.

When they receive a notice of violation, commanders and supervisors must correct it. Although corrective measures may not provide a legal defense, federal prosecutors and regulators especially consider voluntary compliance and cooperation in disclosing and remedying violations as factors in deciding whether to pursue criminal prosecution.³⁶⁴ Federal regulators will often negotiate compliance agreements with federal facilities.³⁶⁵ The unitary executive theory allows only one option if federal agencies refuse to cooperate—the federal grand jury.

Commanders and supervisors also have a duty to train subordinates at all levels for the environmental compliance mission. Legal advisors have responsibility to assist in the education and training process. Employees must understand that they place themselves at risk of criminal conviction if they know of a violation and do nothing. To

³⁶³Habicht, *supra* note 18, at 10,481; Memorandum from Robert M. Perry, *supra* note 357. The United States Army Corps of Engineers publishes material to assist federal facilities in conducting environmental audits. The manual lists compliance areas that federal facilities should inspect under the major environmental statutes. United States Army Corps of Engineers Construction Engineering Research Lab, *Environment Review for Management Action* (undated).

³⁶⁴"Even if a criminal prosecution is unavoidable, substantial assistance rendered to the government may lead to immunity or a favorable plea bargain for cooperative defendants in appropriate cases." Habicht, *supra* note 18, at 10,481, 10,284 (emphasizing and reemphasizing that "cooperation in disclosing a serious violation, and in remedying the hazard, is regularly weighed in the decision whether to proceed civilly or criminally").

³⁶⁵See EPA Memorandum from J. Winston Porter, Assistant Administrator Office of Solid Waste and Emergency Response to Regional Administrators, Region I-X, entitled *Enforcement Actions at Federal Facilities under RCRA and CERCLA* (January 25, 1988), reprinted in 41 Env'tl. Rep. (BNA) 3341 (1989).

avoid criminal liability, employees must report violations to their supervisor and up the chain of command if violations continue. Liability will normally extend to more employees than DOJ indicts; some potential defendants will become the government's key witnesses against those ultimately indicted.

Legal advisors have a special obligation to low and mid-level supervisors upon whom the rules of liability can operate particularly harshly. Ignorance of the law is not a defense. These employees normally lack access to a legal advisor or a person to inform them of their responsibilities under environmental laws. Yet, these employees, such as Mr. Carr and the Aberdeen defendants, are responsible corporate officers and incur liability while those ultimately responsible may escape liability.

B. BUDGETING FOR COMPLIANCE

Commanders and supervisors must treat environmental compliance as they do any other mission. They must devote resources to compliance. Federal regulators and prosecutors consider the economic gain that results from noncompliance as a factor in deciding whether to prosecute a violation.³⁶⁶ Although federal agencies do not have a profit motive as corporations do, they have budget priorities that affect the allocation of personnel and money.

The first area to which commanders and supervisors must devote resources is personnel. The demands of environmental compliance require trained specialists. One or two environmental coordinators may be unable to manage an installation's environmental compliance program. Commanders and supervisors would not entrust an installation training, maintenance, or safety program to several low-level employees. They cannot entrust environmental compliance to poorly trained or overworked individuals.

Commanders must also conduct long and short-range planning for environmental compliance. They must budget for environmental compliance—hazardous waste disposal, asbestos removal, sewage treatment—the same way that they budget for construction, maintenance, and training. Regulators are sensitive to the complexities and delays of the federal budget process. However, their tolerance for budgetary excuses has limits. Federal agencies have had requirements to budget for environmental compliance for some time.³⁶⁷

³⁶⁶Habicht, *supra* note 18, at 10,481.

³⁶⁷See Office of Management and Budget Circular No. A-106 (Dec. 31, 1974).

Congress's ever-expanding waivers of federal supremacy and sovereign immunity make budgeting for environmental compliance a necessity. Federal agencies can take the initiative and budget for compliance in a way that least affects their other federal missions, or they can risk having a court order injunctive relief and dictate their budget priorities. Although federal environmental statutes allow the President to exempt federal facilities from environmental compliance requirements if they lack funds, the President has granted only one exemption.³⁶⁸

C. ENVIRONMENTAL COMPLIANCE AS A MISSION

The most important aspect of an effective environmental compliance program is leadership. Policies, whistleblower hotlines, environmental compliance teams, special training, and budgeting are meaningless if commanders and supervisors do not send the message to subordinates that environmental compliance is important and part of the mission. Subordinates know when a commander or supervisor is actually concerned about a matter and when the leadership is simply going through the motions.

Environmental compliance does not require treatment different from any other part of the federal mission. In fact, the requirements of public welfare statutes and the responsible corporate officer doctrine fit perfectly within the philosophy of command. They emphasize authority and responsibility as the basis of imposing criminal liability; the key elements of command are authority and responsibility.³⁶⁹

Federal service is a public trust.³⁷⁰ The public entrusts not only the national defense, the lives of its sons and daughters, and the public welfare to the federal government, but also it entrusts protection of its natural resources. Commanders and supervisors must view environmental compliance in the same manner that they view training, maintenance, and safety—as part of their mission. As one former officer succinctly noted:

Defense is more than planes and missiles to protect the country against an enemy attack. Part of the defense job is the safe-

³⁶⁸See Exec. Order 12,327, *reprinted in* 3 C.F.R. 185(1990)(exemption to allow use of Fort Allen to house Haitian refugees).

³⁶⁹Army Reg. 600-20, Army Command Policy, para. 1-5b (30 Mar. 1988).

³⁷⁰Army Reg. 600-50, para. 1-4, Standards of Conduct for Department of the Army Personnel (28 Jan. 1988).

guarding of the land, timber and waters, the fish and wildlife, the priceless natural resources which make this country worth defending.³⁷¹

VII. CONCLUSION

Environmental crimes involve federal employees in complex, changing areas of the law. Case law is far from settled. Courts have struggled to balance federal-state relations and issues of federal supremacy, sovereign immunity, and legislative jurisdiction since the founding of the Republic. They have similarly struggled with defining *mens rea* and criminal liability.³⁷²

The solution for the federal employee is to make environmental compliance part of the federal mission. An effective environmental compliance program not only achieves this goal, it avoids criminal prosecutions. The unresolved legal issues discussed in this article provide another reason for "staying on the civil side," as one commentator terms it, and avoiding criminal investigations. Once the process begins, it can sweep any federal employee into its net.

The one constant in the whole morass is that environmental prosecutions are here to stay. To federal regulators and prosecutors, environmental prosecutions are essential to enforcing environmental laws. Society increasingly recognizes the threat of environmental crimes.³⁷³ Society's mores have changed. For many, "pollution is not just an unfortunate by-product of an industrialized America—it is not something that just happens—it is a crime."³⁷⁴

There was a time, not so long ago, when to many pollution was a "so what" crime It was cheaper to dump industrial wastes illegally and be fined for it than it was to properly process those wastes. It was cheaper for cities to release raw sewage into rivers and harbors than it was to build the necessary water treatment facilities. It was cheaper for citizens to take the waste oil from their cars and pour it on the ground than it was to have it recycled. In point of fact, it *was* a small enough price to pay.

³⁷¹Council on Environmental Quality, *Environmental Quality*, 149 (1989) (quoting General Thomas D. White, U.S. Air Force, Chief of Staff, 1957-60).

³⁷²'Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime.' United States v. Bailey, 444 U.S. 394, 403 (1980).

³⁷³See *supra* note 8.

³⁷⁴Remarks by Dick Thornburgh, Attorney General of the United States Before the National Association of District Attorneys, Portland, Maine (July 19, 1989).

Small enough until miles and miles of beaches were closed because garbage and medical wastes had washed ashore. Until supplies of fresh water became undrinkable. Until radioactive wastes threatened the health of entire communities. Until vast bodies of water were changed from cradles of life into crucibles of death for innumerable, and once-thought inexhaustible, species of aquatic life. And until governments, at all levels, began to respond forcefully to the crime of pollution.³⁷⁵

³⁷⁵*Id.*

BOOK REVIEWS

FACING THE PHOENIX: THE CIA AND THE POLITICAL DEFEAT OF THE UNITED STATES IN VIETNAM*

Reviewed by Lieutenant Commander John W. Rolph (USN)**

Understanding the progression of events that marked America's trail to failure during the Vietnam war requires in-depth analysis of the Vietnamese people themselves—who they were, what they were fighting for, and where they saw their country going after years of French colonial occupation. *Facing the Phoenix* is a detailed and riveting analysis of the evolution of Vietnam from 1945 under colonial rule to the fall of Saigon in 1975. This compelling and complex story is examined in part through the eyes of those who were there during the earliest days of America's interest and presence in Indochina, and throughout the war years: multifaceted CIA agents who struggled to understand a culture they would never quite grasp; ambassadors, statesmen, and their staffs who suspected the motives of the CIA and the many "advisors" Washington poured into the country to thwart the "river of communism"; newspaper reporters who were viewed as racing to the doomsday conclusion that the war could not be won; and a military machine (typified by the likes of General William Westmoreland) unwilling to accept that a political solution existed to end a conflict they believed could only be won by raw military might. The fulcrum of the book, however, is the chronicle of Tran Ngoc Chau, a brilliant Vietnamese soldier, strategist, and statesman who knew pacification was the only strategy that would reunite his country, and who dedicated himself to this cause. Chau's gift of incredible insight and energy brought him quickly to the attention of both the French and the Americans (in particular the CIA) in Vietnam, but time and time again his workable and realistic ideas for winning back his country from the influences and destruction of communism were ignored by the very individuals in both the American and Saigon governments who admired him most. This failure, as the author carefully and thoroughly documents, may have been the greatest single failure of the entire conflict, ensuring defeat of American and South Vietnamese forces.

*Zalin Grant, *Facing the Phoenix: The CIA and the Political Defeat of the United States in Vietnam*. New York: W.W. Norton & Company, 1991. Pages 395. Price: \$21.95. Hardcover.

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Tran Ngoc Chau was a fierce Vietnamese nationalist who rose through the ranks of his country's fickle military and political systems solely as a result of hard work and innate ability. From Boy Scout in 1942 to Guerrilla fighter by 1946, Chau's brand of nationalism found him fighting against colonialism with the Viet Minh communist guerrillas in the jungle wars after World War II. Chau was not at all sympathetic to the cause of communism, but he realized that his goal of an independent Vietnam had its best chance through this medium called the Viet Minh. For Chau, the Viet Minh's war against French occupation was a patriotic struggle that had very little to do with the cause of communism, despite the fact that Ho Chi Minh was its leader. All Chau cared about was ridding his country of the French; any collateral benefit his participation might glean for the cause of communism seemed as nebulous as the communist cause itself at the time. Chau viewed himself as a nationalist dedicated to bringing about the expulsion of the French first, and introducing democratic principles to his country second. To the extent that Ho Chi Minh shared Chau's initial goal the two were "brothers," and Chau's participation in the struggle was not at all hampered by the fact that Ho Chi Minh's end result contemplated a communist dictatorship for Vietnam. Indeed, the author documents the views of many that America missed the opportunity to support Ho Chi Minh in his early years of struggle against the French, and that it is very likely that he was pro-American at this point. Once in power, it was theorized that Ho would be amenable to democratic reform. For Chau, nationalism was the motivating force, and it would continue to be for many years to come. Chau left the Viet Minh struggle after four years when communist influence began to overshadow nationalistic goals and "meticulously organized totalitarianism" began creeping in from all sides. Having become firmly anticommunist by this point, it struck Chau as not at all incongruous to now join the French in their battle against the Viet Minh, leaving for a later day the struggle for an independent Vietnam. This was the essence of the ideological Chau, the man America would eventually invest its stock in, only to ignore virtually every dividend the investment reaped.

Chau rose quickly within the political organization of South Vietnam. From Province Chief, to Mayor of DaNang, and finally to the position of Secretary General of the National Assembly in Saigon. He was a theorist with real world experience under his belt that gave credibility to everything he said and did, both with the French and with the Americans. His experiences, in particular that of Province Chief, helped him to formulate a philosophy later known as "pacification," which offered the only real hope of salvation for his country,

but which was routinely ignored by his own country's political establishment and by the United States as our presence in the country increased. According to the author, the failure of both governments to appreciate the intricacies of the Vietnamese and to understand the subtleties of Chau's pacification concept may have been the single most critical factor leading to South Vietnam's fall.

Chau's philosophy was simple enough. The war against the Viet Cong could only be won by defeating the communist rebels' political structure, and military action was not the way to do that. The key to success, Chau realized, was winning over the Viet Cong guerrillas, not killing them. The guerrillas were generally young villagers disenchanted by the failure of the Saigon government to be responsive to their needs. They personified the plight of the poverty-stricken farmer who had been completely ignored in Saigon. When their government stopped listening, communism had a fertile breeding ground and the Viet Cong recruiters had no difficulty winning members. Chau knew that the government in the South could win these people back with even the most basic measures of reform. Simple attention to their needs and minimal efforts aimed at alleviating their plight would have mooted the communist effort. Bringing security first to a war torn area, followed by concrete civic action to improve the rice farmers' lot in life were central elements of the plan. Chau even created an amnesty program that would allow the teetering Viet Cong guerrilla to change sides easily without fear of repercussion. The program worked! It had been tried in a number of provinces (including that over which Chau served as province chief) with excellent results. The threat that Chau perceived as the most difficult aspect of the pacification program was not winning over the hearts of the Viet Cong guerrillas, but rather defeating the efforts of the hard core communist functionary (or cadre) who routinely thwarted the effort to reach the individual guerrilla. Born out of this frustration was the controversial *Phoenix Program*; an initially legitimate wartime tactic that would later become grossly abused by the CIA to the extent that the entire pacification effort would be tarnished and rejected.

Like pacification, the *Phoenix* philosophy, as espoused by Chau, was simple enough. To reach the Viet Cong guerrillas and win them back to the cause of the South, a mechanism had to be employed to get by the hard-core communist functionaries who rendered pacification impotent. That mechanism was limited, measured amounts of force aimed at eliminating the impediment. To avoid killing or injuring innocent civilians and further alienating the farmers,

Chau would deploy “three-man counterterror teams” to eliminate or capture his communist nemeses. After all, they were the *only* enemy in Chau’s mind, the remaining villagers were their innocent pawns. The author is at his best in describing how the competing American interests in Vietnam bungled the pacification effort by either completely failing to understand it or, worse, understanding it but choosing to ignore it completely. The CIA knew the program worked, but got lost in the ends it sought to achieve, typically by overemphasizing the counterterrorist aspects of the plan. The diplomatic community in Saigon, including the many ambassadors and their staffs that filtered through, failed to perform their end of the pacification bargain. Promoting instability in the South Vietnamese government through their inaction to the extent that it deterred Viet Cong defection (the haphazard regime of Ngo Dinh Diem perhaps best exemplifying the political morass) is but one of many examples of the United States’ ineptness in this arena. Never fully appreciating the obvious folly in their pursuits, the United States failed to make concrete, timely decisions in regard to supporting and backing particular regimes in Saigon. Pacification efforts therefore had little to offer the wavering guerrilla due to the instability of the government that the effort was pledging against. The United States military presence in Vietnam after 1965 virtually guaranteed that pacification would fail. Pacification was not a concept the military community could easily digest. As the author clearly notes, military might was the antithesis of what the pacification program stood for. Unless the requisite political reforms were made that would win over the Viet Cong guerrilla, military might would be useless. Instead of using the military in country to shore up the sagging Saigon governments (thereby aiding the pacification effort), our government seemed concerned only with generating “body counts.” The succession of aimless military missions only solidified the resolve of the communists and decimated any hope of winning them back to the South.

There were those in the United States government intelligent enough to know that Chau was right, and that the war was not going to be won on the battlefield. The brilliant but controversial Edward Lansdale of the CIA was the most ardent supporter of Chau and the pacification concept. Another vigorous supporter was Daniel Ellsberg. Both men had been in Vietnam long enough to realize that the path pursued by the United States was leading to sure disaster. Both men exhausted themselves trying to convince various presidents, ambassadors, and military elite that Chau’s ideas could work if employed properly and immediately. They engineered opinion in regard to the pacification program more persuasively than any other

individuals who played a role in the war effort. Nevertheless, they would ultimately fail because of the United States' inability to understand the situation they were dealing with. By the time the government realized the desperate condition in Vietnam was genuine enough to mandate the consideration of viable options such as pacification, it was too late.

The author does an excellent job merging the historical tracks of the CIA in Indochina after World War II, the blossoming of nationalism in Vietnam during French colonial occupation, the inattentive presidencies of Kennedy and Johnson, and the frustrating military missions of Generals Westmoreland and Abrams. When you turn the last page of *Facing the Phoenix*, you realize that the fall of Saigon in 1975 was anything but "predestination," and was contributed to directly by a large degree of American ignorance, stubbornness, and pure blind ambition. Without engaging in wholesale personality bashing, Zalin Grant successfully states his case that the United States failed to read the obvious writing on the wall and ignored those who knew South Vietnam and could best interpret for us. Instead of successful pacification early on in the conflict, the CIA would later disfigure Chau's brilliant program by creating murderous "provincial reconnaissance units" that would engage in excesses unimaginable to the individual who engineered the concept. The *Phoenix Program* became synonymous with assassination and, thus, was widely condemned. Too little too late, the author wisely notes. Pacification was resorted to only as a last resort rather than the first avenue of approach as suggested by Chau, and then poorly implemented by a confusing mixture of American military and civilian authorities. By then, failure was inevitable.

The ultimate flaw of the *Phoenix Program* as implemented by the United States was that it strayed far from Chau's original concept, and failed to grasp its essential ingredient, pacification. "[T]he problem with *Phoenix* was that it had been taken out of the context of Chau's original intentions. It simply wasn't enough to kill the Viet Cong officials. The Saigon government had to counter the communists' programs with something better. And to do that, more dedicated Vietnamese like Chau were needed." Regrettably, the government of Nguyen Van Thieu would prove completely inept at grasping the essence of Chau's ideas, choosing instead to focus all attention on eliminating political opposition forces rather than concentrating on winning the allegiance of the people through pacification related reform. Chau, a former close friend of Thieu, would ultimately become his political prisoner, being confined on trumped up

charges of collaborating with the communists through his brother. This patriot turned prisoner turned out to be one of America's most political "hot potatoes." Fearing that support for Chau would signal dissatisfaction of the Thieu establishment, Washington did virtually nothing to support its longtime friend and ally as he languished for years in South Vietnamese prisons, ultimately to be turned over to the communists as a "prisoner of war." Accordingly, the fate of pacification was sealed just as securely as Chau's prison cell door.

Zalin Grant's well-researched account tracks Chau's story through the fall of Saigon, his years of internment and interrogation in communist "reeducation camps," through his eventual "repatriation" by his captors to a "normal life" in Saigon—with strict instructions to "see people" and to "not act like you're under control." Chau realized he was being released solely to become an informant for the communists. The free and democratic Vietnam Chau had dreamed of since the late 1940's was never to materialize, and the final chapter of his nationalistic quest finds Chau and his family fleeing Vietnam with the waves of "boat people" seeking their dreams elsewhere. Ultimately, Chau fled to the United States and chose to reside in the Los Angeles area, where he worked in the computer industry and ultimately won American citizenship.

The legend of the *Phoenix* in Egyptian mythology describes a beautiful bird that lived for five-hundred years and then consumed itself in fire, rising renewed from the ashes as a symbol of immortality. The only true *Phoenix* to emerge from the Vietnam experience is Chau himself, according to the author, for he alone can hold his head high knowing that he never strayed from the truths he knew to be self-evident.

STALAG LUFT 111: THE SECRET STORY*

Reviewed by Major Thomas K. Emswiler**

Most judge advocates are familiar with the movie "The Great Escape." Many can remember scenes of Steve McQueen in the "cooler" or escaping on motorcycle. While the heroism depicted in the film is entertaining, it offers little insight into POW life that would benefit a judge advocate. Colonel Arthur A. Durand, in his book, *Stalag Luft III: The Secret Story*, offers such insight.

Stalag Luft III is the camp from which the great escape was made. Although discussing the escape in brief, Colonel Durand's aim is not to retell that story. Instead, he seeks to provide a look into the day-to-day life of POWs. Through interviews with prisoners, guards, and relief workers, as well as through extensive research, including much unpublished material stored in military libraries and other archives, Colonel Durand has produced a book that vividly depicts POW life.

While that depiction alone is of interest, the book's greatest value to the judge advocate may be its anecdotal material. The book frequently relates prisoner treatment to the provisions of the Geneva Convention of 1929 and contains numerous examples that can assist a judge advocate in both understanding and teaching a class on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

Stalag Luft III was principally an officers' camp for downed aviators. From the point of shoot down to arrival at Stalag Luft III, all "pass[ed] through the eye of the needle, that indescribably small window that virtually all fliers had to pass through . . ." Colonel Durand traces a number of these journeys. Some were notable for their relative ease. Army chaplain Eugene L. Daniel, Jr., had such a journey. Chaplain Daniel remained behind with German wounded when his unit withdrew. As a consequence of his compassion, upon capture, he was initially afforded better treatment. Because he was a noncombatant, he expected to be immediately repatriated: he never was. Other POWs met brutal mistreatment on their journey

* Arthur A. Durand, *Stalag Luft III: The Secret Story*. Touchstone. 1988. Pages 363. Price \$10.95. Photographs, Notes, Appendix, Bibliography, Index. Publisher's Address: Touchstone, Simon & Schuster Building, Rockefeller Center, 1230 Avenue of the Americas, New York, New York 10020.

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through “the eye of the needle.” In some cases, this was at least partly attributable to their own conduct. Captain Roland L. Sargent was aided by Belgian resistance workers in an attempt to return to England. He was apprehended in Paris wearing civilian clothes and carrying no identification. His success in convincing the Gestapo that he was a flier and not a spy is given thoughtful attention. Others were less fortunate.

Many aviators were subjected to violence, intimidation, insults, and public curiosity in clear violation of GPW Article 13. The Nazis chose to publicly characterize allied fliers as “Luftgangsters.” Photos taken of the fliers when they first arrived at Stalag Luft III, dirty and tired, were circulated in support of this image. Many were attacked, tortured, and even lynched by mobs incited against the “Luftgangsters.” Some Germans encouraged this. The Westphalian defense minister was quoted as saying “pilots who are shot down are . . . not to be protected against the fury of the people. I expect from all police officers that they will refuse to lend their protection to these gangster types.” One American pilot was brought before a mob and an official asked “Is there a manure pitchfork available to kill this individual?” Hitler’s propaganda minister, Paul Josef Goebbels responded to this incident by writing, “It seems to us hardly possible and tolerable to use German police and soldiers against the German people when it treats murderers of children as they deserve.”

Interestingly, of the captured fliers Colonel Durand has written about, most misconduct flowed from civilian-political sources. As a general rule, the military treated these POWs properly. For example, while in transit to Stalag Luft III, Lieutenant James Keeffe was surrounded by a group of German women workers. As they spat and swung their lunch boxes at him and the other prisoners, they pleaded with the guard, “just give us one.” The guard fired his machine pistol into the air to protect the prisoners. Later in Lieutenant Keeffe’s journey, when an old man spat on him, a guard chased the man away shouting, “You damned civilian, get the hell away from these airmen and leave them alone! At least they’re fighting for their country and that’s more than I can say for you.”

In the same spirit, Colonel Von Lindeiner, the camp commandant, told his guards, “The Geneva Convention is the basis for our behavior. It is against the tradition of the German soldier to violate the precept of law, humaneness, and chivalry even against an enemy.” In fact, most German soldiers were trained in the GPW, and all were issued leaflets that they were required to keep with their pay books. As

a consequence, the prisoners at Stalag Luft III generally were treated well (Durand is careful to note that this generalization may not be extended to other POW camps). Nonetheless, even at Stalag Luft III, the GPW was sometimes ignored, violated, and was, in some instances, impossible to comply with.

In their prewar planning, the Germans never anticipated capturing such large numbers of prisoners. On average, camps held five times their capacity. Shortages throughout Germany made it difficult, if not impossible, for the Germans to provide the prisoners with an adequate diet. Nonetheless, the POWs' diet was at least as good as that of German soldiers and probably better than that of German civilians. Fortunately, the POWs were allowed to receive Red Cross parcels from the International Committee of the Red Cross (ICRC), and these provisions adequately supplemented their diet.

Apparently, throughout the war, the Germans generally respected the provisions of the GPW on the ICRC (at least as it pertained to allied POWs). At Stalag Luft III, aside from some war related disruptions in delivery, Red Cross parcels were regularly received. In some cases, the Germans even took extraordinary steps to ensure delivery. For example, when the only available route of delivery was from Sweden, by sea, the Germans dedicated two minesweepers as escorts for a period of nearly six months. Late in the war, Red Cross trucks were allowed to enter Germany in convoy to deliver POW supplies. Even though the parcels contained many items that were in short supply or nonexistent on the German economy, prisoners at Stalag Luft III noted that the German's sense of honor stopped them from stealing the items. Again, however, this sense of honor was not uniform throughout all German POW camps.

The Germans also respected the GPW's provisions on protecting powers. Prior to American entry in the war, the Americans fulfilled this role for British POWs. After American entry, Switzerland took over this function. Complaints were made to the protecting power and in some cases corrections were made. Other times, when the protecting power determined that the Germans were doing all that they could, the protecting power refused to voice the complaint. For example, the coal ration provided to POWs was comparable to that given German soldiers. Consequently, the protecting power refused to raise the prisoner's objection that the ration was inadequate.

Shortages in the German economy put the German military in a seemingly impossible position. To fulfill GPW obligations to the let-

ter, it would be necessary to undermine the war effort. To not fulfill the obligations would constitute a violation of international law. **This** dilemma is illustrated by camp commandant Colonel Von Lindeiner. He told ICRC representatives that the POWs demanded five times more than German soldiers received. He may have wondered how he could be expected to provide POWs with more than was given to troops in the field. In providing clothing, the Germans could not (or perhaps did not intend to) comply with GPW requirements. Clothing seized in Belgium was provided, however, and when supplemented by the Red Cross and "next-of-kin" packages (discussed below), sufficient clothing usually was available.

The Germans permitted the POWs to send and receive mail. In fact, the Germans regularly delivered allied mail more promptly than the Americans delivered German mail to German POWs. Additionally, although the 1929 GPW did not provide for receiving packages, the Germans allowed the POWs to receive "next-of-kin" packages containing books, food, clothing, and other needed items every two months.

In addition to the ICRC and protecting power, the Germans also allowed humanitarian visits by the YMCA. The YMCA supplied items such as hair clippers, religious material, books, sports equipment, and even eyeglasses. On one occasion, the Germans supplied the Americans with material requested for classroom use: a by-name U.S. command wire diagram (the Americans had asked for a chart to teach U.S. command structure).

Despite general compliance with the GPW, there were violations, often severe. Many violations were caused by the interference of political officials. The murder of fifty of the seventy-six officers who made the "great escape" was directed by Hitler, not the Luftwaffe. After the "great escape," control of the camps passed from the military to the SS. But, in order to comply with the letter of the GPW, if not the spirit, the SS officials placed in charge were transferred to the Waffen-SS and commissioned as generals. Operational control of Stalag Luft III remained with the Luftwaffe and on several occasions they chose to ignore directives from higher headquarters. For example, when an order was issued that no more than a one-day supply of Red Cross food would be issued at any one time, a request for exception was made by the senior American officer to the camp commandant. The policy was never implemented. After Hitler decreed that Luftwaffe prisoners were not to be buried with military honors, the camp adjutant, Major Simoleit, allowed at least one such

burial. The POW was a member of a ground crew and Simoleit reasoned that the order only extended to aviators. The funeral proceeded even after Simoleit learned that the POW was Jewish.

On reflecting on his probable fate, Major Simoleit said, "My future is very clear and simple. Either the Germans will shoot me dead for treason or the allies will hang me after the war because I was a jailer of men." Indeed, after the "great escape," Colonel Von Lindeiner was tried and convicted by the Germans. He faked mental disability and never served his sentence. At the war's conclusion, he was arrested by the British, tried, and exonerated, but spent two years as a POW.

GPW violations did occur in the camps. Although Stalag Luft III was located well away from combat zones, both previous and subsequently established camps were not. In fact, toward the end of the war, Hitler contemplated using POWs either as hostages or even as human shields against allied bombing. Near wars end, POWs were evacuated to new camps, but because their convoys were not properly marked, they were subjected to allied bombing and strafing.

Even at Stalag Luft 111, the Nazi characterization of the allied fliers as "Luftgangsters" was not without effect. Swept away by such propaganda, guards would occasionally subject POWs to brutal punishment for minor infractions. Guards were known to shoot prisoners for matters never previously announced as bases for punishment. Except for these tragic exceptions, punishments usually met the requirements of the GPW. The most common was two weeks in the 'cooler.'

The GPW was also of direct significance to the POWs. Colonel Delmar T. Spivey, who was, for a time, the senior American officer at the camp, remarked, "I had but faint recollection of what was in the treaty when I arrived in camp but I knew it by heart within three months after I had arrived. There isn't the slightest doubt in my mind that we would have perished otherwise." Copies of the GPW were posted throughout the camp.

The allies recognized that it was in their interest to at least appear to adhere to the GPW. Normal military courtesies such as saluting were observed. One potential crisis over saluting arose when the "Heil Hitler" salute was mandated. Senior Americans agreed to acknowledge it (in fear of greater SS involvement in the camp), but the British refused. The crisis was averted when the Germans in the

camp chose to interpret the rule as applying only between Germans. Similarly, the allies generally cooperated at appells (roll calls), because they realized that noncooperation would only prolong the process.

Camp life also included religious activities, educational programs, drama, and even publication of a camp newspaper. The Americans engaged in numerous self-help projects to improve their compounds, but the British usually refused to conduct such projects. The sole consequence was that the Americans generally had better facilities.

The allies were not entirely cooperative, however. Upon capture, most were told “fur you, da var ist ofer” (sic). It was not. They engaged in numerous activities aimed at harassing the Germans and tying up German resources. Escape was designated as the camp’s operational function.

Lesser forms of disturbance also had an effect. Douglas Bader, an English pilot with two artificial legs, annoyed the Germans to such an extent that they decided to move him to a higher security camp. It was with obvious satisfaction that he “sneered” as he was led from the camp by two columns of armed German guards. Another favorite activity was “goon baiting” (harassing the guards). This included appearing to play cards or read books in totally dark barracks when the guards made their nightly rounds and pouring hot water through the floor boards on the “ferrets” (guards) underneath looking for tunnels. The POWs taunted a German work crew that marched past the camp every day by singing “heigh, ho, heigh ho, it’s off to work we go.” After several days the work crew changed its route. Recognizing that the Germans were willing to repatriate POWs who were medically unfit, one prisoner feigned mental illness. Upon repatriation he wrote back, “who’s crazy now.” On the darker side, one POW, who was mentally ill, was denied treatment. He was shot and killed when he threw himself onto the wire.

The POWs also engaged in activities of greater significance. Discipline was maintained through a chain of command and the camp was run as a military unit, complete with inspections. “Legal assistance” was even provided to POWs in need of powers of attorney or financial advice. Officers were given advances of pay, but under the existing GPW, NCOs were not (most of the few NCOs present in the camp were there as officers’ orderlies). Because NCOs could only be paid for supervisory work and there were no enlisted to supervise, the officers lent them money so that they could purchase supplies at the canteen.

All newly arrived pilots were debriefed, and information of significance was passed to England via coded letters and casualty reports. Information was also collected on the parole walks the Germans allowed POWs to take outside the camp. Accepting parole was, like now, generally forbidden, but the POWs accepted parole walks because they believed the benefit accrued to the camp and not to the individual. Radio receivers were obtained and hidden throughout the camp. Through bribes to the guards, cameras were obtained and the film initially was developed commercially on the German economy. Later, darkroom equipment was obtained in the camp. Numerous tunnels were dug and an enormous infrastructure of forgers, uniform makers, suppliers and tunnelers developed. German entry into the compounds was monitored openly and continuously. One time, a German supervisor asked to see the log the prisoners kept to keep track of the guards, then left immediately. Two guards who had left the compound before the end of their tour of duty were punished as a consequence. In conclusion, *Stalag Luft III: The Secret Story* presents a thoughtful look at day-to-day life in a prisoner of war camp. It provides many insights, both from the perspective of the captor and the captive, on the application of the Geneva POW Convention. Reading it would benefit, any judge advocate seeking to better understand these problems. The clear prose and narrative style is a pleasure to read.

OPERATION DRUMBEAT*

Reviewed by Major Fred L. Borch**

Operation Drumbeat is a wonderful book. It tells the amazing true story of Germany's first submarine attacks along America's eastern seaboard in World War II. The book is certainly one of the best non-fiction history books of the last few years, and military lawyers will greatly enjoy reading it.

Until the United States entered the war in December 1941, American shipping was off-limits to the German U-boat packs. This was a source of anger and frustration to the German submarine commanders, as they saw clearly that American aid to Great Britain was keeping it in the war and preventing Hitler's victory in the West. Britain depended on the "bridge of ships" across the Atlantic for "much of her food, many of her finished weapons, most of her raw materials, and all of her oil." If the U-boat fleet were to sink more ships than the Allies could build, then the "bridge of ships" would collapse, and Britain would be forced to surrender. Without Britain as a marshalling area, any Allied invasion of Europe would be difficult, if not impossible.

With the surface ships of the Kriegsmarine (German Navy) bottled up in German ports by the Royal Navy, only the U-boat could take the *offensive* against the Allies. After Germany's declaration of war on the United States, American and other Allied shipping could be attacked without restraint. Admiral Donitz, the head of the U-boat forces, recognized that American shipping could best be attacked in United States waters, from New York in the north to Florida in the south. He codenamed his operation "Paukenschlag," which translates as "drumbeat." The name was to reflect the operation's goal--"to inflict a sudden severe injury on the American enemy." Simultaneous initial attacks on American shipping would be a blow "like the percussion of a timpani stick on the tightly stretched head of a brass-barreled drum." The sinkings would not only disrupt cargo transport, but also would have a severe psychological effect. *Operation Drumbeat* tells the story of this German submarine campaign. It argues convincingly that the U-boat "blitzkrieg" against American coastal shipping from January-July 1942 was an "Atlantic Pearl Harbor"—

*Michael Gannon, *Operation Drumbeat*. New York: Harper and Row, Publishers, Inc., 1990. Pages 490. Price: \$24.95. Hardcover.

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a catastrophe that was not only greater in magnitude than the disaster of December 7, 1941, but was the “American nation’s worst-ever naval defeat at sea.”

Author Michael Gannon, a professor of history at the University of Florida in Gainesville, follows this “Drumbeat” submarine campaign by focusing on U-123, the most successful U-boat in the German naval operation, and her commander, Reinhard Hardegen. The U-boat fleet’s motto was “Attack! Advance! Sink!,” and Hardegen’s approach to submarine warfare reflected that motto. A career naval officer, Hardegen began his service after commissioning as a naval aviator, but a near fatal crash took him out of flying. Although he walked with a limp and officially was “unfit” for submarine duty, Hardegen’s aggressive spirit and solid tactics brought him to Donitz’s attention. When “Operation Drumbeat” was planned, it was Hardegen who was hand-picked by Donitz to be a part of the initial attack.

A few days before Christmas of 1941, Hardegen sailed as commander of U-123 from the Kriegsmarine’s U-boat pens on the coast of France. A few weeks later he was off Nantucket, and on January 13, 1942, Hardegen’s U-boat sank a ship off Long Island. The next evening, the captain and crew of U-123 were at the opening to New York Harbor, where they were able to see a brightly lit New York skyline. Before returning to France on February 6, 1942, Hardegen and his men sank 8 more ships, for a total of 9 ships totalling some 53,000 tons. Hardegen and U-123 returned for a second mission against Allied shipping in March 1942, and successfully sank another 10 ships between Hatteras and Key West. Hardegen’s 19 ships made him the most successful U-boat captain of “Operation Drumbeat,” but other U-boat operations also inflicted staggering losses. Professor Gannon shows that the U-boats sank a total of 397 ships in United States Navy protected waters during the *first* half of 1942, with a loss of some 5000 lives. Only six U-boats **were** lost. It was a catastrophe. If it is remembered that no aircraft carriers were sunk at Pearl Harbor, that all the United States Navy’s heavy cruisers and half her destroyers escaped, and that a mere six months later at Midway the undamaged units inflicted defeat on the Imperial Japanese Navy, it is apparent that “Operation Drumbeat” was an “Atlantic Pearl Harbor” for the United States Navy. Furthermore, it was one that could have been avoided, as British intelligence had cracked the German naval cipher and had been regularly passing on information about German U-boat positions to the United States Navy. The blame for the disaster lies not with naval intelligence, but with naval opera-

tions. Just who was to blame, and why the United States Navy failed to defend against the U-boats is discussed at length in *Operation Drumbeat*. The reader can best judge whether Professor Gannon is accurate in his investigation of the United States Navy's fighting effectiveness and his assignment of blame. In any event, what finally halted the U-boat campaign in United States waters was the creation of an effective coastal convoy system, patterned after that used by the Royal Navy. These convoys drew the U-boats to them like iron filings to a magnet, where Allied warships were better able to destroy them while repelling any U-boat attack.

In addition to telling the true story of the "Atlantic Pearl Harbor," *Operation Drumbeat* details much about the U-boat and its tactics. Hollywood would have us believe that a U-boat traveled perpetually under water and attacked undersea, also. This is a myth; a U-boat *could* go underwater to escape attacking ships and planes, or to avoid rough seas. But it usually cruised and fought on the surface, like a torpedo boat; it voyaged on the surface of the sea because a U-boat could go faster and farther on its fuel on top of the sea than submerged (U-boat diesel engines had a maximum speed of 18¼ knots on the surface as opposed to a mere 7.3 knots submerged). It usually attacked on the surface because it could use not only its torpedoes, but also its on-deck 3.7 cm gun to destroy shipping. Moreover, on several occasions U-123 and other U-boats destroyed American and allied shipping using *only* this cannon when all their torpedoes were expended.

Professor Gannon paints a vivid picture of life aboard an U-boat. Conditions were cramped---sleeping bunks were shared, there was but one head and no shower, and no privacy for any of the crew. There was no central heating system, and the few space heaters did little to keep the interior of the U-boat warm. The cold waters of the Atlantic meant it was cold inside the U-boat, and fog often enveloped the crew. Only the wind was kept out. But morale was high, for the U-boat forces saw themselves and were seen as the elite.

Operation Drumbeat is well-researched and written. Never boring, its pages reveal a part of the Second World War that has been overlooked. Professor Gannon is no apologist for Nazi ideology. nor does he seek to glorify the German war effort. Rather, he presents a balanced account of history as it occurred.

WAR: ENDS AND MEANS*

Reviewed by Major David S. Jonas (USMC)**

A thought-provoking, witty, timely, and incisive work, this book discusses all aspects of wars, including how they begin, how they are fought, and how they conclude. Other significant ingredients of war discussed in this scholarly work include the political and material conditions of battle, political warfare, intelligence, and the concept of a just war. This book reads like a novel, yet is suitable for academic use at any level. The joint concern of the authors that our nation has collectively forgotten the lessons and meaning of war animates every page. Designed for laymen rather than military experts, one hopes it will be widely read. Their timely message concerns the clear dangers of failure to comprehend the utility of war and the dangers of peace.

Because the scourge of war has not touched American soil for over a century, and the study of military history has fallen out of favor, the current generation of Americans treat war as a spectator sport. But war is essentially a nasty business, and Americans must understand its fundamental nature. Equally important is the understanding that nations have regretted not going to war as often as they have regretted committing to it. One of the many apropos historical analogues utilized concerns Rome, where during its ascendancy military service was considered a privilege of citizenship. Yet when the barbarians and imminent destruction loomed on the horizon, the Roman leaders would not even consider lifting a weapon to defend the city; in fact, they had grown so soft that they could not even offer a credible bluff. A disturbing parallel is drawn to contemporary American society, were we too have grown soft in pursuit of the finer aspects of life. Generations of peace have allowed us this luxury. The few wars we have waged have been on foreign soil. The authors assert that the burdens of battle have fallen mainly to the lower classes, while those who rule do not serve. Ours begins to look like a mercenary army, and such forces have never historically succeeded in keeping the peace and remaining subservient to civilian rule. Sooner or later, the authors warn, we will have to account for this.

Immediately discredited is the contemporary love for the siren song of peace, which popular notions declare to be the greatest good. Peace actually can be a far greater evil than war. In our century,

* *War: Ends and Means*, by Paul Seabury and Angelo Codevilla. Basic Books, Inc., New York (1989). 306 Pages.

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roughly 120 million people have been killed by governments in times of peace, while approximately 36 million have perished in war. This explains "the otherwise incomprehensible Roman saying that death on the battlefield is sweet." The two kinds of peace most commonly imposed in the absence or aftermath of war are "the peace of the dead" and "the peace of the prison." These kinds of peace involve hunger, slave labor, exposure, beatings, gassings, torture, and death. The peace of the dead is attained by killing off one's enemies, while the peace of the prison is accomplished by keeping one's people captive, as all Communist states currently do. It surely does not take much of that type of peace to make war seem a very attractive option.

The next myth the book explodes is that nuclear weapons are merely "scarecrows." Rather, they are viable weapons that give today's generals more options, but less time to react. The book also shatters the idea of the "accidental" war by illustrating the articulable and deliberate steps that always precede battle.

In startling graphic language, the authors depict war as squeezing "blood and treasure" out of a society. The stress that ensues as a result can have profound results, frequently changing the course of a nation. The key lesson is not to lose a war and thus risk an undesirable peace.

The authors state that war is more likely today than ever before in history, and they convincingly explain why the United States is a tempting target. We are collectively portrayed to significant portions of the world as the cause of their woes, and modern propaganda neatly sharpens and focuses their hatred. Should American dare lose a war, plenty of takers would gladly occupy our nation "both to taste its delights and to punish its people." An even more sobering prediction is that the occupiers would probably come from a tradition accustomed to cruelty. Warnings bolstered by logic such as this pepper the pages and jolt the reader. It is explained why wars will continue, and why war has been the historical norm and not an aberration. Indeed, only our tradition seeks peace as a philosophical goal. But the next time someone recommends peace, the response must be, "Whose peace, and what kind of peace?"

Another vital lesson driven home by the authors is that nations are well-advised to keep their weapons. History teaches that nations armed to the teeth generally can attain a desirable peace, while gentle nations lacking a military power, although truly aspiring to peace, are usually gobbled up by aggressors. Furthermore, larger nations negotiating on behalf of smaller nations and urging them to accept

concessions is a particular peril to the small nations. The authors compare the experiences of the Contras and the Israelis and conclude that “he who has good arms will always have good friends.”

This work forces the reader to grapple with difficult philosophical, political, economic, and moral questions with impact on our society and reflect the way we prepare for and fight wars. For example, the authors claim that military alliances that provide security for our allies cause them to think and spend less on their own defenses, while being ultimately counterproductive. Our all-volunteer military is scrutinized and viewed as turning the inherently political question of who will bleed in war into an economic issue. Thus, we have filled our ranks by offering sufficient compensation and benefits, and by using slick and sometimes deceptive advertising to enhance recruiting. Because this has resulted in the bulk of our military hailing from the lower socio-economic strata of society, the families who pay the “blood tax” have only a “theoretical connection with the policymakers.” The authors claim that “this situation is fraught with danger.” Economics also has resulted in a military force comprised of over ten percent women—a structure without historical precedent. The authors criticize and question this policy and predict “bitter recrimination” when women fall on the battlefield.

Finally, the authors take exception to our policy against assassination. On its face, it seems noble not to target a specific individual. Yet the compelling rationale advanced in favor of this practice convinces the reader that our current stance is dubious. Why should not Hitler have been assassinated during World War II? Who caused more harm than he? Why not target Saddam Hussein now? Is not he most responsible for all the suffering? The soldiers who we target for destruction are mere conscripts who had no choice about whether to enter the fray.

Thus, the authors categorically debunk numerous contemporary illusions and policies pertaining to war and peace. Each section of the book reveals brilliant analysis, in-depth research, and forceful logic. Replete with witty aphorisms and colorful analogy, the book is also exceptionally timely. In keeping with their assertion that war has not fundamentally changed over the millennia, the authors use ancient examples that neatly fit today’s circumstances.

Stripped to its bare essentials, the book gives a clear warning to our society that we must truly understand the nature of the peace we seek—not only for ourselves, but for our allies. For **if** we view war **as** anything but an appropriate and viable alternative to an unacceptable peace, then we may one day unwittingly settle for a peace more hellish than any war we have known.

By Order of the Secretary of the Army:

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