Volume 209 **Fall 2011**

MILITARY LAW REVIEW

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Department of Army Pamphlet 27-100-209

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Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-209, Fall 2011

MILITARY LAW REVIEW—VOLUME 209

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SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are $20 each (domestic) and $28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 209 MIL. L. REV. (page number) (Fall 2011). Each issue is a complete, separately-numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

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MILITARY LAW REVIEW

Volume 209 **Fall 2011**

PROBABLE CAUSE IN CHILD PORNOGRPAHY CASES: DOES IT MEAN THE SAME THING?

MAJOR JACOB D. BASHORE*

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence.[1]

I. Introduction

In today's ever-increasing complex and technological world, the dissemination and possession of child pornography[2] has never been more

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[1] Boyd v. United States, 116 U.S. 616, 630 (1886) (discussing the purpose of the Fourth Amendment).

[2] For the purposes of this article, the term "child pornography" is used as defined in 18 U.S.C. § 2256 (2006). Some say that child pornography is mislabeled because it is the permanent depiction of sexual abuse of children. *See* YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW 11 (2008) (citing Vernon Jones & Elizabeth Skogrand, *Visible Evidence—Forgotten Children*, SAVE THE CHILDREN EUROPE (Oct. 2006),

widespread.[3] It has never been easier to acquire large collections of vile, illegal depictions of children being abused in the worst ways imaginable.[4] As a result, the number of prosecutions involving child pornography has been steadily rising over the past two decades.[5] This trend has not been unique to the civilian sector, as the military has seen a similar increase.[6]

Some have used the horrendous nature of child pornography to argue that the courts have created a lesser probable cause standard in child pornography cases simply because of the despicable nature of the crime.[7] This argument is largely recycled rhetoric from the days when drug searches were shaping Fourth Amendment jurisprudence,[8] but, at least in

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available at http://www.europarl.europa.eu/hearings/20070417/libe/save_the_children_1_en.pdf (last visited Feb. 21, 2012) ("The term 'child pornography' . . . undermines the seriousness of the abuse. It also tends to oversimplify what is a very complex social problem, and . . . the term 'child abuse images' . . . better reflects the nature of the offense."). However, not all depictions meeting the definition as defined in 18 U.S.C. § 2256 are the result of children being sexually abused. KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 110–11 (5th ed. 2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf.

[3] LANNING, *supra* note 2, at 81.

[4] *Id.* at 79–80 (classifying pre–internet boom collectors as better educated, wealthier, and older as opposed to today where any individual can quickly obtain a large collection via the internet); Robert Booth, *EU Fights Huge Increase in Web Child Abuse*, THE GUARDIAN (Mar. 4, 2009), http://www.guardian.co.uk/society/ 2009/mar/04/child–sex–abuse–websites–increase (citing a fourfold increase in Europe of child abuse websites between 2004 and 2007). *See generally Child Pornography: Model Legislation and Global Review*, INT'L CENTRE FOR MISSING & EXPLOITED CHILDREN (5th ed. 2008), *available at* http://www.icmec.org/en_X1/English__5th_Edition_.pdf (finding only 29 of 187 Interpol member countries have enacted legislation sufficient to combat child pornography).

[5] AKDENIZ, *supra* note 2, at 130–39 (discussing the rapidly rising federal prosecution rate for child pornography offenses from 1995 to 2006; in 1995 five offenders were convicted as compared to 1251 in 2006).

[6] In Fiscal Year (FY) 2001, the Army charged twenty-one soldiers with possession of child pornography. From FY 2008 until FY 2010, the Army averaged sixty-four child pornography cases per year. E–mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court Criminal Appeals (Nov. 17, 2010) (on file with author).

[7] United States v. Coreas, 419 F.3d 151 (2d Cir. 2005) ("Child pornography is so repulsive a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules. If they do so, however, they endanger the freedom of all of us.") (upholding warrant only because of *stare decisis*).

[8] JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 97 (2001) ("In fact, it is widely understood by attorneys and legal commentators that there is a 'drugs exception' to the Bill of Rights."); *see also* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889

the case of *United States v. Clayton*,[9] it has some validity.

The Court of Appeals for the Armed Forces (CAAF) has dealt with two cases over the past two years involving the sufficiency of evidence presented to obtain authorization to search for and seize evidence of child pornography. First, in *United States v. Macomber*, the court found that the magistrate properly issued a search authorization[10] when Airman First Class Macomber paid to access a child pornography website and then fourteen months later ordered two child pornography videos from undercover agents.[11] In the second case of interest, *United States v. Clayton*, the CAAF ruled that there was probable cause to seize and search media when Lieutenant Colonel Clayton was found to be a member of an internet discussion group which may have distributed child pornography via an e-mail digest.[12] Judge Ryan, who authored dissenting opinions in both cases, argued in *Clayton* that "[t]he Court today appears to champion the idea that there is something *de minimis* about the Fourth Amendment's requirements when the thing sought by a search authorization or warrant is child pornography."[13] Other judges throughout the federal circuits have expressed similar concerns.[14]

This article specifically argues that the CAAF got it right in *Macomber* by properly applying traditional Fourth Amendment principles to current technology. While there may be new variables that the founders of our country did not envision, the courts are applying the same historical legal analysis. However, the CAAF took a step too far when they saved the nearly "bare bones" affidavit prepared by the investigator in *Clayton* by declaring that sufficient evidence was presented to establish probable cause. Had the agent spent some more time investigating the case to obtain specific information about Clayton and his interaction with the discussion group, the CAAF would likely have been on solid ground in affirming the search based on probable cause. However, the agent's failure to address nexus to the place searched and to provide a complete description of the website that

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(1987).

[9] 68 M.J. 419 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 595 (2010).

[10] The competent military authority issues a "search authorization" as opposed to a "search warrant," which is issued by civilian authorities. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(b)(1)–(2) (2008) [hereinafter MCM].

[11] United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009).

[12] 68 M.J. 419 (C.A.A.F. 2010).

[13] *Id.* at 428 (Ryan, J., dissenting).

[14] *See* cases cited *supra* note 7 and *infra* note 327.

Clayton joined, along with the inability to classify Clayton as a child pornography collector in order to rely on profile information, left the magistrate with little more than a suspicion that Clayton possessed child pornography in his quarters. Thus, if the CAAF was determined to sustain the search, the court should have relied on the deference given to magistrates and the warrant process to declare the evidence admissible, or even the good faith reliance of the investigator on the warrant, rather than affirming insufficient evidence as an adequate basis for probable cause.

This article compares *Macomber* and *Clayton* to prior military and federal circuit courts jurisprudence and concludes with an appendix incorporating the lessons learned in determining the existence of probable cause in child pornography cases. Part II examines the origins of the Fourth Amendment, current case law regarding the standards for obtaining a search authorization, Military Rule of Evidence (MRE) 315's[15] application to those standards, and how the standard of appellate review affects case outcomes. Part III examines the factors that the CAAF found significant in determining that probable cause existed in *United States v. Macomber* and *United States v. Clayton*. Lastly, Part IV analyzes the totality of the circumstances test as it relates to child pornography and other crimes by comparing *Macomber* and *Clayton* to federal circuit cases. The article will discuss how the totality of the circumstances test is applied and how the following areas meet that test: staleness of the evidence; establishment of a nexus to the place searched, including ownership of a computer and access to the internet; the use of profile information; subscription to websites containing illegal images; and sufficiency of the affidavit in describing the child pornography on which the affidavit is based and the items to be seized. Considering all of these factors, this article concludes that the CAAF's decision in *Macomber* was consistent with the Fourth Amendment and similar cases in the federal circuit. However, in *Clayton*, the CAAF ignored precedent and Fourth Amendment principles when the court encroached on the right to personal security and liberty in finding probable cause to save the deficient search authorization.

[15] MCM, *supra* note 10, MIL. R. EVID. 315.

II. Search and Seizure

To understand the totality of the circumstances test and its current application, one must review the origins and history of search and seizure law.

A. Fourth Amendment

The Fourth Amendment simply states,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[16]

1. History and Meaning

When analyzing a Fourth Amendment issue, the Supreme Court requires courts to look to the original intent of the Framers of the Bill of Rights.[17] Strange as it may seem, the Senate did not debate the Fourth Amendment until three years after it was ratified.[18] Thus, it is somewhat difficult to discern exactly what the founders of our country intended when the Fourth Amendment was proposed. While there is debate among constitutional scholars as to the exact original intent of the amendment,[19] what is clear is that the founders abhorred the "colonial epidemic of general searches" that were used by the British prior to America's

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[16] U.S. CONST. amend. IV.

[17] "In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." Florida v. White, 526 U.S. 559, 563 (1999).

[18] THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 20 (2009).

[19] BRUCE A. NEWMAN, AGAINST THAT "POWERFUL ENGINE OF DESPOTISM," at xiv–xvii (2007) (describing the following three views: (1) the Fourth Amendment only requires that searches be reasonable, (2) the Fourth Amendment requires a warrant for the search to be deemed reasonable, and (3) the Fourth Amendment requires warrants for searches on private property and only reasonableness to search public areas).

independence.[20] John Adams demonstrated the importance of the issue when he stated that the British use of general warrants and refusal to follow colonial legislation banning general warrants was "the spark in which originated the American Revolution."[21]

Prior to 1791, there was a movement in England to prohibit these general warrants, also called writs of assistance.[22] As far back as 1604, Sir Edward Coke stated that "[t]he house of every one is to him as his castle and fortress" when arguing against arbitrary entry of the home by the government.[23] Where the common law had advanced over the century prior to 1776 to require specific warrants, the colonialist's homes were routinely searched by power of general warrants issuing blanket authority to search without the presentation of evidence or individualized suspicion.[24] These issues were hotly debated in the years prior to independence, to include James Otis Jr.'s famous argument in the 1761 Boston Writs Case decrying the issuance of general warrants while acknowledging the legitimacy of properly issued specific warrants.[25]

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[20] LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 154 (2001) (citing WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (1990) (Ph.D. Dissertation at Claremont Graduate School)).

[21] 1 CHARLES FRANCIS ADAMS & JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 59 (1856); *see also* NELSON BERNARD LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937).

[22] Boyd v. United States, 116 U.S. 616, 625–31 (1886) (discussing the inevitable affect of general warrants on the founders and quoting in length Lord Camden's opinion in *Entick v. Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1029 (1765)).

[23] Semayne's Case, 77 Eng. Rep. 194 (1604).

[24] PHILLIP HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 21–23 (2005).

[25] *Id.* at 23–30. John Adams quoted Mr. Otis as saying

> I will admit, that writs of one kind, may be legal, that is *special writs, directed to special officers*, and to search *certain* houses &c, especially set for in the write, may be granted by the Court of the Exchequer at home, *upon oath made* before the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed* in THOSE VERY PLACES HE DESIRES TO SEARCH.

Id. at 26 (emphasis and capital letters in original). Mr. Otis went on to use the terms "probable suspicion" and "probable grounds" when describing the information to be presented under oath to a magistrate. *Id.* (emphasis removed). The Massachusetts legislature passed a bill which supported Mr. Otis's view of specific warrants in 1762, but the bill was vetoed by the British governor. *Id.* at 30–31.

While the impetus of the Fourth Amendment was to forbid the use of general warrants, the Fourth Amendment makes clear that the Framers went further than just prohibiting general warrants.[26] While certainly not prohibiting all searches and seizures,[27] the Fourth Amendment also prohibits "unreasonable searches and seizures," and when warrants are issued, they must be based on probable cause.[28] The key point in forcing the government to obtain a warrant is to prevent an arbitrary decision of the government as to what constitutes probable cause resulting in an unreasonable invasion of an individual's privacy interest. The exact meaning of what constitutes probable cause drives much of the subsequent case law.

2. Case Law Development Pre-1983

In early American history, the federal government played a limited role in criminal law resulting in few early cases to develop the breadth of search and seizure law.[29] It was not until 1886 that the Supreme Court gave substance to the Fourth Amendment as it applied to civilian criminal law,[30] and it was not until 1914 when the Court forcefully applied the principles of the Fourth Amendment in *United States v. Weeks*.[31] In *Weeks*, the Court established the sanctity of the home by holding the federal government cannot forcefully enter, search, and seize private property unless a constitutionally proper warrant is obtained.[32] A

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[26] MCINNIS, *supra* note 18, at 20.
[27] *Id.* at 97.
[28] The First Congress, which adopted the Bill of Rights, passed legislation allowing the suspicionless and warrantless boarding of vessels to examine the ship's manifest. United States v. Villamonte-Marquez, 462 U.S. 579, 592 (1983) (citing the drafter's interpretation of the Fourth Amendment in upholding the warrantless, yet reasonable, boarding of a vessel by customs agents).
[29] LASSON, *supra* note 21, at 106.
[30] Colonel Fredric I. Lederer & Lieutenant Colonel Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110, 117–18 (1994) (citing Boyd v. United States, 116 U.S. 616 (1886) (holding compulsory production of books and papers for use against the owner violated the Fourth and Fifth Amendments)).
[31] 232 U.S. 383 (1914). In 1961, the Court applied Fourth Amendment protections and the exclusionary rule to state governments through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). The Fourteenth Amendment was ratified in 1868. The Due Process Clause states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.
[32] *Weeks*, 232 U.S. at 393 ("The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution

search without a warrant was deemed per se unreasonable.[33] For the first time, the Court instituted the exclusionary rule by reversing the conviction of the accused and returning the unlawfully seized goods to the accused.[34] The Court specifically stated that the amendment was not directed at individual action, but that of the federal government.[35]

The scope of the Fourth Amendment continued to grow when the Court established that the Fourth Amendment applies to people, not to places.[36] Thus, the home is not the exclusive place in which a person has sanctuary.[37] If a person has a reasonable expectation of privacy in a place,[38] "he is entitled to be free from unreasonable government intrusion"[39] and law enforcement must seek a warrant from an

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. . . .").

[33] *Id.*; *see also* Johnson v. United States, 333 U.S. 10, 14–15 (1948) (holding that, barring "exceptional circumstances," a warrantless search is unlawful no matter how much evidence is present for a probable cause determination).

[34] Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("[Exclusion] was a matter of judicial implication."); *Weeks*, 232 U.S. at 398–99. The exclusionary rule is not an individual right, is not constitutionally mandated, and is only applied if exclusion can deter police misconduct in the future. Herring v. United States, 555 U.S. 135, 140 (2009). Prior to *Weeks*, unlawfully obtained evidence was admissible at trial against the defendant, but the defendant had a civil cause of action against the officer in tort. NEWMAN, *supra* note 19, at 13.

[35] *Weeks*, 232 U.S. at 398. The Fourth Amendment does not apply unless there is a governmental invasion of privacy. *See* Rakas v. Illinois, 439 U.S. 128, 140–49 (1978) (discussing the basis of possessing a "legitimate expectation of privacy" in the place searched).

[36] Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citations omitted)).

[37] *Katz*, 389 U.S. at 359 (finding a reasonable expectation of privacy in communications); *see also* United States v. Huntzinger, 69 M.J. 1 (C.A.A.F. 2010) (finding a reasonable expectation of privacy in a deployed environment). *But see* Texas v. Brown, 460 U.S. 730 (1983) (finding no expectation of privacy to the visible interior of an automobile); California v. Greenwood, 486 U.S. 35 (1988) (finding no expectation of privacy in sealed trash bags left for collection at curbside); United States v. Michael, 66 M.J. 78 (C.A.A.F. 2008) (finding no expectation of privacy in a laptop computer left in restroom).

[38] *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("There is a twofold requirement, first that a person have exhibited an actual subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

[39] Terry v. Ohio, 392 U.S. 1, 9 (1968). The Court added, "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

independent magistrate before invading that area of privacy.[40] The independence of the magistrate is key, as law enforcement officers "may lack sufficient objectivity" to weigh the evidence properly in determining if there is probable cause to search a particular place.[41]

In *United States v. Carroll*, the Court only required a warrant to be obtained when "reasonably practicable."[42] The Court allowed a warrantless seizure when the officer had probable cause to believe that an item was contraband.[43] This initiated nearly a century of wordsmithing to determine what exactly constitutes probable cause. The Court's acknowledgment that probable cause is "incapable of precise definition or quantification into percentages"[44] created various definitions and argument in the law. Shortly after the *Carroll* decision, the Court said that probable cause is "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."[45] This appears to be a fairly high standard, but looks can prove to be deceiving. The Court had earlier said in *United States v. Locke* that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."[46] While stating what probable cause is not, the *Locke* definition is still unclear because it fails to state what amounts to probable cause. The Court clarified in *Brinegar v. United States* that the

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[40] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) ("Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement.").

[41] Steagald v. United States, 451 U.S. 204, 212 (1981); *see also* Johnson v. United States, 333 U.S. 10, 13–14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is . . . [i]ts protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

[42] 267 U.S. 132, 155–56 (1925) (holding that the warrantless search of a vehicle for illegal liquor was lawful when the officer had "reasonable or probable cause" that contraband was present).

[43] *Id.* The Fourth Amendment denounces only unreasonable searches and seizures. *Id.* at 147.

[44] Maryland v. Pringle, 540 U.S. 366, 371 (2003).

[45] Dumbra v. United States, 268 U.S. 435, 441 (1925) (quoting Stacey v. Emery, 97 U.S. 642, 645 (1891)).

[46] 11 U.S. 339, 348 (1813), *quoted in* Brinegar v. United States, 338 U.S. 160, 175 (1949) *and* United States v. Ventresca, 380 U.S. 102, 107 (1965).

facts known to the officer must be more than "bare suspicion."[47] When the cautious investigator has "reasonably trustworthy information" to believe that a crime is being or has been committed, he has sufficient information with which to establish probable cause to seek a warrant.[48]

The requirement for only "reasonably trustworthy information" appeared to be well established until *Aguilar v. Texas*[49] and *Spinelli v. United States*[50] were decided in the 1960s. The Court established a two-prong test to determine the sufficiency of probable cause to issue a warrant. First, the affidavit seeking a search warrant must set forth the "'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the informant's" information.[51] Second, the affiant must "attempt to support their claim that their informant [i]s 'credible' or his information 'reliable.'"[52] The resulting *Aguilar-Spinelli* test created a more doctrinally rigid definition of probable cause[53] while the Court continued to use some of the same terms that had become the foundation of Fourth Amendment jurisprudence.[54] But the *Aguilar-Spinelli* test had a short lifespan.

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[47] 338 U.S. 160, 175 (1949); *see also* Nathanson v. United States, 290 U.S. 41 (1933) (holding that officer's suspicion without any supporting facts was insufficient for magistrate to find probable cause).
[48] *Brinegar*, 338 U.S. at 175–76 (citing *Carroll*, 267 U.S. at 162).
[49] 378 U.S. 108 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).
[50] 393 U.S. 410 (1969), *abrogated by Gates*, 462 U.S. 213.
[51] *Spinelli*, 393 U.S. at 413.
[52] *Id.* The test was controversial. Justice Black said that *Aguilar*

> went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial. . . . But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions. Of course, it would strengthen the probable–cause presentation if eyewitnesses could testify that they saw the defendant commit the crime. . . . Nothing in our Constitution, however, requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search.

Id. at 429 (Black, J., dissenting).
[53] *Gates*, 462 U.S. at 230 n.5, 235 n.9.
[54] The court stated that "the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit." *Spinelli*, 393 U.S. at 415 (majority opinion) (citing United States v. Ventresca, 380 U.S. 102, 108 (1965)). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id.* at 419 (citing Beck v. Ohio, 379 U.S. 89, 96 (1964)).

3. Illinois v. Gates and Beyond

In *Illinois v. Gates*, the Supreme Court returned to the "nontechnical" analysis of "probabilities" established in *Brinegar*.[55] The Court retreated from their prior decisions in *Aguilar* and *Spinelli* which established that "veracity" and "basis of knowledge" were critical prongs of probable cause.[56] The Court found that the *Aguilar-Spinelli* test was being interpreted as a "rigid, technical methodology" which had been incorrectly instituted into Fourth Amendment jurisprudence.[57] Instead, the Court ruled that probable cause must be analyzed by looking at the traditional "totality of the circumstances."[58]

Citing past precedent, the Court re-established the meaning of probable cause[59] by stating that "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[60] The Court elaborated,

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.[61]

The Court returned to a "circumstances which warrant suspicion"

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[55] 462 U.S. 213 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
[56] *Id.* at 271.
[57] *Id.* at 232 n.6.
[58] *Id.* at 238 (citing United States v. Ventresca, 380 U.S. 102 (1965)); Jones v. United States, 362 U.S. 257 (1960); Brinegar v. United States, 338 U.S. 160 (1949)).
[59] *Id.* at 232 ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").
[60] *Id.* at 231 (quoting *Brinegar*, 338 U.S. at 175). The Court stated that a "prima facie" showing of criminal activity is not the standard. *Id.* at 235 (quoting United States v. Spinelli, 393 U.S. 410, 419 (1969)).
[61] *Id.* at 231–32 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

standard established in *Locke*.[62] The Court further defined the term by stating that the probable cause standard is not "proof beyond a reasonable doubt or by a preponderance of the evidence, [which is] useful in formal trials, [but has] no place in the magistrate's decision."[63]

In re-establishing the standard, the Court acknowledged that innocent citizens would sometimes be subjected to search and seizure while being ultimately vindicated, but "to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands."[64] Thus, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[65] This probable cause standard has also been termed "substantial basis"[66] and "reasonable belief."[67]

Over the past thirty years, the Court has continued to apply the *Illinois v. Gates* analysis.[68] The Court has not created a more stringent requirement than the "totality of the circumstances" test.[69] Further refinement of the term dictated that probable cause to search does not require evidence sufficient to arrest a person,[70] and "does not demand any showing that such a belief be correct or more likely true than false,"[71] nor does it have to be more than a "fifty-percent" probability.[72]

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[62] *Id.* at 235 (quoting Locke v. United States, 7 Cranch 339, 348 (1813)).
[63] *Id.* at 235.
[64] *Id.* at 245 n.13.
[65] *Id.* at 238.
[66] The magistrate must have had a "substantial basis" for concluding that there was probable cause to conduct the search. *Id.* at 238–39; *see Investigations and Police Practices*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 3, 26 n.68 (2010) (listing cases from the circuit courts discussing "substantial basis").
[67] United States v. Taketa, 923 F.2d 665, 674 (9th Cir. 1991) ("[T]he correct inquiry is whether there was reasonable cause to believe that evidence of . . . misconduct was located on the property that was searched.").
[68] As of 2009, the Court cited to *Gates* to reaffirm the "'fair probability'" standard of probable cause. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (citing *Gates*, 462 U.S. at 238).
[69] United States v. Banks, 540 U.S. 31, 41 (2003) (rejecting a lower court's attempt at overlaying a "categorical scheme" to the reasonableness approach of a totality of the circumstances review).
[70] Zurcher v. Stanford Daily, 436 U.S. 547, 558–59 (1978).
[71] Texas v. Brown, 460 U.S. 730, 742 (1983).
[72] United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999).

B. Military Rule of Evidence 315

Historically, the Fourth Amendment was not applied to members of the military.[73] It was not until the 1920s that policies and decisions were emplaced applying Fourth Amendment principles to the military, and search and seizure was not part of the Manual for Courts-Martial until 1949.[74] While the Fourth Amendment has never been strictly applied to the military by the Supreme Court,[75] military courts have applied it continuously since 1959.[76] The Court of Military Appeals (CMA)[77] specifically applied the Fourth Amendment to military members when the court said that "the protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to the men and women serving in the military services of the United States unless expressly or by necessary implication they are made inapplicable."[78] However, special considerations are still accorded the military. Demonstrating such considerations, a commander has broad latitude to carry out inspections[79] and the CMA has found that the commander's power to search and seize are separate from the Warrant Clause and predicated on reasonableness.[80]

Today, the Fourth Amendment principles and limitations have been laid out in MRE 311–317. Probable cause exists when "there is a *reasonable belief* that the person, property, or evidence sought is located in the place or on the person to be searched."[81] Evidence obtained from "searches requiring probable cause" is admissible at trial,[82] and

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[73] Lederer & Borch, *supra* note 30, at 117–18.
[74] United States v. Stuckey, 10 M.J. 347, 352–60 (C.M.A. 1981) (discussing the history of search and seizure in the military from the 1920s until the 1969 version of the *Manual for Courts-Martial*).
[75] Lederer & Borch, *supra* note 30, at 110. Because of the Military Rule of Evidence's adoption of Fourth Amendment principles, it is unlikely the Supreme Court would make such a ruling when the Court can rule on the independent grounds of the Military Rule of Evidence (MRE) instead. *Id.* at 121.
[76] United States v. Brown, 28 C.M.R. 48 (C.M.A. 1959) (holding that a commander must have probable cause to authorize a search); *see also* United States v. Long, 64 M.J. 57 (C.A.A.F. 2006) ("The Fourth Amendment of the Constitution protects individuals, including servicemembers, against unreasonable searches and seizures." (citing United States v. Daniels, 60 M.J. 69, 70 (C.A.A.F. 2004))).
[77] The CMA is the previous name of the Court of Appeals for the Armed Forces.
[78] United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979) (citing United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960)).
[79] MCM, *supra* note 10, MIL. R. EVID. 413.
[80] United States v. Stuckey, 10 M.J. 347, 361–62 (C.M.A. 1981).
[81] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2) (emphasis added).
[82] *Id.* MIL. R. EVID. 315(a).

unlawfully seized evidence is inadmissible.[83] Military Rule of Evidence 315 specifically lays out the standards for conducting probable cause searches.[84] Since this power is separate from the Warrant Clause, the competent military authority issues a "search authorization" as opposed to a "search warrant," which is issued by civilian authorities.[85] An "impartial"[86] military commander, judge or magistrate may issue a search authorization,[87] but the authority to search is generally limited to persons subject to military law and property within military control.[88] Unlike a civilian magistrate who is limited in considering just the information located on the search affidavit request,[89] a military issuing authority can also rely on oral statements and previously obtained information when making a probable cause determination.[90] The military issuing authority may rely on hearsay when making a probable cause determination,[91] but must determine that the information provided is "believable and has a factual basis."[92]

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[83] *Id.* MIL. R. EVID. 311(a).

[84] *Id.* MIL. R. EVID. 315. In limited circumstances, the MRE allows search and seizure without a search authorization or probable cause. *Id.* MIL. R. EVID. 313 (inspections and inventories do not require a search authorization or probable cause); *id.* MIL. R. EVID. 314 (detailing searches not requiring search authorization or probable cause); *id.* MIL. R. EVID. 315(g) (exigent circumstances require probable cause but no search authorization); *id.* MIL. R. EVID. 316(d)(4)(C) (plain view does not require a search authorization).

[85] *Id.* MIL. R. EVID. 315(b)(1)–(2); *see also Stuckey*, 10 M.J. at 359–61.

[86] This term is read to mean "neutral and detached." *See* United States v. Ezell, 6 M.J. 307, 326 (C.M.A. 1979).

[87] MCM, *supra* note 10, MIL. R. EVID. 315(d). A military commander must have control over the "place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over [the] person." *Id.* MIL. R. EVID. 315(d)(1).

[88] *Id.* MIL. R. EVID. 315(c). The MRE allows search of military property, persons or property within military control, and certain nonmilitary property located within a foreign country. *Id.*

[89] "It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. 'It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention.'" Spinelli v. United States, 393 U.S. 410, 413 n.3 (1969) (quoting Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964)).

[90] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2)(B)–(C); *see also* United States v. Cunningham, 11 M.J. 242, 243 (C.M.A. 1981) (allowing the commander to use information provided to him before he made his probable cause determination); United States v. Henley, 48 M.J. 864, 870 (A.F. Ct. Crim. App. 1998) (holding that a magistrate may consider the oral opinion of an investigator or expert).

[91] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).

[92] *Id.* MIL. R. EVID. 315(f), analysis, app. 22, at A22-29.

C. Standard of Review and Effects on Case Outcome

Once a military judge denies a defense motion to suppress evidence obtained as a result of a search authorization, the appellant faces a high hurdle at the appellate level to get that decision overturned. The courts review the military judge's ruling for an abuse of discretion.[93] While the conclusions of law are reviewed *de novo*, the findings of fact are not.[94] The findings of fact will only be overturned if "they are clearly erroneous or unsupported by the record."[95] The appellate court's review determines if "there is substantial evidence in the record supporting the magistrate's decision to issue the warrant."[96] The high bar to relief is in place because of the preference for warrants.[97] The courts seek to encourage law enforcement's use of the warrant process because "the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were [the courts] to eliminate this distinction, [the courts] would eliminate the incentive."[98]

The CAAF analyzes a magistrate's probable cause determination by focusing on four key principles.[99] First, the court gives substantial deference to decisions made by a "neutral and detached"[100] magistrate.[101]

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[93] United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999). Reviews of warrantless searches are *de novo*. United States v. Neal, 41 M.J. 855, 857 (A.F. Ct. Crim. App. 1994).
[94] *Owens*, 51 M.J. at 209.
[95] *Id.* (quoting United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996)); *see also* United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995); United States v. Allen, 53 M.J. 402, 405–06 (C.A.A.F. 2000); *cf.* Ornelas v. United States, 517 U.S. 690, 697–700 (1996) (holding no appellate deference due in warrantless search cases).
[96] United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 1999) (quoting Massachusetts v. Upton, 466 U.S. 727, 728 (1984)).
[97] *Monroe*, 52 M.J. at 331 (citing *Upton*, 466 U.S. at 733); *see also* Illinois v. Gates, 462 U.S. 213, 236 (1983).
[98] *Ornelas*, 517 U.S. at 699.
[99] United States v. Clayton, 68 M.J. 419, 423–24 (C.A.A.F. 2010).
[100] Military Rule of Evidence 315(d) uses the term "impartial individual." MCM, *supra* note 10, MIL. R. EVID. 315(d). Military Rule of Evidence 315(d)(2) clarifies that a magistrate is not disqualified by merely being "present at the scene of a search" or by issuing a prior authorization similar to one which might be issued by a federal district judge. *Id.* MIL. R. EVID. 315(d)(2). For a discussion on commanders' disqualification to issue search authorizations, see United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) (finding disqualification when the commander has personal bias against the accused or when the commander becomes actively involved in the law enforcement or prosecutorial functions).
[101] United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996) (citing United States v. Ventresca, 380 U.S. 102, 109 (1965)) (finding the magistrate to be neutral and detached

This deference has its limitations. The authorization cannot be based on a "hunch"[102] nor be based on a "bare bones" affidavit.[103] The courts will look to ensure the magistrate did not merely ratify the officer's conclusions and act as a "rubber stamp."[104] For example, the CAAF has found sufficient a magistrate spending over an hour reviewing the affidavit and asking questions of the investigator.[105]

Second, "the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants."[106] The CAAF has stated that "close calls will be resolved in favor of sustaining the magistrate's decision."[107] Third, the court must interpret the affidavit in a commonsense manner, rather than making a "hypertechnical" review.[108] During their review, the court will consider the facts known to the magistrate at the time of the magistrate's decision and the manner in which those facts became known to the magistrate.[109] This information allows the court to "usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."[110] Lastly, because the military

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because he had no "ill motive" towards the appellant); *see also* Shadwick v. Tampa, 407 U.S. 345, 350 (1972) ("[N]eutrality and detachment . . . require[s] severance and disengagement from activities of law enforcement."); Lo-Ji Sales v. New York, 442 U.S. 319, 326–28 (1979) (holding that the issuing magistrate was not neutral and detached because of his participation in the search and seizure).

[102] *Upton*, 466 U.S. at 734.

[103] United States v. Leedy, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *Carter*, 54 M.J. at 422 (implying that a bare bones affidavit is one that fails to identify sources and fails to acknowledge conflicts and gaps in the evidence)).

[104] Nathanson v. United States, 290 U.S. 40, 44–47 (1933) (holding inadequate the affiant's conclusion that he believed evidence was in a specific location without listing supporting facts); Illinois v. Gates, 462 U.S. 213, 239, 288 (1983).

[105] *Maxwell*, 45 M.J. at 423. In *Clayton*, the military judge found that the magistrate did not act as a "rubber stamp" as he spent forty-five minutes discussing the case with the investigator and twenty minutes researching the probable cause standard. Transcript of Record of Trial at 172, 174–75, 203, United States v. Clayton, 68 M.J. 419 (C.A.A.F 2010) (Fort McPherson Jan. 9, 2007) [hereinafter *Clayton* ROT].

[106] United States v. Ventresca, 380 U.S. 102, 109 (1965), *quoted in Gates*, 462 U.S. at 237 n.10.

[107] United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 2000) (quoting *Maxwell*, 45 M.J. at 423).

[108] *Gates*, 462 U.S. at 236 (quoting *Ventresca*, 380 U.S. at 109). This standard is consistent with the probable cause review of "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949), *quoted in Gates*, 462 U.S. at 231 *and* United States v. Leedy, 65 M.J. 208, 213 (2007).

[109] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005); *Leedy*, 65 M.J. at 214.

[110] *Gates*, 462 U.S. at 230.

judge's decision is reviewed for an abuse of discretion, "the evidence [is considered] 'in the light most favorable to the prevailing party.'"[111] As most cases at the appellate level are submitted by convicted servicemembers, this last factor typically gives the government a huge advantage as to the standard of review.

1. The Effect of False Information Presented to the Magistrate

While this article will not go in depth on this particular topic, cases involving the sufficiency of evidence presented to a magistrate often involve the issue of the magistrate being provided false information.[112] The U.S. Supreme Court established in *Franks v. Delaware* that

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.[113]

Military Rule of Evidence 311(g)(2) incorporated the *Franks* standard.[114] The CAAF went one step further when the court held that any "misstatements or improperly obtained information" will also be

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[111] United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996), *quoted in* United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010).

[112] This article analyzes whether there was sufficient evidence to substantiate probable cause in *United States v. Clayton* after all erroneous information was severed. *See Clayton*, 68 M.J. at 425–26.

[113] 438 U.S. 154, 155–56 (1978), *quoted in Cowgill*, 68 U.S. at 391. This hearing is often called a *Franks* hearing. United States v. Williamson, 65 M.J. 706, 713 (A. Ct. Crim. App. 2007).

[114] MCM, *supra* note 10, MIL. R. EVID. 311(g)(2).

severed when conducting a review of probable cause sufficiency.[115] In addition, omissions of information that may undermine probable cause are reviewed using the same standard as established in *Franks*.[116] The understanding of this step is essential because it drives what the court considers when analyzing the affidavit and the facts known to the magistrate.[117] The exclusionary rule does not come into play unless the remaining evidence is insufficient to establish probable cause.[118]

2. When All Else Fails, the Government's Silver Bullet—Good Faith

Even when the court finds the magistrate lacked probable cause to issue the search authorization, the evidence may still be admitted against the accused. Incorporating the good faith exception outlined in *United States v. Leon*,[119] MRE 311(b)(3) allows for the admission of evidence when the investigator objectively relies in good faith on the issued search

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[115] United States v. Gallo, 55 M.J. 418, 421 (C.A.A.F. 2001) (disregarding statements of the accused); *see also Cowgill*, 68 U.S. at 391–93 (discussing the treatment of erroneous information).
[116] United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992).
[117] *See supra* text accompanying notes 108–10.
[118] *Cowgill*, 68 U.S. at 391 (citing *Franks*, 438 U.S. at 165–71).
[119] 468 U.S. 897 (1984). *Leon* lays out four limits to the good faith exception:

> [F]irst, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." . . .
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."
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> . . . .
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> . . . Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 914–15, 923 (internal citations omitted).

authorization.[120] This exception requires that the investigator reasonably believe the issuing authority had a substantial basis to find probable cause.[121] If so, the purpose of the exclusionary rule—to deter police misconduct—is moot, and the evidence will be admitted.[122] However, if the information presented to the magistrate is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," the good faith exception does not apply.[123] As the CAAF never reached the good faith exception in *Macomber*[124] and *Clayton*,[125] good faith will not be a focus of this article. Nevertheless, it is important for the military justice practitioner to understand that while the investigator does not get an automatic free pass once he gets the signature on the authorization, a court may find probable cause lacking and yet still admit the evidence under the good faith doctrine.

III. *Macomber* and *Clayton*—A Cause for Concern?

Macomber and *Clayton* were the first two CAAF cases to find probable cause based substantially on internet activity alone without any direct evidence of child pornography possession in the locations searched. In *Macomber*, an Immigration and Customs Enforcement (ICE) investigation found that Airman First Class Macomber paid to subscribe to a child pornography website called "LustGallery.com-A Secret Lolitas Archive."[126] Immigration and Customs Enforcement joined with Air Force investigators and a Postal Inspector to send a

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[120] MCM, *supra* note 10, MIL. R. EVID. 311(b)(3).

[121] *Id.* MIL. R. EVID. 311(b)(3)(B); United States v. Carter, 54 M.J. 414, 421–22 (C.A.A.F. 2001) (discussing the differences in meaning of the term "substantial evidence" as it applies to the probable cause determination compared to the good faith exception).

[122] Massachusetts v. Sheppard, 468 U.S. 981, 990–91 (1984) (citing Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment) ("[The] exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.")).

[123] *Leon*, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)).

[124] *But see* United States v. Macomber, 67 M.J. 214, 223 (C.A.A.F. 2009) (Ryan, J., dissenting) (stating that she would have also suppressed the evidence under the good faith exception).

[125] 68 M.J. 419, 426 (C.A.A.F. 2010) (declining to consider the good faith exception after finding the magistrate's decision was correct). *But see id.* at 428–30 (Ryan, J., dissenting) (discussing why she would have also suppressed the evidence under the good faith exception).

[126] *Macomber*, 67 M.J. at 215 (majority opinion).

"target letter" to Macomber concerning his interest in child pornography.[127] Macomber indicated an interest in "teen sex" and "pre-teen sex" before attempting to purchase two child pornography videos to be sent to his on-base address.[128] Macomber was arrested and his on-base dormitory room searched after he attempted to pick up the videos from the base's post office.[129]

In *Clayton*, an ICE investigation found that Lieutenant Colonel Clayton joined an internet discussion group called "Preteen-Bestiality-and-Anything-Taboo."[130] Immigration and Customs Enforcement found only one picture of child pornography on the website, and discovered that Clayton requested to receive a daily e-mail digest to be sent to his e-mail account registered to his home address in Georgia.[131] The investigation found that a government computer in Kuwait accessed Clayton's Yahoo! account,[132] although it was after the website had been shut down.[133] The magistrate knew that Clayton had the ability to purchase internet access, but did not know whether Clayton had actually paid for the service or owned a personal computer.[134] The moderator of the group and the individual who posted the illicit image both confessed to possessing child pornography prior to the search of Clayton's quarters in Kuwait.[135]

As will be discussed *infra* in Part IV, the CAAF's decision in *Macomber* was consistent with similar decisions in the federal circuit courts because the affidavit demonstrated by a totality of the circumstances that there was probable cause to search the appellant's dormitory room for child pornography. However, the CAAF overextended the bounds of the totality of the circumstances test when saving the deficient affidavit in *Clayton* by finding probable cause.

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[127] *Id.* at 216.
[128] *Id.*
[129] *Id.* at 217.
[130] *Clayton*, 68 M.J. at 422.
[131] *Id.* at 426–28 (Ryan, J., dissenting).
[132] *Id.* at 422 (majority opinion).
[133] Final Brief on Behalf of Appellant at 9, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.
[134] *Clayton*, 68 M.J. at 423.
[135] *Id.*

IV. Probable Cause Factors Common in Child Pornography Cases

A. The CAAF and Probable Cause

1. Reasonable Expectation of Privacy

In order to challenge a warrant-based search, there must be a governmental invasion of privacy[136] and the person must have had a reasonable expectation of privacy in the place searched.[137] That expectation of privacy must be both subjectively held by the person subject to the search and determined to be objectively reasonable.[138] While the military environment can change the analysis compared to civilian cases, the military courts have found a reasonable expectation of privacy in many of the same places. For example, in today's modern barracks with individually assigned rooms, a Soldier has some expectation of privacy when it comes to investigative searches.[139] This expectation has also been applied in the deployed environment to living quarters,[140] to room wall lockers issued for personal use,[141] to personal

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[136] Rakas v. Illinois, 439 U.S. 128, 140–49 (1978). The actor must be acting in an official capacity for the search to be declared a governmental intrusion, as opposed to a non-protected private search. *See* United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986) (distinguishing between a servicemember acting in their private capacity and as "an agent of the government"); United States v. Michael, 66 M.J. 78, 80 (C.A.A.F. 2008) ("For the purposes of military law, a Fourth Amendment search is 'a government intrusion into an individual's reasonable expectation of privacy.'" (quoting United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004))).

[137] United States v. Maxwell, 45 M.J. 405, 417 (C.A.A.F. 1996).

[138] United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006) ("[T]he test used in evaluating the question of a reasonable expectation of privacy . . . 'is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."'" (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); *see also Maxwell*, 45 M.J. at 417 (holding that there is a reasonable expectation of privacy in a personal computer, but there is a diminished expectation of privacy when sending messages over the internet).

[139] United States v. Conklin, 63 M.J. 333 (C.A.A.F. 2006) (recognizing a limited expectation of privacy in a barracks room). *But see* United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) ("[A] military member's reasonable expectation of privacy in the barracks is limited by the need for military discipline and readiness.") (citing United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981)).

[140] United States v. Huntzinger, 69 M.J. 1, 9–10 (C.A.A.F. 2010) (finding that the government did not present sufficient facts to overrule the presumption that there is a reasonable expectation of privacy in living quarters, even in a combat zone); *see also* United States v. Poundstone, 46 C.M.R. 277, 279 (C.M.A. 1973) (holding that "the right to be free from unreasonable search and seizure" applies in the combat zone).

[141] United States v. Neal, 41 M.J. 855, 860–61 (A.F. Ct. Crim. App. 1994) (finding a

computers,[142] and to e-mails sent through a private server.[143] However, the courts have determined the reasonable expectation of privacy decreases in office space,[144] military property not issued for personal use,[145] government computers,[146] personal computers using file sharing programs,[147] and bank records.[148] As *Macomber's* search was in an on-base barracks room and *Clayton's* search in deployed living quarters, this article primarily focuses on cases involving a residence.

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reasonable expectation of privacy in a barracks room locker but not a locker located in the unit's common area).

[142] *Maxwell*, 45 M.J. at 418 (finding a reasonable expectation of privacy in a personal computer kept in a private home); United States v. Tanksley, 54 M.J. 169, 172 (C.A.A.F 2000), *overruled in part on other grounds by* United States v. Inong, 58 M.J. 460, 465 (C.A.A.F. 2003) (finding a limited expectation of privacy in a government-owned work computer located in a government office); *Conklin*, 63 M.J. at 337 (finding a reasonable expectation of privacy in a personal computer kept in a shared barracks room).

[143] *Compare Maxwell*, 45 M.J. at 417–19 (holding that the same expectation does not apply to forwarded e-mails and messages sent in a "chat room"), *with* United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000) (holding that a person does not have a reasonable expectation of privacy in e-mails sent through a government server when users are notified that their actions are subject to monitoring).

[144] The expectation of privacy depends on the "operational realities" of the workplace. O'Connor v. Ortega, 480 U.S. 709, 714–19 (1987). If the expectation of privacy is reasonable, a search for administrative purposes must still undergo a reasonableness analysis. *Id.* at 719–26; *see also* City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (finding an administrative search of a government pager reasonable); United States v. Muniz, 23 M.J. 201 (C.M.A. 1987) (finding no expectation of privacy in a locked government desk searched for administrative purposes).

[145] MCM, *supra* note 10, MIL. R. EVID. 314(d) (stating that government issued footlockers to store personal property is normally for personal use and thus a reasonable expectation of privacy attaches). *But see* United States v. Weshenfelder, 43 C.M.R. 256, 262 (C.M.A. 1971) (finding no expectation of privacy in a government desk).

[146] United States v. Larson, 66 M.J. 212 (C.A.A.F. 2008). *But see* United States v. Long, 64 M.J. 57 (C.A.A.F. 2006) (holding that the warning banner was insufficient to deprive the user of a reasonable expectation of privacy when the banner failed to state that the monitoring could be for law enforcement purposes and the search was at the direction of law enforcement).

[147] United States v. Stults, 575 F.3d 834 (8th Cir. 2009) (finding no reasonable expectation of privacy when appellant downloaded a file sharing program to make some computer files available to others); United States v. Borowy, 595 F.3d 1045, 1048 (9th Cir. 2010) (finding a misunderstanding of the file-sharing program does not create a reasonable expectation of privacy).

[148] United States v. Wooten, 34 M.J. 141 (C.M.A. 1992).

2. Totality of the Circumstances

The CAAF incorporated the *Illinois v. Gates* totality of the circumstances analysis when making probable cause determinations.[149] The totality of the circumstances analysis requires the magistrate to have a "substantial basis" for his determination that there was probable cause to conduct the search.[150] This analysis includes taking a "practical, common-sense" approach to determine if there is a "fair probability" that evidence of a crime is located at a particular place.[151] Like the civilian courts, the CAAF affirmed that "[p]robable cause requires more than bare suspicion,"[152] yet represents less than a fifty-percent probability[153] and less than preponderance of the evidence.[154]

As "probable cause determinations are inherently contextual," each piece of evidence is viewed in relation to the "overall effect or weight of all factors."[155] The totality of the circumstances test allows the magistrate to consider "the location to be searched; the type of crime being

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[149] United States v. Tipton, 16 M.J. 283, 285–87 (C.M.A. 1983); United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992); United States v. Hester, 47 M.J. 461, 463 (1998).

[150] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Illinois v. Gates, 462 U.S. 213, 239 (1983)). The CAAF has used this "substantial basis" standard in reviewing probable cause determinations since 1966. United States v. Figueroa, 35 M.J. 54, 56 n.2 (C.M.A. 1992) (citing United States v. Penman, 36 C.M.R. 223, 229 (C.M.A. 1966)).

[151] *Bethea*, 61 M.J. at 187 (quoting *Gates*, 462 U.S. at 238), *quoted in* United States v. Allen, 53 M.J. 402, 407 (C.A.A.F. 2000); *see also* United States v. Gallo, 55 M.J. 418, 421–22 (C.A.A.F. 2001); United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007) ("[P]robable cause deals with probabilities. It is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949))).

[152] *Leedy*, 65 M.J. at 213.

[153] *Bethea*, 61 M.J. at 187 (citing Ostrander v. Madsen, No. 00-35541, 2003 U.S. App. LEXIS 1665, at *8 (9th Cir. Jan. 28, 2003) (unpublished) ("Probable cause is met by less than a fifty-percent probability . . . .")).

[154] *Id.* at 187 n.15 (citing Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 303 (1st Cir. 1999) ("The phrase 'probable cause' is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than 'more probable than not.'")); *see also* Texas v. Brown, 460 U.S. 730, 742 (1983) ("[Probable cause] does not demand any showing that such a belief be correct or more likely true than false."), *quoted in Bethea*, 61 M.J. at 187.

[155] *Leedy*, 65 M.J. at 213; *see also* United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) ("[The appellant's] arguments are necessarily related where the totality of the circumstances is weighed . . . . [W]e consider each argument in turn, recognizing that the question presented is not whether one fact or another provided sufficient cause, but whether the facts taken as a whole did so.").

investigated; the nature of the article or articles to be seized; how long the criminal activity has been continuing; and, the relationship, if any, of all these items to each other."[156] The nature of the test allows probable cause to be found when considering all the facts as they relate to each other even when the evidence is weak in one or more aspects.

The remainder of this article will compare and contrast the CAAF's application of this test to the federal circuit courts and searches seeking various types of evidence. As there are common components in the totality of the circumstances test, this section will discuss staleness, nexus to the place searched, the child pornographer profile, subscription to child pornography based websites, sufficiency of the description of child pornography in the affidavit, and sufficiency of particularity in the warrant.

B. Staleness

The issue of staleness is a common factor in probable cause analysis cases. For the warrant to be valid there must be a "reasonable belief that the . . . evidence sought is located in the place . . . to be searched."[157] Time is an important factor in this analysis because the likelihood that the contraband is located at the original location dissipates over time.[158] Courts require that "[t]he proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."[159] To establish this nexus, it is imperative that the affidavit establish timeliness because the courts will not presume timeliness.[160]

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[156] United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998), *aff'd*, 53 M.J. 488 (C.A.A.F. 2000).
[157] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).
[158] United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992).
[159] Sgro v. United States, 287 U.S. 206, 210–11 (1932) (holding that reapplication for a search warrant that had expired after ten days must satisfy a new timeliness analysis to ensure the subsequent warrant is based on adequate probable cause); *see also* United States v. Hall, 50 M.J. 247, 250 (C.A.A.F. 1999) ("Probable cause to search must be based on timely information with a nexus to the place to be searched.").
[160] United States v. Hython, 443 F.3d 480 (6th Cir. 2006) (holding that the affidavit in support of the search warrant was insufficient to establish probable cause when the affidavit failed to state when the controlled buy of drugs had occurred even though it was just one day prior to obtaining the search warrant). A military magistrate may use information outside the affidavit to establish timeliness. *See supra* note 90 and accompanying text.

However, "time alone provides no magic formula for determining the presence or absence of a sufficient basis to authorize a search."[161] For example, the difficulty of moving or consuming items greatly affects the lenience the courts will apply on the issue of timeliness.[162] In addition, the analysis of potentially stale information is nearly identical to a totality of the circumstances test.[163] The appropriate amount of time an item is likely to be located at a particular place is contingent on "(1) the nature of the article sought; (2) the location involved; (3) the type of crime; and (4) the length of time the crime has continued."[164] An investigator's experience and knowledge can greatly assist the magistrate in analyzing these four factors when determining if there is a fair probability that objects are located in a particular place when some amount of time has passed.[165]

Macomber and, to a lesser extent, *Clayton*, both had issues concerning the timing of the search as compared to the activity that led to probable cause. In *Macomber*, the evidence supporting probable cause for the search warrant was a paid membership to a child pornography website fourteen months prior to the attempted purchase of two child pornography videos via the mail in an undercover sting operation.[166] The search authorization was not conditioned on receipt of the videos, but the search was conducted after Macomber attempted to pick-up the videos from the base's Postal Service Center.[167]

In *Clayton*, just over five months after shutting down an internet discussion group that contained one child pornography image, a search authorization was issued for Clayton's quarters in Kuwait.[168] No

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[161] *Sgro*, 287 U.S. at 210.
[162] United States v. Johnson, 23 M.J. 209, 212 (C.M.A. 1987) (holding two and a half week old information sufficient under the totality of the circumstances test because a stereo expander would not be easily sold and would likely be retained by the thief); United States v. Motley, No. ACM 29210, 1993 CMR LEXIS 135, at *12–13 (A.F.C.M.R. Mar. 1, 1993) (unpublished) (holding household items are not easily moved or sold resulting in two and a half week old information not being stale).
[163] *See supra* text accompanying note 156.
[164] United States v. Agosto, 43 M.J. 745, 749 (A.F. Ct. Crim. App. 1995) (citing United States v. Lopez, 35 M.J. 35, 38–39 (C.M.A. 1992)).
[165] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001) (relying on investigator's experience); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007) (same).
[166] United States v. Macomber, 67 M.J. 214, 216 (C.A.A.F. 2009).
[167] *Id.* at 217.
[168] Final Brief on Behalf of Appellant at 2–3, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.

evidence was obtained as to when Clayton became a member or last accessed the discussion group, but he had not "unsubscribed" at the time the group was shut down.[169] While Clayton raised the issue of staleness to the CAAF on appeal,[170] the court did not address it in their opinion.

The nature of the item sought for seizure is a predominant focus in the staleness analysis.[171] The next few sections will analyze how the courts generally treat physical evidence, in comparison to child pornography evidence, when using dated information to establish probable cause.

1. Controlled Substances

Even though controlled substances could be kept in a single location for years, courts generally find a short lifespan on information attempting to establish a nexus to the location of controlled substances. In particular, the CAAF has said that "[i]f the property sought is a controlled substance, apparently intended for use or distribution, then it probably would not remain in a suspect's possession over a long period of time."[172] As a result, investigators have a short window to obtain sufficient information and execute a search.

In *United States v. Land*, the CAAF found that possession of a substantial amount of hashish two to three days prior to the search was sufficient time to execute a search.[173] Information indicating possession of marijuana up to a week prior to the search has been found not to be stale.[174] However, the CAAF has held that an alleged single incident of possession and use that was four months old[175] and even one month old[176] were stale for the probable cause analysis. The federal courts of

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[169] *Clayton*, 68 M.J. at 422–23; *Clayton* ROT, *supra* note 105, at 59, 67. When the group was shut down, Clayton was presumably receiving daily digests of the website's postings to his e-mail account. *Id.*

[170] Final Brief on Behalf of Appellant at 24–25, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.

[171] United States v. Lovell, 8 M.J. 613, 618 (A.F.C.M.R. 1979) ("[A]n additional factor [to time] which is likely to be most important is the nature of the property sought.").

[172] United States v. Johnson, 23 M.J. 209, 212 (C.A.A.F. 1987).

[173] 10 M.J. 103, 105 (C.M.A. 1980).

[174] United States v. McClelland, 49 C.M.R. 557, 566 (A.C.M.R. 1974).

[175] United States v Brown, 28 C.M.R. 48 (C.M.A. 1959); United States v. Britt, 38 C.M.R. 415 (C.M.A. 1968).

[176] United States v. Crow, 41 C.M.R. 384, 387 (C.M.A. 1970) ("Of particular importance

appeal have returned similar results.[177]

When also considering the continuing nature of the criminal activity, particularly with controlled substances, the courts extend the amount of time in their staleness analysis. A single use or possession will likely see probable cause diminish very quickly, but evidence of multiple incidents extends the time factor.[178] In *United States v. Harris*, the Supreme Court found that evidence of illegal whiskey sales two weeks prior to the search were not stale because the appellant had been selling liquor illegally to the informant for two years.[179] While the military courts have rarely addressed this issue directly,[180] in *United States v. Bauer*, the Air Force Court of Military Review embraced the concept that multiple related criminal acts dissipate staleness even when those acts occurred at a different location than the one searched.[181] In *Bauer*, the court held that evidence placing marijuana in the appellant's room two months prior to the search was not stale when the magistrate also considered that the appellant had used marijuana four times in other places two weeks prior to the search of his room.[182]

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to this case is the testimony of [the informant] . . . that he had *never observed marihuana in the bunk or locker area of the accused*." (emphasis in original)).

[177] United States v. Wagner, 989 F.2d 69 (2d Cir. 1993) (holding that a one-time sale seven weeks prior to the search was stale). *But see* United States v. Tabares, 951 F.2d 405 (1st Cir. 1991) (holding that an informant seeing cocaine in an apartment ten days prior to the search warrant was not stale); United States v. Guitterez, 203 F.3d 833 (9th Cir. 1999) (holding that a search fifteen days after a controlled buy was not stale).

[178] United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972) ("Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.").

[179] 403 U.S. 573, 579 (1971).

[180] *See* United States v. Connor, No. NMCM 88-0527, 1988 CMR LEXIS 654, at *2 (N.M.C.M.R. Sept. 12, 1988) (unpublished) (finding a search for controlled substances was not stale because of the on-going criminal activity at the residence) (citing United States v. Bruner, 657 F.2d 1278, 1298–99 (D.C. Cir. 1981) (holding that reports of drugs in a cabinet four to five months prior to the affidavit was not stale when the cabinet was located in an established residence of the appellant who had been in a "major drug conspiracy" for six years)).

[181] 49 C.M.R. 121 (A.F.C.M.R. 1973).

[182] *Id.* at 122–23.

The federal courts have considered additional factors such as multiple controlled purchases over time,[183] the size of the drug trafficking operation,[184] the ability of forensics to find trace evidence,[185] the length of the drug conspiracy,[186] the permanency of the operation,[187] and even the lengthy nature of law enforcement narcotic operations.[188]

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[183] United States v. Mathis, 357 F.3d 1200 (10th Cir. 2004) (holding that a search conducted two months after an investigation that spanned several months with multiple controlled purchases was not stale); United States v. Pruneda, 518 F.3d 597, 604 (8th Cir. 2008) (holding that a search conducted one month after an investigation that spanned several months with multiple controlled purchases was not stale).

[184] United States v. Foster, 711 F.2d 871 (9th Cir. 1983) (holding that the passing of three months did not make information stale when the appellant was alleged to head a major heroin distribution ring); United States v. Comeaux, 955 F.2d 586 (8th Cir. 1992) (holding that the passing of two months did not make information stale considering the large size of the drug conspiracy). *But see* United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) (holding that two-year-old information of a narcotics ring was stale).

[185] United States v. Beltempo, 675 F.2d 472 (2d Cir. 1982) (holding that information fifty-two days old was not stale when an expert stated that traces of heroin should still be in the carpet after an alleged spill).

[186] United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984) (holding that a search nearly two months after an informant had purchased drugs for three consecutive months was not stale because of the continuing nature of the drug trafficking); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990) (holding that a seven-month-old distribution was not stale when the appellant had been distributing cocaine for over two years); United States v. Pitts, 6 F.3d 1366 (9th Cir. 1993) (holding that a search four months after distribution to an informant was not stale since the appellant was a regular supplier to the informant); United States v. Feliz, 182 F.3d 82 (1st Cir. 1999) (holding that a search three months after two controlled purchases was not stale when the appellant's drug trafficking had been on-going for twelve years); United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001) (holding that three-month-old information was not stale when the drug trafficking was alleged to have been on-going over a considerable period of time). *But see* Molina *ex rel.* Molina v. Cooper, 325 F.3d 963 (7th Cir. 2003) (holding that two-year-old information concerning a suspected drug dealer was stale).

[187] United States v. Dozier, 844 F.2d 701 (9th Cir. 1988) (holding that five-and-a-half-month-old information was not stale because marijuana cultivation is a long-term crime and the appellant was unlikely to dispose of the tools of the trade); United States v. Schaefer, 87 F.3d 562 (1st Cir. 1996) (holding that two-month-old information was not stale when the appellant was allegedly cultivating marijuana in his home); United States v. Hammond, 351 F.3d 765 (6th Cir. 2003) (holding that five-month-old information was not stale because evidence of marijuana cultivation is likely to remain for an indefinite period of time). *But see* United States v. Goody, 377 F.3d 834 (8th Cir. 2004) (information regarding the manufacture of amphetamines that was sixteen months old was stale).

[188] United States v. Smith, 266 F.3d 902 (8th Cir. 2001) (holding that controlled purchases made three months prior to the search were not stale) ("In investigations of ongoing narcotic operations, 'intervals of weeks or months between the last described act and the application for a warrant [does] not necessarily make the information stale.'" (quoting United States v. Formaro, 152 F.3d 768, 771 (8th Cir. 1998))).

2. Non-Consumable Physical Objects

When the courts analyze the basis to search for non-consumable physical objects, time factors that are considered include the portability of the item, the likely location for an object of that type to be stored, and the likelihood that a suspect would maintain control of such an object. In general, the courts allow investigators more time in the probable cause analysis.[189] However, that is not always the case. In *United States v. Blake*, the search to find two twenty dollar bills used in a controlled purchase was deemed stale after a week.[190] Likewise, a pistol has been considered easily portable and concealable, which limits the amount of time that reliable information retains evidentiary value.[191]

Reliability of information about objects that are difficult to sell or move dissipates at a slower rate. In *United States v. Johnson*, a stereo expander stolen two months prior to the search was found to not be stale.[192] The court reasoned that the stereo expander was harder to transport or hide than a pistol, more likely to be retained for personal use, and less likely to be sold "than some other types of property."[193] Likewise, in *United States v. Lovell*, the court stated that a pistol and disguise used in a robbery would likely still be in the possession of a suspect when the items were not easily sellable and the suspect had no reason to believe the government had been tipped off that he possessed

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[189] United States v. Alvarez, 451 F.3d 320, 332 (5th Cir. 2006) ("[T]his court previously has identified two issues of significance: (1) Information reaching back over long periods may be used to support an affidavit 'if the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity;' and (2) where the type of evidence sought is 'the sort that can reasonably be expected to be kept for long periods of time in the place to be searched,' the court is 'more tolerant of dated allegations.'" (quoting United States v. Pena-Rodriguez, 110 F.3d 1120, 1130 (5th Cir. 1997))).

[190] 7 M.J. 914, 916 (A.C.M.R. 1979), *pet. denied*, 8 M.J. 42 (C.M.A. 1979) ("It is unreasonable to believe that the currency would still be in the appellant's possession after a week."); *see also* United States v. Lovell, 8 M.J. 613, 618 (A.F.C.M.R. 1979) (stating in dicta that stolen money is unlikely to be in a house three months after the theft).

[191] United States v. Bright, 2 M.J. 663, 665 (A.F.C.M.R. 1976) (holding that a pistol was likely moved in the two to three weeks since it had last been seen in a vehicle, thus the information was stale). *But see* United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (holding that information twelve days old was not stale when investigators were searching for ammunition and firearms); United States v. Queen, 26 M.J. 136, 139–40 (C.M.A. 1988) (holding that information relating to a pistol seen up to six weeks prior to the search was not stale); United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992) (holding that a pistol seen one week prior to the search was not stale).

[192] 23 M.J. 209, 212 (C.M.A. 1987).

[193] *Id.*

the items.[194]

When the objects are of a documentary nature, the timeliness of the search has even greater latitude. In *United States v. Andersen*, the Supreme Court found reasonable the search for real estate records produced three months prior to the search.[195] The Air Force Court of Criminal Appeals has found that three and a half months and a move to a new dormitory did not dissipate the probable cause to search for photographs.[196] The federal courts have extended these limits to five months,[197] nearly two years old,[198] and even an open "number of years."[199] The rationale for the extension of time relies on documentation likely being retained for greater periods of time prior to being discarded[200] and the continuing nature of the criminal enterprise.[201]

3. Child Pornography

When reviewing how the courts handle the staleness issue in searching for items other than child pornography, it is easier to understand why the courts extend the lifespan of probable cause when investigators are seeking child pornography. Child pornography is not consumed like a controlled substance, it does not spoil with time, nor is it easily sold. In the digital world, child pornography can be retained even

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[194] 8 M.J. 613, 618 (A.F.C.M.R. 1979) (stating in dicta that even three months' time would not have made the information stale).
[195] 427 U.S. 463, 478 n.9 (1976).
[196] United States v. Agosto, 43 M.J. 745, 749 (A.F. Ct. Crim. App. 1995).
[197] United States v. Alvarez, 451 F.3d 320, 332 (5th Cir. 2006) ("[D]ocumentary evidence can reasonably be expected to be retained after it is obtained or created."); *see also* United states v. Webb, 255 F.3d 890, 905 (D.C. Cir. 2001) (holding that information three and a half months old was not stale in the search for a drug dealer's documents regarding his supplier).
[198] United States v. Yusuf, 461 F.3d 374, 391–92 (3d Cir. 2006).
[199] United States v. Gardiner, 463 F.3d 445, 472 (6th Cir. 2006) ("[F]inancial documents, receipts, and business records of the sort sought in this investigation are generally kept for a number of years . . . .").
[200] *Yusuf*, 461 F.3d at 391–92 ("[T]he mere passage of time does not render information in an affidavit stale where . . . the items to be seized were created for the purpose of preservation, e.g., business records." (citing United States v. Williams, 124 F.3d 411, 421 (3d Cir. 1997))); *Agosto*, 43 M.J. at 749 ("[P]hotographs and telephone numbers, were not necessarily incriminating in themselves; were not consumable over time, like drugs; and were of a nature that they would be kept indefinitely.").
[201] *Yusuf*, 461 F.3d at 391–92 (searching for business records as evidence of money laundering); *Gardiner*, 463 F.3d at 472 (alleging that the appellate took bribes for contracts over several years).

if a copy is sold or given away. Child pornography "can have an infinite life span."[202] In addition, like the creation of documents, child pornography is acquired to be maintained, not quickly destroyed.[203]

Affidavits are often bolstered with evidence that child pornography collectors are more likely to hoard their collections instead of routinely disposing them. The Federal Bureau of Investigation's resident expert on child abusers, Kenneth V. Lanning, states that a preferential sex offender's collection is "a cherished possession and his life's work."[204] As a result, these collectors are highly unlikely to destroy such a collection.[205] The federal courts have almost universally accepted this premise, and routinely cite hoarding by pedophiles as a presumed fact when conducting a staleness analysis.[206]

An additional fact that makes digital child pornography unique is that deleting the files is difficult.[207] Federal courts have factored the possibility of this lingering piece of evidence into their timeliness calculus.[208] While not setting an outer limit, the Sixth Circuit recognized that the forensic examiners ability to retrieve files long after they are deleted significantly alters the probable cause analysis.[209]

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[202] United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010) (quoting United States v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009)).

[203] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008) ("Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to destroy them . . . . [P]edophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time." (quoting United States v. Riccardi, 405 F.3d 852, 861 (10th Cir. 2005) (citing cases from the 3rd, 8th, and 9th Circuit Courts))).

[204] LANNING, *supra* note 2, at 91–92.

[205] *Id.* at 91–92, 136. "If law enforcement has evidence an offender had a collection 5 or 10 years ago, chances are he still has the collection—only it is larger." *Id.* at 91.

[206] *Perrine*, 518 F.3d at 1206 ("'The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases.'" (quoting *Riccardi*, 405 F.3d at 861); *see also* United States v. Irving, 452 F.3d 100, 125 (2d Cir. 2006).

[207] LANNING, *supra* note 2, at 136.

[208] United States v. Allen, 625 F.3d 830, 843 (5th Cir. 2010) ("Important to the staleness issue, the magistrate was advised that computer files or remnants of such files can be recovered months or even years after they have been downloaded onto a hard drive, deleted, or viewed via the internet.") (holding eighteen month old information was not stale).

[209] United States v. Terry, 522 F.3d 645, 650 n.2 (6th Cir. 2008) (holding that a five month delay from intercepting an e-mail containing child pornography did not cause the search to be stale), *cited with approval in* United States v. Lewis, 605 F.3d 395, 402 (6th Cir. 2010) (seven months).

In addition, just like recent activity involving controlled substances can refresh probable cause, a continuing course of conduct in child pornography significantly refreshes old information.[210] While the timeliness window is not endless,[211] federal courts have found that up to a year,[212] eighteen months,[213] and even years-old[214] evidence does not cause information regarding digitally stored child pornography to become stale.

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[210] United States v. Harvey, 2 F.3d 1318, 1323 (3d Cir. 1993) (holding that mailings received thirteen months and two months prior to the search was sufficient to establish probable cause when considering the fact that pedophiles rarely discard sexually explicit material); United States v. Newsom, 402 F.3d 780, 783 (7th Cir. 2005) (holding probable cause existed for evidence of year old images when a pornographic tape had been seen shortly before the search); United States v. Lapsins, 570 F.3d 758, 767 (6th Cir. 2009) (holding that nine month old information was refreshed by the downloading of child pornography a month prior to the search).

[211] *E.g.*, United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) ("We are unwilling to assume that collectors of child pornography keep their materials indefinitely . . . ."); United States v. Doyle, 650 F.3d 460, 74-75 (4th Cir. 2011) (invalidating a search warrant where, *inter alia*, the affidavit was silent as to the age of the allegations).

[212] *Id.* (holding that ten month old information was not stale because of the long term nature of child pornography collectors (citing United States v. Dozier, 844 F.2d 701, 707 (9th Cir. 1988) (discussing long term nature of marijuana cultivation))); United States v. Paul, 551 F.3d 516, 522 (6th Cir. 2009) (holding that evidence thirteen months old was not stale when the appellant had subscribed to child pornography websites for the preceding two years); United States v. Schwinn, 376 F. App'x 974, 979 (11th Cir. 2010) (unpublished) (holding that ten month old information was not stale).

[213] United States v. Frechette, 583 F.3d 374, 378–79 (6th Cir. 2009) (holding that a sixteen month old subscription to a child pornography website was not stale information); United States v. Lemon, 590 F.3d 612, 614–15 (8th Cir. 2010) (considering the continuing nature of child pornography, search warrant based on evidence that was eighteen months old was not stale (citing United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995) (holding three year old information for illegal firearms possession was not stale))); *cf.* United States v. Pappas, 592 F.3d 799, 803 (7th Cir. 2010) (finding with little analysis that officers had good faith belief to assume that appellant still possessed child pornography eighteen months after receipt).

[214] United States v. Irving, 452 F.3d 110, 125 (2d Cir. 2006) (holding that two year old information of child pornography on a home computer was not stale); United States v. Morales-Aldahondo, 524 F.3d 115, 119 (1st Cir. 2008) (holding that child pornography obtained three years prior to the search warrant was not stale); United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010) (holding that e-mails containing purchased child pornography sent twenty-eight months prior to the search warrant were not stale); *cf.* United States v. Prideaux-Wentz, 543 F.3d 954, 958 (7th Cir. 2008) (holding that information two to four years old was stale when the affidavit did not state when the images were uploaded onto the website, but finding officers had a good faith belief that the appellant possessed child pornography).

Accordingly, the military courts have returned similar results. Even prior to *Macomber* and *Clayton*, the CAAF acknowledged the unique characteristics of child pornography. In *United States v. Gallo*, the court summarily accepted a time lag of six months when obtaining a search authorization.[215] The CAAF has gone so far as to find probable cause when searching for child pornography five years after the appellant had last been seen with the material.[216] In a recent case by the Air Force Court of Criminal Appeals, the court held that an affidavit obtained twenty-two months after the appellant paid for a subscription to a child pornography website did not dissipate the fair probability that child pornography would be found on the appellant's computer.[217] The court quickly dismissed the staleness argument citing the affidavit's assertion that digital child pornography is maintained for an "indefinite period of time."[218]

Thus, looking at *Clayton* and *Macomber*, the time span between the website subscriptions and the search easily falls within the window of time that has been allowed by the circuit courts when dealing with both child pornography and documentary evidence. When considering that child pornography is not consumable, is easily recovered by forensic analysis if it is deleted, and is likely to be kept for a long period of time, it is apparent why in *Clayton* the CAAF did not even address the appellant's assertion that the website being shut down for just over five months caused the information to be stale in the probable cause analysis.[219] However, unlike the cases cited above,[220] the Special Agent in *Clayton* failed to list any retention evidence in her affidavit.[221] Had

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[215] 55 M.J. 418, 422 (C.A.A.F. 2001); *see also* United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007) (accepting a one month delay because of the trend that possessors of child pornography tend to hoard their collections, and, if the files were deleted, forensic tools would likely be able to recover the files).

[216] United States v. Henley, 53 M.J. 488, 491 (C.A.A.F. 2000), *cert. denied*, 532 U.S. 943 (2001) (finding that the continual use of child pornography by the appellant to sexually assault his two children in a different home five years prior was sufficient to establish probable cause).

[217] United States v. Orona, No. ACM 36968, 2009 CCA LEXIS 345, at *12–13 n.5 (A.F. Ct. Crim. App. Sept. 14, 2009) (unpublished), *review denied*, No. 10-0128/AF, 2010 CAAF LEXIS 214 (Mar. 5, 2010) (unpublished).

[218] *Id.*

[219] United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010).

[220] *See* cases cited *supra* notes 202–03, 206–18.

[221] U.S. Dep't of Army, DA Form 3744, Affidavit Supporting Request for Authorization to Search and Seize or Apprehend (20 Apr. 2006) [hereinafter *Clayton* Affidavit] (on file with author). While the agent exhibited her knowledge of these trends during the hearing for the motion to suppress, there was no evidence that this information was presented to

there been a longer delay, this failure could have been fatal in the court's analysis of whether or not the magistrate had a substantial basis to believe that evidence of child pornography was located on Clayton's computer.

The case of *Macomber* is a much closer call, but when looking at the totality of the circumstances, the search fourteen months after Macomber subscribed to a child pornography website was properly not considered stale. Recognizing the unique hoarding attribute of child pornography possessors, the affidavit established that they "almost always maintain and possess child pornography materials."[222] More importantly, Macomber showed his continued interest in child pornography and refreshed this fourteen month old information by responding to the sexual interest questionnaire and placing a subsequent order for two child pornography movies in the weeks prior to the search affidavit.[223] The court did criticize the agent for failing to state the date of the subscription.[224] However, when considering the long-term nature of child pornography and Macomber's continued attempt to acquire child pornography, the court correctly found that there was a "fair probability" that evidence of child pornography possession was still located in Macomber's dormitory.[225] The key to a sufficient affidavit is describing the hoarding trends of child pornography possessors and the ability to retrieve deleted files through forensic analysis.[226]

C. Nexus to the Place Searched

Miltary Rule of Evidence 315(f)(2) requires a "reasonable belief that the . . . evidence sought is located *in the place . . . to be searched*."[227] This requirement is often referred to as the "nexus" between the contraband and the suspected location of the contraband.[228] It has been

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the magistrate. *Clayton* ROT, *supra* note 105, at 106.

[222] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009).

[223] *Id.*

[224] *Id.* at 220.

[225] *Id.* at 220–21 (citing United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007)).

[226] *See* COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 243 (3d ed. 2009) [hereinafter CCIPS], *available at* http://www.justice.gov/criminal/cybercrime/ssmanual/ ssmanual2009.pdf (sample affidavit with proposed language for child pornography cases).

[227] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2) (emphasis added).

[228] United States v. Hall, 50 M.J. 247, 250 (C.A.A.F. 1999) ("Probable cause to search

recognized that "[i]f there is probable cause to believe that someone committed a crime, then the likelihood that that person's residence contains evidence of the crime increases."[229] However, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[230] While direct observation can establish probable cause, the courts also allow for the inference of a nexus.[231] As with the totality of the circumstances test in general, there are several factors that a magistrate may consider when making this inferential step.

> The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of [the] items, the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to [keep the] property.[232]

This issue of nexus is a key point of contention in both *Macomber* and *Clayton*. In *Macomber*, the appellant argued that probable cause was not established to search his dormitory room because (1) there was no evidence that he possessed a computer in his room, and (2) the child pornography found in his possession was delivered and seized at a postal center as opposed to his dormitory.[233] The affidavit stated that Macomber's dormitory address was listed on the "LustGallery.com-A Secret Lolitas Archive" website's subscriber index, the credit card that paid for the subscription, the return address on the two correspondence letters he sent to the undercover agents, and the money order included in his request to purchase the videos.[234] The affidavit also stated that child

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must be based on timely information with a nexus to the place to be searched . . . .").

[229] United States v. Jones, 994 F.2d 1051, 1055–56 (3d Cir. 1993).

[230] Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

[231] United States v. Potts, 586 F.3d 823, 831 (10th Cir. 2009) ("[D]irect evidence that contraband is in the place to be searched is not required."); *see also* United States v. Alexander, 835 F.2d 1406, 1409 (11th Cir. 1988) (inferring that tools of a robbery were located in an automobile), *noted in* United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (inferring the location of stolen items).

[232] United States v. Gann, 732 F.2d 714, 722 (9th Cir. 1984) (discussing a search for stolen property); *see also* United States v. Lopez, 35 M.J. 35, 38–39 (C.M.A. 1992) (discussing nexus factors and supporting cases).

[233] United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (holding that the search authorization was not predicate on receipt of the contraband).

[234] *Id.* at 215–17.

pornography is "stored in a secure but accessible location within [the collectors] immediate control, such as in the privacy and security of [the collectors] own home[], most often in their personal bedrooms."[235]

The nexus to Clayton's living quarters in Kuwait was more tenuous. The Yahoo! e-mail that Clayton used to subscribe to the free internet group "Preteen-Bestiality-and-Anything-Taboo" was linked to his home address in Georgia.[236] Clayton requested receipt of a daily e-mail digest of the group's daily postings,[237] and Clayton's Yahoo! account was accessed by a government-owned computer in Kuwait after the website was shut down.[238] At the time that the group was shut down by Google, Clayton had not "unsubscribed" to the group.[239] No evidence was presented to the magistrate concerning Clayton's ownership of a private computer or access to the internet, although the magistrate had personal knowledge that Clayton could purchase internet service capability for his quarters.[240] In the affidavit, the Special Agent did not state any information regarding the likely locations that child pornography would be stored.[241]

The following sections discuss the sufficiency of the nexus information presented to the magistrates in *Macomber* and *Clayton* when compared to other types of evidence.

1. Nature of the Material and Likelihood of Location

In cases not involving child pornography, courts use facts presented to a magistrate to infer there is a fair probability that varying types of

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[235] *Id.* at 217.
[236] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).
[237] *Id*. at 422 (majority opinion) (limited to twenty-five postings each day).
[238] Final Brief on Behalf of Appellant at 9, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705. There was evidence that Clayton's Yahoo! account had been accessed by a private server while in Kuwait. *Clayton* ROT, *supra* note 105, at 40, 45–46. While this information would have greatly increased the nexus evidence to his private residence in Kuwait, this key piece of information could not be considered by the court because it was not listed in the affidavit nor orally presented to the magistrate. *Id.* at 76, 196–98.
[239] *Clayton*, 68 M.J. at 422.
[240] *Id.* at 423. It is unclear if the issue of internet access was considered by the magistrate or only discussed at the motions hearing when probable cause was called into question. *Id.* at 427 n.2 (Ryan, J., dissenting).
[241] *Clayton* Affidavit, *supra* note 221.

evidence will be found at a specific location. With controlled substances, courts look for the link between the location to be searched and the drug possession or sale.[242] Some courts are willing to presume that drugs were located in the place where the suspect had just left.[243] The majority of the circuit courts have allowed the inference that drug dealers typically store evidence of their crimes in their own homes.[244] The agent's experience is vital in establishing the relevant inference in the affidavit.[245]

The courts also use a "likelihood" analysis when dealing with non-controlled substance crimes. Specifically, when involving physical objects, the military courts permit reasonable inferences in logical locations that a servicemember might store such items.[246] In a case of stolen night-vision goggles, without any direct evidence pertaining to the location of the goggles, the CAAF reasoned that "the logical place to search would be areas under appellant's control—his truck and his apartment."[247] When in a foreign country and there is probable cause to

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[242] United States v. Otero, 495 F.3d 393, 398 (7th Cir. 2007) (holding that, in light of the totality of the circumstances test, an informant identifying the apartment in which he bought drugs was sufficient to establish a nexus to search the apartment).

[243] United States v. Servance, 394 F.3d 222, 230–31 (4th Cir. 2005) (holding that normal inferences established that contraband would be found in the apartment of the suspect when he was arrested for the sale and possession of narcotics shortly after leaving the apartment), *vacated on other grounds*, 544 U.S. 1047 (2005). *But see* United States v. McPhearson, 469 F.3d 518, 524–25 (6th Cir. 2006) (finding no substantial basis to infer probable cause to search a home when the defendant was found with cocaine on his person when being arrested outside his home for a non-drug offense and he was not a known drug dealer).

[244] United States v. Whitner, 219 F.3d 289, 297–98 (3d Cir. 2000) (citing eight circuit courts which have drawn a similar conclusion).

[245] Texas v. Brown, 460 U.S. 730, 742–43 (1983) (stating the importance of the officer's experience as it related to the establishment of probable cause); United States v. Feliz, 182 F.3d 82, 87–88 (1st Cir. 1999) (discussing the importance of the agent's experience in establishing probable cause to search a known drug trafficker's home for evidence of drug trafficking); United States v. Gunter, 266 F. App'x 415, 419 (6th Cir. 2008) (unpublished) (holding that the agent's experience combined with the suspect's visit to his home immediately before the sale established sufficient nexus necessary to provide a substantial basis for probable cause).

[246] United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992) ("The most logical place for appellant to store the weapons was either his quarters or his automobile."); *see also* United States v. Queen, 26 M.J. 136, 138–39 (C.M.A. 1988) (finding the search of a car reasonable because it was the most logical place to find the pistol). *But see* United States v. Lidle, 45 C.M.R. 229, 232 (C.M.A. 1972) (finding that inferences to search a car for drugs were insufficient).

[247] United States v. Light, 48 M.J. 187, 191 (C.A.A.F. 1998) (citing United States v. Johnson, 23 M.J. 209 (C.M.A. 1987)); *see also* United States v. Sparks, 44 C.M.R. 188,

believe a suspect stole physical objects, the CAAF has stated that "there is an inference that the property will be either at the residence, barracks, or home of the individual."[248] In addition, the search of one location has been found valid even when the items could be located at other locations.[249] The affidavit must establish only that there is a fair probability that the items will be found in one of the possible locations.[250]

2. Child Pornography and Nexus to the Home

The issue of nexus to the home involving child pornography is treated just like other items with evidentiary value. The investigator may receive a report from a roommate, friend, or supervisor who saw child pornography on the suspect's digital media.[251] An investigator may develop the required nexus by intercepting a transmission of child pornography with a specific Internet Protocol (IP) address that connects to the suspect's residence[252] or by viewing possessed files through a

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190 (C.M.A. 1971) ("[T]he most logical place to search for [the stolen items] was among his personal possessions in his quarters."); United States v. Walters, 48 C.M.R. 1, 3 (C.M.A. 1973) (finding it logical to search the suspect's car and wall locker for stolen items); United States v. Barnard, 49 C.M.R. 548, 551 (C.M.A. 1975) ("[When looking for stolen jewelry, t]he two logical and reasonable places that met these requirements were the accused's living quarters and his locker at his work station."); United States v. Owens, 51 M.J. 204, 211 (C.A.A.F. 1999) (finding the quarters of the defendant was a logical place to search when some of the stolen items were found in his car).

[248] United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (citing United States v. Johnson, 23 M.J. 209, 212 (C.M.A. 1987)).

[249] *Johnson*, 23 M.J. at 212 ("[T]he stereo expander could only be in one place at one time . . . . [T]he evidence here was adequate, even though it left open the possibility that the stereo expander was in the off-base residence, rather than in the barracks room; and *vice versa*."); *see also* United States v. Cervini, 16 F. App'x 865, 868 (10th Cir. 2010) (unpublished) (finding no requirement to eliminate all possible locations).

[250] *Id.* ("[I]t suffices if the commander authorizing the search has probable cause to believe that the property being sought will be found in one of the several identified areas which are under the suspect's direct control.").

[251] United States v. Leedy, 65 M.J. 208, 216–17 (C.A.A.F. 2007) (finding probable cause to search computer media when roommate with no apparent ulterior motive saw titles of files that appeared to be child pornography); United States v. Strader, No. NMCCA 200600385, 2008 CCA LEXIS 132, at *7–8 (N-M. Ct. Crim. App. Apr. 3, 2008) (unpublished) (same); United States v. Camnetar, No. ACM 36448, 2009 CCA LEXIS 40, at *4–9 (A.F. Ct. Crim. App. Jan. 30, 2009) (unpublished) (finding probable cause to search all computer media when roommate saw child pornography on DVD video located in quarters).

[252] United States v. Vosburgh, 602 F.3d 512, 526–27 (3d Cir. 2010) (citing circuit courts which upheld search warrants based on Internet Protocol (IP) information) ("[E]vidence

peer-to-peer network.[253] When there is no direct evidence, investigators must substantiate the nexus requirement through other means.[254]

The Sixth Circuit has found that, unlike suspicion for simple possession of controlled substances, child pornography possession is "much more tied to a place of privacy, seclusion, and high–speed internet connectivity (e.g., a home or office) . . . ."[255] Even with this inferential link, courts have made the same logical and common sense conclusions to find that drug dealers[256] and thieves likely store evidence of their crime in their residence.[257] The analysis for child pornography possession should be no different. A search should not be declared invalid when using inferential evidence just because child pornography could be found in a location other than the home.

It is an accepted presumption that child pornographers usually secret their collections in the privacy of their home.[258] Kenneth V. Lanning

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that the user of a computer employing a particular IP address possessed or transmitted child pornography can support a search warrant for the physical premises linked to that IP address.").

[253] United States v. Stults, 575 F.3d 834, 838, 843–44 (8th Cir. 2009) (describing the peer-to-peer file-sharing process and finding probable cause when agent found child pornography on appellant's computer through a file sharing program); United States v. Jameson, 371 F. App'x 963, 966 (10th Cir. 2010) (unpublished) (finding probable cause to search when investigator viewed child pornography through peer-to-peer network and connected the IP address to the appellant); United States v. Saxman, 69 M.J. 540, 541 (N-M. Ct. Crim. App. 2010) (describing process of agent who used peer-to-peer file sharing program to establish probable cause that appellant possessed child pornography).

[254] *Compare* United States v. Doyle, 650 F.3d 460, 472-73 (4th Cir. 2011) (stating that "evidence of child molestation alone does not support probable cause to search for child pornography"), *with* United States v. Colbert, 605 F.3d 573, 577-78 (8th Cir. 2010) (finding probable cause to search for child pornography after appellant attempted to entice a young girl back to his home).

[255] United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006), *quoted in* United States v. Lapsins, 570 F.3d 758, 766 (6th Cir. 2009); *see also* United States v. Terry, 522 F.3d 645, 648 (6th Cir. 2008) ("[A]s a matter of plain common sense, if . . . a pornographic image has originated or emanated from a particular individual's e-mail account, it logically follows that the image is likely to be found on that individual's computer or on storage media associated with the computer." (citation omitted)).

[256] *See supra* notes 244–45 and accompanying text.

[257] *See supra* notes 247–50 and accompanying text.

[258] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008) ("The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases . . . . [C]ollectors will want to secret them in secure places, like a private residence. This proposition is not novel in either state or federal court . . . ." (quoting United States v. Riccardi, 405 F.3d 852, 861 (10th Cir. 2005) (citing cases from the 3d, 8th, and 9th

acknowledges that the collection could be located at a place of business, in a safety deposit box, or in a rented storage locker, but he asserts that the "collection is usually in the offender's home."[259] This assertion is supported by research. According to the National Juvenile Online Victimization Study, 91% of arrested child pornography possessors stored child pornography mainly on their home computer and only 7% stored child pornography only on their work computer.[260] Of those, 18% had child pornography in more than one place, usually their home and work computers.[261] If the courts use these statistics to limit the locations in which an inferential nexus may be found, Judge Ryan's concern that "the government is free to search for that pornography *anywhere*" is without merit.[262]

For this information to be relevant to the probable cause analysis, the agent must inform the magistrate of these facts.[263] Like in the non-child pornography cases, the CAAF has allowed the agent to use his experience to fill in the "gaps" to establish the required nexus.[264] This requires the agent to inform the magistrate of reasonable inferences which identify where evidence is likely to be stored based on the type of offense and nature of the evidence.[265]

In *Macomber*, the affidavit listed five specific connections to Macomber's dormitory address coupled with the information that child pornographers usually store their collections in their own home.[266] When considering Macomber's refreshed desire to possess child pornography by ordering videos using his home address and his paid subscription to a

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Circuit Courts))).

[259] LANNING, *supra* note 2, at 92.

[260] Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 7–8 (2005), http://www.missingkids.com/en_US/publications/NC144.pdf (leaving a mere 2% of possessions at other locations).

[261] *Id.*

[262] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting) (emphasis in original). For example, without more, the data is not sufficient to infer a suspect is storing child pornography in a rented storage locker.

[263] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).

[264] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001) (holding that an expert can use his experience to establish the likelihood that child pornography is stored in the home).

[265] *Id.* (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987)).

[266] *See supra* notes 234–35 and accompanying text.

child pornography website,[267] the trial court and the CAAF treated this case involving child pornography just like they and the circuit courts have treated cases involving physical objects. The court properly found that there was a substantial basis to form a "practical, common sense" opinion that Macomber probably possessed child pornography in his dormitory.

In contrast, the agent in *Clayton* failed to provide the magistrate with any information regarding the location of likely storage.[268] This mistake should have proven fatal to the sufficiency of the warrant considering the agent did not provide any evidence that Clayton was receiving and storing child pornography in his Kuwait residence. Failure to provide this critical piece of information requires a finding of no probable cause in accordance with the standard established in MRE 315(f)(2). The sole piece of information linking child pornography to Kuwait was that Clayton's Yahoo! account had been accessed by a government computer in Kuwait after the internet group was shut down. While the majority relied on the fact that Clayton possessed a laptop and the laptop could have been taken to his residence, the laptop Clayton was known to possess was a government issued laptop.[269] The CAAF provided no evidence to support the conclusion that the possession of a government laptop made it likely that Clayton transferred contraband to personal media devices.[270] From the information provided to the magistrate, there was no evidence indicating that this behavior was or could be occurring. Thus, while there may have been probable cause to search Clayton's government laptop, the agent failed to establish a nexus to Clayton's Kuwait quarters for personally owned media.

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[267] *See infra* Part IV.E (discussing subscriptions to child pornography based websites).

[268] *Clayton* Affidavit, *supra* note 221; *Clayton* ROT, *supra* note 105, at 191–294 (the testimony of the agent and magistrate did not indicate this topic was discussed). At the motion to suppress hearing, the magistrate stated that actual knowledge of computer ownership and private internet access would have made the case much stronger. *Id.* at 192.

[269] United States v. Clayton, 68 M.J. 419, 424 (C.A.A.F. 2010); *id.* at 427 (Ryan, J., dissenting).

[270] *See* United States v. Gallo, 55 M.J. 418, 421–22 (C.A.A.F. 2001) (holding evidence of files being transferred to external media on a government computer created probable cause to search the appellant's residence).

3. The Failed Controlled Delivery in Macomber

While the CAAF found that the magistrate's probable cause determination in *Macomber* was not based on the receipt of the package from the undercover agents,[271] a controlled delivery of illicit items can form the basis for probable cause to search via an anticipatory warrant.[272] In order for an anticipatory warrant to be valid, the condition in the warrant must be met before probable cause is established to execute the warrant.[273] However, when the child pornography is not delivered directly to the place to be searched, some courts have held that the agents must establish the likelihood that the contraband will be taken to the place to be searched.[274] In addition, the agent should produce some evidence establishing that there is a fair probability that the suspect possesses child pornography other than that delivered by the undercover operation because possession of the delivered package by itself does not establish probable cause to search for more than the contents of the package.[275]

The agents in *Macomber* may have been "hedging their bets" by executing a controlled delivery after obtaining what first appears to be an anticipatory warrant. Had the *Macomber* warrant needed to rely on a successful delivery of the target package, the CAAF would probably still

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[271] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009) ("[T]he [search] request was based on Appellant's subscription to the 'LustGallery.com' child pornography website using his dorm room address, his self-proclaimed interest in children engaged in sex, and his attempt to order movies containing child pornography.").

[272] United States v. Grubbs, 547 U.S. 90 (2006). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.'" *Id.* at 94 (quoting 2 W. LAFAVE, SEARCH AND SEIZURE § 3.7(c), at 398 (4th ed. 2004)).

[273] *Id.* at 94–97 (holding that the triggering event of a person accepting the controlled delivery of child pornography and taking the package into the residence was sufficient to establish probable cause to search the residence).

[274] United States v. Ricciardelli, 998 F.2d 8, 14 (1st Cir. 1993) (holding anticipatory warrant not valid, even when the suspect took the package home, when agents did not produce evidence in the affidavit that suspect would take the package to his home) (citing United States v. Hendricks, 743 F.2d 653, 655 (9th Cir. 1985) (same)); *see also Investigations and Police Practices*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 3, 25–26 n.67 (2010) (listing cases from the circuit courts involving anticipatory warrants).

[275] United States v. Weber, 923 F.2d 1338, 1344 (9th Cir. 1990) (holding that the affidavit must establish probable cause that the suspect possesses child pornography other than what was delivered by law enforcement to search for additional evidence of child pornography) (citing State v. Sagner, 506 P.2d 510, 514–15 (Ct. App. Ore. 1973) (holding that probable cause to search for two stolen items does not give law enforcement probable cause to search for other stolen property)).

have upheld the search. The affidavit provided evidence to support the conclusion that Macomber possessed other child pornography, his paid subscription, and that Macomber was likely to take the target package to his dormitory because he used his dormitory address to order the package. This, along with his unique status as a servicemember living on a military installation, would lead his dormitory to be the most likely secure and private location to store contraband.[276]

4. What About Evidence of Computer Ownership and Internet Access?

In Judge Ryan's dissents in both *Macomber* and *Clayton*, she argued that probable cause was not established in the affidavit because there was no evidence showing either appellant possessed a computer or had access to the internet.[277] While the majority opinion in *Macomber* used common sense inferences to establish these two facts,[278] these are easy facts for investigators to include in an affidavit to help solidify the probable cause analysis.

Investigators should always give some information concerning computer ownership and internet access when seeking digital media. If these facts are not known, the investigator could include profile type information, as routinely done concerning other aspects of child pornography and drug dealer cases.[279] The affidavit could state something as simple as the following: "The majority of servicemembers own a personal computer and have internet access where they live." The investigators can base this statement off their personal experiences or research.[280] The U.S. Census Bureau reports that, as of 2009, over 80% of employed Americans have internet access in their home.[281] When the

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[276] *See supra* notes 246–50 and accompanying text.
[277] United States v. Macomber, 67 M.J. 214, 221 (C.A.A.F. 2009) (Ryan, J., dissenting); United States v. Clayton, 68 M.J. 419, 427–28 (C.A.A.F. 2010) (Ryan, J., dissenting).
[278] *Macomber*, 67 M.J. at 220 (majority opinion) ("[The magistrate] reasonably relied on the common sense inference that a military member who subscribed to an Internet website while listing his dormitory as his address owned a computer . . . ."). *But see Clayton*, 68 M.J. at 424–25 (majority opinion) (ignoring the issue).
[279] *See supra* notes 204–06, 231, 245, 263–65 and accompanying text.
[280] *Cf. id.* The agent in *Clayton* opined that a majority of deployed soldiers owned personal computers. *Clayton* ROT, *supra* note 105, at 159. The agent did not state that this opinion factored into the probable cause analysis, and acknowledged not knowing if Clayton owned a computer or had internet access. *Id.* at 91–162.
[281] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES tbl.2 [hereinafter U.S.

person has at least a bachelor's degree, as did Lieutenant Colonel Clayton, these numbers rose to over 90%.[282] While data regarding computer ownership was last compiled in 2003, past research showed computer ownership was at least seven points higher than internet access.[283] When considering that these statistics are lowered by including older individuals not in the military population and those that live in areas with less developed internet access,[284] the investigator can easily make a common sense argument that a servicemember is over 90% likely to own a computer and have internet access in his residence. Using the totality of the circumstances test, this helps create a fair probability that evidence of child pornography will be found on digital media in the suspect's residence.

D. Guilty by Association and the Child Pornographer Profile

As discussed above in Part IV.B–C (staleness and nexus to the place searched), an agent's inclusion of "profile" evidence is often used to support the probable cause analysis. Judge Ryan's dissents in *Macomber* and *Clayton* make it clear why every affidavit regarding child pornography should include information regarding child pornography collectors and, if relevant, pedophiles. Judge Ryan criticized the majority in *Macomber* because of their reliance on a "pedophile profile."[285] Judge Ryan stated that she "cannot agree that all the government ever need do to defeat nexus concerns is provide boilerplate language about the habits of the theoretical 'collector.'"[286] Yet, in *Clayton*, Judge Ryan correctly

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CENSUS BUREAU, Tbl. 2], *available at* http://www.census.gov/population/www/socdemo /computer/2009.html (last visited Mar. 11, 2011) (Reported Internet Usage for Individuals three Years and Older, by Selected Characteristics: 2009).

[282] *Id.*

[283] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES app., tbl. A (2009), *available at* http://www.census.gov/population/www/socdemo/ computer/2009.html (last visited Mar. 11, 2011) (Appendix, Tbl A. Households with a Computer and Internet Use: 1984 to 2009).

[284] Only 53% of persons sixty-five and older have internet access in their home. tbl.2, *supra* note 282. Only 56% of Mississippi residents have internet access in their home compared to nearly 85% in New Jersey. U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES tbl.3 (2009), *available at* http://www.census.gov/population/www/ socdemohttp://www.census.gov/population/www/socdemo/computer/2009.html (last visited Mar. 11, 2011) (Table 3. Reported Internet Usage for Individuals Three Years and Older, by State: 2009).

[285] United States v. Macomber, 67 M.J. 214, 217, 221–22 (C.A.A.F. 2009) (Ryan, J., dissenting).

[286] *Id.* at 222.

faulted the affidavit for not containing "even this constitutionally minimally relevant evidence."[287]

In *United States v. Gallo*, the CAAF found a "pedophile profile" crucial in the probable cause analysis.[288] While stating that "conclusory statements should not be in an affidavit," the court accepted the agent's conclusion that the "appellant fit the pedophile profile."[289] The court found the conclusion was proper because Gallo had solicited child pornography and "downloaded and uploaded child pornography from his work computer."[290]

While Judge Ryan acknowledges the CAAF's decision in *Gallo*,[291] her attempt to distinguish *Gallo* from *Macomber* is unpersuasive. In *Gallo*, the appellant sought out child pornography and used his work computer to transfer child pornography to electronic media.[292] These facts provided "other factors" allowing the magistrate to rely on the pedophile profile.[293] In *Macomber*, the appellant had paid to at least have access to child pornography on the internet, and, nearly fourteen months later, he was still trying to obtain child pornography when he ordered two videos in an undercover sting operation.[294] Considering the court's opinion in *Gallo*, Judge Ryan fails to describe adequately why Macomber's continuing quest to obtain child pornography should have been insufficient for the magistrate to consider collector profile information.[295]

While the *Macomber* court titled this information a "pedophile profile," the agent used the more general language of "child pornographers and persons with a sexual attraction to children."[296] The court in *United Sates v. Pappas* equates this information to a

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[287] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).
[288] 55 M.J. 418, 421–22 (C.A.A.F. 2001).
[289] *Id.*
[290] *Id.*
[291] United States v. Macomber, 67 M.J. 214, 222 (C.A.A.F. 2009) (Ryan, J., dissenting); *see also Clayton*, 68 M.J. at 428 (Ryan, J. dissenting) (distinguishing *Gallo*).
[292] *Gallo*, 55 M.J. at 422.
[293] *Macomber*, 67 M.J. at 222 (Ryan, J., dissenting).
[294] *Id.* at 215–16 (majority opinion).
[295] Judge Ryan's only argument differentiating the cases is that the affidavit in *Macomber* could not definitively establish that Macomber had actually downloaded child pornography. *Id.* at 222 (Ryan, J., dissenting).
[296] *Id.* at 217 (majority opinion).

"collector."[297] The *Pappas court* said,

> [T]he moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors."[298]

For profile information to be relevant, "the affidavit must lay a foundation which shows that the person subject to the search is a member of the class."[299] The affidavit must demonstrate a substantial connection to child pornography,[300] as a single request to purchase child pornography, which is never delivered, is not sufficient.[301] In addition, the affidavit must not be "rambling boilerplate recitations."[302] While some courts have allowed the magistrate to make his own conclusions,[303]

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[297] 592 F.3d 799, 804 (7th Cir. 2010).

[298] *Id.* at 804.

[299] United States v. Weber, 923 F.2d 1338, 1345 (9th Cir. 1990); *Macomber*, 67 M.J. at 220 ("[A] profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search.").

[300] United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc) (accepting the agent's conclusion that the appellant "fit the collector profile because he joined a paid subscription website"); United States v. Pappas, 592 F.3d 799, 804 (7th Cir. 2010) (receiving eleven e-mails containing child pornography was sufficient to include "child pornography collector boilerplate" (citing United States v. Prideaux-Wentz, 543 F.3d 954, 961 (7th Cir. 2008) ("Because the warrant connected Prideaux-Wentz to several e-mail accounts responsible for uploading or possessing child pornography, we cannot say that it required too much of an inferential leap to conclude that Prideaux-Wentz might be a collector of child pornography."))). *But see* United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) (accepting trends of a collector when appellant was known to have downloaded two files of child pornography); United States v. Hay, 231 F.3d 630, 632, 636 (9th Cir. 2000) (holding the profile information included in the affidavit was relevant when appellant received only one internet transfer of nineteen child pornography pictures); United States v. Martin, 426 F.3d 68, 75 (2d Cir. 2005) (accepting trends of a collector when appellant was a member of the child pornography website "girls12–16").

[301] *Weber*, 923 F.2d at 1344–45, *cited with approval in Lacy*, 119 F.3d at 745.

[302] *Weber*, 923 F.2d at 1345 ("It is clear that the 'expert' portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind.").

[303] United States v. Schwinn, 376 F. App'x 974, 979 (11th Cir. 2010) (unpublished) ("[T]he magistrate was entitled to infer that Schwinn was a collector based on other information in the affidavit, including his status as a sex offender and the alleged pattern

the affidavit should draw from the facts in the case to tie the suspect to the relevant class of people.[304]

These "collector" conclusions have received criticism from some judges because they presume guilt by a "person's mere propinquity to others independently suspected of criminal activity."[305] This argument is based on the Supreme Court's *Ybarra v. Illinois* ruling that there was no individual suspicion to search a patron in a public tavern when the warrant only authorized the search of the bartender and tavern for the presence of controlled substances.[306] In *United States v. Perez*, the court found this rationale persuasive when it held that the simple subscription to one free child pornography website where the appellant received no e-mails to be insufficient to establish probable cause to search Perez's home.[307] *Perez* appears analogous to walking into a public tavern located

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of purchasing brief memberships to multiple websites containing child pornography.") (citing *Pappas*, 592 F.3d at 803–04) ("[W]here evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the 'collector' profile to justify including the child pornography collector boilerplate in a search warrant affidavit.").

[304] *Compare Weber*, 923 F.2d at 1341, 1345 (finding the profile insufficient when there was no evidence that appellant actually possessed child pornography, the affidavit did not describe how much material must be purchased for a suspect to be "defined as a 'collector,'" and the affidavit did not even make a "conclusory recital" that the suspect was a pedophile, molester, or collector), *with* United States v. Clark, 668 F.3d 934 (7th Cir. 2012) (finding that appellant fit the collector profile when he showed pornography to one child, sexually assaulted one child, and made sexual advances towards a third child), *and* United States v. Rabe, 884 F.2d 994, 995–97 (9th Cir. 1988) (holding profile information relevant to probable cause determination when appellant was known to actually possess child pornography from a controlled delivery and appellant described a small collection that he possessed while seeking to expand his experience as an "avid photographer" (distinguished in *Weber*, 923 F.2d at 1345–46)), *and* United States v. Henley, 48 M.J. 864, 869–70 (A.F. Ct. Crim. App. 1998) (allowing a magistrate to consider an investigator or expert's opinions in the probable cause analysis).

[305] United States v. Coreas, 419 F.3d 151, 156 (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)); *see also* United States v. Martin, 426 F.3d 68, 81–82 (2d Cir. 2005) (Pooler, J., dissenting), *reh'g denied*, 426 F.3d 83, 89 (2d Cir. 2005) (Pooler, J., dissenting) (cited by United States v. Falso, 544 F.3d 110, 119 (2d Cir. 2008)); United States v. Gourde, 440 F.3d 1065, 1084 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting). *But see Martin*, 426 F.3d at 87–88 (majority opinion) (distinguishing child pornography websites from the tavern in *Ybarra*); United States v. Shields, 458 F.3d 269 (3d Cir. 2006) (discounting the *Ybarra* argument when appellant subscribed to two child pornography websites with a suggestive username in his e-mail address).

[306] 444 U.S. at 91–92.

[307] 247 F. Supp. 2d 459, 462, 482 (S.D.N.Y. 2003) ("The affidavit did not represent or assert that the sole or principal purpose of the Candyman Egroup was to engage in unlawful conduct."). While the first page of the website gave an indication to a potential subscriber that the website may contain illegal content, the viewer would not have seen

in the "bad part of town," unaware that the tavern's primary purpose was drug distribution.

However, the tavern analogy can often be distinguished when additional facts regarding the "tavern" and the "patron" are added to the equation. The Supreme Court did not say that the police could never have probable cause to search the patron. The police must have additional facts to tie the patron to criminal activity when the patron is sitting in an establishment that appears legitimate.[308] When the welcome message indicates the primary purpose of the website is illegal activity, the situation appears to be more akin to a tavern that advertises that its primary purpose is drug trafficking. The *Ybarra* case is only analogous if the website primarily dealt in legal pornography, and the visitor has to delve deep into the site to participate in illegal functions. In *Macomber*, the website's primary purpose was the distribution of illegal child pornography.[309] While the website may have had some legal features, such as a chat room, there was still a fair probability of child pornography receipt by the website's subscribers.

In addition, *Macomber* can be distinguished from *Perez*. In *Macomber*, the appellant paid for his subscription to a website whose name indicated a criminal purpose by using common child pornography terms in "A Secret Lolitas Archive."[310] Then, less than fourteen months later, Macomber was still seeking out child pornography when he ordered two videos from undercover investigators.[311] The inferential step that Macomber was a collector is not tenuous considering the evidentiary standard is less than a fifty-percent probability and Macomber twice paid to receive contraband.[312]

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any illegal content or confirmed such suspicion until the viewer became a subscriber and was granted access to the full website. *Id.* at 464.

[308] *Ybarra*, 444 U.S. at 91 ("[A] person's mere propinquity to others independently suspected of criminal activity does not, *without more*, give rise to probable cause to search that person." (emphasis added)).

[309] *See infra* note 343.

[310] United States v. Macomber, 67 M.J. 214, 215 (C.A.A.F. 2009); *see* United States v. Gourde, 440 F.3d 1065, 1067, 1072 (9th Cir. 2006) (en banc) (finding the conclusion that Gourde fit the collector profile reasonable when Gourde paid to subscribe to a child pornography website called "Lolitagurls.com").

[311] *Macomber*, 67 M.J. at 216.

[312] *Id.* at 220 (allowing the magistrate to draw the inference even when the affidavit "did not expressly conclude or state that Appellant fit the profile").

The agent in *Clayton* did not include any profile information in the affidavit, nor did she provide any information allowing the magistrate to make such an inference.[313] The agent acknowledged in her testimony at the motion to suppress hearing that the investigation produced no "specific information" that Clayton had viewed or downloaded any child pornography to give her an indication that Clayton fit the profile to make it likely that he possessed a "library" of child pornography.[314] The specific request to receive daily e-mails without ever unsubscribing to the e-mail list demonstrates the likely intent of Clayton if the e-mails contained child pornography, but there was no evidence that the e-mails contained child pornography or that Clayton was a member of the group when the one picture of child pornography was posted on the website.[315] Considering the additional facts that the website may have had a legal primary purpose,[316] the website was free, the website did not contain numerous pictures of child pornography, and that Clayton had not participated in any posts or even made one request for child pornography, [317] the evidence did not support an inference that Clayton fit the collector profile.[318] Thus, profile information could not be used to support the affidavit. When considering the weaknesses discussed in Part IV.C (nexus to the place searched) and Part IV.E (sufficiency of website description), the CAAF appears to have been on an affidavit saving mission as opposed to truly analyzing the basis for probable cause.

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[313] *Clayton* Affidavit, *supra* note 221. While the affidavit notes that the group moderator and another individual who posted the one purported child pornography picture were arrested and found to possess child pornography, *id.*, these facts should not be sufficient to impute their crimes on Clayton when the website contained only one photograph of child pornography and no posts by Clayton. Had the website contained numerous postings of illicit images or posts by Clayton indicating possession of child pornography, probable cause would have easily been established.

[314] *Clayton* ROT, *supra* note 105, at 148.

[315] *Id.* at 79, 128–30. The Immigration and Customs Enforcement Agency (ICE) agent assumed that the e-mail digest would have included the one picture of child pornography posted on the website, but there was no confirmation that the digest contained anything more than text. *Id.*

[316] The ICE report did not detail the functions or content of the discussion group other than describing the one illicit image and only four posts over a four month period concerning the desire to receive child pornography, to find a "preteen escort," and the general preference for child pornography. *Id.* at Appellate Exhibit I (ICE Report). There were "numerous photos of graphic Adult Pornography" in the record of trial, but it was unclear if those pictures were taken from the discussion group or Clayton's digital media. *Id.* at Court Order to Seal Exhibits.

[317] *Id.* at 32–34, 67.

[318] *Clayton* is very similar to *Weber* where the court refused to draw the profile inference. *See supra* notes 300–305 and accompanying text.

E. Subscription to a Child Pornography-Based Website

As the internet explosion took hold in the 1990s, the internet became the primary tool to acquire child pornography.[319] This transfer is often accomplished by the creation of pay-for-access websites,[320] barter websites,[321] or discussion group websites[322] where members can share their collections with fellow group members. When these websites are discovered, in cooperation with the host servers such as Google or Yahoo!, investigators seek to acquire the e-mail addresses, physical addresses, and credit card information of the subscribers. Courts have found a reasonable expectation of privacy in private e-mails,[323] but have generally refused to extend similar privacy expectations for information provided to websites.[324]

The point of contention is whether or not simply subscribing to a website that traffics child pornography creates probable cause to search a residence for the actual possession of child pornography. Judge Ryan believes that allowing this result requires too many inferences: that the subscriber has access to a computer, that the computer is in his residence, and that membership results in the downloading and possession of child pornography.[325] However, when dealing with "fair probability" and an evidentiary requirement that is less than fifty-percent, Judge Ryan's

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[319] AKDENIZ, *supra* note 2, at 5–6; LANNING, *supra* note 2, at 119.
[320] *See infra* note 330.
[321] United States v. Grant, 218 F.3d 72, 76 (1st Cir. 2000) (citing the requirement to possess 10,000 images of child pornography to join the group).
[322] United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010); *Clayton* ROT, *supra* note 105, at 81.
[323] United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996) ("Expectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient. Messages sent to the public at large in the 'chat room' or e-mail that is 'forwarded' from correspondent to correspondent lose any semblance of privacy. Once these transmissions are sent out to more and more subscribers, the subsequent expectation of privacy incrementally diminishes.").
[324] United States v. Bynum, 604 F.3d 161, 164 (4th Cir. 2010) (finding no reasonable expectation of privacy in information provided to an internet service provider (citing United States v. Perrine, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy exception.")); United States v. Hambrick, 55 F. Supp. 2d 504, 508 (W.D. Va. 1999) (finding no reasonable expectation of privacy in personal information supplied to an internet service provider when the suspect knowingly reveals his name, address, credit card number, and telephone number (cited by United States v. Allen, 52 M.J. 402, 409 (C.A.A.F. 2000))); United States v. Ohnesorge, 60 M.J. 946 (N-M. Ct. Crim. App. 2005) (same).
[325] *Clayton*, 68 M.J. at 428 (Ryan, J., dissenting).

claim that drawing these inferences requires a "leap of faith"[326] is unsubstantiated.

Some courts have found a simple subscription to a child pornography-based website is insufficient to establish probable cause, but most of these decisions are at the district court level.[327] At the circuit courts of appeal, the results have been nearly unanimous that such a subscription provides a common sense basis that the suspect probably possesses child pornography in his home.[328] As the Sixth Circuit said in *United States v. Wagers*, "evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion the he has likely downloaded, kept, and otherwise possessed the material."[329]

Using the totality of the circumstances test, the courts usually point to some additional information to support their decision. These factors typically include one or more of the following: payment for access,[330] the

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[326] United States v. Macomber, 67 M.J. 214, 223 (C.A.A.F. 2009) (Ryan, J., dissenting).

[327] United States v. Gourde, 382 F.3d 1003 (9th Cir. 2004), *overruled by* 440 F.3d 1065 (9th Cir. 2006) (en banc); United States v. Perez, 247 F. Supp. 2d 459, 471, 481 (S.D.N.Y. 2003) (holding there was no probable cause when appellant subscribed to the Candyman child pornography group nine days before it was shut down when the welcome message did not make it clear that the website was solely for child pornography trafficking); United States v. Strauser, 247 F. Supp. 2d 1135, 1144–45 (E.D. Mo. 2003) (holding there was no probable cause when appellant subscribed to the Candyman child pornography group for over a month without unsubscribing when there was no evidence that he received e-mails of the groups postings); *see also* United States v. Coreas, 419 F.3d 151 (2d Cir. 2005) (upholding warrant solely because of *stare decisis* (citing United States v. Martin, 418 F.3d 148 (2d Cir. 2005), *amended by* 426 F.3d 128 (2d Cir. 2005)). *But see* United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003) (finding that the courts in *Strauser* and *Perez* "fail[ed] to apply the common sense test for probable cause"); United States v. Coye, No. 02 Cr. 732, 2004 WL 1743945, at *3 (E.D.N.Y. Aug. 4, 2004) (unpublished) (finding the *Strauser* court's reasoning unpersuasive).

[328] *See infra* notes 330–38; United States v. Terry, 522 F.3d 645, 649 (6th Cir. 2008) ("[T]he courts universally found that the probable cause threshold had been satisfied because the defendants had purchased *access* to child pornography."); United States v. Garlick, 61 M.J. 346, 352–53 (C.A.A.F. 2005) (Baker, J., concurring) (stating that "[c]onsistent with the majority of courts," he would find probable cause existed when the appellant belonged to the no-fee Candyman website); *cf.* United States v. Hutto, 84 F. App'x 6, 8 (10th Cir. 2003) (unpublished) (finding probable cause solely on the factors that the website's purpose was to share child pornography, child pornography was available, and the appellant voluntarily joined).

[329] 452 F.3d 534, 540 (6th Cir. 2006) (citing United States v. Froman, 355 F.3d 882, 890–91 (5th Cir. 2004); United States v. Martin, 418 F.3d 148, 157 (2d Cir. 2005)).

[330] United States v. Wagers, 452 F.3d 534, 538–43 (6th Cir. 2006) (finding probable

receipt of e-mails from the child pornography website containing illicit images,[331] the number of websites visited,[332] the failure to "unsubscribe" to the website,[333] the website title or welcome message indicating content and purpose,[334] the username of the suspect,[335] the prior conviction of the suspect for child pornography possession,[336] and the requirements to

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cause when appellant had a prior conviction for child pornography and subscribed for one to two months to three paid websites containing child pornography); United States v. Paull, 551 F.3d 516, 522 (6th Cir. 2009) (finding probable cause when the appellant paid for a subscription to a child pornography website); United States v. Frechette, 583 F.3d 374, 380 (6th Cir. 2009) (same); United States v. Schwinn, No. 08-14592, 2010 U.S. App. LEXIS 8851, at *4, *10–11 (11th Cir. Apr. 28, 2010) (unpublished) (finding probable cause when registered sex offender appellant purchased one-month subscriptions to four child pornography websites).

[331] United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003) ("[K]nowingly becoming a computer subscriber to a specialized internet site that frequently, obviously, unquestionably and sometimes automatically distributes electronic images of child pornography [via e-mail] to other computer subscribers alone establishes probable cause for a search of the target subscriber's computer . . . ."); United States v. Kunen, 323 F. Supp. 2d 390 (E.D.N.Y. 2004) (affirming three appellant's convictions because investigators believed all members of the "Candyman" group were receiving e-mails from the illicit website and reversing the conviction of a fourth appellant whose warrant relied on this fact but was executed after investigators knew that all members were not receiving the illicit e-mails).

[332] United States v. Ramsburg, 114 F. App'x 78, 79–80 (4th Cir. 2004) (unpublished) (finding probable cause when appellant registered with two websites whose "primary purpose was to facilitate the exchange and distribution of child pornography" after sending an illicit image to an undercover officer seven years prior).

[333] *Froman*, 355 F.3d at 890; United States v. Martin, 430 F.3d 73 (2d Cir. 2005) (Wesley, J., concurring) (explaining the rehearing petition was denied because the website's illicit purpose was apparent from the welcome message and the appellant had subscribed two weeks prior to the website being shut down without unsubscribing), *cert denied*, 547 U.S. 1192 (2006).

[334] United States v. Martin, 426 F.3d 68, 71, 74–75 (2d Cir. 2005), *reh'g denied*, 426 F.3d 83 (2d Cir. 2005) (finding probable cause when the e-group was titled "girls 12-16" and contained a welcome message inviting the posting of pictures and videos of "11 to 16 yr old[]" girls); United States v. Gourde, 440 F.3d 1065, 1067–71 (9th Cir. 2006) (en banc) (finding probable cause when the appellant paid to subscribe to a website for three months which advertised "Over one thousand pictures of girls age 12-17! Naked Lolita girls").

[335] *Froman*, 355 F.3d at 890 (finding probable cause when the appellant subscribed to a website which sole purpose was to traffic child pornography when he had registered usernames of "Littlebuttsue and Littletitgirly"); United States v. Shields, 458 F.3d 269, 275 (3d Cir. 2006) (finding probable cause when the appellant registered for two child pornography sharing websites with the suggestive username of "LittleLolitaLove").

[336] United States v. Wilder, 526 F.3d 1, 5–7 (1st Cir. 2008) (finding probable cause when convicted child pornography possessor paid for a subscription to the same website as Macomber—"LUST GALLERY—a Secret Lolita Archive").

become a member.[337] Probable cause has been found even when it was not conclusive that the website exclusively contained illegal images.[338] However, the affidavit must give sufficient facts to demonstrate the features of the website are designed to make child pornography acquisition an easy process.[339]

In *Macomber*, the appellant purchased a subscription to a website with the sexually suggestive name of "LustGallery.com-A Secret Lolitas Archive."[340] Had Macomber not subsequently attempted to purchase two child pornography videos from undercover agents, the CAAF would have had to give the staleness analysis more attention in finding probable cause to search Macomber's residence. The CAAF would likely still have found the fourteen-month old purchase to not be stale, consistent with the circuit court's decisions discussed above, [341] as the facts meet the common sense test required by *Illinois v. Gates*.[342] With a paid subscription to a website that contained thousands of images of child pornography, to include naked children on the preview page,[343] it would seem nearly impossible that Macomber accidently gained access to the site. When combined with the title words "Lolitas Archive," it is hardly a stretch of the imagination to conclude that the subscriber was attempting to obtain child pornography. These simple conclusions result in the "fair probability" that the suspect possesses child pornography.

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[337] United States v. Grant, 218 F.3d 72, 76 (1st Cir. 2000) (finding that the requirement to possess 10,000 images of child pornography to join the group established probable cause to search appellant's home). *But see* United States v. Falso, 544 F.3d 110, 121 (2d Cir. 2008) (finding no probable cause when it could not be confirmed that the appellant actually accessed the child pornography website).

[338] United States v. Wagers, 452 F.3d 534, 538–39 (6th Cir. 2006).

[339] United States v. Falso, 544 F.3d 110, 121 (2d Cir. 2008); *see* United States v. Gourde, 440 F.3d 1065, 1067 (9th Cir. 2006) (en banc) (citing the affidavit which described the website's primary features).

[340] United States v. Macomber, 67 M.J. 214, 216 (C.A.A.F. 2009). The word "lolita" is commonly associated with child pornography. United States v. Allen, 53 M.J. 402, 407 (C.A.A.F. 2000).

[341] *See supra* notes 213–19 and 336.

[342] *See supra* Part II.A.3 (discussing the test instituted in *Illinois v. Gates*).

[343] United States v. Wilder, 526 F.3d 1, 3 (1st Cir. 2008) (describing the same website that Macomber visited as charging $57.90 per month, portraying naked children on the preview page, and readily displaying thousands of images of child pornography upon entering the website).

The problem with basing probable cause solely on the website subscription in *Clayton* is that the investigators did not confirm any of the additional factors that the circuit courts relied on in finding probable cause.[344] The investigation did not discover a large number of contraband images, how long Clayton had been a member, if Clayton was a member when the picture was posted, or whether the daily e-mail digest would have even contained that picture.[345] The ICE agent confirmed that the postings indicated that Clayton did not make any requests to receive or offers to distribute child pornography.[346] The only known access of the free website was the one time Clayton requested a digest,[347] and the ICE report did not give sufficient details of the website to determine its primary purpose.[348] In addition, ignoring the recommendation of the ICE agent, the military investigator did not subpoena Clayton's Yahoo! records to determine what digest e-mails Clayton had received or if Clayton had contact with members of the group outside the public postings.[349] This simple subpoena could have added significant depth to the evidence presented to the magistrate. With the lame excuse that the investigator did not want Clayton to be tipped off and destroy evidence,[350] the investigator was content to "cut and paste" portions of

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[344] *See* cases *supra* notes 331–38 and accompanying text. Clayton did not pay for access, there was no confirmation of illicit images in any e-mails, Clayton was not found to have visited other child pornography websites, it was unknown if Clayton was a member long enough to "unsubscribe," the website did not have a welcome message inviting the posting of illicit images, Clayton did not have an illicit username, Clayton did not have criminal history of sexual deviance, and there were no special requirements to become a member.

[345] *Clayton* ROT, *supra* note 105, at 59, 79–80, 128–30.

[346] *Id.* at 67.

[347] *Id.* at 161. Weighing in favor of probable cause is that Clayton took proactive steps to become a member of the website. Clayton did not simply click a few buttons and become a member. Clayton had to be approved by the moderator from whom Clayton requested to receive a daily e-mail containing up to twenty-five of the group's daily postings. United Sates v. Clayton, 68 M.J. 419, 422 (C.A.A.F. 2010).

[348] *See supra* note 316 (describing only four posts over a four-month time period).

[349] *Clayton* ROT, *supra* note 105, at 74, 132–33. Had the investigator found e-mail communication with other group members, this would have provided a significant indication that Clayton was actively using the website to find child pornography trading partners. The investigator did not tell the magistrate that the ICE agent recommended additional investigation. *Id.* at 135.

[350] *Id.* at 103. This excuse is illogical as Clayton was out of the country and not scheduled to return for nearly two weeks. *Id.* If Clayton had returned before the evidence was obtained, Clayton's room could have been secured until Yahoo! responded and the magistrate ruled on the search request. United States v. Hall, 50 M.J. 247 (C.A.A.F. 1999).

the ICE report into the affidavit[351] in hopes of receiving the search authorization without additional work or concern for the possible encroachment on Fourth Amendment privacy rights. The investigator's failure to adequately investigate Clayton's participation in the website made the probable cause conclusion mere speculation.

Thus, Macomber's and, assuming a thoroughly investigated case, Clayton's "status as a member manifested [their] intention and desire to obtain illegal images."[352] This well-supported conclusion leads to five common arguments against finding probable cause in website subscription cases. While these arguments are more suited for trial on the merits, they are often cited by disapproving judges and commentators who argue against finding probable cause based on website subscription.

1. "Ooops! I Didn't Mean to Subscribe to that Filth!"

An argument against finding probable cause in website subscription scenarios is that a person may have signed up for a group in which he did not know the true purpose. After discovering the true purpose, the subscriber never returns to the website and inadvertently fails to unsubscribe. The court in *United States v. Strauser* analogized this situation to finding probable cause to search a person who subscribes to a "drug legalization organization or newsletter."[353] Such a hypothetical subscription is far off the mark from being analogous to child pornography possession unless that newsletter includes a little baggie of an actual illegal substance as an insert. If the newsletter delivered actual illegal substances, it would seem likely that an investigator would find that illegal substance where the newsletter was delivered, providing probable cause to obtain a search warrant. When the website required payment or the subscriber chose to receive e-mail digests containing child pornography from the group, this "accidental" subscription scenario seems even less likely.

In addition, the argument ignores the standard for finding probable cause. It has long been settled that probable cause is an evidentiary showing of less than fifty-percent and the investigator need not exclude

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[351] *Clayton* ROT, *supra* note 105, at 133.
[352] United States v. Gourde, 440 F.3d 1065, 1070 (9th Cir. 2006) (en banc).
[353] 247 F. Supp. 2d 1135, 1144 (E.D. Mo. 2003).

every innocent purpose behind the information.[354] Critics of this evidentiary basis have not shown that a majority of subscribers who are searched do not possess child pornography, which would then negate the fair probability assertion. Lacking this information, applying a "practical, common sense" analysis would indicate to any reasonable investigator that the subscriber most likely intentionally became a member specifically because the website provided access to child pornography. While some innocent citizens may undergo the invasiveness of a search, it hardly flies in the face of the Bill of Rights when investigators use magistrates like the Fourth Amendment intended.

2. "I Just Wanted to Use the Chat Room!"

Even "repugnant" speech is protected by the First Amendment.[355] But "[t]here is no requirement for a higher standard of probable cause for material protected by the First Amendment."[356] A "fair probability" that child pornography is located in the home is all that is required.[357] The court in *United States v. Coreas* argued that probable cause did not exist because Coreas may have been using the legal features of the website while abstaining from downloading child pornography.[358] The simple fact that a child pornography website has some lawful features does not significantly alter the common sense probability that a person who subscribes to such a website, which primary purpose is to trade child pornography, is attempting to acquire child pornography, particularly when combined with additional information to support such a conclusion.[359] Holding otherwise is injecting a "hypertechnical" thought process to the analysis; just the type of analysis the Supreme Court rejected in *Gates*.[360]

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[354] *Cf.* Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) (discussing the probability standard and acknowledging the possibility that innocent behavior may still result in probable cause).
[355] United States v. Coreas, 419 F.3d 151, 156–57 (2d Cir. 2005).
[356] United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000) (citing New York v. P. J. Video, Inc., 475 U.S. 868 (1986)).
[357] *Id.*
[358] *Coreas*, 419 F.3d at 156–57.
[359] *See supra* notes 330–38 and accompanying text; United States v. Terry, 522 F.3d 645, 649 (6th Cir. 2008) ("[T]he courts universally found that the probable cause threshold had been satisfied because the defendants had purchased *access* to child pornography.").
[360] *See supra* Part III.A.3 (discussing the standard established by *Illinois v. Gates*).

3. "But I Was Trying to Catch the Real Perverts!"

The "concerned civilian" defense sometimes arises.[361] This defense is also without merit as it relates to probability analysis. In no other criminal enterprise does a non-law enforcement person get a free pass to unilaterally engage in a criminal enterprise with the purpose of ferreting out crime.[362] The U.S. Code does not create such an exception,[363] nor should the judiciary find that a few citizens' attempted "good deeds" diminishes probable cause. These citizens consciously put themselves at risk of search, seizure, and prosecution, and they should present their excuses to those who determine if their case will go to trial.

4. "But I Was Doing Research!"[364]

In 1996, freelance reporter Lawrence Matthews was caught sending and receiving child pornography over the internet.[365] Mr. Matthews presented the defense that he was conducting research for an article that he was supposedly planning to write.[366] The Fourth Circuit found no special First Amendment protection for journalists and affirmed his conviction.[367] Judge Pooler of the Second Circuit offered the unsupported, and illogical, possibility that a concerned parent could be caught while researching "potential threats to his children."[368] While this scenario makes little sense,[369] 18 U.S.C. § 2252 does not allow for a

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[361] LANNING, *supra* note 2, at 123–26 (discussing the reasons why some "concerned civilians" find illicit images and seek legal justification for their involvement).

[362] Informants sometimes purchase controlled substances, but these acts are done in conjunction with law enforcement as opposed to solo vigilantes.

[363] 18 U.S.C. § 2252(c) (2006) (creating an affirmative defense only when the recipient immediately destroys or reports to law enforcement the possession of less than three files of child pornography).

[364] In 2003, rock guitarist Pete Townshend of "The Who" was arrested for subscribing to a pay-for-access website. Townshend claimed to have been doing research for his autobiography. Warren Hoge, *British Rock Star Receives Lesser Punishment in Internet Case*, N.Y. TIMES, May 8, 2003, at A7.

[365] United States v. Matthews, 209 F.2d 338, 340 (4th Cir. 2000).

[366] *Id.* (noting Mr. Matthew's lack of notes or research on the subject of child pornography).

[367] *Id.* at 350.

[368] United States v. Martin, 426 F.3d 68, 82–83 (2d Cir. 2005) (Pooler, J., dissenting).

[369] If this scenario were to occur, the parent would likely be ecstatic that law enforcement was proactively seeking out and shutting down those who would traffic such material. Regardless, no common sense reason is apparent as to why the parent would need to download and possess child pornography to conduct such research. Judge Pooler also

research exception, and the Fourth Circuit rejected the "reporter conducting research" argument as a valid defense.[370] Thus, as these possibilities have not been shown to even account for a minute number of subscribers, this possibility should have no part in the probable cause analysis of whether a search is warranted.

5. "There is No Proof of Actual Possession!"

Judge Ryan claims that mere access to child pornography does not provide probable cause to show that a suspect actually possesses child pornography.[371] A closely related argument is that the subscriber just desires to view the material in order to avoid going to jail for possession.[372] While the CAAF has held that simple viewing of child pornography does not constitute possession, the court's holding was limited since the accused viewed the child pornography through a briefcase portal on a computer located in an internet café.[373] Granted, unlike a case where an e-mail is intercepted or a computer's contents are viewed through a peer-to-peer portal, the subscription itself does not conclusively mean that illicit images have been downloaded. If the argument is simply that the agent did not make the magistrate aware of the presumptions that subscribers (1) are highly likely to possess child pornography, and (2) possessors usually do so in their own home, the point is valid. However, when no evidence has been presented in the public debate to the contrary, the argument that a subscription to a website full of illegal images does not provide at least something near fifty-percent probability of possession is ludicrous.[374] Just because the

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equates the majority's holding to mean the government could search the home of a person who subscribes to a website which unlawfully traffics music. *Id.* at 83. This is not an analogous situation because the possession of music is not unlawful nor does it indicate obtaining the music in an unlawful manner.

[370] *Matthews*, 209 F.2d at 347.

[371] United States v. Macomber, 67 M.J. 214, 222 (C.A.A.F. 2009) (Ryan, J., dissenting).

[372] United States v. Gourde, 440 F.3d 1065, 1077–84 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting).

[373] United States v. Navrestad, 66 M.J. 262, 267–68 (C.A.A.F. 2008) (this holding is further limited because the trial court used the definition of possession of controlled substances, Article 112a, Uniform Code of Military Justice, and charged the appellant for possession of child pornography under Article 134, clause 1 or 2, for acts to the prejudice of good order and discipline or of a nature bringing discredit to the armed forces).

[374] *Gourde*, 440 F.3d at 1071 (majority opinion) ("It neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer.").

subscriber may be skirting the line of criminality does not invalidate the common sense conclusion that the subscriber possesses the contraband in the one area that most possessors store their illegal images. Judge Ryan's standard appears to seek evidence indicating possession by a clear and convincing evidence standard while ignoring the "principles of *Gates*—practicality, common sense, a fluid and nontechnical conception of probable cause . . . ."[375]

F. Sufficiency of Description

As part of the probable cause analysis, the magistrate must receive sufficient information to determine that evidence of a crime, child pornography for example, is likely located in a certain location. The circuit courts have generally required at least a detailed description of the suspected child pornography so that the magistrate can make his own determination on the illegality of the alleged contraband.[376] This requirement is to prevent the magistrate from simply ratifying the "bare conclusions of others."[377]

The CAAF stated in *United States v. Monroe* that it is "preferable" that the agent include exemplars or a detailed description of the pictures on which the affidavit is based.[378] As pictures "speak for themselves,"[379] this requirement significantly bolsters the finding of probable cause.[380]

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[375] *Id.* (citing United States v. Gates, 462 U.S. 213, 246 (1983)).
[376] *Compare* United States v. Lowe, 516 F.3d 580, 586 (7th Cir. 2008) (finding a detailed description sufficient), *and* United States v. Chrobak, 289 F.3d 1043, 1045 (8th Cir. 2002) (finding sufficient the agent's descriptions that the pictures "depict sexually explicit conduct involving children under the age of 16," and "graphic files depicting minors engaged in sexually explicit conduct"), *with* United States v. Doyle, 650 F.3d 460, 73-74 (4th Cir. 2011) (finding insufficient the agent's description of an image as "nude children"), *and* United States v. Brunette, 256 F.3d 14, 18–19 (1st Cir. 2001) (finding insufficient the agent's description of an image as "'prepubescent boy lasciviously displaying his genitals'").
[377] *Brunette*, 256 F.3d at 18 (quoting *Gates*, 462 U.S. at 239).
[378] 52 M.J. 326, 332 (C.A.A.F. 2000); *see also* United States v. Miknevich, 638, F.3d 178, 184 (3d Cir. 2011) (same recommendation). When dealing with a search for obscene materials, the Supreme Court has stated that a verbal description is sufficient, as a magistrate does not have to actually view the alleged obscene material to issue the warrant. New York v. P.J. Video, Inc., 475 U.S. 868, 874 (1986).
[379] *Id.* Considering the respect for the victims depicted in child pornography, the need to secure the material, and the court's acceptance of detailed descriptions, the author does not recommend attaching child pornography to the affidavit.
[380] *See* United States v. Prideaux-Wentz, 543 F.3d 954, 959–60 (7th Cir. 2008) (finding

While the CAAF went on to find the agent's terminology of "graphic pornographic photographs" adequately communicated the picture's content, the CAAF discouraged future use of such bare conclusions.[381]

However, affidavits continue to include barely sufficient descriptions of the pictures on which probable cause is based. In *United States v. Gallo*, the CAAF allowed for the search of the appellant's home when, without further description, "images of children 'in various sexual encounters'" were found on the appellant's work computer.[382] Likewise, in *United States v. Orona*, the Air Force Criminal Court of Appeals took at face value that the agent had "personally verified that the [web]site contained child pornography."[383]

Interestingly, although the picture files were never opened, Judge Ryan joined the majority in *United States v. Leedy* in finding that one file name could provide sufficient information to indicate its likely content even when no actual child pornography had been seen.[384] The CAAF acknowledged that requiring a picture or description in all circumstances would in effect require conclusive proof of possession.[385] Although the CAAF stated that an affidavit that "describes th[e] pornography is more likely to substantiate probable cause than one that does not,"[386] it is also clear that the military courts have ignored the circuit court's decisions by not requiring any more than an experienced agent's conclusions.

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that the affidavit sufficiently established the agent's experiences when considering, among other things, the detailed descriptions the agent provided of the suspected child pornography and erotica images).

[381] *Id. But see* Nebraska v. Nuss, 781 N.W.2d 60, 65–68 (Neb. 2010) (holding an affidavit was insufficient to establish probable cause when the affidavit provided "mere conclusions" as opposed to a "detailed verbal description" or photographs (citing *Brunette*, 256 F.3d at 18–19 (same))).

[382] 55 M.J. 418, 420 (C.A.A.F. 2001).

[383] No. ACM 36968, 2009 CCA LEXIS 345, at *12–13 n.4 (A.F. Ct. Crim. App. Sept. 14, 2009) (unpublished).

[384] 65 M.J. 208, 215–17 (C.A.A.F. 2007) (holding a picture titled "14 Year Old Filipino Girl" sufficiently indicated the possible presence of child pornography when the file was located among other files that were sexually explicit); *see also* United States v. Miknevich, 638 F.3d 738, 782–85 (3d Cir. 2011) (finding probable cause based on explicit file name and Secure Hash Algorithim that had been previously confirmed as child pornography).

[385] *Id.* at 217 (quoting United States v. Eichert, 168 F. App'x 151, 152 (9th Cir. 2006) (unpublished)).

[386] *Id.*

In *Macomber*, when the affidavit "described in fairly graphic detail" the child pornography, the magistrate was able to draw his own inferences to find probable cause.[387] In *Clayton*, the ICE report provided a minimally detailed description that the one image of child pornography depicted "a nude minor female and a nude adult male engaged in sexually explicit conduct."[388] While this description would likely be deemed insufficient in some jurisdictions,[389] the description meets the lower standard established by the CAAF,[390] which allowed the magistrate to determine that Clayton at least had access to one illicit image. Along with the detailed description of two posts requesting child pornography,[391] this report gave the CAAF enough evidence to find good faith reliance by the investigator, but the affidavit's other weaknesses should not have been determined sufficient for a finding of probable cause.

G. Sufficiency of Particularity

The Fourth Amendment requires that the warrant "particularly describe[e] the place to be searched, and the persons or things to be seized."[392] In *United States v. Grubbs*, the Supreme Court stated that "[the Fourth Amendment] specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'"[393] In order to prevent investigators from executing warrants akin to the general warrants of the mid-1700s,[394] this description may not be "general or overbroad."[395] If these requirements are only met in the affidavit, the affidavit must specifically be incorporated in the warrant.[396] These requirements are significantly

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[387] United States v. Macomber, 67 M.J. 214, 217, 220 (C.A.A.F. 2009).
[388] *Clayton* ROT, *supra* note 105, at Appellate Exhibit I (ICE Report). The military investigator briefing the magistrate never saw the image. *Id.* at 124.
[389] *See* cases cited *supra* notes 376, 381 and accompanying text.
[390] *See* cases cited *supra* notes 381–83 and accompanying text.
[391] *Clayton* ROT, *supra* note 105, at Appellate Exhibit I (ICE Report).
[392] U.S. CONST. amend. IV.
[393] 547 U.S. 90, 97 (2006).
[394] Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").
[395] United States v. Allen, 53 M.J. 402, 408 (C.A.A.F. 2000).
[396] United States v. Tracey, 597 F.3d 140 (3d Cir. 2010); United States v. Allen, 625 F.3d

tied to probable cause because the inability to sufficiently describe the place to be searched and the things to be seized indicates a lack of probable cause and gives the appearance of a general warrant.[397]

In child pornography cases, a somewhat generic description of "computer equipment" is permissible when a more detailed description cannot be obtained.[398] This allowance is granted because it would often be impossible for an agent to know on which exact piece of computer equipment that child pornography is held.[399] The description may also use statutory language, such as "images of child pornography," if defined in the statute.[400]

The affidavits and authorizations to search in *Macomber* and *Clayton* were sufficient to meet the Fourth Amendment requirements. In *Macomber*, the affidavit sought to search the appellant's dormitory room,[401] and the defense did not raise any issue concerning the sufficiency of the descriptive language regarding the items to be seized.[402] Likewise, in *Clayton*, the search and seizure authorization specifically authorized the investigator to search Clayton's room for "child pornography material in violation of 18 U.S.C. § 2252A [on] any computer files, hardware, or media . . . ."[403] This language was sufficient

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830 (5th Cir. 2010).

[397] LAFAVE, *supra* note 272, § 4.6(a).

[398] Thomas K. Clancy, *The Search and Seizure of Computers and Electronics Evidence: The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 199–202 nn.14–17 (2005) (compiling cases discussing the sufficiency of language in warrants); *see* United States v. Monroe, 52 M.J. 326, 329 (C.A.A.F. 1999) (detailing search authorization which allowed seizure of "all computer related data media suspected to contain pornography or child pornography"); United States v. Cote, No. 2009-15, 2010 CCA LEXIS 186, at *2 (A.F. Ct. Crim. App. Apr. 6, 2010) (unpublished) (detailing the affidavit which sought "electronic devices and storage media"). *See generally* CCIPS, *supra* note 226, at 242–46 (sample affidavit with proposed language for child pornography cases).

[399] United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997).

[400] United States v. Weber, 923 F.2d 1338, 1342–43 (9th Cir. 1990) (citing VonderAhe v. Howland, 508 F.2d 364, 369–70 (9th Cir. 1974) ("[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971))).

[401] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009) (disregarding any possible issues with the description of the items to be seized).

[402] Brief in Support of Petition Granted, United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009) (No. 08-0072), 2008 WL 2214359.

[403] U.S. Dep't of Army, DA Form 3745, Search and Seizure Authorization (20 Apr. 2006) (on file with author). The standard form used by military magistrates to authorize

to instruct the investigator where she could search and what she could seize.

V. Conclusion

While *Macomber* and *Clayton* may appear to be limited to the facts of each case, the prevalence of case law in the circuit courts, and the growing trade of child pornography on the internet, indicate that investigators will see more of these types of case. The investigator, supervising trial counsel, and approving magistrate must ensure the affidavits sufficiently detail the information required to establish probable cause in order to protect the Constitutional rights of our servicemembers.

Military justice practitioners can learn from *Macomber*. When the agents received information that was more than a year old, even though some courts would have found probable cause at that point, the agents conducted an undercover sting operation to ensure that they could present sufficient information to the magistrate. The agents then provided a detailed twelve-page affidavit to support their search request.[404]

Judge Ryan's concerns are valid that the CAAF gave a *de minimis* review of the Fourth Amendment issue in *Clayton*.[405] While the government won a narrow 3-2 decision, the decision would have been more palatable if the court had not relied on probable cause sufficiency, but based their conclusion primarily on the substantial deference the courts grant both magistrates and the warrant process, or even the good faith reliance of the investigator. Thus, military justice practitioners should be careful to not rely too heavily on *Clayton's* finding sufficiency of probable cause. While the meager two-page affidavit provided enough information so that the search authorization did not resemble a "general warrant" used prior to the Bill of Rights,[406] using the totality of the circumstances test, the amount of information presented was closer to "bare suspicion" than a "fair probability" that Clayton possessed child pornography in his Kuwaiti quarters. The agent did little more than pass

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searches specifically incorporates the affidavit as part of the authorization. *See id.* The affidavit in *Clayton* requested a similar search. *Clayton* Affidavit, *supra* note 221, at 2.

[404] Brief in Support of Petition Granted at 6, United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009) (No. 08-0072), 2008 WL 2214359.

[405] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).

[406] *Clayton Affidavit*, *supra* note 221.

information from ICE to the magistrate; consequently, the agent failed to establish a nexus to the place searched, inadequately described the website that Clayton joined, and presented no evidence that Clayton was a collector, which limited the inferences the magistrate could make in finding probable cause. Like in *Macomber*, investigators should be trying to clear the probable cause hurdle with as much evidence as possible, to include the establishment of a nexus to the place searched, as opposed to pulling together just enough information to satisfy the magistrate.

The CAAF should realign its Fourth Amendment standard on child pornography with that established by the circuit courts. Declaring that the nearly bare bones *Clayton* affidavit provided sufficient evidence to establish probable cause sends a bad message to our investigative community. The CAAF should not condone minimum effort in investigations which pierce the security and liberty accorded to our servicemembers by the Fourth Amendment. The probable cause standard is not an overwhelming one, but it is a standard that must be upheld in order to protect the freedoms accorded to us all.

Appendix

Probable Cause Analysis Checklist for Child Pornography Search Authorizations

Over the past two decades, the federal and military courts have heard countless cases involving the sufficiency of evidence to substantiate probable cause as the basis of a search authorization or warrant. This Appendix is a compilation of some of those cases recognizing common factors used to establish probable cause in child pornography cases. The military justice practitioner—investigator, trial counsel, magistrate or defense counsel—can use this list as a starting point in evaluating the sufficiency of probable cause. Under the totality of the circumstances test, no one piece of evidence is necessarily conclusive. Only when looking at all the factors as they interrelate with each other can a probable cause determination be made. Not knowing what piece of evidence the appellate courts might find relevant,[407] the affidavit should be as thorough as possible.[408] The below factors are a list of some factors that courts have relied on in finding probable cause.

The Standard: A probable cause determination is "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."[409] "[Probable cause] does not demand any showing that such a belief be correct or more likely true than false."[410]

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[407] United States v. Krupa, 658 F.3d 1174 (9th Cir. 2011) (finding relevant to the probable cause analysis that the home contained fifteen computers, the home was under the control of a non-resident, and the home was in "complete disarray").

[408] *See* U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CRIMINAL DIV., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 241 (3d ed. 2009), *available at* http://www.justice.gov/criminal/cybercrime/ssmanual/ ssmanual2009.pdf (sample affidavit with proposed language for child pornography cases).

[409] Illinois v. Gates, 462 U.S. 213, 238 (1983) (emphasis added).

[410] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (holding that probable cause "requires more than bare suspicion," but less than a fifty-percent probability).

1. Professional Experience of Agent or Consultants[411]

2. Description of Material being used to Establish Probable Cause
   a. Description of titles and how they fit with other titles[412]
   b. Description or exemplar of images, videos or other files[413]

3. Pedophile/Collector Profile and Facts Linking Suspect to Profile[414]

4. Nexus to Place Searched
   a. Direct Evidence – Roommate, Friend, or Other Person Viewed[415]
   b. Peer-to-Peer access to personal computer with description of the P2P process[416]
   c. Sent e-mails[417]
   d. Received e-mails[418]
   e. IP address[419]
   f. Home address connected to child pornography[420]
   g. Computer ownership and internet service[421]
      - If unable to confirm, data indicating likelihood of ownership and internet access
      - U.S. Census Bureau: >80% of employed persons have internet access at home[422]
   h. Expert opinion on most likely location for storage[423]
      - NJOV Study, NCMEC – 91% of child pornography found on

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[411] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007).
[412] *Leedy*, 65 M.J. at 215–17.
[413] United States v. Monroe, 52 M.J. 326, 332 (C.A.A.F. 1999).
[414] United States v. Weber, 923 F.2d 1338, 1341–45 (9th Cir. 1990); United States v. Pappas, 592 F.3d 799, 804 (7th Cir. 2010); United States v. Clark, 668 F.3d 934 (7th Cir. 2012); United States v. Macomber, 67 M.J. 214, 220 (C.A.A.F. 2009).
[415] United States v. Camnetar, No. 36448, 2009 CCA LEXIS 40 (A.F. Ct. Crim. App. Jan. 30, 2009) (unpublished).
[416] United States v. Saxman, 69 M.J. 540, 541 (N-M. Ct. Crim. App. 2010).
[417] United States v. Terry, 522 F.3d 645, 648 (6th Cir. 2008).
[418] United States v. Kelley, 482 F.3d 1047, 1051–55 (9th Cir. 2007).
[419] United States v. Vosburgh, 602 F.3d 512, 526–27 (3d Cir. 2010).
[420] United States v. Macomber, 67 M.J. 214, 219–20 (C.A.A.F. 2009).
[421] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010).
[422] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES (2009), *available at* http://www.census.gov/ population/www/socdemo/ computer/2009.html.
[423] United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006); United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001).

home computer, 7% on work computer, nearly 18% on both[424]

i. Controlled delivery[425]

j. Transfer of child pornography from work computer to external media[426]

k. Enticement and sexual abuse of a minor[427]

5. Information from an "Informant"

a. "Concrete indicia of reliability"[428]

b. No ulterior motive[429]

6. Subscription to a Child Pornography Website

a. Website's name and welcome message indicating illicit purpose[430]

b. Description of website features indicating ease of access to child pornography[431]

c. Username of a deviant sexual nature[432]

d. Active participation by posting or commenting on website[433]

e. Number of websites joined[434]

f. Paid subscription[435]

g. Request to receive e-mails with description of contents[436]

7. Staleness (unlike most contraband, case law supports "years" old information when dealing with child pornography)

a. Dates of involvement in child pornography for staleness analysis[437]

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[424] Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 7–8 (2005), http://www.missingkids.com/en_US/publications/NC144.pdf.

[425] United States v. Grubbs, 547 U.S. 90 (2006); *Macomber*, 67 M.J. at 217.

[426] *Gallo*, 55 M.J. at 421–22.

[427] United States v. Colbert, 605 F.3d 573 (8th Cir. 2010). *But see* United States v. Doyle, 650 F.3d 460 (4th Cir. 2011).

[428] United States v. Cowgill, 68 M.J. 388, 393–94 (C.A.A.F. 2010).

[429] United States v. Leedy, 65 M.J. 208, 216–17 (C.A.A.F. 2007).

[430] United States v. Martin, 426 F.3d 68, 71–75 (2d Cir. 2005).

[431] United States v. Falso, 544 F.3d 110 (2d Cir. 2008).

[432] United States v. Froman, 355 F.3d 882, 890 (5th Cir. 2004).

[433] United States v. Clayton, 68 M.J. 419, 425 (C.A.A.F. 2010).

[434] United States v. Shields, 458 F.3d 269, 275 (3d Cir. 2006).

[435] United States v. Gourde, 440 F.3d 1065, 1070–71 (9th Cir. 2006); United States v. Macomber, 67 M.J. 214, 220 (C.A.A.F. 2009).

[436] United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003); *Clayton*, 68 M.J. at 424.

[437] *Macomber*, 67 M.J. at 220.

b. Hoarding nature of pedophiles and retention evidence[438]
c. Ability to retrieve deleted files with forensic tools[439]
d. "Infinite Life Span" of child pornography[440]

8. Specificity on Where to Search and What to Seize[441]

9. Magistrate's Action
a. Neutral and detached[442]
b. Does not act as "rubber stamp"[443]

[438] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008).
[439] United States v. Allen, 625 F.3d 830, 843 (5th Cir. 2010); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007).
[440] United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010).
[441] U.S. CONST. amend. IV; United States v. Allen, 52 M.J. 402, 408 (C.A.A.F. 2000).
[442] United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996).
[443] *Leedy*, 65 M.J. at 217–18.

THE GOLDSTONE REPORT: POLITICIZATION OF THE LAW OF ARMED CONFLICT AND THOSE LEFT BEHIND

MAJOR JOSHUA L. KESSLER*

I don't think any country would find it acceptable to have missiles raining down on the heads of their citizens. The first job of any nation-state is to protect its citizens. And so I can assure you that if . . . somebody was sending rockets into my house, where my two daughters sleep at night, I'm going to do everything in my power to stop that. And I would expect Israelis to do the same thing.[1]

I. Introduction

Fractured streets lined with the debris of shattered buildings. Families rummaging through the bits and pieces of the remnants of their broken homes, searching for anything they can salvage from the piles of crushed cement and rebar. Women and children, walking behind donkey carts, horses, and battered pick-up trucks on their way to a safer place.[2]

These images are an all too familiar sight on the international twenty-four hour news cycle. Civilians caught in the crossfire of a deadly struggle between their governments and fundamentalist insurgent groups employing terror tactics. The images are too common in modern

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[1] Senator Barack Obama, Speech in Sderot, Israel (Jul. 23, 2008), *available at* http:// www.nytimes.com/ 2008/07/23/us/politics/23text-obama.html.

[2] *See* Videotape: An Uneasy Calm in Gaza (New York Times 2009), http://www.nytimes. com/2009/01/20/ world/middleeast/20gaza.html?pagewanted=2&_r=1&ref=gaza_strip (last visited Nov. 24, 2010).

asymmetric warfare; whether it is an Afghan refugee cradling her recently deceased child, or a New York City firefighter rummaging through the wreckage of a fallen skyscraper. In this case, the images described above relate to the most recent conflict in the Palestinian Territories[3] ("Territories"), known to the Israeli Defense Forces ("IDF") as Operation Cast Lead.

In the wake of repeated failed attempts at diplomacy, with lasting political peace a seemingly unattainable goal, civilians on both sides of the Israel-Palestine conflict are suffering. Since 2001, armed groups within the Gaza Strip (hereinafter Gaza) have fired thousands of rockets into Israel, conducted suicide bombings, and staged vehicular assaults, killing nearly 1,200 Israeli residents and wounding nearly 10,000 more.[4] Indiscriminate rocket attacks are the daily reality of over 950,000 Israelis currently living within the range of mortar, Qassam rocket, and M-21OF (a.k.a., "Grad") rocket attacks fired from Gaza.[5] Many civilians have only fifteen seconds to find a safe place to take cover following warnings of an impending attack.[6] Daily life for Gaza's Israeli neighbors is inundated "with frequent sirens, crowded shelters, frightened children, considerable danger, trauma and stress."[7]

In 2007, the living conditions for civilians in both southern Israel and Gaza took a dramatic turn for the worse. After years of restlessness with the stagnant political process, in-fighting among Palestinian sects led to a bloody *coup d'état*, with Hamas[8] taking *de facto*[9] administrative control

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[3] Parties, on each end of the political spectrum, have referred to the areas known as the Gaza Strip and West Bank as the Occupied Territories and/or Administered Territories. *See, e.g.*, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report]. Since the legal status of the Palestinian territories as "occupied areas" is a largely unsettled and politically charged topic, this article instead refers to these areas as the "Territories."

[4] *See Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, HUM. RTS. WATCH (Aug. 6, 2009), http://www.hrw.org/en/reports/2009/08/06/rockets-gaza?; *International Law Series: The Right to Self Defense*, NGO-MONITOR.ORG, http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0 (last visited Feb. 22, 2012).

[5] *Rocket Attacks Toward Israel*, IDFSPOKESPERSON.COM, http://idfspokesperson.com/facts-figures/rocket-attacks-toward-israel (last visited Nov. 17, 2010).

[6] *Id.*

[7] Steven Erlanger, *Israel's Dilemma in Response to Rockets*, N.Y. TIMES, Dec. 19, 2007, *available at* http://www.nytimes.com/2007/12/19/world/middleeast/19mideast.html?_r=1.

[8] The U.S. State Department provides the following description of Hamas:

of Gaza.[10] Under Hamas's regime, increased rocket attacks became the daily reality for southern Israel.[11] In 2008, Israel struck back in order to "bring about an improvement in the security reality of the residents of the south of the country."[12] The military offensive, entitled Operation Cast Lead, was designed to "stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure."[13] Over the course of twenty-two days, the Israeli Defense Force conducted both aerial and land military operations against Hamas command posts, training camps, weapons caches, and rocket and mortar launching sites.[14]

According to Palestinian figures, Operation Cast Lead resulted in 1,300 deaths, 5,300 injuries, and two billion dollars of damage to critical infrastructure. Living conditions in Gaza deteriorated as food prices soared to three times the pre-conflict level, damage to water wells and pipes led to water shortages, and hospitals—damaged during the

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> HAMAS possesses military and political wings, and was formed in late 1987 at the onset of the first Palestinian uprising, or Intifada, as an outgrowth of the Palestinian branch of the Muslim Brotherhood. The armed element, called the Izz al-Din al-Qassam Brigades, conducts anti-Israeli attacks, previously including suicide bombings against civilian targets inside Israel . . . [a]fter winning Palestinian Legislative Council elections in January 2006, HAMAS seized control of significant Palestinian Authority (PA) ministries in Gaza, including the Ministry of Interior. HAMAS subsequently formed an expanded, overt militia called the Executive Force, subordinate to the Interior Ministry. This force and other HAMAS cadres took control of Gaza in a military-style coup in June 2007, forcing Fatah forces to either leave Gaza or go underground.

Country Reports on Terrorism 2009, STATE.GOV (Aug. 5, 2010), http://www.state.gov/s/ct/rls/crt/2009/ 140900.htm.

[9] BLACK'S LAW DICTIONARY 427 (7th ed. 1999) (defining *de facto* as "[E]xisting in fact; having effect even if not formally or legally recognized").

[10] *See* ISRAEL MINISTRY OF FOREIGN AFF., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS para. 40 (Jul. 29, 2009) [hereinafter The Operation in Gaza], *available at* http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

[11] *Id.* at 16–19.

[12] Press Release, Israel Ministry of Foreign Affairs, PM Olmert Press Briefing on IDF Operation in the Gaza Strip (Dec. 27, 2008), *available at* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/PM_Olmert_press_briefing_IDF_operation_Gaza_Strip_27-Dec-2008.htm.

[13] The Operation in Gaza, *supra* note 10, at 32.

[14] *Id.*

fighting—struggled to treat the massive amount of injuries with diminished availability of space and supplies.[15]

The United Nations (UN) Human Rights Council reacted to this humanitarian crisis by establishing a fact-finding mission ("Mission") with the directive to "investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from December 27, 2008, and January 18, 2009, whether before, during, or after."[16] The Mission's report, entitled Human Rights in Palestine and Other Occupied Arab Territories (hereinafter Goldstone Report), found that "serious violations of international human rights and humanitarian law were committed by Israel . . . and that Israel committed actions amounting to war crimes, and possibly crimes against humanity."[17]

The findings and recommendations of the Goldstone Report—which will be discussed in detail in the sections that follow—are suspect for a number of reasons. First, the Goldstone Report based its findings on a restrictive interpretation of international humanitarian law[18] ("IHL") that is not only in sharp contrast to the legal approach maintained by Israel and its court system, but also a departure from well-settled international legal norms. In addition, the Goldstone Report's application of the law is predicated on biased assumptions that ignore the fragile security situation endured by the government of Israel over the past six decades, and Israel's right to take measures in self-defense in accordance with the UN Charter.[19] Finally, the Mission's one-sided, capability-based analysis of Israel's military operation—a nation struggling to protect its people from

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[15] *See Gaza: Humanitarian Situation*, BBCNEWS.COM (Jan. 30, 2009), http://news.bbc.co.uk/go/pr/fr/-/2/hi/ middle_east/7845428.stm.

[16] *See* Goldstone Report, *supra* note 3.

[17] Press Release, Head of UN Fact Finding Mission on the Gaza Conflict Urges Accountability for War Crimes; Insists Impunity Undermines Peace Process and Encourages Violence (Sept. 29, 2009), United Nations Press Release, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm.

[18] INT'L COMMITTEE OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), *available at* www.icrc.org/eng/documents/legal-fact -sheet/humanitarian-law-factsheet.htm (defining international humanitarian law as "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict").

[19] *See generally* UN Charter art. 51.

a terrorist organization that places its own people in harm's way to achieve its political objectives—could set a dangerous and untenable precedent. The Mission's "Monday morning quarterback"[20] interpretation of the law, if applied to similar counterinsurgency (COIN) operations, could serve to inhibit nation-states from executing their sovereign responsibility to protect their populace from threats to their national security, while also empowering an enemy who deliberately blurs the line between combatant and civilian.

This article will not address whether Israel's policies with respect to the Territories are effective in conducting a COIN operation, nor will it offer a resolution for the troubling humanitarian situation that has continued to plague Gaza since Hamas took power. Only time will tell whether Operation Cast Lead will bring about an improved security reality for the parties to this conflict. Likewise, this article will not discuss the controversial issue of applying international human rights law during a period of armed conflict – yet another controversial assumption relied upon in the Goldstone Report.[21] Instead, this article will address the legal issues specifically pertaining to Operation Cast Lead in Gaza, and the Mission's troubling analysis thereof. Ultimately, the article will conclude that the Mission's one-sided analysis of Operation Cast Lead overshadows the very real and pressing effects of war on the civilian populations of both Israel and Gaza. By superimposing a capabilities-based paradigm on international humanitarian law—holding the attacker to a higher legal standard than the defender in an armed conflict—the Mission creates an environment that encourages non-state actors to circumvent the law, while rendering adherence to the law for nation-states nearly impossible.

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[20] DICTIONARY.COM, http://dictionary.reference.com/browse/Monday+morning+quarterback (last visited Feb. 22, 2012) (defining Monday morning quarterback as "[a] person who criticizes the actions or decisions of others after the fact, using hindsight to assess situations and specify alternative solutions").

[21] There exists a split in opinion regarding where, and when, human rights law applies. Whereas both the United States and Israel maintain that international humanitarian law (IHL) is the *lex specialis* in time of armed conflict, many European nations, the International Court of Justice and the International Committee for the Red Cross, all argue that Human Rights Law and IHL apply concurrently to all conflicts, without regard to the nature or status of the hostilities. *See generally* Francoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of A Human Rights Treaty Body*, 871 INT'L REV. OF THE RED CROSS 459, 550 (2008); GARY D. SOLIS, THE LAW OF ARMED CONFLICT 24 (2010). Since this article concerns itself primarily with the application of the LOAC to the conflict in question, the application of Human Rights Law to this conflict is unnecessary.

First, a historical context of the conflict and the applicable law will be reviewed, providing a backdrop for the military operation and its causes. This background will be followed by a discussion of the legal standards that apply to Operation Cast Lead under IHL. The article will then address the Goldstone Report's strengths and weaknesses, to include a critique of select findings of the Mission as they relate to the IHL. Finally, this article will conclude with a discussion of the value of the Goldstone Report as a whole, rejecting the politicization of asymmetric warfare[22] (epitomized in the Goldstone Report) as counter-productive to achieving the intent of the IHL: to respect a nation-state's military necessities while at the same time protecting non-combatants caught between adversaries on the field of battle.[23]

II. From Occupation to Confrontation

A cursory review of the historical context of the Israeli-Palestinian conflict is important for three reasons. First, since the application of IHL depends primarily on the type of conflict (e.g., international vs. internal armed conflict) and the type of person (e.g., combatant vs. non-combatant), a historical analysis is necessary to determine the normative framework for Operation Cast Lead. This legal framework will focus the subsequent analysis of the Mission's findings. Second, since Operation Cast Lead is only the most recent clash in the Israeli-Palestinian conflict, a brief review of the hostilities between these rivals is necessary to place this significant clash in historical context. Finally, a review of Israel's control over the Territories is vital to determining whether Israel was an occupant of Gaza at the time of Operation Cast Lead. This assumption, relied upon heavily in the Mission's findings that Israel violated its obligations under IHL, has crucial implications for the validity and bias illustrated in the Goldstone Report.[24]

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[22] Asymmetric warfare is "leveraging inferior tactical or operational strength against the vulnerabilities of a superior opponent to achieve disproportionate effect with the aim of undermining the opponent's will in order to achieve the asymmetric actor's strategic objectives." Kenneth F. McKenzie, Jr., *The Rise of Asymmetric Threats: Priorities for Defense Planning*, QUADRENNIAL DEF. REV. 75, 76 (2001).

[23] *See* SOLIS, *supra* note 21, at 7 (stating that "modern LOAC has been largely driven by humanitarian concerns").

[24] *See infra* Part V.A (for a discussion on Israel's controversial status as an occupying force).

The debate and confusion concerning Israeli sovereignty over the Territories began as early as 1947 in Israel's War of Independence.[25] In the aftermath of that war, Gaza and the West Bank—previously controlled by Egypt and Transjordan, respectively—fell under Israeli control. As a result, Israel's government became responsible for land "three times larger than its previous borders . . . with the responsibility for an additional one million Arab residents."[26] Unfortunately, the 1949 Israel-Egypt and Israel-Jordan Armistice Agreements did not resolve *de jure*[27] sovereignty over the newly administered areas,[28] leaving governance over the Territories an unanswered question.

The issue was not clarified in the wake of the "Six Day War" of 1967. After that violent clash with Jordan and Egypt, Israel found itself in *de facto* control of Gaza, the West Bank, *and* the Sinai Peninsula. Although Israel, pursuant to the 1979 Israel-Egypt Peace Treaty, subsequently relinquished control of the Sinai Peninsula to Egypt, it retained control of the Territories and, to date, "[n]o international agreement has yet settled the question of sovereignty over the Gaza Strip and 'West Bank.'"[29]

At this point, Israel asserted that the Territories were neither an independent state nor an occupied territory.[30] Despite denying, as a matter of law, that the Territories were occupied, Israel elected to "govern the Territories *de facto* under the provisions of customary international law applicable to belligerent occupation."[31] In doing so, Israel managed to avoid any admission that it should be bound by international law as applicable to belligerent occupation[32] while at the same time steering clear of any interpretation that Israel was renouncing any claim of sovereignty over the Territories.[33]

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[25] UZI AMIT-KOHN ET AL., ISRAEL, THE "INTIFADA" AND THE RULE OF LAW 19–22 (1993).
[26] Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245, 248 (1996).
[27] BLACK'S LAW DICTIONARY 437 (7th ed. 1999) (defining *de jure* as "[e]xisting by right or according to law").
[28] AMIT-KOHN ET AL., *supra* note 25, at 20 (referring to the Egypt.-Isr. Armistice Agreement, art. V., Feb. 23, 1949, *available at* http://unispal.un.org/UNISPAL.NSF/0/9EC4A332E2FF9A128525643D007702E6).
[29] *Id.*.
[30] *See* The Operation in Gaza, *supra* note 10, at 11.
[31] Shoham, *supra* note 26, at 250 (observing that Israel would apply the Hague Convention IV provisions concerning "Military Authority over the Territory of the Hostile State").
[32] *Id.* at 249.
[33] AMIT-KOHN ET AL., *supra* note 25, at 21.

The practical effect of this course of action was a *de facto* application of Article 43 of the Convention (IV) Respecting the Laws and Customs of War on Land (hereinafter Hague IV), which requires an occupying force to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[34] The Territories were thereafter governed by the IDF under a military chain of command, acting as both the executive and legislative authority. Despite the law of the Territories being the existing Egyptian or Jordanian law in force prior to June 7, 1967, the military administration amended it through extensive proclamations and orders.[35] Although formation of governance by the military administration was intended as a stopgap measure until such time that political compromise could be accomplished, it became a daily reality for the Palestinian people for two decades.[36]

The military administration of the Territories "w[as] marked by relative quiet" until December of 1987.[37] Fueled by escalating nationalist sentiments and dissatisfaction with the stagnant political process, among other things, a Palestinian uprising began "as a mass outburst against the realities of life—political, economic and social—that existed in the territories."[38] The so-called Intifada[39] was, in essence, the violent by-product of the extended occupation and the failure of the political process to bring an end to the Israeli Administration of the Territories.[40]

The outcome of the bloody[41] six-year conflict was considered a stalemate, "with the Palestinians unable to eject the Israelis from the territories and the Israelis unable to stop the violence."[42] The Intifada

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[34] Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].
[35] *See* Shoham, *supra* note 26, at 253.
[36] *Id.* at 251–54.
[37] AMIT-KOHN ET AL., *supra* note 25, at 27.
[38] *Id*. at 30.
[39] It was Palestine Liberation Organization leader Yassir Arafat who, in December 1987, coined the term "al Intifada" (the "shaking off" or "casting off"), an expression that in Arabic normally connotes a passing outburst of revolutionary violence rather than a sustained struggle." *Id.* at 30. Where does this quote begin?
[40] *Id.* at 28–30 (outlining theories for the causes of the uprising).
[41] *See Fatalities in the First Intifada*, B'TSELEM.COM, http://www.Btselem.org/English/statistics/first_intifada_ tables.asp (last visited Dec. 28, 2010) (providing statistics that the first intifada claimed the lives of 1551 Palestinians and 422 Israelis between December 9, 1987 and September 28, 2000).
[42] BENNY MORRIS, RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–1998, at 596 (2001).

was, however, instrumental in changing the political situation in the Middle East at large:

> Spurred largely by the uprising, Jordan definitively renounced its theoretical role as agent for the Palestinians; the Palestine Liberation Organization declared itself definitively in favor of a two-state solution, *recognizing Israel's right to exist* . . . and *renounced terrorism*; and the United States agreed to open official contacts with the PLO.[43]

The first intifada ultimately ended with political compromise and the hope of a two-state solution. In 1993, the leadership of the Palestinian Liberation Organization (PLO) and government of Israel signed the "Declaration of Principles on Interim Self-Government Arrangements" (hereinafter Oslo Accords).[44] The Oslo Accords[45] established: (1) a Palestinian authority, marking the beginning of an end to the Israeli military administration, (2) the handover of specified lands to Palestinian control, and (3) the formation of the Palestinian security forces.[46] The Oslo Accords did not, however, resolve issues such as "[control over] Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors."[47] Instead, the parties agreed upon a five-year, three-tiered, transitional period during which the parties would hold negotiations addressing such unresolved issues.[48]

The promise of Oslo was not to be. Even though the parties engaged in sporadic negotiations since Oslo,[49] the peace process was shattered by

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[43] Michael C. Hudson, *The Transformation of Jerusalem, 1917-1987*, *in* JERUSALEM IN HISTORY (Ed. K. J. Asali ed., 1989) (emphasis added).

[44] *See* Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993 [hereinafter The Oslo Accords], *available at* http://www.jewish virtuallibrary.org/jsource/Peace/dop.html (last visited Feb. 22, 2012).

[45] To include its successor, the Interim Agreement on the West Bank and the Gaza Strip (popularly known as Oslo II), wassigned in 1995. *See* Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sept. 28, 1995, *available at* http://www.knesset.gov.il/
docs/heskemb_eng.htm.

[46] *See* The Oslo Accords, *supra* note 44.

[47] *Id*. art. V.

[48] *Id*.

[49] *See, e.g.*, Protocol Concerning the Redeployment in Hebron, Isr.-P.L.O., Jan. 17, 1997, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/ Protocol+Concerning+the+Redeployment+in+Hebron.htm, Wye River Memorandum, Isr.-P.L.O., Oct. 23, 1998, *available at* http://www.mfa.gov.il/mfa/peace%process/guide

failures on both sides to adhere to the tenets of the agreements. The Palestinian Authority was either unwilling or unable to curb terrorist operations from the Territories; in the five years following the 1993 Oslo Accords, 279 Israeli citizens were killed in 92 terrorist attacks.[50] This led critics to conclude that Oslo was merely a "Trojan Horse" and that "[t]he entire intent of the Oslo Accords, on the part of the Palestinian people, on the part of Arafat, was to . . . accept any piece of territory in Palestine from which to wage the war."[51] Israel was also blamed for Oslo's failure. Critics regarded Israel's continued expansion of settlements in Palestinian areas, and failure to re-deploy its troops from the West Bank, as a show of bad faith.[52]

Prompted by the failed peace process—and exacerbated by a boom in Israeli settlements in both Gaza and the West Bank[53]—a second uprising,

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%20to%20the%20peace%20process/the%20wye%20river%20memorandum, Sharm al-Sheik Memorandum, Isr.-P.L.O., Sept. 4, 1999, *available at* http://www.jewishvirtual library.org/jsource/Peace/ sharm0999.html, the Camp David Summit in 2000, and the Taba Talks in 2001.

[50] *More Israelis Have Been Killed by Palestinian Terrorists Since Oslo*, ISRAEL MINISTRY OF FOREIGN AFF. (1998), https://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/9/ More%20Israelis% 20Have%20Been %20Killed%20by%20Palestinian%20Terr.

[51] Dr. Charles Krauthammer, Address at the Hudson Institute Forum: Whither the Road Map on the Middle East Peace (Sept. 25, 2003) (transcript available at http://mes.hudson.org/index.cfm?fuseaction=publication_details&id=3049&pubType= mes_speeches).

[52] The Palestinian frustration with continued Israeli settlements can be summarized as follows:

> Although the language [of the Oslo Agreements] did not promise a settlement freeze, the understanding on the Palestinian side was that Oslo would eventually lead to Israeli withdrawal from the territories. In fact, the accords turned into a *state-run land grab of astounding proportions*, leaving many Palestinians feeling that the Israelis had bargained in bad faith. In the eight years since the first Oslo agreement, according to the Washington, DC-based Foundation for Middle East Peace, the population of the settlements has grown by 100 percent, to reach some 200,000 (not including East Jerusalem). Housing units have jumped by 50 percent. About forty new settlements were built between 1996 and the 1999 election, the vast majority of them rising after the fall of 1998.

Robert I. Friedman, *And Darkness Covered the Land*, THENATION.COM, http://www.the nation.com/article/and-darkness-covered-land (last visited Feb. 22, 2012).

[53] Jeremy Pressman, *The Second Intifada: Background and Causes of Israeli-Palestinian Conflict*, J. CONFLICT STUD. 114, 120 (2003). Pressman states:

the al-Aqsa Intifada, erupted.[54] This rebellion, significantly more violent than its predecessor, would have profound effects on the course of the peace process, daily life for civilians in and around the Territories, and the internal politics of both Israel and Palestine in important ways.

If the first intifada brought Israel and Palestine closer to a political compromise and final status determination, the al-Aqsa Intifada had the opposite effect. The rapid increase in violence made continued status negotiations impossible.[55] Shortly after his election as Israel's Prime Minister, Ariel Sharon "discontinued any direct contacts with the Palestinian leadership, in effect putting an end to talks on the final status."[56] In addition, Israel began to take graduated steps designed to improve its security situation, such as the construction of the "security fence" around the West Bank in 2003[57] and unilateral disengagement

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> From 1993 to 2000, the number of Israeli settlers increased by at least 117 percent in Gaza and at least 46 percent in the West Bank . . . [i]n 2000, seven years after Oslo I, Israel still fully controlled East Jerusalem, 20 percent of Gaza land, and about 59 percent of the West Bank land.

Id.

[54] *Id.*

[55] It is difficult to determine the exact number of casualties resulting from the violence associated with the al-Aqsa intifada. This is due in large part to ambiguity regarding when the conflict began and ended, as well as the difficulty in distinguishing civilians from combatants in an insurgency. It is clear, however, that both sides suffered from "Israel's heavy-handed response [to Palestinian uprisings] and the Palestinian leadership's inability to rein in militants." *Id.* at 133. Israel claimed the "deaths of 1,100 Israelis, the wounding of thousands more, and the terrorisation of millions." The Operation in Gaza, *supra* note 10, at 14. The Israel Security Agency, one of Israel's three secret service agencies, maintains a list of Palestinian deaths with 2,124 names. Palestinian sources, on the other hand, put the number of Palestinian casualties at 2736. Ze'ev Schiff, *Israeli Death Toll in Intifada Higher Than Last Two Wars*, HAARETZ.COM (Aug. 24, 2004), http://www.haaretz.com/print-edition/news/Israeli-death-toll-in-intifada-higher-than-last-two-wars-1.132555 (last visited Feb. 22, 2012). Statistics regarding the civilian impact of the al-Aqsa Intifada are even harder to ascertain. According to B'Tselem, an Israeli non-governmental organization, Israeli civilians represented 68.3% (719 of 1053) of Israeli deaths, compared to 46.4% Palestinian civilians killed (2204 of 4789). B'TSELEM.ORG, http://www. btselem.org/English/Statistics/Casualties.asp (last visited Jan. 5, 2011). *But see In 2007, B'Tselem Casualty Count Doesn't Add Up*, CAMERA.ORG (Nov. 2, 2008), http://www.camera.org/index.asp?x_content=9999&x_article=1533 (last visited Feb. 22, 2012) (challenging B'Tselem's statistical methodology).

[56] Goldstone Report, *supra* note 3, para. 184.

[57] Israel Ministry of Foreign Affairs, *Saving Lives - Israel's Security Fence* (2003), http://www.mfa.gov.il/mfa/mfaarchive/2000_2009/2003/11/ (last visited Feb. 22 2012) [hereinafter Israel Ministry of Foreign Affairs].

from the Territories in 2005.[58] Finally, in the vacuum left by the Israeli disengagement, a bloody civil war resulted in deep and lasting divisions within the Palestinian population itself. It was during this period of turmoil and uncertainty that Hamas began its rise to power in Gaza, setting the stage for Operation Cast Lead.

In 2003, Israel made its first attempt at severance from the Territories with the construction of a security fence around much of the West Bank. The government of Israel maintained that the construction of the fence was a defensive measure, intended to "keep the terrorists out and thereby save the lives of Israel's citizens, Jews and Arabs alike."[59] This approach was met with mixed reception; some considered the fence a legitimate exercise in self-defense, while others maintained that the fence was, in fact, an attempt by Israel to annex Palestinian lands, which thereby exacerbated the humanitarian situation in the Territories.[60] Despite the divergence in public opinion, the security fence proved to be effective, significantly reducing the number of suicide bombings and deaths attributed to Palestine militants in the year that followed its construction.[61] Incidentally, the security fence was among many of Israel's measures in self-defense that the Mission would criticize in the

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[58] *See Israel's Disengagement Plan: Renewing the Peace Process*, MINISTRY OF FOREIGN AFF. (2005) [hereinafter *Disengagement Plan*], *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+ProcessProcess/Israels+Disengagement+Plan-+htm.

[59] Israel denied that the fence was intended as a border, "which is to be determined by direct negotiations between Israel and the Palestinians." Israel Ministry of Foreign Affairs, *supra* note 57. It is also interesting to note that Israel had experienced success with a similar wall, erected on the Gaza border, in 1995. *See also* Major General Doron Almog, *Lessons of the Gaza Security Fence for the West Bank*, JCPA.ORG (Dec. 23, 2004), http://www.jcpa.org/brief/brief004-12.htm (last visited Feb. 22, 2012) (providing an after-action review of security improvements and lessons learned from erection of the Gaza security fence after Oslo).

[60] *See* Neil Bar-Or, *Israel Begins to Fence Borders*, PORTSMOUTH HERALD (Aug. 18, 2003), http://archive.seacoastonline.com/2003news/08182003/world/45482.htm (indica ting that "many in [the U.S.] Congress feel the fence is an important contributor to preventing acts of terror."). *But see* Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003) (demanding that Israel cease construction of the fence, as it "could prejudge future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians.").

[61] *See* Dion Nissenbaum, *Death Toll of Israeli Citizens Killed by Palestinians Hit a Low in 2006*, MCCLATCHY NEWSPAPERS, June 14, 2007, http://www.mcclatchydc.com/2007/06/14/15469/death-toll-of-israeli-civilians. html.

Goldstone Report as an unlawful act directed at Palestinian civilians. This issue is discussed in greater depth in Part V of this article.[62]

Following the death of PLO leader Yasser Arafat in 2004, and the subsequent election of Mahmoud Abbas as the Prime Minister of the Palestinian Authority in 2005, a renewed sense of hope and reconciliation between Israel and Palestine began to emerge.[63] Israel, in an attempt to "reduce friction with the Palestinian population,"[64] initiated its disengagement plan. The plan involved removing 8,000 Jewish settlers from twenty-one different settlements within the Territories and, most importantly, "ended its 38-year-long military presence in Gaza."[65] The Palestinian Authority, joined by Egypt and Jordan, subsequently endorsed Israel's disengagement plan at the Sharm el-Sheikh Summit on February 8, 2005. Another outcome of the summit was a cease-fire between the Palestinian Authority and Israel, "formally ending more than four years of violence and terrorism."[66] Despite the Israeli government and Supreme Court's claims to the contrary, Israel's disengagement did not resolve the question of its status as an occupant. As will be discussed in Part III of this article, this question—a hotly contested issue with important implications to the allegations of the Goldstone Report—remains the subject of scholarly debate in the international legal community even today.[67]

Unfortunately, Israel's disengagement from Gaza did not produce the desired end result of reduced friction and renewed negotiations. Instead, economic hardship in the Territories combined with escalating political instability in the wake of Yasser Arafat's death led to Palestinian in-fighting "pit[ting] Fatah's secular democratic nationalism against Hamas'

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[62] *See infra* pp. 91–116 (for a detailed discussion of the Goldstone Report's shortcomings).

[63] *See generally Disengagement Plan*, *supra* note 58. *See also* Ephraim Sneh, *The Partner Who Had No Partner*, HAARETZ.COM (Nov. 11, 2009), http://www.haaretz.com/print-edition/opinion/the-partner-who-had-no-partner-1.4591 (characterizing Mahmoud Abbas as a Palestinian leader who took a courageous stand on peace, "condemn[ing] the second intifada, which was then raging full force," and speaking out "strongly against the senseless use of terrorism and call[ing] for a return to negotiations").

[64] *Disengagement Plan*, *supra* note 58.

[65] Dr. Mohammed Samhouri, *Gaza Economic Predicament One Year After Disengagement: What Went Wrong?*, Brandeis Univ. Middle East Brief, Nov. 2006, at 1, http:*//www.brandeis.edu/crown/publications/meb/MEB12.pdf.*

[66] *Disengagement Plan*, *supra* note 58, at 14.

[67] *See infra* pp 94–98.

radical Islam."[68] Ultimately, Hamas would prevail over Fatah both on the battlefield and at the polls, taking political control of Gaza.[69] The rise of Hamas to political power in Gaza did not resolve the Palestinian civil war; instead, it claimed the lives of 616 Palestinians between January 2006 and June 2007.[70] By June 2007, Hamas's military arm succeeded in defeating the remaining Palestinian troops loyal to Mahmoud Abbas—Chairman of the Palestine Liberation Organization and President of the Palestinian National Authority—thereby consolidating its control of Gaza.[71]

Not surprisingly, rocket attacks increased considerably following Hamas' assumption of control of Gaza. In 2006, 1,130 missiles were fired from Gaza toward Israel. In 2007, the year following Hamas' takeover, 2,433 rockets were launched from Gaza, more than double the amount of the previous year. The trend continued upward in 2008 when Hamas militants launched 3,278 rockets into Israel. [72] These attacks did not cease until the "Tahadiya," or "lull arrangement" on June 19, 2008.[73]

The Tahadiya called for Hamas to cease all terrorist acts in return for an end to Israeli Defense Force counter-terrorist operations in Gaza, as well as the opening of the points of entry from Gaza into Israel.[74] The cessation of hostilities was initiated in order to "re-launch the Egyptian-brokered negotiations on the release of Israeli captive soldier Gilad Shalit (as demanded by Israel) and promote dialogue on opening the Rafah Crossing between the Gaza Strip and Egypt (as demanded by Hamas)."[75]

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[68] Ronny Shaked, *Religious War in Gaza*, YNETNEWS.COM (Apr. 2, 2007), http://www. ynetnews.com/articles/ 0,7340,L-3360655,00.html.
[69] *Id.*
[70] *Id*.
[71] *Timeline and Causes of "Operation Cast Lead" in Gaza*, CAMERA.ORG (Jan. 6, 2009), http://www.camera .org/index.asp?x_context=7&x_issue=52&x_article=1581.
[72] *See Rocket Attacks Towards Israel*, *supra* note 5.
[73] *Tahadiya*, GLOBALJIHAD.NET, http://www.globaljihad.net/ view_page.asp?id=989 (defining Tahadiya as "the Arabic term for calm and relaxation").
[74] *See One Month Into the Lull in the Fighting: An Interim Report*, TERRORISM-INFO.ORG.IL (Jul. 27, 2008), http://www. terrorism-info.org.il/malam_multimedia/English /eng_n/html/hamas_e001.htm.
[75] *Id*. *See also Gilad Shalit: In Terrorist Captivity Since 25 June 2006*, MFA.GOV.IL (Jun. 24, 2010), http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind+the+Headlines-+Six+months +in+terrorist+captivity+11-Jan-2007.htm (explaining the circumstances of Israeli Defense Force (IDF) Corporal Shalit's abduction and captivity).

Although the Tahadiyah brought about a temporary interruption in the daily rocket fire from Gaza, it would eventually break down prior to its six-month expiration date. [76] This was due, in large part, to a lack of progress in negotiations for the release of Corporal Shalit and stalled negotiations for the opening of the Rafah Crossing.[77] After five months of relative tranquility, the peace was broken by an Israeli military incursion into Gaza on November 4, 2008.[78] The IDF claimed that they were "acting on intelligence that Palestinian militants were poised to infiltrate Israel,"[79] maintaining that the "target of the raid was a tunnel that . . . Hamas was planning to use to capture Israeli soldiers."[80] The attack resulted in deaths to six Hamas gunmen and injuries to four Israeli soldiers.[81] Despite Hamas's retaliatory attacks—firing a considerable barrage of rockets into Southern Israel—Israeli officials maintained that "[t]here [was] no intention to disrupt the ceasefire, rather the purpose of the operation was to remove an immediate and dangerous threat posed by the Hamas terror organisation."[82] This view was not shared by Hamas. At the conclusion of the skirmish, a Hamas representative issued a warning, stating, "[t]he Israelis began this tension and they must pay an expensive price . . . [t]hey cannot leave us drowning in blood while they sleep soundly in their beds."[83]

Hamas made good on their threat just ten days later. On November 14, 2008, Hamas fired a wave of rockets at southern Israel, injuring

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[76] In the first month following the Tahadiya, rocket and mortar attacks fell from 237 between June 1–18 to only eight between June 19–30, 2008. In July, only twelve attacks were recorded. Interestingly, these attacks were not attributed to Hamas, but rather to rogue Palestinian armed groups with suspected Fatah loyalties. *See generally One Month Into the Lull in the Fighting*, *supra* note 74. In the five-month ceasefire, only 362 rockets and mortar shells were fired at Israel. *See Timeline and Causes of "Operation Cast Lead" in Gaza*, *supra* note 71.

[77] *See One Month Into the Lull in the Fighting*, *supra* note 74 (explaining that the increase in hostilities has also been linked to internal pressures experienced by Hamas in its continuing turmoil with its Fatah rival).

[78] *See* Rory McCarthy, *Gaza Truce Broken as Israeli Raid Kills Six Hamas Gunmen*, GUARDIAN.CO.UK (Nov. 5, 2008, 2:32 PM), http://www.gurdian.co.uk/world/2008/nov/05 /israelandthepalestinians (last visited Mar. 26, 2012).

[79] *Timeline and Causes of "Operation Cast Lead" in Gaza*, *supra* note 71.

[80] *See* McCarthy, *supra* note 78.

[81] *Id.*

[82] *Id.*

[83] *Id.*

eighteen Israelis.[84] Once again, both sides blamed each other for the renewed hostilities. Israel claimed that the tunnels were a grave breach of the truce. Hamas, on the other hand, justified its attack as retaliation against Israel's recent military incursion, the resulting deaths of Palestinian militants, and increased closure of crucial crossings from Gaza into Israel, which was decreasing already depleted levels of fuel and supplies.[85]

On December 19, 2008, after a volley of political rhetoric and threats from both sides, Hamas declared the Tahadiyah officially over and only five days later commenced "Operation Oil Stain," which resulted in a launch of a total of eighty-seven mortars and rockets at southern Israel in just twenty-four hours.[86] Following this attack, news reports announced that on December 24, 2008, the IDF received approval "for a number of [military] operations that would likely include heavy air strikes against Hamas and Islamic Jihad targets, as well as pinpoint ground operations against terrorist infrastructure."[87] Operation Cast Lead began in earnest on December 27, 2008.[88]

III. The Normative Framework

The determination as to what laws apply in a given conflict is based on three key factors: first, whether the parties to the conflict are signatories to the relevant treaties; second, whether or not the conflict is considered international armed conflict; and third, whether any other international humanitarian law is applicable due to its status as customary international law ("CIL").[89] This is not an easy task when

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[84] Ethan Bronner & Taghreed El-Khodary, *Cease Fire Unravels as Hamas Fires Rockets on Israel*, N.Y. TIMES, Nov. 14, 2008, *available at* http://www.nytimes.com/2008/11/14/world/africa/14iht-15gaza.17839437.html.

[85] *Id.*

[86] *Hamas: 87 Shells Fired at Israeli Targets in 24 Hours*, MAANNEWS.NET (Dec. 25, 2008 10:19 AM), http://www.maannews.net/eng/ViewDetails.aspx?ID=207221.

[87] Yaakov Katz & Herb Keinon, *IDF Gets Green Light to Strike Hamas After Rocket Barrage*, JPOST.COM (Dec. 24, 2008 7:46 AM), http://www.webcitation.org/5dSq9wqKW.

[88] *Timeline and Causes of "Operation Cast Lead" in Gaza*, *supra* note 71.

[89] *See generally* SOLIS, *supra* note 21. Although this article addresses the split in international opinion regarding whether Gaza remains occupied—due to the implications that such a conclusion has on the Goldstone Report's findings and recommendations—it will not address the human rights law as it relates to IHL. For the purposes of this article, the analysis will assume that the IHL is the *lex specialis* in times of armed conflict.

discussing the Israel-Palestine conflict—a sixty-year-old state of affairs involving countless skirmishes and a myriad of Israeli administrations, Palestinian leaders, Islamic militant groups, and international actors.[90] Further, since "war is only a continuation of state policy by other means,"[91] it should not be surprising that the application of the law of war is equally political. In the sections that follow, this article will demonstrate how the parties to this controversial and emotionally charged conflict—to include critics such as the UN Human Rights Council—tend to interpret, or completely disregard existing laws to meet their political agendas and desired end-state.[92] What results is a piecemeal application of the IHL to the modern asymmetrical fight.

Fortunately, the parties to this contentious conflict agree for the most part on the fundamentals of the applicable law. Israel's Supreme Court, sitting as the High Court of Justice, has held that the normative system that applies is the law as it pertains to international armed conflict. This law applies even where there is a belligerent occupation; as long as international borders are crossed, the law of international armed conflict is the *lex specialis*.[93] In addition, CIL applies, subject to Israeli statutes to the contrary. The court also held that public Israeli law authorizes the IDF to "do all acts necessary and legal, in order to defend the State and public security." The court found the following treaties to be applicable to Israel's use of force in the Territories:

a. Hague IV: even though Israel is not a party, it will adhere to its tenets as a reflection of CIL;

b. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter Geneva IV): to which Israel is a party;

c. Protocol Additional to the Geneva Conventions of 12 August 1949 (hereinafter AP I): Although Israel is not

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[90] *See supra* text accompanying notes 4–11.

[91] GENERAL CARL VON CLAUSEWITZ, ON WAR (Colonel J. J. Graham trans., Kegan Paul, Trench, Trubner & Co. 2d ed., 1908), *available at* http://www.gutenberg.org/files/1946/1946-h/1946-h.htm.

[92] *See generally infra* Part IV.

[93] DEFINITIONS.USLEGAL.COM, http://definitions.uslegal.com/ l/lex-specialis/ (last visited Feb. 27, 2011) (defining *lex specialis* as "law governing a specific subject matter . . . . The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters").

a party to AP I, it will comply with provisions of AP I that are accepted as CIL; and

d. Although the government of Israel does not apply the rules of belligerent occupation in Geneva IV, it will honor the humanitarian provisions thereof.[94]

The Mission arrived at a similar conclusion regarding the normative framework, concurring with Israel's contention that the distinction between international and non-international armed conflict is "largely of theoretical concern, as many norms and principles govern both types of conflicts."[95] As such, this article will apply the previously referenced legal framework to the analysis of the Goldstone Report's allegations against Israel's operation in Gaza.

Any agreement between Israel and the Mission ends abruptly when the legal analysis turns to the issue of *when* the aforementioned framework is triggered. International humanitarian law draws a distinction between those actions that a nation-state takes prior to armed conflict, *jus ad bellum*[96] (JAB), and the legal constraints that apply to a nation-state's use of force after the conflict has begun, *jus in bello*[97] (JIB). Drawing a line between these two important concepts—to determine where peace ends and the armed conflict begins—has important implications regarding responsibilities of both the attacker and defender under IHL.

Under the Geneva tradition, the IHL is triggered where two or more nation-states are engaged in armed conflict with each other.[98] Under

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[94] *See* HCJ 769/02 The Pub. Comm. Against Torture in Isr., et. al. v. Gov't of Israel 57(6) IsrSC 285, P21 [2006] (Isr.).
[95] Goldstone Report, *supra* note 3, at 87 (citing The Operation in Gaza, *supra* note 10, at 11).
[96] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK 7 (2010) [hereinafter LOW DESKBOOK] (defining *jus ad bellum* as "the law dealing with conflict management, and how States initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified)").
[97] *Id.* (defining *jus in bello* as "the law governing the actions of States once conflict has started (i.e., what legal and moral restraints apply to the conduct of waging war)").
[98] SOLIS, *supra* note 21, at 150.

"Common Article 2"[99] of the Geneva Conventions, IHL applies 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."[100] Additional Protocol I takes this definition a step further by applying the IHL to some conflicts previously considered non-international in nature, to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination."[101] The protections of IHL cease upon the general close of military operations.[102]

Prior to the commencement of Operation Cast Lead on December 27, 2008,[103] the conflict between Israel and Hamas could be classified in one of three ways: (1) as a time of relative peace marked by discrete armed conflicts short of war, governed under the JAB paradigm; (2) as a continuation of an ongoing international armed conflict,[104] subject to the IHL and, therefore viewed under a JIB paradigm; or (3) as a state of belligerent occupation, also viewed under the JIB paradigm as a subset of Geneva IV.[105]

Drawing a line is difficult in the instant case. As demonstrated in Part II,[106] the Israel-Palestinian borders have been the sites of immeasurable clashes of varying degrees throughout the years. Further, other than Israel, none of the parties to the ongoing conflict (e.g., Fatah, Hamas and other Jihadist militant groups) are high-contracting parties to the IHL.

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[99] The term "common article" refers to "a certain number of articles that are identical in all four of the 1949 Geneva Conventions . . . [n]ormally these relate to the scope of application and parties' obligations under the treaties." *Supra* note 92, at 19.

[100] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[101] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, 37–38 [hereinafter AP I]. Like the United States, Israel does not consider Art. 1(4) a reflection of CIL.

[102] GC IV, *supra* note 100, art. 6.

[103] Based on the stated intent of the parties, it appears as though the beginning of the armed conflict—for legal purposes—could have either been with Hamas's Operation Oil Stain or even on Dec. 4, when the IDF attacked the Hamas tunnel systems. Since both Israel and the Mission agree that jus *jus in bello* is the applicable law to all actions thereafter, this issue need not be definitively resolved for the purposes of this article.

[104] *See generally* SOLIS, *supra* note 21, at 149–69 (discussing the complexities surrounding a determination of conflict status under IHL).

[105] *Id.*

[106] *See supra* text and accompanying notes 4–11.

Finally, at no time have either Israel or Hamas made a clear declaration of war, affirmatively acknowledging the application of the IHL to Operation Cast Lead.

In more traditional situations, where high-contracting parties engage in war with each other, the line between war and peace is determined by a *de facto* standard, rendering the subjective goals of the respective parties irrelevant.[107] In situations such as Operation Cast Lead, where the line between continued armed "incidents" and armed conflict (i.e., war) is difficult to discern, the specific intentions of the parties become a determining factor.[108]

Based on these guidelines, it is not likely that Operation Cast Lead was simply a continuation of an ongoing Common Article 2 conflict. After Hamas's rise to control over Gaza's government and military in 2007, Israel was facing a new adversary. As such, any analysis of the applicable legal framework between Israel and Hamas should be viewed accordingly.

Although hostilities intensified in the years following Hamas's takeover, the Tahayidah marked nearly five months of relative peace. It was not until December 2008 that hostilities amounting to an armed attack interrupted this lull in hostilities. After its military attack of Hamas's tunnels on December 4, Israeli officials specifically indicated that it did not intend to break the ceasefire or engage in a protracted military operation.[109] Hamas was, however, unequivocal in its intent following the IDF's December 4 attack and made its intent to engage in an armed attack against Israel abundantly clear with Operation Oil Stain.[110] Likewise, the government of Israel's response to the press, authorizing sustained military operations against Hamas and its infrastructure, made its intent clear.[111] Whether the IHL was triggered after Hamas's Operation Oil Stain in December 2008, or Israel's commencement of Operation Cast Lead later that same month, there is no debate regarding its application to all operations thereafter.

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[107] LOW DESKBOOK, *supra* note 96, at 20.
[108] SOLIS, *supra* note 21, at 152 ("An armed conflict is characterized by the specific intention of one state to engage in armed conflict against another state . . . an armed *incident*, even when between two states, is not sufficient to constitute an armed conflict in the sense of common Article 2.").
[109] McCarthy, *supra* note 78.
[110] *Id.*
[111] Bronner & El-Khodary, *supra* note 84.

The Goldstone Report disagrees with the conclusion that the JIB framework applies only after the aforementioned December 2008 demarcation between peace and armed conflict, concluding instead that since the commencement of Israel's occupation of Gaza, the provisions of Geneva IV apply to all actions undertaken with regard to Gaza, whether before, during, or after the military operation.[112] This contentious issue will be discussed at length in Part V below.[113]

IV. What the Mission Got Right

The Goldstone Report is not without merit. The Goldstone Report is effective in portraying the general terror and fear experienced by civilians caught in the crossfire of a violent struggle.[114] Through extensive interviews with Gazan citizens, the Mission highlights a tragic and deteriorating humanitarian situation in Gaza,[115] recounting vivid, heartbreaking tales of entire families wiped out in the hostilities,[116] as well as scarcity of food, resources, and adequate healthcare faculties.[117] From a humanitarian point of view, these dire images are effective in calling into question whether Israel's arguably heavy-handed COIN tactics are potential violations of international human rights law.

From a legal perspective, the Mission made a number of factual findings that, if true, could aid Israel in holding members of its ranks accountable for allegations of both human rights law and IHL. An example of this is the shocking first hand accounts of potential IHL violations committed by IDF personnel during the detentions of Gazan citizens.[118] The Mission made findings that Israel detained unarmed civilians, including women and children, "in degrading conditions, deprived of food, water and access to sanitary facilities, and exposed to the elements in January without any shelter . . . [t]he men were

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[112] *See generally* Goldstone Report, *supra* note 3.
[113] *See infra* pp. 94–98.
[114] *See generally* Goldstone Report, *supra* note 3.
[115] *Id.* para. 1632.
[116] *See id.* para. 841–49 (detailing the destruction of the al-Daya family house, killing twenty-two civilian family members).
[117] *See Gaza: Humanitarian Situation*, BBCNEWS.CO.UK (Jan. 30, 2009, 10:55 AM), http://news.bbc.co.uk/ 2/hi/middle_east/7845428.stm.
[118] *See generally* Goldstone Report, *supra* note 3, paras. 1103–61.

handcuffed, blindfolded and repeatedly made to strip, sometimes naked, at different stages of their detention."[119]

Israel, in order "to assess certain allegations discussed in the Human Rights Council Fact-Finding Report," has addressed these alleged transgressions of violence and maltreatment of detainees by appointing several special command and criminal investigations, the results of which have not yet been released.[120] In fact, of the thirty-four incidents of potential violations addressed by the Mission, "[t]he [Goldstone] Report brought . . . 12 incidents to the IDF's attention for the first time—10 of which involved alleged damage to property and 2 of which involved alleged harm to civilians."[121] Thus, the Goldstone Report has proven influential in encouraging Israel's accountability for violations of the law by IDF personnel.[122]

The Mission also devoted at least a portion of its findings to admonishing Hamas and other Palestinian armed groups for potential violations of IHL and human rights law. To its credit, the Mission—despite being "faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the [Palestinian] armed group"[123]—investigated the following crucial points: (1) the extent to which Palestinian armed groups took adequate precautions to protect civilian populations and property,[124] (2) the continuing detention of IDF Corporal Gilad Shalit,[125] and (3) the indiscriminate attacks upon the civilian population of southern Israel.[126] Despite the obvious disparity in

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[119] *Id.* para. 57.

[120] ISRAEL MINISTRY OF FOREIGN AFFAIRS, GAZA OPERATIONS INVESTIGATIONS: AN UPDATE, January 2010, at 122, [hereinafter Gaza Update], *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza_Operation_Investigations_Update_Jan_2010.htm at 122.

[121] *Id.* at 36.

[122] *See generally id.* (discussing the Israeli military justice system and its investigations into numerous allegations of IHL and human rights violations by IDF personnel). *But see, 18 Jan. '12: Three Years Since Operation Cast Lead: Israeli Military Utterly Failed to Investigate Itself*, B'TSELEM.COM, http://www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead (last visited Feb. 22, 2012) (highlighting perceived shortfalls in the known results of Israel's investigations into misconduct within its ranks during Operation Cast Lead).

[123] *See* Goldstone Report, *supra* note 3, at 12.

[124] *Id.* at 76–106 (detailing Israel's emphasis on legal training, supervision, implementation of rules of engagement, and precautions to protect the civilian population in an effort to adhere to the requirements of IHL).

[125] *Id.* at 25.

[126] *Id.* at 31–33.

the Mission's emphasis on Israel's shortcomings, it is worth noting that the Mission's attempt at even-handedness in this regard was a clear deviation from its mandate, which required no inquiry into Hamas's violations whatsoever.[127]

The horror suffered by the people of Gaza cannot be denied and adherence to the law demands that culpability be placed upon those who violate it. It does not follow, however, that the sins of a few can be attributed either to the IDF's overall adherence to the IHL or to Operation Cast Lead as a whole. As will be discussed below, the Goldstone Report does just that. By relying upon the suffering of civilians as proof that IHL violations were willfully committed by Israel's forces as a whole, the Mission's fallacious analysis overshadows the otherwise valid concerns and allegations that are contained in the report. Ultimately, the suffering of the Gazan people is obscured by the Mission's skewed interpretation of the law.

V. Goldstone's Shortcomings

Many argue that the Goldstone Report was biased from the start. The mandate to investigate "[t]he grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip,"[128] was adopted by the UN Human Rights Council on January 12, 2009. This UN body has been criticized for its unequal treatment of Israel. One critic summarizes the historical tension between Israel and the Human Rights Council as follows:

> Among the nearly 200 nations represented at the UN, only Israel has ever been assigned special—reduced—membership privileges, its ambassadors formally barred, for 53 straight years ending only recently, from election to the Security Council. Meanwhile, and right up to the present day, that same Security Council has devoted fully a third of its energy and criticism to the policies of a single country: Israel. The UN Commission on Human Rights, which regularly—and unreprovingly—accepts

[127] *See infra* pp. 105–16.
[128] UN HRC, 9th Special Sess., U.N. Doc. A/HRC/S-9/2 (Jan. 12, 2009) [hereinafter A/HRC/S-9/2].

> delegations from any number of homicidal tyrannies across the globe, has issued fully a quarter of its official condemnations to a single (democratic) country: Israel.[129]

The mandate is filled with presuppositions that find voice in the Goldstone Report. First, the mandate assumes the status of the Territories as occupied and, therefore, that IHL (i.e., JIB) is the applicable framework for all actions taken by Israel in response to Hamas's acts of belligerency. This assumption is reinforced by the Human Rights Council's recognition that the "Israeli siege imposed on the occupied Gaza Strip, including the closure of border crossings and the cutting of the supply of fuel, food and medicine, constitutes *collective punishment* of Palestinian civilians."[130] This statement alleges that Israel's actions were willfully indiscriminant and, therefore, in violation of the IHL before any evidence had been gathered. Finally, while explicitly condemning the Israeli military operation for the effects that the conflict has had on the Palestinian populace, the Mandate makes no mention of acts of terrorism emanating from the Territories or Israel's right to self-defense from such aggression.[131] These one-sided themes echo through the findings and recommendations of the Goldstone Report, casting doubt on the veracity of this fact-finding mission from its very commencement.[132]

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[129] The article goes on to cite examples of clear human rights violations that have occurred since Israel's recognition as a sovereign state, to include "a genocide in Rwanda, an ethnic cleansing in Yugoslavia, periodic and horrifying communal "strife" in Indonesia's East Timor, the "disappearance" of a few hundred thousand refugees in the Congo, a decades-long and culturally devastating occupation of Tibet by the People's Republic of China." Ironically, unlike Israel on multiple occasions, none of these countries have received the "rebuke" of a UN General Assembly "emergency special session." David Tell, *The U.N.'s Israel Obsession*, WEEKLYSTANDARD.COM (May 6, 2002), http://www.weeklystandard.com/Content/Public/Articles/000/000/001/186drluv.asp.

[130] *See* A/HRC/S-9/2, *supra* note 128 (emphasis added).

[131] *Id.*

[132] To his credit, Richard Goldstone claims to have agreed to lead the Mission only after the mandate was expanded to look at the conduct of all parties to the conflict, acknowledging that "[t]he issue is deeply charged and politically loaded." Richard Goldstone, *Justice in Gaza*, NEWYORKTIMES.COM, http://www.nytimes.com/2009/09/17/opinion/17goldstone.html?_r=1 (last visited Mar. 26, 2012). Interestingly, no such language ever found its way into the mandate and no revised mandate was ever approved or released by the Human Rights Council. *See* UN Watch, *UN Human Rights Council fails to Ratify Changes to Goldstone Mission*, BLOG.UNWATCH.ORG (Jul. 5, 2009), http://blog.unwatch.org/?p=409. Critics have also questioned the composition of the Mission in alleging further bias. This article will not concern the alleged personal biases

Although the Goldstone Report claims to place importance on "understanding . . . the situation, the context, impact and consequences of the conflict on people . . . to assess violations of international law,"[133] faulty assumptions, suspect methodology and misapplication of IHL are further evidence of partiality on the part of the Mission.

The first of these issues is the Mission's failure to fully address recent historical events that shed new light on the status of Israel's sovereignty over the Territories. Instead, the Mission bases its findings on an assumption that the Territories remain occupied by Israel, without providing sufficient context for the controversial nature of this issue.

Second, by ignoring these historical developments and their effects on Israel's responsibilities vis-à-vis Gaza, the Goldstone Report downplays the security threat Hamas poses to southern Israel and Israel's right to self-defense in light of persistent terrorist attacks from Gaza. Not once does the Mission reference Israel's right under the UN Charter or CIL to resort to force in order to protect both its citizenry and sovereignty. Further, instead of viewing Israel's actions leading up to Operation Cast Lead and its justification for resort to force through the lens of JAB, the Goldstone Report alleges that the same acts are violations of JIB, thereby further justifying its provocative allegations.

Third, this section will discuss the Mission's allegation that IDF forces committed grave breaches of AP I by violating the doctrine of distinction. The Goldstone Report makes reference to numerous targeting decisions made by the IDF that resulted in the unfortunate deaths of Palestinian civilians. In doing so, however, the Mission departs from the accepted standards in IHL, making findings based on information collected after the fact instead of ascertaining the intelligence known by military commanders at the time. The Goldstone Report continues with its retrospective analysis of Israel's attempts to warn the Gazan population while, at the same time, giving very little attention to Hamas's own failures to protect its populace. In doing so, the Mission

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of the individuals comprising the Mission. Such an analysis has led to personal attacks and allegations of political posturing in the media. Instead, the legal analysis and conclusions of the Mission are sufficient to support this article's conclusions. *See generally Establishment of the Mission*, GOLDSTONE REPORT.ORG, http://www.goldstonereport.org/controversies/establishment-of-mission (last visited Feb. 22, 2012) (providing a discussion surrounding the establishment of the mission and allegations of bias in both mandate and composition, including links to treatment of this topic in the media).

[133] Goldstone Report, *supra* note 3, para. 163.

employs a capability-based analysis. While the Mission requires a heightened adherence to IHL for Israel due to its advanced technology and perceived tactical ability to notify civilians in the line of fire, the Mission also downplays Hamas's responsibilities as a defender under IHL.

The mission's misapplication of the law unduly limits a counterinsurgent's ability to respond to threats, while ignoring or downplaying the obligations of the defender. Not only does this method of analysis expose the bias inherent in the Goldstone Report, but the long-term effects of this UN-sanctioned interpretation could prove an untenable precedent for countries attempting to protect their populace against modern terrorism. By casting the traditional understanding of IHL aside, the Goldstone Report's misguided analysis manipulates the plight of civilians and discards the concept of reciprocity in adherence to IHL.

A. Status of Israel As Occupant of Gaza

The Goldstone Report bases many of its conclusions regarding Israel's actions in Operation Cast Lead on the assumption that the Territories are "occupied" as a matter of law, requiring Israel to adhere to the framework of belligerent occupation.[134] This is a common theme throughout the document that has its genesis in the Mission's mandate.[135] The plain language of the report indicates that "[t]he Mission is of the view that the circumstances . . . establish that the Gaza Strip remains occupied by Israel."[136] The Mission makes dozens of references throughout the Goldstone Report referring to Israel as an occupier, or the Territories as occupied.[137]

The significance of attaching the term occupation to a given international dispute cannot be understated since application of this framework has far-reaching effects on both the occupant and occupier. Generally, the law of occupation requires the occupant to, *inter alia*: (1) "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented,

[134] *Id.* para. 276.
[135] A/HRC/S-9/2, *supra* note 128.
[136] Goldstone Report, *supra* note 3, para. 276.
[137] *See generally id.*

the laws in force in the country,"[138] (2) respect the "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice,"[139] and (3) refrain from imposing any "general penalty, pecuniary or otherwise . . . upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."[140] In addition to the prohibitions contained in the Hague Convention, the Fourth Geneva Convention affirmatively requires occupying forces to "bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."[141] Most important: because an occupying force is bound by the IHL, it is restricted by the JIB standards. Thus, it logically follows that an occupant no longer maintains the right to resort to military force in self-defense under the JAB framework.

Despite the importance of this legal distinction in terms of the rights and responsibilities of the parties involved, and the fact that violations of the requirements of the law of belligerent occupation make up much of the Goldstone Report's criticisms of Israel, the Mission takes for granted that an occupation actually existed in the Gaza Strip during the relevant period of time, only briefly offering counterpoints to this assumption. The Mission devotes little attention to significant events such as Israel's unilateral disengagement from Gaza in 2005,[142] its declaration of Gaza as a 'hostile territory' in 2007,[143] and Operation Cast Lead itself, all of which represents an evolution in the role of Israel in the day-to-day governance of Gaza over the past decade and calls into question the legal conclusion that Gaza remains occupied.

As explained in Part II, Israel has "not formally claimed sovereignty over . . . the Gaza Strip," and "has zealously avoided any action which could be interpreted as renunciation of its own possible status as a repository of sovereignty over the Territories in question."[144] Since the Palestinian authority has demonstrated an "unwillingness to pursue a

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[138] Convention (IV) Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].
[139] *Id.* art. 46.
[140] *Id.* art. 50.
[141] *Id.* art. 55.
[142] *See generally Disengagement Plan*, *supra* note 58.
[143] *Israelis Declare Gaza 'Hostile,'* BBC NEWS (Sept. 19, 2007), http://news.bbc.co.uk/2/hi/7002576.stm.
[144] Goldstone Report, *supra* note 3, at 21.

unilateral route to statehood,"[145] and no lasting political compromise has been reached to date, there exists no clear answer regarding sovereignty of the territories.

In the years leading up to Operation Cast Lead, Israel deliberately distanced itself from the Territories by redeploying its military forces from both Gaza and the West Bank and placing the day-to-day administration of the Territories in the hands of the Palestinian elected authorities.[146] The Israeli Supreme Court held that:

> [S]ince September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law.[147]

Numerous international law scholars have concurred with this supposition, agreeing that following the disengagement, the conclusion that Gaza is occupied is no longer valid.[148]

In addition, Israel's declaration of Hamas as hostile represented yet another step away from Gaza. This designation arguably justifies Israel's reluctance to become involved in Gaza's internal politics, or to provide

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[145] Pressman, *supra* note 53, at 117.
[146] *See generally Disengagement Plan*, *supra* note 58.
[147] HCJ 9132/07 Bassiouni v. Prime Minister [2008] (Isr.), para. 12.
[148] *See generally* Ruth Lapidoth, *Unity Does Not Require Uniformity*, BITTERLEMONS.ORG (Aug. 22, 2005), http://www.bitterlemons.org/previous/b1220805ed30.html#pal2 bl220805ed30.html#pal2 (arguing that "[t]he drastic restriction of Israel's powers in the Gaza Strip will terminate the application of the rules on occupation"), Solon Solomon, *The Great Oxymoron:* Jus in Bello *Violations as Legitimate Non-Forcible Measures of Self-Defense*, 9 CHINESE J. INT'L L. 501, 523 (2010) (stating that, "[t]he legal certainty around the status of the Gaza Strip as that of an Israeli occupation ended in 2005). *But see generally*, Shane Darcy & John Reynolds, *'Otherwise Occupied': The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SECURITY L. 211 (2010) (concluding that Gaza remains occupied despite Israel's Disengagement, Declaration of Hamas as hostile, and Operation Cast Lead).

fuel and electricity that could potentially be used against them in furtherance of hostile acts. Common sense dictates that a party to any conflict cannot be expected to take actions that could serve to strengthen its opponent.

Finally, in order to curb the rocket attacks fired by Palestinian armed groups, Israel's resort to military force in Gaza is further evidence that Israel does not have effective control over the region. Combined with the disengagement and declaration of Hamas as hostile, this loss of control over Gaza is final proof that Israel no longer meets the criteria of an "occupier" in accordance with the relevant international law.

The Goldstone Report summarily disregards the significance of these events, relying on the fact that "the Israeli armed forces continued to maintain control over Gaza's borders, coastline and airspace . . . telecommunications, water, electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory while the inhabitants of Gaza continued to rely on the Israeli currency."[149] This argument is persuasive on its face, given the fact that the existence of a belligerent occupation in Gaza was a largely settled issue until 2005.[150]

The Mission seems to ignore the plain language of Article 42 of the Hague IV, which sets forth the definition of belligerent occupation. Article 42 specifies that an occupation exists where the actual authority of a hostile army over territory has been established and is capable of being exercised.[151] The facts in this case clearly do not meet the customary definition of Article 42. After Israel's disengagement in 2005, no military presence remained in Gaza and the Palestinian Authority assumed responsibility for the day-to-day governance of the region. Second, even though Israel maintains military control over Gaza's borders—thereby controlling the resources that enter and exit those borders—it does not necessarily follow that this constitutes Gaza's being

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[149] Goldstone Report, *supra* note 3, para. 187.

[150] *See generally* Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 105 (2010). *See also* Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915 (2010) (outlining the legal status of Gaza over time and concluding that, since Israel's disengagement in 2005, Gaza should be considered "a '*sui generis* territory' for the intermediate period between the previous Palestinian occupation and any prospective future statehood.").

[151] Hague IV, *supra* note 135, art. 42.

placed under the "authority of the hostile army." In fact, if Operation Cast Lead has proven anything, it has shown that Israel has very limited potential to exercise effective control over the Gaza Strip. As stated above, the fact that Israel had to commence an extensive military operation to curb rocket attacks from Gaza is evidence that the Israeli Defense Force no longer has the ability to control Gaza or its population. Finally, the Goldstone Report downplays the fact that Hamas, with its organized governmental bodies and substantial security personnel, "exercises effective governmental powers in the Strip without significant external intervention."[152]

The Mission's decision to ignore the plain language of Hague IV and disregard facts that support a conclusion that an occupation no longer exists appears political in nature. Conceding that an occupation no longer exists in Gaza would relieve Israel from allegations that it ignored its human rights obligations to the Palestinian people (e.g., by failing to keep law and order and providing basic services). The Mission's acceptance of this alternate theory would weaken many of its inflammatory assertions. Its cursory treatment of this issue is, therefore, self-serving.

Further prejudice is apparent in the Mission's reliance upon Security Council Resolution 1860 for the proposition that "the international community continues to regard [Israel] as the occupying Power."[153] In fact, the cited resolution makes no assertion that Gaza remains an occupied territory. To the contrary, the Security Council affirmatively avoided any such pronouncement by rejecting a Libyan draft of the resolution that emphasized Israel's continuing occupation of Gaza.[154] Although this does not necessarily mean that the UN's official position is not in line with the Mission's view, reliance on this particular Security Council Resolution to support its point is perplexing and arguably indicative of a preconceived conclusion on the issue. Unfortunately, the self-serving presumption regarding Gaza's status as occupied is only one indicator of partiality contained in the Goldstone Report.

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[152] Benoliel & Perry, *supra* note 150, at 109.
[153] Goldstone Report, *supra* note 3, at 277.
[154] *Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council*, ISRAEL MINISTRY OF FOREIGN AFF. (Sept. 24, 2009), http://www.mfa.gov.il /MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm.

B. Omission of Israel's Right to Self-Defense

The Goldstone Report's legal conclusion that Gaza remains occupied conveniently allows the Mission to exclude any mention that Israel's resort to force against Hamas was legally justified in accordance with both the UN Charter and CIL. This omission is telling. Instead of acknowledging Israel's attempts to take gradual, deliberate steps—such as security fences and economic sanctions—in order to avoid a full-scale military operation, the Goldstone Report paints a picture of Israel as a callous reactionary force. The reality is that Israel, in accordance with the UN Charter, appealed to the UN Security Council repeatedly over the course of nearly a decade to obtain assistance in deterring the rockets targeted at its citizens.[155] It was only after lesser means of force, years of failed negotiation, and continued security threats from Hamas, that Israel resorted to full-scale conventional warfare.[156] This account of Israel receives no voice in the Goldstone Report.

The Goldstone Report's bias is most obvious in the Mission's criticism of Israel's blockade (i.e., control of both the navigable waters and entry points) of Gaza's borders. The Mission views the blockade through the lens of the JIB framework, alleging that the measures and effects thereof are violations of the principle of distinction (i.e., that they were intended to target the civilian population of the Territories) and, therefore, grave breaches of IHL.[157] In so doing, the Mission ignores the fact that these same measures, viewed in a JAB context, are not only legal acts in self-defense, but also the preferred approach in international law. The Mission's application of this law is not only a departure from international norms, but completely ignorant of the realities faced by the government of Israel in attempting to mitigate a deadly threat to its population.

The Goldstone Report alleges that Israel's blockade surrounding Gaza, was "intended to inflict collective punishment on the people of the Gaza Strip in violation of *international humanitarian law*."[158] The Mission found that the blockade denies "Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water . . . freedom of movement and their right to leave and enter their own country,"

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[155] The Operation in Gaza, *supra* note 10, at 19-21.
[156] *Id.* at 32–33.
[157] *See generally* Goldstone Report, *supra* note 3.
[158] *Id.* para. 74 (emphasis added).

concluding that these effects on the population "could amount to persecution, a crime against humanity."[159] Despite the persistent terrorist attacks emanating from the Territories, the Mission summarily rejects Israel's justifications, stating "[w]hile the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole."[160]

The interesting yet troubling aspect of this provocative allegation is the Mission's invocation of IHL in its conclusion that Israel targeted civilians, couching its analysis in the JIB framework. As discussed above, this conclusion can either be predicated on the assumption that an armed conflict had already begun, thus triggering the application of the IHL, [161] or on the Mission's assumption that Gaza remains occupied.[162] Since the blockade began in September 2007,[163] more than a year before the initiation of hostilities in Operation Cast Lead, it is reasonable to conclude that the Mission's analysis is based on an assumption that Gaza remains occupied, thereby viewing Israel's actions under the JIB framework applied to measures taken during a situation of belligerent occupation.[164] As indicated above, this assumption may no longer hold ground in post-disengagement Gaza. Moreover, the Mission's conclusion that these economic sanctions should be viewed as IHL violations is not only unfounded in law, but represents additional evidence of the Mission shaping its legal analysis to meet its political agenda.

Although it is true that Israel began restricting the passage of people and goods—most notably fuel and electricity supplies—to and from Gaza, these measures are more appropriately viewed under JAB standards. Israel's attempts to curb the rocket attacks from within Gaza without resort to a full military operation are not only "not *a priori* illegal, but they could be also deemed preferable as a non-violent solution to a military operation in the strip that would leave behind many

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[159] *Id.* para. 75.
[160] *Id.* para. 1680.
[161] *See infra* pp. at 84–89 (discussing the normative framework and implications on application of IHL to Operation Cast Lead).
[162] *See infra* pp. at 94–98 (discussing Israel's status as a potential occupant of Gaza and the legal implications thereof).
[163] *See* Solomon, *supra* note 148, at 518.
[164] Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self Defense under International Law*, 36 RUTGERS L. REC. 164, 165 (2009).

victims."[165] This viewpoint is supported by Article 41 of the UN Charter which states that "[t]he Security Council may decide what measures *not involving the use of armed force* are to be employed . . . and it may call upon the Members of the United Nations to apply such measures."[166] It is only until Article 42, after non-lethal methods fail, that the UN advocates the use of force. Although the UN was not the proponent of the economic sanctions at issue in the Goldstone Report, the UN Charter indicates that "resort to non-violent defensive measures does not constitute a mere option available to international leaders, but the option primarily envisioned by the drafters of the international legality after World War II."[167] The Mission hangs its hat on the fact that civilians were severely affected[168] as proof that Israel intended to harm the Gazan population in its blockade. Although the Goldstone Report clearly establishes the deleterious effects such sanctions had on the residents of Gaza, it provides no independent evidence to support the assertion that Israel intended any such harm.

The Mission made similar arguments about Israel's resort to the use of force in Operation Cast Lead, once again ignoring well-settled standards within international law. The UN Charter, considered the primary source of modern JAB,[169] "provides two bases for the resort to force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 (which governs acts of both individual and collective self-defense)."[170] Chapter VII states that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."[171]

Despite continuous efforts by Israel to effectuate UN intervention prior to escalation to the level of a full-scale military operation, the Security Council took no substantial action under Chapter VII of the UN Charter to mitigate tensions in Israel and the Territories.[172] According to Israel's Ministry of Foreign Affairs, Israel sent "dozens of letters to the

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[165] Solomon, *supra* note 147, at 523 (emphasis added).
[166] U.N. Charter art. 41 (emphasis added) .
[167] Solomon, *supra* note 147, at 523.
[168] *See generally* Goldstone Report, *supra* note 3.
[169] LOW DESKBOOK, *supra* note 96, at 25–36.
[170] *Id.*
[171] U.N. Charter art. 39.
[172] *See* The Operation in Gaza, *supra* note 10, at 19–21.

Secretary General of the UN and the President of the Security Council, describing the Qassam rocket shelling of Israeli town[s] [sic] and cities and suicide attacks on Israeli civilians."[173] These letters, sent between October 3, 2000, and December 24, 2008, documented the deteriorating security situation in the region and "referenced Israel's inherent right to defend itself and its citizens."[174] In addition, Israeli representatives engaged in repeated diplomatic overtures with the UN, to include the Security Council, in order to "exhaust all diplomatic channels prior to its realisation that it was necessary to launch a wide-ranging military operation in Gaza."[175] Still, the UN refused to intervene.

Even as the security situation deteriorated, the UN remained hopeful for a peaceful resolution. On December 16, 2008, the Security Council issued Resolution 1850, calling for "intensification of diplomatic efforts to foster . . . peaceful coexistence between all states in the region in the context of achieving a comprehensive, just and lasting peace in the Middle East."[176] This was not to be. Just three days later, Hamas "unilaterally announced the end of the *Tahadiyah*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres."[177] Notwithstanding Secretary General Ban Ki Moon's condemnation of the recommencement of rocket attacks, and plea for Hamas "to ensure that rocket attacks from Gaza cease immediately,"[178] no affirmative measures were taken by the UN to quell the hostilities or otherwise authorize Israel to use force in accordance with the UN Charter.

In the absence of a resolution under Chapter VII, Article 51 of the UN Charter recognizes a right to self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[179] As such, the UN Charter

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[173] *Id*.
[174] *Id*. at 21 ("In 2008 alone, Israel sent 29 letters to the U.N. Secretariat.").
[175] The Operation in Gaza, *supra* note 10, at 21.
[176] S.C. Res. 1850, U.N. Doc. S/RES/1850 (Dec. 16, 2008).
[177] The Operation in Gaza, *supra* note 10, at 23.
[178] Statement Attributable to the Spokesperson for the Secretary-General on the Situation in Gaza and Southern Israel (Dec. 24, 2008), http://www.un.org/apps/sg/sgstats.asp ?nid=3631.
[179] U.N. Charter art. 51.

seems to support Israel's resort to the use of force, even where no affirmative UN intervention or formal sanction took place.

Even if resorting to the use of force is unlawful under the UN Charter, Israel was likely justified to act in accordance with the CIL right to self-defense.[180] Although the plain language of Article 51 seems clear, the legal interpretation of this verbiage has been subject to much dispute in the international legal community, particularly among non-governmental organizations ("NGOs").[181] This matter has been further complicated by, among other things, dispute over: (1) the extent to which the UN Charter has impinged on the CIL meaning of self-defense, (2) the meaning of "armed attack," and (3) the increased incidence of non-state actors in modern asymmetric warfare. Non-governmental organizations such as Al Haq and the Palestinian Center for Human Rights claim that Article 51 is inapplicable to the situation in Israel and the Territories because Palestinian Armed groups are non-state actors.[182] This argument does not hold true, as the right to self-defense is not a construct of the UN Charter alone:

> Most States now agree that a State's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under customary international law was *supplemented, not displaced*, by the Charter.[183]

As such, CIL may provide a justification for self-defense even if Article 51 does not apply.

Israel supports its contention that a "State's right to self-defense extends beyond attacks by other states"[184] by citing the UN's invocation of the right of self-defense "in the wake of the September 11 [2001] attacks on the United States, calling upon the international community to

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[180] The Operation in Gaza, *supra* note 10, at 29.
[181] *See International Law Series: The Right to Self Defense*, *supra* note 4 (criticizing some non-governmental organizations of wrongfully claiming that Israel does not have the right to self defense under IHL, and others for acknowledging Israel's right to self-defense, but consistently judging every action taken by Israel as a violation of international law).
[182] *Id.*
[183] The Operation in Gaza, *supra* note 10, at 15 (emphasis added).
[184] *Id.* at 27.

combat such terrorism perpetrated by non-state actors."[185] Interestingly, this conclusion was supported by the U.S. House of Representatives, which declared Operation Cast Lead a legitimate act in self-defense, as authorized under the UN Charter.[186]

From both a legal and common sense perspective, Operation Cast Lead was a necessary measure in self-defense. Continued inaction would have likely resulted in claims that Israel failed to protect its citizenry. Further, if Israel continued to wait for UN intervention, the constant and imminent threat posed by Hamas to nearly one million Israeli citizens may have continued indefinitely. Faced with the constant barrages of missile and mortar fire, Operation Cast Lead is exactly the type of response envisioned by Article 51 of the UN Charter.

C. Misapplication of the Doctrine of Distinction

Whether or not Israel was justified in resorting to the use of force, Israel was nevertheless obliged to comply with the IHL in its military operations. The principle of distinction, just one of many core principles within IHL, exists to maintain the delicate balance between military necessity and the adverse impact on civilians and protected property that inevitably accompanies armed conflict. Although the Goldstone Report has also been criticized for its legal analysis of JIB proportionality[187]—another core principle in IHL—this section will focus solely on the Goldstone Report's treatment of the doctrine of distinction.

The IDF was faced with unprecedented operational obstacles in Operation Cast Lead. In order to "destroy the sophisticated infrastructure of an organization that built between 600-800 tunnels, built and stored thousands of missiles and fired 6,000 missiles," while at the same time

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[185] *Id. See also* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

[186] Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self Defense under International Law*, 36 RUTGERS L. RECORD 164, 165 (Oct. 29, 2009). Note that for the act of self-defense to be deemed legitimate, it must be both necessary (a last resort after peaceful measures have failed) and proportionate ("limiting force in magnitude, scope and duration to that which is reasonably necessary to counter a threat or attack"). LOW DESKBOOK, *supra* note 96 at 5. Although many may disagree about whether Israel's actions meet these criteria, this article is more concerned with the fact that the Mission completely ignored any arguments that Israel had a right to self-defense at all.

[187] Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, YEARBOOK OF INTL. HUMANITARIAN L. 347, 357 (2009).

"seeking to minimize the loss of life to innocent individuals,"[188] the IDF would undertake numerous preventative measures and engage in extensive planning to avoid unnecessary civilian casualties.

Numerous factors made minimizing injuries and death to civilians and destruction of protected places an almost impossible task. First, there is evidence that Hamas and other Palestinian armed groups used nefarious and indiscriminate methods to achieve its ends. Even the Goldstone Report acknowledged "it is likely that the Palestinian armed groups did not at all times adequately distinguish themselves from the civilian population among whom the hostilities were being conducted."[189] Second, the nature of Hamas as both a governing body and recognized terrorist organization necessitated attacking the organization as a whole, including "objects [that] were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques."[190] This created situations in which otherwise protected property became a valid military objective. Finally, the conflict took place in Gaza, "the most densely populated piece of land on earth."[191] Taken together, these operational challenges placed Gazan citizens directly in the crossfire throughout Operation Cast Lead.

1. Double Standard in Measures Used to Warn Civilians

In order to overcome the increased operational obstacles inherent in fighting an insurgency, the IDF implemented "operational plans and rules of engagement, [wherein] military necessity was balanced against the fundamental obligations of the Law of Armed Conflict, through the principles of distinction, proportionality, and the obligation to take appropriate precautions to minimize civilian harm."[192]

The IDF used numerous methods, and mediums, of communication to warn civilians of impending attacks. First, the IDF inundated Gaza with nearly 2,500,000 leaflets "warn[ing] civilians to distance themselves from military targets, including buildings containing weapons,

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[188] Amos Guiora, Response to *Was the Gaza Campaign Legal*, Am. Bar Ass'n, NAT'L SECURITY L. REP. 8 (2009).
[189] Goldstone Report, *supra* note 3, para. 493.
[190] The Operation in Gaza, *supra* note 10, at 86.
[191] Blank, *supra* note 187, at 357.
[192] The Operation in Gaza, *supra* note 10, at 85–86.

ammunitions or tunnels, or areas where terrorist activity was being conducted."[193] Second, the IDF "conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls," thereby providing daily updates regarding operational activity affecting civilian areas.[194] Third, the IDF made targeted phone calls to specific Gazan population centers prior to attacks, "informing residents at risk about the upcoming strike and urging them to leave the place."[195] Finally, the IDF used cutting-edge technology to provide up-to-date information to military planners regarding civilian presence in the vicinity of military objectives. Each IDF brigade combat team had an unmanned aerial vehicle squadron assigned to it, not only for providing troops on the ground with timely close air support,[196] but also for supplying commanders with real-time intelligence intended "to assess the presence of civilians in the designated military target, despite the advance warnings."[197] The IDF confirmed the efficacy of these measures, witnessing on numerous occasions "the departure of civilians from targeted areas prior to the attack as a direct result of the warnings."[198]

Whether these warnings complied with international law is at issue in the Goldstone Report. Additional Protocol I (hereinafter AP I) requires an attacking force to provide advance warning of attacks that may affect the civilian population, as long as circumstances permit such warning.[199] In recent years, this standard has been interpreted further, imposing a feasibility test on the measures employed by attacking forces. Thus, an attacking force is only required to take all measures to warn civilian populations "that are practicable or practically possible, taking into account all circumstances ruling at the time."[200]

Instead of focusing on the AP I requirement that warnings be given when feasible, the Goldstone Report imposes an additional efficacy-

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[193] *Id.* at 99.
[194] *Id.*
[195] *Id.*
[196] David Eshel, *New Tactics Yield Solid Victory in Gaza*, AVIATIONWEEK.COM (Mar. 11, 2009), http://www. aviationweek.com/aw/generic/story-channel.jsp?channel=defense &id=news/gaza031109.xml.
[197] The Operation in Gaza, *supra* note 10, at 100.
[198] *Id.*
[199] *See* AP I, *supra* note 101, art. 57(2)(c).
[200] Blank, *supra* note 187, at 384 (citing Arbitral Award of December 19, 2005, 'Ethiopia v. Eritrea, Western and Eastern Fronts, Ethiopia's claims 1 & 3,' para. 33, *available at* http://www.pca-cpa.org).

based requirement on Israel as the attacking force. The Mission asserted that Israel's warning measures were inadequate because they were not effective, further finding the IDF's leaflets to be insufficiently clear and the telephone calls to be generic and unspecific. Ultimately, The Mission concluded that the IDF's warnings failed to adequately communicate critical information, resulting in fear and ambiguity rather than effective results.[201]

In reaching this conclusion, the Mission explains its interpretation of the AP I standard:

> Article 57 (2) (c) requires the warning to be effective. The Mission understands by this that it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of [sic] hoax may undermine future warnings, putting civilians at risk.[202]

Although seemingly reasonable on its face, the Mission ignores the standard's emphasis on feasibility rather than efficacy in its conclusions of law, choosing instead to focus on the capability of the IDF to issue more effective warnings, and arriving at its adverse findings based on information gathered after the fact. This shift in emphasis imposes a narrower standard on Israel than is required by IHL, placing undue significance on absolute efficacy, rather than the practicability and military considerations known to commanders at the time of the attack.

First, the Mission places heavy emphasis on Israel's failure to live up to its potential by issuing more effective warnings, stating that "[i]n terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances."[203] The Mission

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[201] Goldstone Report, *supra* note 3, at 151–62.
[202] *Id.* para. 528.
[203] *Id.* para. 509.

bases this conclusion on Israel's extensive planning, preparations, technological capabilities, and control over Gaza's airspace and telephone networks.[204] This conclusion wrongfully assumes that compliance with the IHL is based on the attacker's relative abilities. In other words, since Israel has greater ability to issue more effective warnings, it should be held to a higher standard than Hamas or other Palestinian Armed Groups. In fact, no such standard exists in AP I or in CIL. Such a standard would require Israel to exhaust *all* warning measures prior to attacking, rather than those measures that are feasible under the circumstances. This type of criticism is typical of the capabilities-based paradigm and a departure from the IHL standard that all parties to an armed conflict—regardless of their relative resources or abilities—are held to the same legal standard.[205] Critics of the capability-based model argue that not only is such a standard more stringent than the existing law, but there is a danger that "states simply will not issue warnings because no warnings will meet these standards and still enable effective military operations."[206]

Second, the Goldstone Report focuses its criticism on the IDF's warnings on the effect that they had on civilians receiving the warnings, in determining whether the warnings were, in fact, effective. The Mission offers only two after-the-fact accounts to support its conclusion that the Israeli efforts of warning by telephone were not adequately sufficient. In one account, the Mission interviewed Mr. Abu Askar, a Palestinian resident whose house was hit by an Israeli strike just seven minutes after he received a telephone warning,[207] thus indicating that the warning, although specific and targeted at Mr. Askar, gave too little notice. In another interview concerning the Al-Bader Flour Mills Co., a business owner and his staff suffered from fear and confusion after receiving two recorded messages indicating that their mill was to be targeted. Although the mill was not attacked immediately following the phone warning, it was attacked five days later with no additional

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[204] *Id.*

[205] M.N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, *in* W. Heintschel von Heinegg & V. Epping, eds., *International Humanitarian Law Facing New Challenges*, Symposium in Honour of Knut Ipsen (Berlin, Springer 2007), at 36 ("The more a military is capable of conducting 'clean' warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury."); *see also* Blank, *supra* note 187, at 386.

[206] Blank, *supra* note 187, at 181. *See also* Schmitt, *supra* note 205, at 11.

[207] Goldstone Report, *supra* note 3, paras. 501–02.

notification.[208] Aside from the fact that both of these warnings apparently proved to be effective in putting the civilians on notice of an impending attack, thereby seeking to avoid unnecessary death or injury, reliance on these accounts reveals a misunderstanding on the part of the Mission that the impact on civilians receiving the warnings is a consideration in the legal standard. In fact, the only legal issue that is relevant is whether the warnings were effective in transmitting a warning, and whether the warning "generally informed civilians that they were at risk and should seek shelter."[209] Ironically, the instances cited by the Mission to prove the IDF measures as ineffective seem to meet the legal requirements of AP I.

Finally, despite extensive criticism of Israel's failures to adequately warn civilians in the area of military operations, the Goldstone Report places very little emphasis on Hamas's failures toward its own civilians. AP I requires the defending force in a conflict to act as follows:

> [E]ndeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; and take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[210]

Although the Goldstone Report acknowledges "that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations," its legal findings regarding Hamas's abuses of their obligations as defenders receives little attention in the Goldstone Report.[211] By placing disproportionate emphasis on the obligations of the

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[208] *Id.*
[209] Blank, *supra* note 187, at 387.
[210] AP I, *supra* note 101, art. 58 (a)–(c).
[211] Blank, *supra* note 187, at 388 (noting that "the [Goldstone] report gives the defending party's obligations short shrift"). This dynamic will be further developed in the discussion in the next section of the article, discussing allegations that Israel violated the principle of distinction by engaging Hamas in the vicinity of the al-Qud Hospital. As will be seen, the Mission rushes to a conclusion that Israel violated its obligations, while ignoring evidence that Hamas violated its owns responsibilities under IHL.

attacker (IDF) over the defender (Hamas and other Palestinian armed groups), the Goldstone Report "creates perverse incentives for the defender to use the civilian population as a shield."[212]

2. Questionable Criticism of Israeli Defense Forces Targeting Decisions

Unfortunately, the precautions and preventative measures utilized by the IDF ultimately did not prevent more than a thousand unintended civilian deaths. The Goldstone Report addresses these deaths and the destruction of civilian or governmental infrastructure, alleging grave breaches of AP I.[213] The Mission made this finding despite Israel's refusal to cooperate. As such, the Mission did not possess and lacked the means to obtain crucial information regarding civilian impact anticipated by commanders and military planners in their targeting process. Instead of simply gathering the available facts, as required by its mandate, the Mission used the insufficient facts accessible to it to arrive at legal conclusions. In doing so, the Goldstone Report distorts the IHL by placing more restrictive standards where there are none in an effort to assess responsibility to Israel's actions.

Although all violations of the doctrine of distinction are grave breaches of Article 85 of AP I, not all civilian casualties and deaths are violations of the doctrine of distinction.[214] To the contrary, the IHL "operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target."[215] The doctrine of distinction, codified in AP I and applied to Israel as a reflection of CIL, states 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."[216] It is well settled in international law that the doctrine of distinction applies to both

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[212] *Id.* at 388.
[213] *See generally* Goldstone Report, *supra* note 3.
[214] Blank, *supra* note 187, at 355.
[215] The Operation in Gaza, *supra* note 10, at 35 (citing Schmitt, *supra* note 205, at 150).
[216] AP I, *supra* note 101, art. 48. *See also* HCJ 769/02 The Pub. Comm. Against Torture in Isr., et. al. v. Gov't of Israel 57(6) IsrSC 285, P21 [2006] (Isr.) (discussing the doctrines of distinction and proportionality as applicable to Israel through CIL).

international and internal armed conflict.[217] As such, any lingering controversy regarding the status of Gaza as occupied, and the accompanying normative framework, is irrelevant to this particular issue.

The question of who, or what, qualifies as protected people or property is a difficult issue in modern asymmetrical warfare. The belligerents launching rocket attacks against Israel during the al-Aqsa Intifada were neither representatives of a "high contracting party," as envisioned by the Geneva Conventions, nor were they acting as part of any internationally accepted nation-state.[218] These individuals often do not wear distinctive insignia, openly carry arms, or make any effort to distinguish themselves from civilians around them.[219] Instead, many Palestinian extremist groups actively abuse IHL by using civilian populations as cover, conducting operations in and around civilian communities, and storing their implements of warfare in highly populated civilian areas.[220]

Creating confusion between civilians and combatants and protected property, a primary tactic of insurgents in asymmetric warfare, presents a challenge not only for opposing forces seeking to achieve military objectives without running afoul of international law, but also for those assessing the legality of military operations in the framework of IHL. Additional Protocol I attempts to provide guidance in these situations by extending protections to civilian persons "unless and for such time as they take direct part in hostilities."[221] Similarly, AP I allows the targeting of otherwise protected civilian structures when the structure "by [its] nature, location, purpose or use make[s] an effective contribution to military action and whose total or partial destruction, capture or neutralization, *in the circumstances ruling at the time*, offers a definite military advantage."[222]

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[217] Blank, *supra* note 187, at 355. *See also* Prosecutor v. Dusko Tadic, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 110, 127 (citing U.N. GAOR Res. 2675, U.N. Doc. A/RES/2675(XXV) (Dec. 9. 1970)).
[218] *See generally* AMIT-KOHN ET AL., *supra* note 25.
[219] *See generally* The Operation in Gaza, *supra* note 10.
[220] *Id.* paras. 186–89.
[221] AP I, *supra* note 101, art. 51(3) (defining "direct part" as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces").
[222] *Id.* art. 45(2) (emphasis added).

Distinguishing between combatants and civilians is even more complex for Israel because its enemy, Hamas, is both an elected government body—carrying on the daily civil administration in Gaza—and an internationally recognized terrorist organization that has taken credit for multiple terrorist attacks and whose political campaign platform lists national liberation by armed struggle against Israel among its top priorities.[223] *The Operation in Gaza: Factual and Legal Aspects*, Israel's after-action report to Operation Cast Lead (hereinafter AAR), succinctly summarizes this dynamic:

> While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the *ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts*. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.[224]

The Goldstone Report's criticism of Israel's targeting decisions against Gazan hospitals is a helpful illustration of the Mission's flawed analysis under this legal framework. The Mission dedicates a full eight pages[225] to the partial destruction of the al-Quds hospital by an Israeli attack on January 15, 2009, noting that "[t]he devastation caused to . . . the hospital buildings . . . and the ambulance depot was immense, as was the risk to the safety of the patients."[226] The Goldstone Report concludes that by striking the hospital and the adjoining ambulance depot, the IDF violated Article 18 of Geneva IV.[227]

In the eight-page narrative, the Mission continued the trend that it used throughout the report: focusing primarily on the actual effects of attacks rather than the intelligence relied upon by the IDF in its targeting

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[223] *Hamas—2006 Electoral Campaign Platform*, List for Change and Reform, *available at* http://Israeli palestinian.procon.org/view.additional-resource.php?resourceID=646 (last visited Feb. 22, 2012).
[224] The Operation in Gaza, *supra* note 10, para. 235 (emphasis added).
[225] *See generally* Goldstone Report, *supra* note 3, at 174–82.
[226] *Id.* at 177.
[227] *Id.* at 182.

decision. The Mission made no reference to any information that it independently collected regarding the nature, location, purpose, or use of the hospital under the IHL framework. Instead, it concludes, based on information gathered after the fact, that "the hospital could not be described in any respect at that time as a military objective."[228]

Although Israel—refusing to cooperate with the Mission's investigation—has never publicly revealed the nature of its military intelligence possessed prior to the attack, it cited two sources of information that confirmed its intelligence that the building had been used for cover by Palestinian militants and had therefore lost its protected status. The first piece of information relied upon was a Newsweek magazine article that contained a quote from a representative of the Palestinian People's Party, indicating that during the attack "resistance fighters were firing from positions all around the hospital."[229] The IDF also cited the account of a local man who confirmed that "[t]he men of Hamas took refuge mainly in the building that houses the administrative offices of al Quds . . . [t]hey used the ambulances and forced ambulance drivers and nurses to take off their uniforms with the paramedic symbols, so they could blend in better and elude Israeli snipers."[230] The Goldstone Report directly addresses Israel's reliance on the *Newsweek* article, stating:

> The Mission understands that the Israeli Government may consider relying on journalists' reporting as likely to be treated as more impartial than reliance on its own intelligence information. The Mission is nonetheless struck by the lack of any suggestion in Israel's report of July 2009 that there were members of armed groups present in the hospital *at the time*.[231]

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[228] *Id.* at 181.

[229] The Operation in Gaza, *supra* note 10, at 65 (citing Rod Nordland, *Hamas and Its Discontents*, NEWSWEEK (Jan. 20, 2009), http://www.newsweek.com/2009/01/19/hamas-and-its-discontents.html).

[230] Lorenzo Cremonesi, *Così I Ragazzini di Hamas Ci Hanno Utilizzato Come Bersagli*, CORRIERE DELLA SERA, 21 January 2009, http://www.corriere.it/esteri/09_gennaoio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml (last visited Feb. 22, 2012). The *Corriere della Sera* is a reputable daily newspaper published in Milan, Italy, since 1876. The translation of this article can be found in The Operation in Gaza, *supra* note 10, at 218.

[231] Goldstone Report, *supra* note 3, para. 614 (emphasis added).

This comment is disconcerting for two reasons. First, in discrediting the *Newsweek* account, the Mission completely disregarded the additional, corroborating evidence offered by Israel. Second and more troubling, the analysis increases the requirements imposed by IHL by insinuating that the only circumstance in which an attacker can attack a civilian object is where the structure is being misused at the time of an attack. In fact, current use is only one criterion to be considered by commanders when determining whether or not to attack an otherwise protected object. As stated above, both the "nature" and "purpose" of a civilian object may also be considered when determining whether or not "military necessity 'imperatively demands' that the structure be targeted." [232] The aforementioned news articles are evidence that the hospital had been used to shield Palestinian militants from attack both in the past and at time of the attack. Assuming that Israel possessed similar evidence prior to the attack regarding the nature, purpose, and use of the hospital, a finding that the hospital's protected status had been negated may have been legally justified. Since the Mission did not have access to Israel's intelligence and admitted that it could not "discount the possibility that Palestinian armed groups were active in the vicinity of such . . . hospitals,"[233] its conclusion seems to be a rush to judgment and a distortion of the legal precepts applied to such situations.

Despite its reliance on Israel's justifications in its AAR to support the conclusions in the Goldstone Report,[234] the Mission discounts other sections of the same document that do not fit neatly within its finding that Israel violated Article 18 of Geneva IV. In the case of the al-Shifa Hospital, Israel claimed to possess intelligence that Hamas was making "use of an entire ground floor wing [of the hospital] as its headquarters during the Gaza Operation."[235] Notwithstanding this intelligence, Israel refrained from targeting the structure "out of concern for the inevitable harm to civilians also present in the hospital."[236] It is worth noting that despite the gravity of Israel's accusation of grave breaches of IHL by Hamas, the Mission did not even investigate this alleged abuse of the al-

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[232] *See* LOW DESKBOOK, *supra* note 96, at 131 (referencing the AP I commentary interpretation of items which, by their very nature, are military objectives: "all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.").
[233] Goldstone Report, *supra* note 3, at 13.
[234] *See id.* at 178.
[235] The Operation in Gaza, *supra* note 10, at 48.
[236] *Id.*

Shifa Hospital.[237] It is no surprise, therefore, that "the Mission did not find any evidence to support the allegations made by the Israeli Government."[238]

It is understandable that, in the absence of Israeli military cooperation with the UN mandate, the Mission would be forced to make findings based on information collected after the fact. After all, the Mission did not have access to the vital information relied upon by IDF commanders at the time of the targeting decisions in question. What is troubling is that instead of accepting the restraints caused by restricted access to crucial information, the Mission makes findings and conclusions based only upon the limited information gathered during its investigation, "accept[ing] claims of atrocities at face value," and "attribut[ing] them to deliberate policy rather than the mistakes, negligence, and misconduct out of which most wartime violations are compounded."[239] Through its selective use of evidence provided in Israel's AAR, and failure to investigate allegations of grave violations by Hamas, the Mission further detracts from the perceived veracity and validity of its findings.

Further, such application of the doctrine of distinction based solely on information gathered after the fact sets a dangerous precedent. It is unreasonable to expect that military planners would have the capability to definitively determine the exact number of casualties or civilian property damage a military operation will cause. Commanders, engaged in urban warfare, would be deterred from initiating military operations, fearing that allegations of war crimes may be leveled against them. This approach is clearly another departure from the intent of the IHL contained within the Goldstone Report.

These issues, taken together, evoke serious concerns upon the ultimate findings of the Goldstone Report, and further support a conclusion that the Mission engaged in a biased evaluation of Israel's actions. By narrowing and misapplying accepted legal principles, the Goldstone Report creates its own legal framework—one that imposes nearly impossible standards for the attacker in an armed conflict, while

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[237] Goldstone Report, *supra* note 3, at 143.
[238] *Id.*
[239] Alan Dowty, *Bungled Again: Israel and Goldstone*, Middle East Strategy at Harvard Blog (Nov. 3, 2009), http://blogs.law.harvard.edu/mesh/2009/11/bungled-again-israel-and-goldstone/.

ignoring or downplaying the obligations of those who defend against military operations such as Operation Cast Lead.

VI. Conclusion

Although the Goldstone Report succeeded in telling the compelling tale of civilians caught in the crossfire of a seemingly everlasting battle—demonstrating that this chapter in the Israeli-Palestinian conflict is far from over—its account is incomplete. Without information regarding the information used by IDF commanders, and facts known only by Israeli planners and politicians—both prior to and during Operation Cast Lead—the Mission was hamstrung with insufficient information with which to make a reasoned and unbiased analysis. Instead of recognizing these constraints and responding to the Human Rights Council with only those facts which could be readily ascertained, the Mission took its mandate a dangerous step further, making findings and recommendations that fill in the blanks. In doing so, the Mission contorts international law by taking a selective, narrow, and misguided approach that resonates with bias and politically charged sentiment. The unsound analysis not only cuts against the Mission's own findings and recommendations, but ignores the most important, and tragic, aspect of this conflict: the dire effects of an insurgency on the civilian population.

The Goldstone Report also represents a missed opportunity to provide much needed guidance to those engaged in COIN operations. The rise in global terrorism and accompanying increase in incidence of asymmetric tactics brings with it new challenges to the modern battlefield. Clearly, terrorism is not a problem endemic to Israel or the Middle East. In fact, many scholars believe that there is a global jihad.[240] Whether or not

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[240] David Kilcullen—who has shaped COIN doctrine as a writer for the Quadrennial Defense Review at the Pentagon and has worked as a chief counter-terrorism strategist at the U.S. State Department, the senior COIN advisor to General David Petraeus, and the U.S. Secretary of State's Special Advisor for COIN—argues that Osama Bin Laden's 1998 declaration "World Islamic Front Declaration of War against Jews and Crusaders" was "a fatwa to all Muslims calling for Jihad," and has cited numerous examples of cooperation between Al Qa'eda and its affiliates worldwide to illustrate "that Islamist groups . . . follow general ideological or strategic approaches that conform to the pronouncements of Al Qa'eda and share a common tactical style and operational lexicon." He bolsters this argument by demonstrating familial, financial, operational, planning, propaganda, and tactical ties that suggest that there is, in fact, a global community of decentralized, self-sustaining and semi-dependant Islamist groups that comprise the global insurgency. *See* DAVID KILCULLEN, COUNTERINSURGENCY 168 (2010)

Hamas is part of this network is uncertain. What is clear, however, is that terrorism and asymmetric warfare are here to stay.

Since global terrorism is a threat to the security of the United States and her allies, the legal framework for fighting COIN operations must be a chief concern. For the law to stay relevant, it must evolve to meet the needs of nations fighting this enemy. As described in Part II, Israel, throughout its existence, has at times selectively applied the IHL to mitigate the ever-present terrorist threat to its populace. The United States has also taken similar liberties with IHL in its policies of pre-emption and detention of "unlawful enemy combatants." Many in the international legal community have called for review and amendment of the normative framework to recognize the challenges of asymmetrical warfare and provide a meaningful response to the problem of global terrorism. In the absence of a new solution, nation-states like Israel and the United States will continue to do what is necessary to fulfill their obligations to protect their people, even if that means testing the boundaries of existing international law.

The Goldstone Report's flawed interpretation of IHL does little to clarify the law. As demonstrated in Part V, the Mission tends to impose stricter standards on the IDF than are required by international law. At the same time, the Mission devotes very little attention or criticism to the acts or omissions of Hamas as the governing body of Gaza. This interpretation of the law empowers non-state actors by imposing more restrictive legal paradigms upon nation-states—thereby providing a disincentive for nation-states to react to security threats to protect their citizens—while turning a blind eye to the violations of those who seek to circumvent the law as a matter of course.

This Goldstone Report did little to halt the cycle of conflict between Israel and Hamas. If anything, the Goldstone Report is a reflection of the reluctance of international bodies to recognize the new reality of global terrorism, and the tendency of third parties to fill the vacuum in the IHL with lawfare and controversy. Until there is a realization that politicization of such conflicts only stalls progress in addressing the very real threat of global terrorism, or a new legal framework that recognizes

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(citing WORLD ISLAMIC FRONT, WORLD ISLAMIC FRONT DECLARATION OF WAR AGAINST JEWS AND CRUSADERS, 23 February 1998, http://www.mideastweb.org/osamabinladen2.htm).

the challenges of the global terrorism is enacted, civilians will continue to suffer the tragic consequences of war and lasting political peace will remain but a dream.

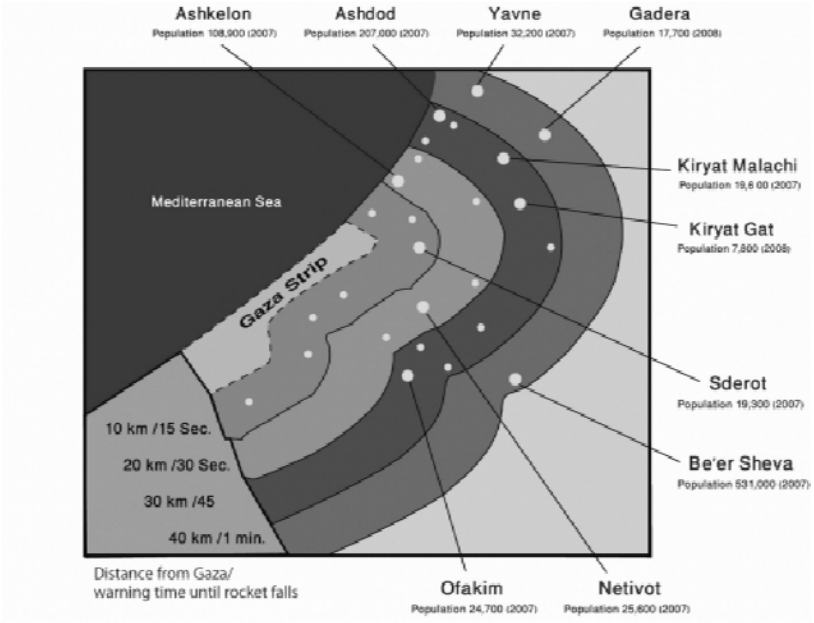
Appendix A

Map of Israel[241]

[241] *CIA Map of Israel*, WORLDATLAS.COM, http://www.worldatlas.com/webimage/countrys/asia/ciamaps/il.htm (last visited Mar. 26, 2012).

Appendix B

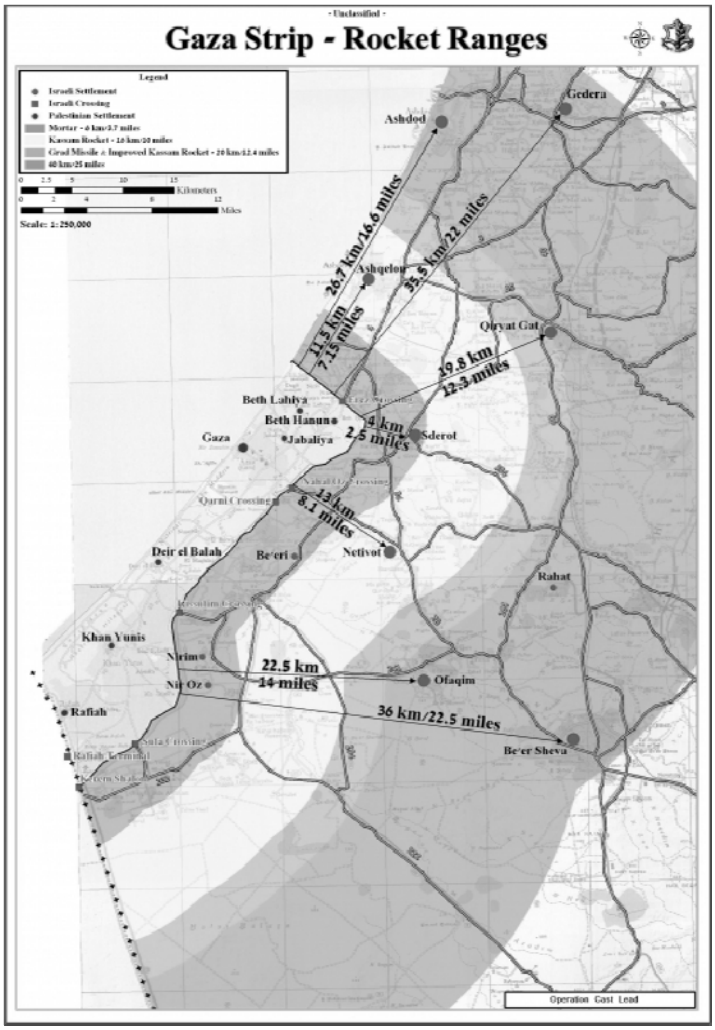
Rocket Attack Civilian Populations Affected[242]



[242] *See Rocket Attacks*, *supra* note 5.

Appendix C

Rocket Ranges to Israeli Civilian Communities[243]



[243] *Id.*

THE ILLEGAL DISCHARGE OF OIL ON THE HIGH SEAS: THE U.S. COAST GUARD'S ONGOING BATTLE AGAINST VESSEL POLLUTERS AND A NEW APPROACH TOWARD ESTABLISHING ENVIRONMENTAL COMPLIANCE

LIEUTENANT BENEDICT S. GULLO*

Our oceans and coasts are among the chief pillars of our nation's wealth and economic well-being. Yet our lack of full understanding of the complexity of marine ecosystems, and our failure to properly manage the human activities that affect them, are compromising the health of these systems and diminishing our ability to fully realize their potential.[1]

I. Introduction

Each year, up to 810,000 tons of oily waste are intentionally and illegally dumped into the world's oceans by commercial vessels.[2] As a consequence, seabird populations are reduced,[3] the habitats for slow-

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[1] UNITED STATES COMM'N ON OCEAN POL'Y, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 32 (2004) [hereinafter OCEAN COMM'N].

[2] *See* JOINT GRP. OF EXPERTS ON THE SCIENTIFIC ASPECTS OF MARINE ENVTL. PROT., REPORT AND STUDIES NO. 75: ESTIMATES OF OIL ENTERING THE MARINE ENVIRONMENT FROM SEA-BASED ACTIVITIES 15 (2007); David P. Kehoe, United States v. Abrogar: *Did the Third Circuit Miss the Boat?*, 39 ENV'T LEWIS & CLARK L. REV. 1, 3 (2009); *cf.* OCEANA, THE DUMPING OF HYDROCARBONS FROM SHIPS INTO THE SEAS AND OCEANS OF EUROPE—THE OTHER SIDE OF OIL SLICKS 3 (2003) [hereinafter OIL SLICKS] (estimating that approximately 666,000 tons of oil are illegally dumped each year).

[3] *See* Kees (C.J.) Camphuysen, INT'L FUND FOR ANIMAL WELFARE, CHRONIC OIL POLLUTION IN EUROPE 6, 21 (2007) (explaining how hundreds of thousands of untreated seabirds, including penguins, can die from a "small spot of oil on their feathers" since oil reduces the insulating properties of feathers and ultimately causes hypothermia); FRANCIS WIESE, WORLD WILDLIFE FUND CAN., SEABIRDS AND ATLANTIC CANADA'S SHIP-SOURCE OIL POLLUTION 3 (2002) (noting that an estimated 300,000 birds are killed each year in the Atlantic Canada waters from illegal oil pollution); *see also* Lieutenant Commander David O'Connell, *Port State Control–International Cooperation on Marine Pollution Enforcement*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD

moving shellfish such as clams, oysters, and mussels are poisoned,[4] and fish—if not killed by the harmful toxins of the oil—lose the ability to reproduce, reproduce deformed offspring, or upon ingestion of the oil, create even more toxic substances.[5] Separately, mammals, reptiles, and amphibians whose natural habitats are either in or close to coastal waters either suffocate to death from oil ingestion or die from eating wildlife previously poisoned by oily waste.[6]

For the human population, the decline of biodiversity in the marine environment cannot be overstated.[7] In the United States, millions of people rely on the marine environment for employment in commercial fishing,[8] tourism, and recreation.[9] In fact, it is estimated that "[m]ore than $1 trillion, or one-tenth, of the nation's gross domestic product (GDP) is generated within nearshore areas . . . ."[10] Worldwide, the marine environment serves as an important indicator of water quality and ecosystem health.[11] Most importantly, the marine environment—of which it is estimated that 95% remains unexplored[12]—contains organisms vital to conducting scientific research and producing

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J. OF SAFETY AND SEC. AT SEA 60 (Summer 2009); Andrea Thompson, *The Science and History of Oil Spills*, LIVESCIENCE.COM (Apr. 23, 2010, 11:54 AM), http://www.livescience.com/environment/oil-spill-faq-100423.html ("[S]ea otters, which depend on their clean fur coats to stay warm, can also become hypothermic . . . ."); Kehoe, *supra* note 2, at 3.

[4] *See Illegal Oil Discharge in European Seas*, U.N. ENVTL. PROGRAMME BULL., No. 7 (Feb. 2006), *available at* http://www.grid.unep.ch/product/publication/download/ew_oil discharge.en.pdf [hereinafter UNEP BULL.].

[5] *See id.*; *see also Oil Spills: Impact on the Ocean*, WATERENCLYCOPEDIA.COM, http://www.waterencyclopedia.com/Oc-Po/Oil-Spills-Impact-on-the-Ocean.html (last visited Jan. 24, 2012) [hereinafter *Oil Impact*] (oil pollution causes declines in marine biodiversity because it interrupts the food chain to both marine and land-based life).

[6] *See Oil Impact*, *supra* note 5.

[7] *See* Louis A. Helfrich et al., *Sustaining America's Aquatic Biodiversity—Why Is Aquatic Biodiversity Declining?*, VA. COOP. EXTENSION (May 1, 2009), http://jpubs.ext.vt.edu/420/420-521/420-521.html (discussing how "[a]though aquatic biodiversity has been declining . . . species extinction rates have gone from about one species per year over the past 600 million years to hundreds of species per year in recent times").

[8] *See* OCEAN COMM'N, *supra* note 1, at 31–32 (noting that the U.S. commercial fishing industry's total value exceeds $28 billion annually; Americans consume more than four billion pounds of seafood per year).

[9] *Id.* at 31 (over two million jobs exist in tourism and recreation near U.S. coasts).

[10] *Id.*

[11] *See* Helfrich et al., *supra* note 7 (noting that a fishery's decline could indicate a water pollution problem).

[12] *See* OCEAN COMM'N, *supra* note 1, at 35.

pharmaceutical products that presently treat human diseases and illnesses such as cancer, osteoporosis, and liver failure.[13]

To stop the devastating effects of intentional and illegal vessel pollution, during the past two decades the Coast Guard, in conjunction with the Department of Justice (DOJ), has launched an ambitious crusade against parties responsible for such acts.[14] In fact, DOJ estimates that within the last ten years vessel owners, operators, and crew members have been sentenced to over $216 million in fines and twenty years of total incarceration.[15] But despite the Coast Guard and DOJ's best efforts, the number of environmental crimes involving illegal vessel pollution is not declining.[16] Rather, as global seaborne commerce continues to increase,[17] so too does the number of vessels that intentionally and

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[13] *Id.* at 32–35. A multitude of other scientific applications presently exist for marine organisms, including the production of nutritional supplements, medical diagnostics, cosmetics, agricultural chemicals (pesticides and herbicides), enzymes, and chemical probes for disease research. *See id.* at 338–42.

[14] *See* U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, series, para. 9.A (2010) [hereinafter MLEM] (For Official Use Only manual) (copy on file with author) (stating that the Coast Guard, working in concert with DOJ, is dedicated to "vigorous enforcement of environmental laws"); *see also* Raymond W. Mushal, *Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1124 (2009) (detailing DOJ's prosecution of vessel pollution cases); Andrew W. Homer, Comment, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 150 (2007) (discussing DOJ's aggressive criminal prosecution of vessel pollution cases to "cast as broad a net as possible in bringing such charges" against noncompliant vessel owners, operators, and crew members).

[15] *See* Ignacia Moreno, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at the 2011 Priorities for the Environmental and Resource Division in Washington, D.C. (Jan. 13, 2011) (transcript available at http://www.justice.gov/enrd/opa/pr/speeches/2011/enrd-speech-110113.html); *cf.* Lieutenant Commander John Reardon, CG-0941, U.S. Coast Guard & Lieutenant Commander David O'Connell, CG-0941, U.S. Coast Guard, Presentation at the U.S. Naval Justice School: Environmental Crimes for the Missions Lawyer 10 (Sept. 16, 2010) (noting that since the Coast Guard began referring vessel pollution cases to DOJ, an estimated $300 million in criminal fines and thirty-eight years of jail time have been awarded to offenders).

[16] *See* Mushal, *supra* note 14, at 1124 ("The [vessel pollution] cases do tend to be rather similar to one another, but they just keep coming."); Kehoe, *supra* note 2, at 41 ("Despite . . . substantial criminal fines and the publicity that accompanies them, the Coast Guard continues to discover and refer new vessel cases on a steady and frequent basis . . . . Unfortunately, the level of noncompliance . . . remains high . . . .").

[17] *See* RESEARCH AND INNOVATIVE TECH. ADMIN., U.S. DEP'T OF TRANSP., FREIGHT TRANSPORTATION: GLOBAL HIGHLIGHTS 46 (2010) (discussing how global maritime trade grew about three percent each year in the last decade—partly due to the increase in internet shoppers and implementation of just-in-time inventory practices—which led to

illegally dumps oily waste into the world's oceans.[18] Indeed, in 2010 the Coast Guard referred twenty-one vessel pollution cases to DOJ[19]—a number nearly twice the past decade's annual average of twelve.[20]

Part II of this article discusses the "who, what, when, why, where, and how" of intentional and illegal vessel pollution. Part III describes the international and domestic laws that the United States uses to prevent, deter, and criminalize acts of vessel pollution. Then, Part IV explains the Coast Guard's authority to investigate criminal acts of vessel pollution and highlights the integral roles that Coast Guard Port State Control teams and judge advocates perform during a vessel pollution investigation.

Finally, Part V argues that the Coast Guard's current practice—the referral of nearly all intentional and illegal acts of vessel pollution to DOJ for criminal prosecution—must be revised. Specifically, as illustrated in the May 2010 vessel pollution case of Motor Tanker (M/T) Wilmina,[21] the Coast Guard must begin administratively banning vessels responsible for acts of intentional and illegal vessel pollution from entering U.S. waters. Such a shift in Coast Guard practice, while retaining discretionary authority to refer recidivists or egregious acts of

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an increased reliance on commercial vessels to meet growing consumer demands) [hereinafter RITA HIGHLIGHTS].

[18] Over 99,000 vessels currently operate in the world's oceans. *See* INT'L MAR. ORG., INTERNATIONAL SHIPPING AND WORLD TRADE FACTS AND FIGURES 11 (Oct. 2009) [hereinafter IMO FACTS]; *see also* John Vidal, *Health Risks of Shipping Pollution Have Been 'Underestimated,'* GUARDIAN (London), Apr. 9, 2009, http://www.guardian.co.uk/environment/2009/apr/09/shipping-pollution/print. Of the world's fleet, approximately 10%–15%, intentionally and illegally pollute the oceans with oily waste each year—which equates to at least 5,000–7,500 environmentally noncompliant vessels. *See* ORG. FOR ECON. CO-OPERATION AND DEV., COST SAVINGS STEMMING FROM NON-COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL REGULATIONS IN THE MARITIME SECTOR 4 (2003) [hereinafter OECD REPORT].

[19] *See* E-mail from Lieutenant Commander John Reardon, Judge Advocate, CG-0941, U.S. Coast Guard, to author (Jan. 4, 2011, 14:16 EST) [hereinafter Reardon e-mail] (on file with author).

[20] *See* U.S. COAST GUARD, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES COAST GUARD 13 (2010) [hereinafter JAG REPORT], *available at* http://www.jaa.org/templates/files/2010-annual-report-final-.pdf ("The first half of 2010 saw a significant uptick in the number of environmental cases referred to . . . [DOJ].").

[21] In the matter of M/T Wilmina, the Coast Guard—rather than refer the case to DOJ for criminal prosecution—administratively banned M/T Wilmina from entering U.S. waters for three years and revoked its certificate of compliance. *See* Press Release, U.S. Coast Guard, Coast Guard Restricts Norwegian-flagged Wilmina from U.S. Ports for Three Years (May 27, 2010) [hereinafter Coast Guard Ban] (on file with author).

vessel pollution to DOJ, will better address a crime that is motivated as much by economics as it is by environmental ambivalence. To bolster and clarify the Coast Guard's authority to administratively ban such vessels, Appendices A and B offer proposed revisions to the Ports and Waterways Safety Act[22] (PWSA) and the Coast Guard's implementing regulations of PWSA found in Title 33 Code of Federal Regulations (CFR) Part 160, respectively.

II. The Rhyme and Reason behind Intentional and Illegal Vessel Pollution

"Oil . . . [is] essential for the operation of most sea-going vessels."[23] Oil serves as fuel, lubrication for the ship's machinery, and as cargo ensuring the global supply of energy.[24] As 99,000 commercial vessels transit the world's oceans each year,[25] "[t]he drone of [their] diesel engines[26] and complex systems produce a steady supply of waste oil, dripping, collecting, and mixing with the water below, thereby creating an oily wastewater cocktail."[27]

A. Oily Waste: How It Is Generated and Its Harmful Effects

Onboard most large vessels, two types of oily waste are generated: bilge slops and sludges.[28] Bilge slops are typically generated from small pipe leaks that accumulate in the vessel's machinery spaces, condensation by air cooling systems, engine room cleaning, and drains from engine room sinks.[29] On average, a typical vessel accumulates up to

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[22] 33 U.S.C. §§ 1221–1236 (2006).
[23] *See* OECD REPORT, *supra* note 18, at 11.
[24] *Id.*
[25] *See* IMO FACTS, *supra* note 18, at 11.
[26] "The world's biggest container ships have 109,000 horsepower engines which weigh 2,300 tons." Vidal, *supra* note 18.
[27] Lieutenant Christopher Coutu, *Tackling the Oily Water Separator Issue*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 11 (Winter 2004–2005).
[28] *See* UNEP BULL., *supra* note 4.
[29] *See* Ken Olsen, *Wastes and Machinery Space Maintenance*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 19 (Winter 2004–2005).

twenty-nine cubic meters[30] of bilge slops per month, and in some instances, up to twenty cubic meters of bilge slops per day.[31] Bilge slops contain refined crude oil; consequently, bilge slops are highly toxic to living organisms in the marine environment.[32]

The second type of oily waste generated aboard large vessels is sludge. Sludge is primarily generated from heavy fuel or marine diesel fuel used to power the ship's engines.[33] Since heavy fuel is the "dirtiest of all fuel sources available,"[34] and because it contains contaminants that are not removed during its initial refining process,[35] vessels must first direct the heavy fuel through centrifuges to purify the oil prior to it entering the vessel's engines.[36] On average, up to two percent of a vessel's heavy fuel becomes sludge during the purification process.[37] To the marine environment, sludges are less toxic than bilge slops;[38] however, sludges take longer to dissolve than bilge slops[39] and contain dioxins and heavy metals that have dramatic effects on wildlife.[40] For example, the viscidity of sludges is easily capable of smothering living organisms.[41]

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[30] A cubic meter is a measurement of volume equivalent to a space one meter long, one meter wide, and one meter high. *See What is Cubic Meter and w/m?*, OCEAN FREIGHT USA, http://www.oceanfreightusa.com/shipref_cbm.php (last visited Jan. 23, 2012).
[31] *See* Olsen, *supra* note 29, at 19. Consequently, bilge slops must be pumped out or they can affect the vessel's stability. *See* OECD REPORT, *supra* note 18, at 12–13.
[32] *See* Thompson, *supra* note 3 (noting that the toxicity from oil can kill organisms through inhalation or by absorption into the skin).
[33] *Id.*
[34] *See* OECD REPORT, *supra* note 18, at 6, 52. In fact, heavy fuel, often referred to as "low-grade ship bunker," has up to 2,000 times the sulfur content of diesel fuel used in United States and European automobiles. *See* Vidal, *supra* note 18. When heavy fuel is used, it is estimated that fifteen of the world's largest vessels emit as much air pollution as the world's 760,000,000 automobiles. *Id.*
[35] *See* Olsen, *supra* note 29, at 20.
[36] *Id.*
[37] *See* UNEP BULL., *supra* note 4.
[38] *See* Thompson, *supra* note 3.
[39] *Id.*
[40] *See* UNEP BULL., *supra* note 4.
[41] *See* Thompson, *supra* note 3.

B. Disposing Oily Waste and the Obstacles to Environmental Compliance

On average, vessels operate twenty-four hours a day for 280 days per year[42] and therefore generate an enormous amount of oily waste.[43] How vessels dispose of this waste depends on whether the oily waste is bilge slops or sludges. Accumulated bilge slops are normally directed to bilge water holding tanks,[44] where they are stored until the vessel's crew: (1) off-loads the bilge slops at port facilities;[45] (2) discharges them overboard—after being processed through an oily water separator;[46] or (3), incinerates them along with other ship-generated wastes.[47] Sludges are normally directed to sludge tanks, where they remain until the vessel's crew either off-loads the oily waste at a port facility or burns the sludges via an incinerator or auxiliary boiler.[48]

1. Off-Loading Oily Waste at Port Facilities

The costs associated with off-loading oily waste provide less scrupulous vessel owners and operators with ample incentive to pollute. Financially, it is estimated that the proper disposal of oily waste costs a vessel owner—depending on the size of the ship, its age, number of days at sea, and how well it is maintained—anywhere from $55,000 to $150,000 per year.[49] On a new or well-maintained vessel, these amounts account for 3.5%–6.5% of the ship's operating costs.[50] On an older or less-maintained vessel in a tight economic market, those costs account for 9%–15% of the ship's operating costs.[51]

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[42] *See* Vidal, *supra* note 18; *see also* Dr. Jean-Paul Rodrigue, *Ports, Maritime Transportation and the Global Economy*, HOFSTRA UNIV., http://people.hofstra.edu/jean-paul_rodrigue/downloads/Ports%20and%20Maritime%20Trade.pdf (last visited Mar. 20, 2012) ("[G]lobal trade is more than a matter of capacity, it is also concerned [with] the timeliness and reliability of the distribution.").

[43] A vessel that burns approximately 11,880 gallons of heavy fuel per day will accumulate up to 238 gallons of sludge. *See* Coast Guard Office of Maritime and Int'l Law, Missions Law Course: Environmental Crimes 11 (2010) [hereinafter CG Missions Law] (copy on file with author).

[44] *See* Coutu, *supra* note 27, at 11; Olsen, *supra* note 29, at 20.

[45] *See* Coutu, *supra* note 27, at 11.

[46] *Id.*

[47] *See* Olsen, *supra* note 29, at 20.

[48] *See* OECD REPORT, *supra* note 18, at 6.

[49] *Id.* at 5. In addition, capital, maintenance, and repair costs for a vessel's environmental equipment typically range around $30,000. *Id.*

[50] *Id.*

[51] *Id.* at 5, 51.

In addition to the financial incentive to pollute, the inadequacy of port waste reception facilities is equally problematic and forces vessel owners and operators to make a Hobson's choice between illegally discharging oily waste or retaining it onboard until the vessel's safety[52] and stability are placed at risk.[53] In many countries, waste reception facilities are inadequate because: (1) they are inoperable; (2) they are operable but incapable of off-loading large amounts of oily waste; (3) they were built only to satisfy international regulatory requirements—not to actually off-load oily waste; or (4) they are operable, but facility managers are simply unwilling to accept oily waste for the normal costs associated with off-loading the oily waste.[54]

To complicate matters even further, vessel operators work within an operating budget and against a demanding schedule.[55] Off-loading oily waste during port calls delays the vessel's departure and arrival times,[56] and of course, the vessel's owner or operator must pay additional fees to port waste reception facilities to off-load oily waste.[57] In addition, dockage fees increase for each day a vessel remains in port to off-load oily waste.[58] In the United States, depending on the port and the size and type of the vessel, dockage fees range between $4,000 and $15,000 per day.[59]

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[52] *See Marpol Annex I: Regulations for the Prevention of Pollution by Oil*, GARD AS, 20 (Apr. 2010), http://www.gard.no/ikbViewer/Content/72338/Marpol%20April%202010.pdf [hereinafter GARD REPORT] ("Blocking the overboard pipe from the main bilge pumps should never be done, as this would seriously affect the safety of the vessel . . . ."); *see also* OECD REPORT, *supra* note 18, at 13.

[53] *See* OECD REPORT, *supra* note 18, at 12–13, 40.

[54] *Id.* at 41; *see also* UNEP BULL., *supra* note 4 (describing how the low value of oily waste offers little incentive to the port state to treat and refine it).

[55] *See* OECD REPORT, *supra* note 18, at 40–42; Kees, *supra* note 3, at 58 (listing "overworked crews" as one of several reasons why crew members intentionally discharge oily waste); Vidal, *supra* note 18.

[56] *See* OECD REPORT, *supra* note 18, at 40–42.

[57] *See* Richard A. Udell, Senior Trial Attorney, U.S. Dep't of Justice, INTERTANKO Criminal Vessel Enforcement (Mar. 21, 2005), www.intertanko.com/.../presentations/INTERTANKOLESSPHOTOS.UDELL.PPT (PowerPoint presentation providing overview of U.S. enforcement of vessel pollution).

[58] *See* UNEP BULL., *supra* note 4. In addition, vessels are prohibited from off-loading sludges while loading or unloading cargo. *Id.*

[59] *See* E-mail from Michael Chalos, Senior Partner, Chalos, O'Connor, LLP, to author (June 1, 2011, 09:13 EST) [hereinafter Chalos e-mail] (on file with author) (Chalos O'Connor, LLP is a law firm that specializes in maritime, admiralty, and environmental law.).

2. The Oily Water Separator

An oily water separator (OWS) is "self-describing."[60] Although an OWS is a complicated piece of environmental equipment that incorporates oil sensing probes, solenoid valves,[61] check valves,[62] a pump, and other critical components (Figure 1), an OWS has one simple purpose—to separate oil from water taken from a holding tank.[63] Once the oily waste is separated, an oil content monitor (OCM) (often referred to as an oil content meter) ensures that the oil content in the clean bilge water is below international and domestic standards (detailed in Part III below), and then the OWS system allows the clean bilge water to be discharged overboard.[64] If, however, the OCM indicates that the oil content in the processed bilge water is above international and domestic standards, the processed bilge water is returned to the holding tank until it is reprocessed, incinerated, or off-loaded.[65]

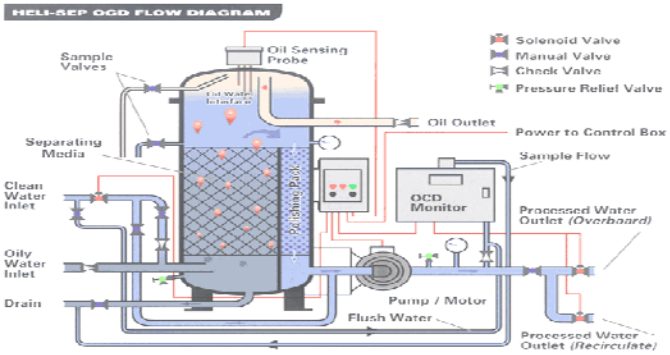

Figure 1. Diagram of an Oily Water Separator[66]

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[60] R. Michael Underhill, *Part I: Dumping Oil, Cooking the Books, and Telling Lies: The False Statements Act as Applied to Marine Pollution*, 15 U.S.F. MAR. L.J. 271, 276 (2003).

[61] A solenoid valve converts electrical energy into mechanical energy; once converted, the valve is either opened or closed to control the amount of flow. *See Definitions*, VALVE INFO CTR., http://industrialvalveresource.com/info-center/category/definitions.html (last visited Jan. 23, 2012).

[62] Check valves are valves installed in the piping system that allow flow in one direction only. *Check Valves*, SPIRAX SARCO LTD., http://www.spiraxsarco.com/resources/steam-engineering-tutorials/pipeline-ancillaries/check-valves.asp (last visited Jan. 23, 2012).

[63] *Id.*

[64] *See* Olsen, *supra* note 29, at 20.

[65] *Id.*

[66] *Heli-Sep Oily Water Separator*, SEPARATION EQUIP. CO., INC., http://www.separationequipment.com/helisep.htm (last visited Jan. 23, 2012).

Financially, because new and larger vessels can easily cost over $100 million to build,[67] the costs of acquiring and maintaining an OWS are not necessarily prohibitive.[68] Nevertheless, capital, maintenance, and repair costs for an OWS quickly add up.[69] A new OWS ranges from $10,000 to $100,000, depending on the complexity of the model purchased and whether it has the capacity to self-clean.[70] Additionally, the cost of training crew members to operate an OWS system ranges from $3,000 to $5,000 per year.[71] Finally, OWS maintenance costs, to include periodic checks, washings, and filter replacements, fall between $3,000 to $15,000 per year.[72]

Practically, most OWS systems are fraught with operational and technical challenges. First, operating the OWS requires manpower—typically accounting for at least one crew member's time and attention during an eight-hour watch.[73] Second, the OCM must be correctly calibrated for the OWS to function properly.[74] If for instance the OWS is misreading the level of oil being processed through the OCM, the OWS will automatically shut down[75] and sound an alarm.[76] Third, chemicals contained in certain cleaning detergents commonly used in the engine room—which also collect in the vessel's bilge water holding tanks—foul the OWS system's filters and render the OWS inoperable.[77]

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[67] IMO FACTS, *supra* note 18, at 10.
[68] *See* OECD REPORT, *supra* note 18, at 18 (noting that when "[a]morti[z]ed over the OWS's lifetime . . . , the cost for many simpler [OWS] systems is not that high").
[69] *Id.*
[70] *Id.*; *cf.* Chalos e-mail, *supra* note 59 (indicating that some OWS systems now cost more than $150,000; a good OWS system generally costs between $40,000–$80,000).
[71] OECD REPORT, *supra* note 18, at 18.
[72] *Id.*; *see also* Chalos e-mail, *supra* note 59.
[73] *See* OECD REPORT, *supra* note 18, at 18; Kees, *supra* note 3, at 58. For cost-cutting vessel owners who choose to "retrofit" existing OWS systems rather than replace them with newer and more costly OWS systems, the level of manpower is increased two-fold because retrofitted OWS systems originally designed to meet lower levels of discharge purity often fail. *See* Homer, *supra* note 14, at 151.
[74] *See* OECD REPORT, *supra* note 18, at 19.
[75] *See id.*; Olsen, *supra* note 29, at 20.
[76] *See* OECD REPORT, *supra* note 18, at 19; *cf.* Telephone Interview with Lieutenant Commander Brian Province, Chief, Investigations and Inspections Div., Atlantic Area, U.S. Coast Guard (Feb. 4, 2011) [hereinafter Province Interview] (stating that only newer OWS systems can simultaneously shut down and sound an alarm).
[77] *See* OECD REPORT, *supra* note 18, at 19.

C. Other Motivations for the Illegal Discharge of Oily Waste

While the primary impetus for vessel pollution is economic,[78] other motivations exist for why vessel owners, operators, and crew members pollute the world's oceans with oily waste. First, despite increased environmental awareness as well as criminal penalties for the noncompliant, some mariners remain ambivalent about the adverse environmental effects of vessel pollution,[79] while other mariners dismiss the importance of environmental equipment because they have no impact on the vessel's ability to navigate.[80] Some mariners do not believe they will be caught and convicted,[81] while other mariners succumb to corporate or financial pressures to "look the other way."[82] Regrettably, industry ambivalence and top-down pressures continue to influence not just the foreign commercial fleet but also domestic mariners[83] and even a few Coast Guardsmen.[84]

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[78] *See* Reardon & O'Connell, *supra* note 15, at 5 ("In their simplest terms[,] environmental crimes are economic crimes."); *see generally* OECD Report, *supra* note 18; Homer, *supra* note 14; Kehoe, *supra* note 2; Underhill, *supra* note 60.

[79] *See* OIL SLICKS, *supra* note 2, at 11 ("[T]he lack of scruples of some individuals and companies[] mean that every year[] millions of tons of hydrocarbons are dumped in our oceans.").

[80] *See* OECD REPORT, *supra* note 18, at 44.

[81] *See id.* at 47.

[82] *See* Homer, *supra* note 14, at 152 ("Chief engineers, masters, and other key personnel are often given financial incentives, by way of performance bonuses, for running at or below the vessel's projected operating budget."); Gillian Whittaker, *Shipping Is Easy Target*, TRADEWINDS.NO (May 7, 2005, 8:08 AM), http://www.codus-law.com/news/shipping-easy-target.pdf ("Often there is a bad environmental culture among seafarers and it is hard to change their attitudes and ways, ..."); Ken Olsen, *Someone Will Report*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 49 (Winter 2004–2005) ("Shipboard peer pressure, . . . may contribute to a person's willingness to [pollute]."); e-mail from Jeanne Grasso, Partner, Blank, Rome LLP (June 3, 2011, 16:30 EST) [hereinafter Grasso e-mail] (on file with author) (Blank, Rome LLP maintains an environmental law division that specializes in environmental enforcement and litigation (civil, criminal, and administrative proceedings.)) (stating that vessel pollution occurs in part because of ego and associated fear of being perceived as incompetent; additional factors include the installation of inoperable equipment, difficulty and time to maintain and operate the equipment, and "crew members not having or taking the time to deal with challenging equipment").

[83] *See* Press Release, Dep't of Justice, Louisiana Vessel Company to Pay $2.1 Million in Penalties (Nov. 4, 2010) (on file with author) (American vessel owner whose vessel was contracted by the National Science Foundation subsequently convicted of vessel pollution); Press Release, Dep't of Justice, Former Chief Engineer of Louisiana Vessel Company Sentenced for Falsifying Oil Record Book (Jan. 12, 2011) (on file with author) (chief engineer sentenced to two years probation and $5,000 fine for lying to Coast Guard).

Second, though "government responsibility and enforcement [of environmental laws] is vested primarily in the flag state,"[85] the emergence of "flags of convenience ships"[86] has "rendered the quality of the world's fleets and their crews more problematic."[87] In 2009, the International Maritime Organization (IMO) reported:

> The ownership and management chain surrounding any particular vessel can embrace many countries; it is not unusual to find that the owners, operators, shippers, charterers, insurers[,] and the classification society, not to mention the officers and crew, are all of different nationalities and that none of these [individuals or entities are] from the country whose flag flies at the ship[']s stern.[88]

Consequently, flags of convenience ships, or ships "that fly the flag of a country other than the country of ownership,"[89] allow vessel owners to choose "open registry" countries whose only interest in overseeing the vessel's activities is to collect registration fees.[90] And although proponents of the open registry system cite to the cost savings to vessel

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[84] *See* United States v. Ander (Commander, Atlantic Area Aug. 24, 2010) (Coast Guard Cutter Eagle, Atlantic Area Aug. 14, 2010) (First Class Petty Officer convicted at special court-martial of three specifications of dereliction of duty for discharging oily waste into international and U.S. waters during 2009); Memorandum from Vice Admiral D.P. Pekoske, Vice Commandant, to Distribution, subject: Final Decision Letter on the Pollution Incident Aboard CGC RUSH, Honolulu, HI, 2006 (11 May 2010) [hereinafter RUSH Memo] (citing a "disregard for . . . a key [Coast Guard] mission: environmental enforcement" and "a significant amount of stress" as two of the factors for why a Coast Guard warrant officer directed subordinate crew members to illegally discharge approximately 3,000 gallons of bilge waste into the Honolulu Harbor).

[85] OCEAN COMM'N, *supra* note 1, at 238.

[86] The list of states that offer open registration to foreign vessel owners has also been dubbed the "black list." *See* OCEANA, REPORT OF THE EUROPEAN COMMISSION ON THE MONITORING OF ILLICIT VESSEL DISCHARGE 3 (2001) [hereinafter OCEANA REPORT]

[87] *See* OECD REPORT, *supra* note 18, at 8.

[88] *See* IMO FACTS, *supra* note 18, at 38.

[89] *See What do FOC's Mean to Seafarers*, INT'L TRANSP. WORKERS' FED'N, http://www.itfglobal.org/flags-convenience/sub-page.cfm (last visited Jan. 23, 2012) [hereinafter Flags of Convenience].

[90] *See* OCEAN COMM'N, *supra* note 1, at 239; *see also* Shaun Gehan, Case Note, United States v. Royal Caribbean Cruises, LTD.: *Use of Federal "False Statements Act" to Extend Jurisdiction over Polluting Incidents into Territorial Seas of Foreign States*, 7 OCEAN & COASTAL L.J. 167, 182 (2001) (citing Liberia and Luxemburg—states with little or no coastline that face little or no threat of coastal pollution—as prime examples of flags of convenience that have a disincentive to enforce environmental laws against substandard vessel owners registered by their countries).

owners and the new employment opportunities created for seafarers,[91] the advent of open registries has in some instances led to low seafarer wages, poor onboard conditions, inadequate food and clean drinking water, and long periods of work without proper rest.[92] These conditions, coupled with the vessel owner's ability to easily change vessel registry to another state, make it easier for irresponsible owners to avoid environmental enforcement actions.[93]

D. The Crime: Where, When, and How Vessels Discharge Oily Waste

To reduce the chances of getting caught, vessels most often illegally discharge their oily waste outside of any port, flag, or coastal state's territorial seas,[94] "along regular shipping routes[95] or in an area of recent oil accidents"[96] at nighttime.[97] The polluter's reasons for choosing these locations and time are straightforward. First, vessel polluters believe they will avoid detection and punishment by polluting outside of a country's jurisdiction.[98] Second, vessel polluters often successfully avoid detection by mixing their oily waste with accident residues already on the ocean's surface along regular shipping routes.[99] Third, the discharge of oily waste at night reduces the ability of many states to positively identify oil sheens on the ocean's surface and the offending vessel.[100]

To actually move oily waste from the inside to the outside of a vessel, crew members use many different methods to commit intentional

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[91] *See* OECD REPORT, *supra* note 18, at 8.
[92] *See* Flags of Convenience, *supra* note 89.
[93] *See* OCEAN COMM'N, *supra* note 1, at 239.
[94] *Id.* at 47.
[95] Although the discharge most often occurs outside a state's territorial zones, at least in Europe—where the coastlines are so complex—it is normal for local nationals to often see their beaches "dotted for miles by thick, sticky tar balls" as a result of vessel pollution. *See* OCEANA REPORT, *supra* note 86, at 3.
[96] UNEP BULL., *supra* note 4.
[97] *See* OECD REPORT, *supra* note 18, at 47; OIL SLICKS, *supra* note 2, at 11.
[98] *See* OECD REPORT, *supra* note 18, at 47; UNEP BULL., *supra* note 4.
[99] *See* UNEP BULL., *supra* note 4.
[100] *See* OECD REPORT, *supra* note 18, at 47. *But see* Kehoe, *supra* note 2, at 7 (describing the Coast Guard's ability to detect oil spills at night by using "Forward Looking Infrared Radar"). Since aerial surveillance remains technically and financially unfeasible for most countries, spaceborne surveillance through the use of synthetic aperture radar (SAR) is now being explored. OCEANA REPORT, *supra* note 47, at 4. Still, satellite imagery costs $4,000 per photo and is unaffordable for most states. Kees, *supra* note 3, at 58 (highlighting the problems of implementing effective global surveillance of the shipping industry).

and illegal vessel pollution.[101] First, and by far the most common, crew members divert bilge slops away from the OWS to an overboard discharge port by using a bypass hose or pipe.[102] As seen in Figure 2, a bypass hose is nothing more than a hose with flanges attached to each end. These flanges are attached to piping leading from the bilge water holding tank to the vessel's overboard discharge piping.[103] The bilge slops are then channeled through the bypass hose with the assistance of a pump.[104] Since flexible bypass hoses are easily spotted, crew members often build "hard bypass piping" (Figure 3) that appears, at first glance, to be part of the OWS system.[105]

Figure 2. Photo of a "Flexible" Bypass[106]

[101] The list of pollution methods discussed in this article is not exhaustive; crew members use a number of "clandestine methods" to illegally discharge oily waste. *See* Missions Law, *supra* note 43, at 1–13 (describing how incinerators are filled with clean diesel fuel to falsely give the impression of proper operation during testing, piping is manipulated, and cooling and sewage system discharge ports are improperly fitted); *see, e.g.*, Press Release, Dep't of Justice, Ship Crew Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation (Apr. 22, 2010) (on file with author) (crew member directed oily waste to vessel's center fuel tank then illegally discharged it overboard).

[102] *See* OECD REPORT, *supra* note 18, at 41; *see also* Kehoe, *supra* note 2, at 6; Press Release, Dep't of Justice, Ship Serial Polluter Ordered to Pay $4 Million for Covering up the Deliberate Discharge of Oil and Plastics (Sept. 21, 2010) [hereinafter M/V Iorana] (on file with author); Press Release, Dep't of Justice, Cargo Ships' Chief Engineer Sentenced for Violating Pollution Prevention Act (Aug. 17, 2010) (on file with author); Press Release, Dep't of Justice, Ship Management Firm Pleads Guilty and is Sentenced for Violating Federal Pollution Law (June 7, 2010) [hereinafter M/T Chem Faros] (on file with author); Press Release, Dep't of Justice, Operator of Commercial Ship Inspected in Port of Tampa Fined $725,000 for Oil-Pollution Related Crime (May 21, 2010) [hereinafter M/T Kerim] (on file with author).

[103] *See* CG Missions Law, *supra* note 43, at 1–7.

[104] *Id.*

[105] *See id.* at 3.

[106] Reardon & O'Connell, *supra* note 15, at 41.

Figure 3. Photo of a "Hard" Bypass[107]

Second, crew members "trick" the OWS into believing that it is processing effluent in conformity with international and domestic regulatory standards.[108] To accomplish this, crew members continuously "flush" the OCM with fresh water while they illegally discharge bilge slops overboard through the OWS.[109] In this instance, the "flushing" of the OCM prevents the OWS from sounding its alarm or automatically shutting down.[110] Third, "crew members attach hoses to the sludge pumps and pump [the contents inside] the sludge tanks directly overboard."[111] Vessel owners and operators save an estimated $12.8 million each year just by illegally dumping sludges.[112]

III. The International and Domestic Laws Enacted to Combat Vessel Pollution

In 1969 and 1970, Thor Heyerdahl, a world-renowned explorer and archeologist, sailed the Atlantic Ocean in two papyrus rafts.[113] During

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[107] *Id.* at 29.
[108] *See* CG Missions Law, *supra* note 43, at 10–11.
[109] *Id.* at 10–11.
[110] *Id.*
[111] Kehoe, *supra* note 2, at 6.
[112] OECD REPORT, *supra* note 18, at 13.
[113] *Thor Heyerdahl Expeditions and Archaeology of the Pacific Peoples*, GREATDREAMS.COM, http://www.greatdreams.com/thor.htm (last visited Mar. 20, 2012) [hereinafter Heyerdahl Expeditions]. Thor Heyerdahl is most famous for his 101 day "Kon-Tiki" expedition in 1947, during which he and five others safely transited 4,300 miles across the Pacific Ocean in an aboriginal balsa raft. *See* THOR HEYERDAHL, KON-TIKI (1950).

his first voyage in the "Ra," a raft fifteen meters long, Heyerdahl traveled 2,700 nautical miles across the Atlantic Ocean.[114] During his second voyage in the "Ra II," a raft twelve meters long, Heyerdahl successfully traveled 3,270 nautical miles across the Atlantic Ocean from Morocco to Barbados.[115] By doing so, Heyerdahl proved to the world that modern science underestimated the long-forgotten aboriginal technologies of sea voyage by crafts made only of reed; regrettably, along his legendary ocean voyages Heyerdahl encountered globs of oil, tar, and plastics stretching from the coast of Africa to South America.[116]

A. The International Convention for the Prevention of Pollution from Ships

Three years after Heyerdahl's second voyage, the International Maritime Organization (IMO), a specialized agency of the United Nations responsible for the prevention of pollution by ships,[117] responded to the widespread pollution that Heyerdahl found floating on the Atlantic Ocean's surface. In 1973, IMO drafted a treaty called the International Convention for the Prevention of Pollution from Ships (MARPOL 73).[118] Five years later in 1978, IMO drafted the Protocol of 1978, a treaty that modified MARPOL 73.[119] Together, Annex I of each of these two treaties comprise "MARPOL 73/78" and represent the first significant international effort to regulate the commercial fleet and prevent vessels from committing intentional and illegal acts of pollution.[120]

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[114] *Heyerdahl Expeditions*, *supra* note 113.
[115] *Id.*
[116] *See* DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Protection%20of%20the%20Marine%20Environment (last visited Jan. 23, 2012) [hereinafter *Sea Perspective*].
[117] *See* INT'L MAR. ORG., *Introduction to IMO*, http://www.imo.org/About/Pages/Default.aspx (last visited Jan. 23, 2012).
[118] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1983 U.N.T.S. 184 (entered into force Oct. 2, 1983) [hereinafter MARPOL].
[119] Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1983 U.N.T.S. 62 (entered into force Oct. 2, 1983).
[120] *See* Homer, *supra* note 14, at 153 (characterizing MARPOL 73/78 as one of the "most important . . . devices" governing vessel pollution); Nicholas H. Berg, Comment, *Bringing it all Back Home: The Fifth and Second Circuits Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels*, 34 TUL. MAR. L.J. 253, 255 (2009) ("MARPOL [73/78] has since been ratified by nations that represent the vast majority of the world's shipping interests.").

In MARPOL 73/78, specific guidelines were established for all tanker vessels (tankers)[121] 150 gross tons (GT) and above and all ships 400 GT and above to either maintain onboard or discharge oily waste. Most notably, MARPOL 73/78 sets forth the following requirements: (1) undergo surveys[122] to ensure the functionality of its oil discharging equipment;[123] (2) maintain a valid international oil pollution prevention certificate (IOPP)—again, to confirm the oil discharging equipment's specifications and functionality;[124] (3) adhere to strict oil discharging requirements outside designated special areas;[125] (4) adhere to even stricter oil discharge restrictions or prohibitions inside special areas;[126] and (5), maintain an oil record book (ORB) that documents every overboard discharge of bilge water that accumulates in machinery spaces.[127] Separately, MARPOL 73/78 mandates that signatories maintain port facilities capable of off-loading the vessel's oily waste.[128]

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[121] Unlike other "ships" used to transport almost any type of cargo, "tankers" are generally defined as a class of vessels that exclusively transport bulk amounts of oil or hazardous materials. *See* 46 U.S.C. § 2101(39) (2006); MARPOL, *supra* note 118, annex I, reg. 1(4).

[122] Surveys are undertaken every five years by either the flag state or a classification society. *See* OECD REPORT, *supra* note 18, at 14.

[123] MARPOL, *supra* note 118, annex I, reg. 4(1)(c).

[124] *Id*. reg. 5; *accord* Lieutenant Commander Ryan Allain, *USCG Inspectors and Industry Working Together for a Cleaner, Greener Environment*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 11 (Winter 2008–2009). Vessel owners must have IOPPs reissued every five years. *See* MARPOL, *supra* note 118, annex I, reg. 4(1)(b).

[125] *See* MARPOL, *supra* note 118, annex I, reg. 9. Specifically, regulation 9(1)(a)(v) prohibits new tankers from discharging oily mixtures unless the effluent is less than 1/30,000 water to oil, and regulation 9(1)(b)(iv) prohibits all other vessels from discharging oily mixtures unless the effluent is less than 100 parts per million of oil. *Id.* Consistent with regulation 16(7) and as a general baseline, the Coast Guard prohibits any vessel from discharging effluent that contains fifteen parts per million of oil or more. 33 C.F.R. § 151.10 (2011).

[126] MARPOL, *supra* note 118, annex I, reg. 1. A "special area" is defined in MARPOL as a "sea area where for recognized technical reason in relation to its oceanographical and ecological condition . . . special mandatory methods for prevention of sea pollution by oil is required." *Id.* reg. 1(10). For a list of the ten internationally recognized "special areas" under MARPOL 73/78, Annex I, see INT'L MAR. ORG., *Special Areas U nder Marpol*, http://www5.imo.org/SharePoint/mainframe.asp?topic_id=760 (last visited Jan. 23, 2012).

[127] MARPOL, *supra* note 118, annex I, regs. 20.2(a)(xii), 20.2(b)(iv).

[128] *Id*. reg. 12.

The spirit and intent of MARPOL 73/78—and most importantly its regulatory framework—remain as relevant today as the day both treaties took effect on October 2, 1983. Presently, 151 states have ratified MARPOL 73/78.[129] (Those 151 states make up 98.91% of the world's gross shipping tonnage.)[130] In the United States, MARPOL 73/78 was ratified by the Senate on August 12, 1980.[131] Today, MARPOL 73/78 is codified in federal law, that is, the Act to Prevent Pollution from Ships (APPS),[132] and the Coast Guard, by delegation of authority from the Department of Homeland Security (DHS),[133] enforces MARPOL 73/78 through APPS and corresponding regulations found in Title 33 of the CFR.[134]

B. The United Nations Convention on the Law of the Sea

In the midst of the twentieth century technological revolution, the world's oceans became a traffic jam of sorts for sea mining activities that yielded anything from oil and tin to metals and diamonds, deep sea submarine exploration, large-scale commercial fishing activities—including fisheries by one state's vessels within another state's territorial seas, maritime disputes over territorial sovereignty between states, and of course, continued intentional and illegal acts of oil pollution.[135] To address these problems, the United Nations (around the same period MARPOL 73/78 was drafted and signed) convened the Third United Nations Conference on the Law of the Sea.[136] After nearly a decade, the United Nations drafted the Convention on the Law of the Sea of 1982 Treaty (UNCLOS).[137]

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[129] For a complete list of MARPOL 73/78 signatories, see INT'L MAR. ORG., *Status of Conventions by Country*, http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (follow hyperlink for "Status of Conventions summary") (last visited Jan. 23, 2012).
[130] *Id.*
[131] INT'L MAR. ORG., *IMO Documentation*, https://imo.amsa.gov/au/public/parties/marpol78.html (last visited Mar. 20, 2012).
[132] 33 U.S.C. §§ 1901–1915 (2006).
[133] Memorandum from Dep't of Homeland Sec., to U.S. Coast Guard, subject: Delegation to the Commandant of the U.S. Coast Guard 0170.1, sec. 2, para. 77 (June 20, 2003) [hereinafter DHS Memorandum].
[134] *See* 33 C.F.R. §§ 151.01–29 (2011).
[135] *See Sea Perspective*, *supra* note 116.
[136] *Id.*
[137] U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994) [hereinafter UNCLOS]; *see also* Berg, *supra* note 120, at 258.

In the context of intentional and illegal vessel pollution, UNCLOS has been dubbed the "constitution of the oceans"[138] and is significant for various reasons. First, UNCLOS represents a reaffirmation by the international community to conserve the ocean's living resources and protect and preserve the marine environment.[139] Second, UNCLOS creates a jurisdictional framework for the world's oceans. Specifically, UNCLOS identifies the "territorial seas" (TS) as waters extending twelve nautical miles from a state's low-water baseline,[140] the "contiguous zone" (CZ) as waters between twelve and twenty-four nautical miles from a state's low-water baseline,[141] the "exclusive economic zone" (EEZ) as waters extending two hundred nautical miles from a state's low-water baseline,[142] and the "high seas" (HS) as waters beyond a state's EEZ.[143] Third, UNCLOS provides investigative and enforcement guidance to flag, port, and coastal states that identify acts of vessel pollution.[144] Specifically, UNCLOS promotes the "law of the flag doctrine," or concept that a vessel's "flag state"—or state to which the vessel claims its sovereignty—has the right of first refusal to investigate intentional and illegal "dumping"[145] violations and punish those responsible.[146]

With the exception of provisions pertaining to seabed mining[147] and the "law of the flag doctrine,"[148] UNCLOS is largely viewed by the

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[138] *See* Gehan, *supra* note 90, at 169 (quoting Agustin Blanco-Bazan, Senior Deputy Dir., Legal Affairs, IMO, Address at the IMO Interface with the Law of the Sea Convention at the Twenty-Third Annual Seminar of the Center Ocean Law and Policy, Univ. of Virginia School of Law (Jan. 6–9, 2000), *available at* http://www5.imo.org/SharePoint/mainframe.asp?topic_id=406&doc_id=1077).
[139] *See* UNCLOS, *supra* note 137, pmbl. & arts. 192–219.
[140] *Id.* arts. 3, 5.
[141] *Id.* art. 33.
[142] *Id.* arts. 55–57.
[143] *Id.* art. 86.
[144] *Id.* pt. XII, § 6.
[145] "Dumping" is defined as any deliberate disposal of wastes or other matter from vessels, aircraft, platforms, or other man-made structures at sea. *Id.* art. 1(5)(a)(i).
[146] *Id.* arts. 217(1), 218(2); *accord* Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923) (rejecting "law of the flag doctrine" where foreign merchant ships were illegally transporting alcohol into the United States).
[147] *See* INTL & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 142 (2011) [hereinafter OPLAW HANDBOOK].
[148] *See* United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1372–74 (S.D. Fla. 1998) (rejecting argument that Liberia, as flag state, had sole right to enforce violation of false ORB violation possibly committed outside U.S. waters but discovered in U.S. waters); United States v. Jho, 534 F.3d 398, 406 (5th Cir. 2008) (holding that the "law of the flag doctrine" is chiefly applicable to vessels on the high seas).

United States as customary international law.[149] Notably, for the past two decades, U.S. presidents made several unsuccessful bipartisan efforts to have UNCLOS ratified by the Senate.[150] Separately, the United States—in accordance with the territorial boundaries created in UNCLOS—claimed sovereignty over its TS to twelve nautical miles,[151] its CZ between twelve and twenty-four nautical miles,[152] and its EEZ up to 200 nautical miles.[153] Moreover, in recent judicial decisions, federal courts have acknowledged that UNCLOS is properly considered customary international law.[154] Finally, the Coast Guard identifies UNCLOS as "among the most important treaties for [the] protection of the marine environment."[155]

C. The Act to Prevent Pollution from Ships

> I am pleased to sign into law . . . the "Act to Prevent Pollution from Ships," which addresses a number of environmental issues related to intentional and accidental pollution . . . .
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> . . . .

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[149] *See generally* JAMES H. DAVENPORT, 16 BUSINESS ORGANIZATIONS WITH TAX PLANNING 240F.02 (2010) ("UNCLOS remains pending before the U.S. Senate without accession. Notwithstanding this fact, UNCLOS continues to be regarded as the accepted statement of the international law of the sea."); Berg, *supra* note 120, at 259 ("The widespread international acceptance of UNCLOS, along with the approval of the executive branch, has raised the question of whether UNCLOS has become customary international law . . . .").

[150] *See* OPLAW HANDBOOK, *supra* note 147, at 142–43 ("On October 7, 1994, President Clinton submitted [UNCLOS] . . . to the Senate for its advice and consent. On February 25, 2004, and again on October 31, 2007, the Senate . . . voted to send the treaty to the full Senate with a favorable recommendation for ratification."); *see also* COUNCIL ON FOREIGN RELATIONS, *Transcript of Hillary Clinton's Confirmation Hearing* (Jan. 13, 2009), http://www.cfr.org/publication/18225/transcript_of_hillary_clintons_confirmation_hearing.html.

[151] Proclamation No. 5928, 3 C.F.R. 547 (1989); 33 C.F.R. § 2.22 (2011).

[152] Proclamation No. 7219, 64 C.F.R. 48,701 (1999); 33 C.F.R. § 2.28 (2011).

[153] Proclamation No. 5030, 3 C.F.R. 22 (1983); 33 C.F.R. § 2.30 (2011).

[154] *See* United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 632 (E.D. Tex. 2006), *rev'd on other grounds*, 534 F.3d 398 (5th Cir. 2008); United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998).

[155] *See* MLEM, *supra* note 14, para. 9.B.1; *see also* 9 U.S. COAST GUARD MARINE SAFETY MANUAL, COMDTINST M16247, at 1-1 (25 Aug. 1997) ("An excellent example of [treaties becoming customarily international law] is the United Nations Convention for the Law of the Sea . . . with respect to traditional uses of the oceans . . . .").

> The United States has been and will continue to be a leader in urging the adoption of international maritime safety and environmental standards. My signing [APPS] is a mark of our determination to protect the marine environment from pollution.[156]

By signing APPS into federal law on October 21, 1980, President Carter codified the regulations set forth in MARPOL 73/78.[157] As a consequence, President Carter gave the Coast Guard unambiguous legal authority to investigate vessel pollution[158] committed by U.S. commercial vessels anywhere and by foreign-flagged commercial vessels within the navigable waters of the United States.[159]

In accordance with APPS, the Coast Guard has the following additional authorities when investigating suspected acts of vessel pollution. First, the Coast Guard can detain or revoke the clearance of vessels whose equipment does not substantially comply with the vessel's IOPP.[160] Second, the Coast Guard, upon request to the U.S. Customs and Border Protection (CBP),[161] may effect the detention of any foreign-flagged commercial vessel whose equipment does not substantially agree with the vessel's IOPP[162] or whose crew members are suspected of committing an APPS violation.[163] Third, the Coast Guard may allow a previously detained vessel to leave port if the vessel files a bond or other surety satisfactory with the Coast Guard.[164] Fourth, APPS, per DHS

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[156] Presidential Statement on Signing the Act to Prevent Pollution from Ships Law, 16 WEEKLY COMP. PRES. DOC. 2379 (Oct. 21, 1980).

[157] John Woolley & Gerhard Peters, *Act to Prevent Pollution From Ships Statement on Signing H.R. 6665 Into Law*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=45342 (last visited Mar. 20, 2012); *see also* Jeff B. Curtis, Comment, *Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story?*, 15 ENVTL. L. 679, 701 (1985). Of particular note, Act to Prevent Pollution from Ships (APPS) codified the requirement to preserve an ORB on board for a period of three years. *See* MARPOL, *supra* note 118, annex I, reg. 20(5).

[158] *See* 33 U.S.C. §§ 1901(a)(11), 1907(b–c) (2006).

[159] *See id.* § 1902(a)(1–2).

[160] *Id.* § 1904(e)(2).

[161] 46 U.S.C. § 60105 (2006) authorizes the release of detained vessels upon receipt of a bond or other financial security. However, it is the U.S. Customs and Border Protection (CBP), not the Coast Guard, who possesses this authority. *See id.* § 91.

[162] *See id.* § 1904(f)(1).

[163] *See id.* § 1908(e).

[164] *Id.* Interestingly, since MARPOL 73/78 does not discuss bonds or surety, it appears that a vessel's ability to have a detention lifted by filing a bond or other surety is rooted not in MARPOL but rather UNCLOS. *See* UNCLOS, *supra* note 137, art. 226(1)(b) ("If

delegation,[165] allows the Coast Guard to implement regulations whose genesis is MARPOL 73/78.[166] Practically, those regulations, set forth in the CFR, put the commercial fleet on constructive notice of MARPOL 73/78's regulations and the criminal and civil penalties vessel polluters can incur under APPS.[167]

For DOJ, APPS provides prosecutors (post-Coast Guard investigation) with a breadth of discretion to address acts of intentional and illegal vessel pollution. Most importantly, APPS gives DOJ discretion to charge vessel owners, operators, and crew members criminally.[168] In this instance, vessel owners, operators, and crew members can each be convicted of a Class D federal felony.[169] For each APPS violation, a Class D felony is punishable by up to six years imprisonment[170] and a fine of up to $250,000 for an individual[171] or $500,000 for a corporation.[172]

Third, and perhaps the most damaging to the environmentally noncompliant, APPS gives courts, upon conviction of the guilty parties, the authority to award up to half of any fine to persons giving information leading to the conviction.[173] Consequently, APPS's "whistle[-]blower provision" provides crew members earning $12,000 per year with a major financial incentive to report acts of vessel

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[an] investigation indicates a violation of applicable laws . . . for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.").

[165] DHS Memorandum, *supra* note 133.

[166] *See* 33 U.S.C. §§ 1902(e), 1903(c)(4)(A).

[167] *See* 33 C.F.R. §§ 151.01–29 (2011).

[168] *See* 33 U.S.C. § 1908(a).

[169] *Id*. Vessel owners and operators may be prosecuted for MARPOL 73/78 violations committed by crew members, if the crew members' acts are committed within the scope of their employment and while under the belief that such acts benefit the company. *See, e.g.*, United States v. Petraia Maritime, Ltd., 2007 WL 6150150, at *1 (D. Me. May 17, 2007); *see also* MLEM, *supra* note 14, at 9–8; Jeanne M. Grasso & Gregory F. Linsin, *Environmental Criminal Enforcement: A Record-Setting Year in Review, Troubling Trends, and Future Opportunities*, BLANK ROME LLP (Feb. 2008), http://www.blankrome.com/index.cfm?contentID=37&itemID=1508 (last visited Jan. 23, 2012).

[170] *See* 18 U.S.C. § 3581(a)(4) (2006).

[171] *See id.* § 3571(b)(4).

[172] *See id.* § 3571(c)(3). Another alternative action the APPS provides separate and distinct from criminal enforcement is the option of levying administrative civil penalties against vessel owners, operators, and crew members; this action is brought by the Coast Guard, not DOJ. *See* 33 U.S.C. § 1908(b).

[173] *See id.* § 1908(a).

pollution.[174] At the same time, APPS's whistle-blower provision provides DOJ with a cooperating witness (albeit a witness with a monetary incentive to testify) that it can use as either pretrial leverage or as live testimony at trial.[175]

D. The False Statements Act and other General Criminal Laws

A discussion of the False Statements Act[176] (FSA) and other general criminal laws such as Obstruction of Agency Proceedings,[177] Tampering with a Witness,[178] Conspiracy,[179] and Falsification of Agency Records in Federal Investigations[180] may appear "out of place . . . because [they are] neither international law nor marine pollution law."[181] However, in the context of environmental enforcement, such laws have become as relevant—if not more relevant—than APPS in the Coast Guard and DOJ's continued efforts to deter and hold accountable vessel owners,

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[174] Chalos E-mail, *supra* note 59; *cf.* Province Interview, *supra* note 76 (noting that some crew members earn as little as $235 per month excluding overtime wages, or approximately $2,820 per year).

[175] *See, e.g.*, United States v. Kassian Mar. Navigation Agency, Ltd., No. 3:07-cr-00048-HLA-MCR (M.D. Fla. filed Aug. 29, 2007) (two $230,000 awards and two $20,000 awards given to whistle-blowers); United States v. Sun Ace Shipping Co., No. 2:06-cr-00705-SDW, slip op. at 2 (D.N.J. Dec. 7, 2006) ($200,000 split evenly between three whistle-blowers); United States v. M.K. Ship Mgmt. Co., Ltd., No. 2:06-cr-00307-WHW, judgment at 2 (D.N.J. filed Aug. 10, 2006) ($200,000 split between two whistle-blowers); United States v. Wallenius Ship Mgmt., No. 2:06-cr-00213-JAG, Judgment, at 4 (D.N.J. filed Oct. 16, 2006) ($250,000 split between four whistle-blowers); Kehoe, *supra* note 2, n.77; Press Release, Dep't of Justice, Shipping Company and Senior Crewmembers Convicted of Covering up Oil Pollution (Dec. 2, 2010) (on file with author) (two $125,000 whistle-blower awards given).

[176] 18 U.S.C. § 1001 (2006). A violation of the FSA is punishable by fine and up to five years imprisonment. *Id.* § 1001(a). To sustain a conviction under the FSA, the government must prove the following elements: (1) a statement; (2) falsity; (3) materiality; (4) specific intent; and (5) agency jurisdiction. *See* United States v. Lawson, 809 F.2d 1514, 1517 (11th Cir. 1987); United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998).

[177] 18 U.S.C. § 1505. This statute is punishable by fine and up to five years imprisonment. *Id.*

[178] *See id.* § 1512. Depending on the stage of the proceeding, whether violence is used, and other factors, convictions under this statute are punishable by 3–30 years imprisonment. *Id.*

[179] *See id.* § 371. This statute is punishable by fine and up to five years imprisonment. *Id.*

[180] *See id.* § 1519. This statute is punishable by fine and up to twenty years imprisonment. *Id.*

[181] Berg, *supra* note 120, at 262.

operators, and crew members who intentionally and illegally discharge oily waste.[182]

Specifically, in comparison to the APPS, the FSA and other general criminal laws possess several legal and tactical advantages for DOJ prosecutors. First, these general criminal laws allow for enforcement of environmental laws beyond the TS jurisdictional limitation contained in the APPS.[183] Second, these laws lack the nexus requirement the APPS maintains with regard to the falsification of an ORB and the vessel's illegal discharge. In other words, under the FSA a court could sustain a conviction for a false ORB without the Government ever proving that an illegal discharge occurred.[184] Third, U.S. prosecutions brought pursuant to the FSA and other general criminal laws present less international comity concerns than prosecutions brought pursuant to the APPS.[185] Finally, the FSA and other general criminal laws authorize higher guideline base offense levels and enhancements for jail time than those

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[182] *See* Kehoe, *supra* note 2, at 31–36 (Kehoe, an Assistant U.S. Attorney (AUSA), details the advantages of charging vessel polluters under the FSA instead of APPS); Mushal, *supra* note 14, 1124 (Mushal, an AUSA, describes how parties who falsify the ORB are prosecuted under APPS and the FSA); Underhill, *supra* note 60, at 273–286 (Underhill, an AUSA, highlights the use of the FSA to prosecute vessel polluters).

[183] *See* 33 U.S.C. § 1901(a)(7) ("'[N]avigable waters' include the territorial sea of the United States (as defined in Presidential Proclamation 5928 of December 27, 1988) and the internal waters of the United States."); *see also* United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358, 1363–65 (S.D. Fla. 1998) (denying motion to dismiss FSA counts because FSA violations are committed when the ORB is presented to Coast Guard in U.S. waters—not when the ORB is falsified in international waters; alternatively, the extraterritoriality doctrine provides jurisdiction over offenses committed outside the United States but with an intended effect of compromising a Coast Guard function and the laws the Coast Guard enforces).

[184] *See Royal Caribbean*, 11 F. Supp. at 1371 (noting that the gravamen of the FSA charge is the misrepresentation of the ORB to the Coast Guard—regardless of whether an illegal discharge was committed).

[185] Unlike the FSA, the APPS is the implementing domestic legislation of MARPOL 73/78 and specifically requires that any action be "in accordance with international law." *See* 33 U.S.C. § 1912. According to MARPOL 73/78, evidence of discharges is to be forwarded to the flag state. *See* MARPOL, *supra* note 118, art. 6(3).

Nevertheless, just like the courts that upheld FSA counts against vessel polluters (*See* Royal Caribbean, 11 F. Supp. at 1369–74), so too have recent courts rejected MARPOL 73/78 and UNCLOS-based international comity motions in APPS prosecutions. *See* United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009); United States v. Petraia Maritime, Ltd., 483 F. Supp. 2d 34 (D. Me. 2007). Because of these recent judicial decisions, recent APPS jurisprudence has been characterized as "show[ing] little concern for international comity." Berg, *supra* note 120, at 277.

levels and enhancements under APPS.[186] Consequently, the FSA and other general criminal laws are utilized by DOJ as "a means to redress violation[s] of law . . . . [with] the side effect of thinning the ranks of midnight dumpers and cheaters . . . ."[187]

E. The U.S. Ports and Waterways Safety Program

To further promote the safe navigation of vessels, vessel safety, the protection of the marine environment, and the safety of life, property, and structures in, on, or immediately adjacent to the navigable waters of the United States,[188] Congress enacted the Ports and Waterways Safety Act (PWSA) in 1972.[189] In pertinent part, the PWSA provides for the establishment of vessel traffic services,[190] subpoena authority to Coast Guard personnel investigating marine casualties,[191] and authority to control the movement of vessels in U.S. navigable waters by Coast Guard Captains of the Port[192] (COTPs).[193]

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[186] *See* Kehoe, *supra* note 2 (arguing that the Third Circuit erred when it reversed a lower court's six-level sentence enhancement of a chief engineer convicted under the APPS while separately highlighting that the FSA and other non-maritime laws have higher base offense levels and enhancements than the APPS).
[187] Underhill, *supra* note 60, at 291.
[188] *See* 33 U.S.C. § 1221 (a)–(c).
[189] *Id.* §§ 1221–1236.
[190] *See id.* § 1223(a)(1). Vessel traffic services (VTS) consist of controlling and supervising vessel traffic through the following: reporting and operating requirements, surveillance and communications systems, routing systems, and fairways. *Id.*
[191] *See id.* § 1227.
[192] Captains of the Ports are typically sector commanders holding the rank of Captain (O-6). *See* Michael Shumaker, *The New Sector Commands*, COAST GUARD MAGAZINE, NO. 3., 2006, at 24–33. C.F.R. § 1.01–30 (2011) defines a COTP's responsibilities as follows:

> Captains of the Port and their representatives enforce[,] within their respective areas[,] port safety and security and marine environmental protection regulations, including, without limitation, regulations for the protection and security of vessels, harbors, and waterfront facilities; anchorages; security zones; safety zones; regulated navigation areas; deepwater ports; water pollution; and ports and waterways safety.

Id.
[193] *See id.* § 1223(a)(4). Specifically, the Coast Guard is authorized to specify times of entry, movement, and departure into U.S. navigable waters; establish routing schemes; establish vessel size, speed, draft limitations, and operating conditions; and, restrict vessel operations. *Id.*

Subsequent to the PWSA's enactment however, U.S. navigable waters continued to suffer environmentally from accidental and intentional tanker vessel pollution.[194] On December 15, 1976, the Liberian-flagged tanker vessel Argo Merchant grounded twenty-six miles southeast of Nantucket Island, Massachusetts, and spilled approximately 204,000 barrels of heavy heating oil.[195] Two days later, on December 17, 1976, the Liberian-flagged tanker vessel Sansinena exploded and sank in the Port of Los Angeles.[196] Nine lives were lost, over 400 boats were damaged, and approximately 30,000 barrels of oil were released into the harbor.[197]

These above incidents, along with a number of other serious groundings, collisions, and disastrous explosions during the 1970s, prompted Congress to pass the Port and Tanker Safety Act (PTSA) in 1978.[198] The PTSA, codified through amendments to the PWSA and sections located in Chapter 37 of Title 46 of the U.S. Code,[199] gives the Coast Guard broader authority than the originally codified PWSA: (1) to supervise and control all types of vessels, foreign and domestic;[200] (2) to control and monitor vessel operations in offshore waters, to include lightering operations[201] and vessel manning and pilotage standards;[202] (3) to supervise and control waterfront safety—including the responsibility to regulate fire-fighting capabilities, protect bridges and other waterfront structures, and limit access to any vessel;[203] and (4), to set conditions for tanker vessels entering U.S. ports or jurisdiction.[204]

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[194] H.R. REP. NO. 95-1384(I), at 6 (1978) [hereinafter HOUSE REPORT].
[195] *Id.*
[196] *Id.*; *see also Sansinena*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://www.incidentnews.gov/incident/6232 (last visited Mar. 20, 2012) [hereinafter *Sansinena*].
[197] *Sansinena*, *supra* note 196.
[198] *See* HOUSE REPORT, *supra* note 194, at 6.
[199] 33 U.S.C. § 1221.
[200] *See id.* § 1223; *see also* U.S. COAST GUARD MARINE SAFETY MANUAL, COMDTINST M16247, vol. VI, at 1–4 (27 June 1986) [hereinafter MSM VI].
[201] "Lightering is the act of transporting cargoes from ship to shore via a lighter vessel. Lightering involves the open water transfer of fuel from the tankers to several smaller vessels to distribute the load and reduce the draft of the tanker to an allowable entry depth." *Tanker Lightering*, GLOBALSECURITY.ORG., http://www.globalsecurity.org/military/systems/ship/tanker-lighter.htm (last visited Mar. 20, 2012).
[202] *See* 33 U.S.C. §§ 1221, 1223(a)(4); 46 U.S.C. § 3715 (2006); MSM VI, *supra* note 200, at 1–4.
[203] *See* 33 U.S.C. § 1225.
[204] *See id.* § 1228.

Specifically, § 1228(a)(1–3) of the PWSA, as amended by the PTSA, states:

> (a) In general
>
> No vessel, subject to the provisions of [C]hapter 37 of Title 46, shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel—
>
> (1) has a history of accidents, pollution incidents, or serious repair problems which, as determined by the Secretary, creates reason to believe that such vessel may be unsafe or may create a threat to the marine environment; or
>
> (2) fails to comply with any applicable regulation issued under this chapter, [C]hapter 37 of Title 46, or under any other applicable law or treaty; or
>
> (3) discharges oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party[.][205]

Unlike APPS, the FSA, and other general criminal laws, the Coast Guard, by DHS delegation of authority,[206] may criminally, civilly, *or administratively* enforce PWSA laws.[207] Specifically, COTPs maintain authority—pursuant to § 1228(A)(2)—to administratively ban tanker vessels that commit acts of vessel pollution prohibited under MARPOL 73/78 and the APPS. Section 160.107 of Title 33 of the CFR reiterates that authority and states:

> Each District Commander or [COTP], subject to recognized principles of international law, may deny entry into the navigable waters of the United States or to

[205] *Id.* § 1228(a)(1–3).
[206] *See* DHS Memo, *supra* note 133, ¶ 70. The Coast Guard enforces the PWSA through regulations found in 33 C.F.R. §§ 160.1–320 (2011).
[207] *See* 33 U.S.C. §§ 1228, 1232 (emphasis added).

> any port or place under the jurisdiction of the United States, and within the district or zone of that District Commander or [COTP], to any vessel not in compliance with the provisions of the Port and Tanker Safety Act (33 U.S.C. [§§] 1221–1232)[208] or the regulations issued thereunder.[209]

IV. The Coast Guard's Marine Environmental Protection Mission

The Coast Guard represents one of five armed forces of the United States military.[210] Unlike the Army, Navy, Air Force, and Marine Corps, however, the Coast Guard operates within the Department of Homeland Security and is also a law enforcement agency.[211] As a law enforcement agency, one of the Coast Guard's statutory non-homeland security missions is marine environmental protection.[212]

In the context of vessel pollution investigations, the Coast Guard carries out its marine environmental protection mission primarily through its law enforcement authority set forth in 14 U.S.C. § 89, which provides, in pertinent part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty

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[208] Although the COTP's authority to deny entry to a tanker vessel is accurately captured in this CFR Section as deriving from the Port and Tanker Safety Act, the entire Chapter—"33 U.S.C. §§ 1221–1236," not "33 U.S.C. §§ 1221–1232"—is commonly referred to by Congress, the Coast Guard, and the legal community as the Port and Waterways Safety Act, not the Port and Tanker Safety Act. *See* H.R. REP. NO. 108–617, § 410, at 17 (2004) (Conf. Rep.); MLEM, *supra* note 14, app. O–20; MSM VI, *supra* note 202, at 4–1; *Codes and Rules*, THE ADMIRALTY AND MAR. LAW GUIDE, http://www.admiraltylawguide.com/codes.html (last visited Jan. 23, 2012).
[209] 33 C.F.R. § 160.107 (2011).
[210] 14 U.S.C. § 1 (2006) ("The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy.").
[211] Homeland Security Act of 2002 § 888(b), 6 U.S.C. § 468 (2006).
[212] *Id.* § 888(a)(1)(E).

> officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.[213]

A. The Coast Guard's Port State Control Program

"The [Coast Guard's] Port State Control (PSC) program began in the [United States] in 1994 when Congress . . . required the U.S. Coast Guard to hold those most responsible for substandard ships accountable, including owners, classification societies,[214] and flag [s]tates."[215] Accordingly, the purpose of the Coast Guard's PSC program is to verify that "foreign[-]flagged vessels operating in U.S. waters comply with international conventions, U.S. laws[,] and U.S. regulations"[216] and "to identify and eliminate substandard ships from U.S. waters."[217] In 2009, over 8,500 foreign-flagged vessels made at least 75,902 port calls in the United States; the Coast Guard conducted over 9,600 PSC exams on those vessels.[218]

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[213] 14 U.S.C. § 89(a) (2006). Because courts consistently uphold the Coast Guard's broad authority to conduct suspicionless searches pursuant to 14 U.S.C. § 89(a). *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983); United States v. Watson, 678 F.2d 765, 773–74 (9th Cir. 1982); United States v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980). Coast Guard boarding officers are often referred to as "super cops." *See* Greg Shelton, Note, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?*, 34 WM. & MARY J. REV. 933, 938 (1993).

[214] Classification societies are private organizations in the shipping industry that assess a vessel's condition against international and domestic environmental and safety standards as well as the classification society's internal technical standards. In addition, classification societies conduct vessel surveys to ensure that they are compliant with international and domestic laws. *See* COMM'N OF THE EUROPEAN CMTYS., ON THE SAFETY OF THE SEABORNE OIL TRADE 18 (2000).

[215] *See* Policy for Banning of Foreign Vessels from Entry into U.S. Ports, 75 Fed. Reg. 67,386 (Nov. 2, 2010) [hereinafter Ban Notice]; Policy Letter 10–03, CG-543, subject: Banning of Foreign Vessels (1 Sept. 2010) [hereinafter Ban Policy].

[216] MLEM, *supra* note 14, at 9–12.

[217] *Id.*

[218] U.S. COAST GUARD, PORT STATE CONTROL IN THE UNITED STATES ANNUAL REPORT 2 (2009) [hereinafter PSC REPORT].

Using limited allocated resources,[219] the Coast Guard carries out its PSC program by targeting the highest-risk vessels with regard to safety and the marine environment.[220] The Coast Guard identifies each high-risk vessel by using a five-factor analysis of the vessel's management, flag state,[221] classification society, history, and type.[222] After assessing these five factors, the Coast Guard gives each vessel a point total and classifies the vessel as a Priority I, Priority II, or Non-Priority vessel for purposes of undergoing a PSC exam.[223]

1.Personnel and Protocol for a Standard Port State Control Exam

A Coast Guard PSC exam is normally conducted by a port state control officer (PSCO) and a port state control examiner (PSCE)[224] who: (1) hold the rank of petty officer and occupy the rate of marine science technician[225] (MST);[226] (2) are assigned to a Coast Guard sector;[227] and (3), have completed the necessary training to conduct PSC exams.[228]

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[219] *See* OCEAN COMM'N, *supra* note 1, at 240 ("The Coast Guard currently carries out a port state control program that allocates limited inspection resources to the highest-risk vessels . . . ."). In fiscal year 2010, the Coast Guard allocated an estimated $372 million of its $11.15 billion budget toward its marine environmental protection mission. *See* U.S. COAST GUARD, 2011 POSTURE STATEMENT 44 (2011).
[220] *See* PSC REPORT, *supra* note 218, at 8.
[221] The Coast Guard maintains a list of flag states with the highest detention rates; thus, the Coast Guard awards a higher point total to vessels registered by those flag states. *See Annual Targeted Flag List*, U.S. COAST GUARD, https://homeport.uscg.mil/mycg/portal/ep/browse.do?channelId=-18374&channelPage=/ (last visited Jan. 23, 2012) (type "Annual Targeted Flag list" in the search box and then follow hyperlink for "Annual Targeted Flag list").
[222] *See* PSC REPORT, *supra* note 218, at 8.
[223] *Id.*
[224] *See* E-mail from Commander Michael Antonellis, Deputy Staff Judge Advocate, District One, U.S. Coast Guard, to author (Nov. 1, 2011, 15:53 EST) [hereinafter Antonellis e-mail] (on file with author).
[225] Although an MST performs a multitude of diverse duties, an MST's overall mission is to enforce regulations for the safety of the marine environment and port security. *See Marine Science Technician*, U.S. COAST GUARD, http://www.gocoastguard.com/find-your-career/enlisted-opportunities/enlisted-ratings-descriptions/marine-science-technician-(mst) (last visited Jan. 23, 2012).
[226] *See* Antonellis e-mail, *supra* note 224.
[227] *Id.* Presently, there are thirty-five Coast Guard sectors. Thirty sectors are located coastally throughout the continental United States. Two sectors are located in Alaska. Honolulu, San Juan, and Guam each have a sector. Shumaker, *supra* note 192.
[228] *See* Antonellis e-mail, *supra* note 224.

Typically, a PSC exam consists of multiple components[229] and begins with a review of the vessel's required safety, security, manning, and pollution prevention documentation[230]—including a review of the vessel's IOPP, ORB, and shipboard pollution emergency prevention plan (SOPEP).[231] Each document is verified for its authenticity, and then each document is scrutinized to ensure that: (1) the vessel's equipment matches the equipment listed in the IOPP;[232] (2) the ORB documents all of the vessel's oil transfers and discharges;[233] and (3) the pollution response equipment listed in the SOPEP is aboard the vessel and operable.[234]

During the second component of the PSC examination, the PSCO and PSCE (PSC Team) perform visual inspections inside the vessel and require the crew members to operate steering, safety, and environmental machinery and equipment.[235] Notably, the PSC Team assesses the general cleanliness of the vessel and inspects "the engine room and machinery spaces to verify the presence and condition of required equipment."[236] In addition, the PSC Team requires specific crew members to perform an operational test of the OWS and its OCM.[237] These operational tests are conducted to verify not just the equipment's operability but also the crew's competency to operate the OWS.[238] Finally, the PSC Team checks the vessel's sludge tank to "ensure that the level of sludge corresponds to entries made in the ORB."[239]

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[229] *See id.* ("Normal PSC examinations consist of multiple components[.] [T]hese components are happening simultaneously. These components . . . include, among other things, document review, visual inspection[,] . . . operational testing of safety [and] environmental equipment to ensure proper operation, and . . . drills.").
[230] *See* O'Connell, *supra* note 3, at 58.
[231] *See* Allain, *supra* note 124, at 74. A shipboard pollution emergency prevention plan (SOPEP) details actions to be taken by the vessel's crew in the event of an accidental outflow of oil. *Id.*
[232] *See* Allain, *supra* note 124, at 74.
[233] *Id.*
[234] *Id.*
[235] *See* Antonellis e-mail, *supra* note 224.
[236] *See* Allain, *supra* note 124, at 74.
[237] *Id.*
[238] *Id.*
[239] *Id.* Depending on the size of the type of the vessel, e.g., cruise ship, tanker, the PSC Team may also require the crew to perform fire-fighting and "abandon ship" drills. *See* Antonellis e-mail, *supra* note 224.

2. Identifying Suspected MARPOL 73/78 Violations

Most often, PSC Teams learn about vessel pollution allegations either before or during the PSC exam.[240] Before the exam, the Coast Guard may receive intelligence reports of suspected MARPOL 73/78 violations from foreign countries[241] or by Coast Guard aviation and surface assets engaged in surveillance.[242] The Coast Guard possesses aerial surveillance technology capable of capturing oil sheens on the ocean's surface during both the day[243] (Figure 4) and the night.[244]

Figure 4. Aerial Day Photo of Vessel Discharging Oily Waste[245]

During the PSC exam, the PSC Team may obtain information sufficient to support a MARPOL 73/78 violation by either noting significant discrepancies during the exam itself or by obtaining information of illegal discharges by whistle-blowers.[246] In the first

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[240] *See* Reardon & O'Connell, *supra* note 15, at 23 (noting additionally that MARPOL 73/78 violations are sometimes identified during marine casualty investigations and after voluntary disclosure).

[241] *See* Gregory F. Linsin, *Exercise of Prosecutorial Discretion in Vessel Pollution Cases*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 17 (Winter 2004–2005) ("As the vessel pollution enforcement program in the United States matures, real-time consultations among [p]ort [s]tates . . . is yielding significant enforcement benefits.").

[242] Reardon & O'Connell, *supra* note 15, at 23; *see also* Udell, *supra* note 57, at 3 (noting Coast Guard's use of remote sensing to detect illegal discharges of oil).

[243] *See* Reardon & O'Connell, *supra* note 15, at 23.

[244] *See* United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1361 (S.D. Fla. 1998) (noting the Coast Guard's use of "Forward Looking Infra-red Radar" at 3:00 AM to identify a cruise ship discharging oily waste in the Bahamian waters).

[245] Reardon & O'Connell, *supra* note 15, at 10.

[246] *See* CG Missions Law, *supra* note 43.

instance, the PSC Team identifies telltale signs of suspected MARPOL 73/78 violations, e.g., unexplained oil in the discharge piping connected to the OWS (Figure 5), sludge inside the OWS (Figure 6), a lack of crew competency to operate the OWS, recently painted flanges and worn flange bolts on OWS pipe fittings (Figure 7), ORB entries that conflict with the sounding log entries for the sludge and bilge water holding tanks, unsigned ORBs, ORBs with missing pages, or an inoperable OWS and OCM.[247]

Figure 5. Photo of Sludge inside OWS Discharge Piping[248]

Figure 6. Photo of Sludge Pumped through OWS[249]

[247] *Id.*; *see also* MLEM, *supra* note 14, at 9–11 (listing ten indicators of MARPOL 73/78 violations).
[248] Reardon & O'Connell, *supra* note 15, at 42.
[249] *Id.* at 10.

Figure 7. Photo of Worn Flange Bolts[250]

In the second instance, the PSC Team is sometimes notified of a MARPOL 73/78 violation by whistle-blowers.[251] Whistle-blowers are usually low-ranking crew members who pass handwritten notes to the PSC Team during the exam.[252] To some individuals involved with the maritime industry and legal counsel representing the interests of vessel owners and operators, whistle-blowers are considered "one of the U.S. [G]overnment's biggest weapons"[253] in vessel pollution prosecutions.[254] To the seafarer community, "'whistle[-]blower awards' [are now] well-known in the crewing community and [create] an undeniable incentive [for crew members] to report wrongdoing not to the company but to the authorities."[255]

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[250] *Id.* at 23.

[251] *See* Udell, *supra* note 57, at 9–11 (highlighting the successful prosecutions of twelve vessel pollution cases initiated by whistle-blowers).

[252] *Id.*; *see e.g.*, M/T Chem Faros, *supra* note 102 (during PSC exam, a whistle-blower with limited English writing skills passed the following note to a PSC team, "Good morning sir, I would like to let you know this ship discharging bilge illegally using by magic pipe, if you want to know illegal pipe there in work shop five meters long with rubber. Sir, I hope if you don't mind. We have a security for our safety").

[253] Whittaker, *supra* note 82; *accord Whistle[-B]lowers Awarded $250,000 for Reporting Illegal Discharge of Oil at Sea*, BLANK ROME LLP (Jun. 2005), http://www.blankrome.com/index.cfm?contentID=37&itemID=61 (last visited Jan. 23, 2012) (detailing how the location of two bypasses was revealed to Coast Guard examiners by four whistle-blowers, ultimately leading to obstruction of justice convictions for the vessel's operator, captain, chief engineer, and second engineer).

[254] In one attorney's opinion, "[W]histle[-]blowers have been said to be motivated to use the U.S. whistle[-]blower program for self-serving purposes of revenge and exacting large monetary rewards." *See US Prosecution of Suspected MARPOL Violations—Whistle[-]blowers: Are They Really Reliable?*, CHALOS, O'CONNOR & DUFFY LLP, http://www.chaloslaw.com/us-prosecution-marpol-violations.html (last visited Jan. 23, 2012).

[255] *See* GARD REPORT, *supra* note 52.

3.Expanding the Exam to Support a Future Criminal Referral

Once clear grounds are identified to show that the vessel, its equipment, or its crew do not correspond substantially with the regulations of MARPOL 73/78, the Coast Guard takes several steps to expand and enhance its examination under 14 U.S.C. § 89(a)[256] and prepare a potential case package for DOJ's consideration.[257] First, the PSCO requests additional investigative assistance from the Sector Commander.[258] Typically, the Sector Commander directs additional marine and pollution investigators to join the PSC Team.[259] Separately, the Sector Commander requests investigative assistance from the Coast Guard Investigative Service (CGIS).[260] Finally, the Sector Commander notifies the servicing district legal office of the ongoing and now expanded examination.[261]

Once aboard, the expanded PSC Team starts collecting critical evidence to reconcile the apparent discrepancy or corroborate that at least one MARPOL 73/78 violation was committed.[262] Since crew members often log illegal activity aboard the vessel's computers, the PSC Team requests CGIS—who maintains computer forensics resources—to mirror the vessel's hard drive.[263] Separately, photographs are taken and key documents such as the ORB, sounding logs, and OWS alarm records are

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[256] It is well-settled that the Coast Guard possesses broad authority to board and inspect any vessel in U.S. waters without a warrant or consent under 14 U.S.C. § 89(a) (2006). *See* United States v. Petraia Mar., Ltd., 483 F. Supp. 2d 34, 41 (D. Me. 2007) (affirming Coast Guard's authority to inspect and search vessel suspected of MARPOL 73/78 violations without a warrant or consent); *see also* United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (dismissing argument that any ulterior motive of customs officers strips federal law enforcement of its authority to conduct warrantless searches of foreign-flagged vessels).

[257] *See* Policy Letter 06–01, COMDT (G–PCV), subject: Guidance for the Enforcement of MARPOL Annex I during Port State Control Examinations (20 Jan. 2006) [hereinafter PSC Policy] (detailing Coast Guard procedures for expanding PSC exam after identifying suspected MARPOL 73/78 violations).

[258] *See id.* at 9.

[259] *See* CG Missions Law, *supra* note 43, at 4–5.

[260] *See* MLEM, *supra* note 14, at 9–4 ("The request for Special Agent assistance on a case-by-case basis must be made through the unit's [c]ommanding [o]fficer.").

[261] *Id.* ("The [Staff Judge Advocate] is responsible for providing advice on marine environmental law cases with the potential for criminal prosecution.").

[262] *See* PSC Policy, *supra* note 257, at 7–9.

[263] *See* CG Missions Law, *supra* note 43, at 16 ("A ship's computer often contains important evidence . . . .").

seized.[264] Next, oil samples are obtained from bypasses, sludge tanks, bilge water holding tanks, and any other place where oil is retained.[265] (These oil samples are forwarded to the Coast Guard's Marine Safety Laboratory, and each sample is tested to determine if the oil recovered from the bypass matches the oil in the vessel's holding tanks.)[266] Finally, each crew member is interviewed, and if possible, statements are obtained.[267]

B. The Coast Guard Judge Advocate's Role in Vessel Pollution Cases

In the Coast Guard, nine "district" commands geographically oversee the navigable waters of the United States.[268] Each district is commanded by a flag officer and maintains a legal office comprised of a staff judge advocate (SJA) and subordinate judge advocates (JAs).[269] Of the 253 military and civilian attorneys currently employed by the Coast Guard, forty-four JAs are assigned to district legal offices.[270] In the context of vessel pollution cases, district JAs provide real-time advice to field units, facilitate DOJ referrals on behalf of the District Commander, and sometimes serve as Special Assistant U.S. Attorneys (SAUSAs) during criminal prosecutions.[271]

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[264] *Id.* at 13–16 (listing twenty types of evidence often collected during an expanded PSC exam).
[265] *Id.* at 14–15.
[266] *Id.* The Marine Safety Laboratory, located in New London, Connecticut, is capable of "fingerprinting" oils using gas chromatography, infrared spectroscopy, and gas chromatography–mass spectrometry. *See Oil Analysis Methodology*, U.S. COAST GUARD, http://www.uscg.mil/hq/cg5/msl/oil.asp (last visited Jan. 23, 2012).
[267] CG Missions Law, *supra* note 43, at 16–17. In many instances, crew members are advised to invoke their Fifth Amendment right to remain silent. *See Suspected MARPOL Violations in the United States—The Human Cost*, CHALOS, O'CONNOR & DUFFY LLP, http://www.codus-law.com/publications/human-cost.pdf (last visited May 31, 2011) ("All . . . crew members should invoke their Fifth Amendment privilege . . . .").
[268] *See Units*, U.S. COAST GUARD, http://www.uscg.mil/top/units/ (last visited Jan. 23, 2012).
[269] *See* JAG REPORT, *supra* note 20, at 8, 27–41.
[270] *Id.* at 7, 27–41; e-mail from Lieutenant Commander Scott Herman, Deputy Staff Judge Advocate, District Eight, U.S. Coast Guard, to author (Jan. 26, 2011, 12:18 EST) (on file with author).
[271] JAG REPORT, *supra* note 20, at 7, 27–41; *see also* Captain William Baumgartner et al., *Environmental Enforcement Actions*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 6–10 (Winter 2004–2005).

1. Advising the Command and Notifying DOJ

> [U]nique to vessel pollution investigations is the mobility of the vessel and its crew and the resulting time pressures this creates with respect to the conduct of an investigation. *This timing factor places a high premium on early and intensive consultation among . . . [PSC Team] personnel, the . . . [d]istrict [l]egal [o]ffice, and the [f]ederal [p]rosecutor*.[272]

Once a PSCO expands a PSC exam and requests additional assistance to investigate a MARPOL 73/78 violation, district JAs play a pivotal role during both the examination and referral phases.[273] First, district JAs provide advice day and night on "the securing of critical documentary evidence (e.g., ORB, sounding logs, etc.), the proper collection of necessary physical evidence (e.g., mirror-imaging a hard drive), and the identification of crew members who [] directed the illegal activity or who have been eyewitnesses to the violations."[274]

Next, district JAs work closely with the Sector Commander to detain the vessel under 33 U.S.C. § 1908(e). District JAs educate the Sector Commander (acting within the authority of a COTP) about CBP's authority under 46 U.S.C. § 91 to detain the vessel.[275] Additionally, district JAs discuss with the Sector Commander the effects of any decision to detain the vessel—including urgent efforts by the vessel owner and operator's counsel to negotiate surety that will authorize the vessel's release.[276] Finally, district JAs often prepare or review letters that are sent to the vessel, vessel's owner, and the vessel's operator notifying them of the detention and the COTP's basis for the detention.[277]

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[272] Linsin, *supra* note 241, at 18 (emphasis added).
[273] *See* JAG REPORT, *supra* note 20, at 8, 27–41 (describing the various roles district JAs performed during the investigation, referral, and prosecution phases of vessel pollution cases during 2010).
[274] Linsin, *supra* note 241, at 18; *see also* CG Missions Law, *supra* note 43, at 1–17 (describing the various legal responsibilities of a district JA during a vessel pollution case).
[275] *See* Reardon & O'Connell, *supra* note 15, at 56 (discussing the mechanics involved with detaining a vessel and the accompanying letters that are sent to the vessel's owner and operator).
[276] *See* CG Missions Law, *supra* note 43, at 18 ("[T]he surety agreement mechanism provides an opportunity for shipping companies to continue to use their ship for their economic business.").
[277] *See* Reardon & O'Connell, *supra* note 15, at 56.

Commonly, district JAs—on behalf of the Sector Commander—communicate directly with CBP to effect the detention.[278]

Finally, since the Coast Guard's Office of Maritime and International Law Prevention Department (CG–0941) is the primary interface between district JAs and DOJ's Environmental Crimes Section (DOJ-ECS),[279] district JAs immediately notify CG-0941 of the ongoing PSC exam.[280] Upon making this notification, district JAs are introduced to DOJ prosecutors (either assigned to DOJ-ECS or a local U.S. attorney's office) who ultimately decide whether to accept the referral for criminal prosecution.[281] At this point, district JAs closely interact with DOJ prosecutors; district JAs brief DOJ prosecutors on the status of the examination, the evidence collected so far, outstanding evidence that needs to be collected, and the potential timeline for if or when the District Commander may refer the case.[282]

2. Negotiating the Surety Agreement

A district JA's authority to negotiate surety agreements contributes to "the Coast Guard's ability to effectively assist DOJ prosecutorial efforts and was created due to the special transitory nature of foreign vessels."[283] The overriding purpose of a surety agreement is "to provide [the government with] security for payment of the maximum penalty . . . imposed for the violation, as well as [to set] other conditions that place the government in the same legal and practical condition as if the vessel's clearance [is] withheld."[284] Surety agreements are negotiated by the district JA on behalf of the COTP.[285]

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[278] *See id.*
[279] *See* MLEM, *supra* note 14, at 9–6.
[280] *See id.* (CG–0941 acts as "a clearinghouse for information about environmental prosecutions and [is] a source of expertise . . . .").
[281] *See* Linsin, *supra* note 241, at 14–17.
[282] *Id.* at 17. It is important to note that the DOJ's acceptance of a Coast Guard referral serves as a "bright line" for when the Coast Guard's investigative authority under 14 U.S.C. § 89(a) ceases—despite any interaction district judge advocates have with DOJ during the PSC exam. *See* CG Missions Law, *supra* note 43, at 51.
[283] CG Missions Law, *supra* note 43, at 18.
[284] MLEM, *supra* note 14, at 9–15.
[285] *See* CG Missions Law, *supra* note 43, at 18.

Putting aside the obvious major business incentive of getting the CBP detention lifted,[286] surety negotiations provide the vessel's owner and operator with several benefits. First, the vessel's owner and operator learn how many MARPOL 73/78 violations have been identified and can assess the overall strength of the government's case.[287] Additionally, surety negotiations provide the vessel's owner and operator with an exact number of crew members it needs to fly to the United States to safely man and ready the vessel to sail.[288] Finally, a signed surety agreement signals the end of the $4,000–$15,000 per day additional dockage fees, up to $10,000 per day in armed security guard costs,[289] and the added costs of crew provisions and fuel needed to keep the vessel's engines powered.[290]

However, despite the financial and operational advantages afforded to vessel owners and operators who quickly secure surety agreements, district JAs and legal counsel (Parties) who represent the vessel owners and operators often engage in lengthy and contentious surety negotiations.[291] First, the Parties negotiate the dollar amount of the surety.[292] Second, district JAs identify which crew members are relevant to a DOJ prosecution.[293] Typically, relevant crew members remain in the

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[286] *Id.* ("[T]he surety agreement mechanism provides an opportunity for shipping companies to continue to use their ship . . . .").

[287] For example, counsel for the owner and operator may learn from the district JA if a whistle-blower is involved and what evidence (e.g., falsified ORBs, bypasses, etc.) was seized. *See* Antonellis e-mail, *supra* note 224.

[288] Often, several crew members are identified to remain in the United States while the vessel's owner and operator scurries to find qualified replacements to be flown to the United States on very short notice; once aboard, the Coast Guard vets the new crew members' qualifications and competence. *Id.*

[289] In CBP or the Coast Guard's discretion, the vessel owner and operator may be required to ensure that the vessel's crew does not leave the ship. *See* Chalos e-mail, *supra* note 59.

[290] Chalos e-mail, *supra* note 59.

[291] *See, e.g.*, Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, *4–6 (S.D. Tex. May, 19, 2010) (noting parties' inability to agree to surety provisions during twelve-day period; specifically, the surety amount, the number of crew members to be retained, and the time the crew members were to remain in the United States); *see also* CG Missions Law, *supra* note 43, at 64 ("[The] [m]ost contentious terms will be [the] amount of the surety and [the] length of obligations for crewmembers [sic]."); Chalos e-mail, *supra* note 59 (the Coast Guard's surety demands require "the 'putative defendant' to fund its own prosecution"); Grasso e-mail, *supra* note 82 (the Coast Guard demands surety far beyond what Congress intended 33 U.S.C. § 1908(e) to cover).

[292] MLEM, *supra* note 14, at 9–15. Typically, for each APPS violation, the Coast Guard seeks the maximum dollar amount of any potential criminal fine, that is, $500,000 per violation. *Id.*

[293] *Id.*

United States throughout DOJ's prosecution.[294] Third, the Parties negotiate the amount of time crew members are required to remain in the United States while they receive total wages, lodging, per diem, and medical care that is paid for by the vessel's owner and operator.[295] Finally, the Parties negotiate issues of service of process, stipulations of vessel ownership and operation, and authentication of certain documents.[296]

3. Referring the Case Criminally to DOJ

"The discretion to . . . refer a [vessel pollution] case for criminal prosecution is part of the discretion exercised under the Coast Guard's law enforcement mission . . . ."[297] The decision to refer a case is vested in the cognizant district commander[298] and made "in those situations that best serve the American public by promoting compliance with the law, protecting the public health and welfare, and safeguarding the marine environment."[299] Prior to referral, the Coast Guard does not consider fixed thresholds as the sole basis to pursue criminal sanctions;[300] rather, the Coast Guard's decision to refer a vessel pollution case "is based on two general measures, significant environmental harm and culpable conduct."[301]

Accordingly, the District Commander—in consultation with the SJA[302]—considers several factors prior to referring a vessel pollution case to DOJ.[303] First, the District Commander assesses the overall

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[294] Because foreign crew members remain away from their home countries and their families until no longer needed to testify, DOJ prosecutes every vessel pollution case in an expedited timeframe. *See* Gregory F. Linsin, Senior Litigation Counsel, U.S. Dep't of Justice, Maritime Midnight Dumpers 13 (Oct. 4, 2007), www.marpoltraininginstitute.com /Maritime%20Dumpers%20Marpol%20US.pdf).
[295] *See* MLEM, *supra* note 14, at 9–17.
[296] *See id.*
[297] *Id.*
[298] 33 C.F.R. § 1.07 (2011); MLEM, *supra* note 14, at 9–17.
[299] MLEM, *supra* note 14, at 9–17.
[300] *See id.*; *accord* Baumgartner et al., *supra* note 271, at 8 ("There is no ready-made matrix for enforcement, and good judgment will always be a part of [the Coast Guard's] enforcement strategy.").
[301] MLEM, *supra* note 14, at 9–17.
[302] *See id.* at 9–4 (outlining the SJA's responsibilities during an environmental crimes case, including providing advice to the District Commander and coordinating the referral with DOJ).
[303] *See id.* at 9–17.

strength of the evidence to support a criminal prosecution.[304] For instance, if a whistle-blower alerted the Coast Guard to the MARPOL 73/78 violation, all independent evidence is assessed because of the whistle-blower's financial incentive to possibly fabricate evidence.[305] Second, the District Commander considers the operational impact of supporting a criminal prosecution.[306] In two recent prosecutions, courts rejected expert testimony proffered by Coast Guard personnel in the field of ship operations, procedures, record-keeping requirements,[307] and chemical analysis.[308] Consequently, the District Commander weighs and considers judicial precedent, the strength of the case, and the obligation to release field personnel to travel and testify prior to making the decision to refer the case.[309]

Separately, IMO has expressed serious concern about the fair treatment of seafarers in the context of domestically-based vessel prosecutions.[310] As a result, IMO promulgated guidance "to ensure that seafarers are treated fairly following a maritime accident and . . . that detention is for no longer than necessary."[311] Since Coast Guard personnel serve daily as advisors to the IMO, and the Coast Guard's Chief of Office (Chief of Office is the correct term?) and Maritime and International Law serves as the head of a U.S. delegation to IMO's legal committee,[312] the District Commander considers the impact of a referral on the vessel's crew members[313] alongside domestic and international

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[304] *Id.*; Baumgartner et al., *supra* note 271, at 8.

[305] *See* Udell, *supra* note 57, at 10 (noting that when whistle-blowers are involved in the investigation, "[a]llegations are usually confirmed by multiple witnesses, documents, and physical evidence"); *see generally* United States v. Fleet Mgmt. Ltd., 2008 U.S. Dist. LEXIS 34970, at *18 (E.D. Pa. Apr. 29, 2008) (noting defense theory that the whistle-blower fabricated allegations for financial gain and "to sabotage the defendant").

[306] MLEM, *supra* note 14, at 9–17 ("The determination to [pursue criminal sanctions] . . . involves . . . prioritizing the use of available resources.").

[307] *See Fleet Mgmt. Ltd.*, 2008 U.S. Dist. LEXIS 34970, at *20 (rejecting chief petty officer's expert reports and testimony as unreliable and based on insufficient facts and data).

[308] *See* United States v. Mylonakis, No. 4:09–cr–00492 (S.D. Tex. Apr. 28, 2010), *available at* http://www.chaloslaw.com/engineer-acquitted-magic-pipe.html (striking testimony of Coast Guard Marine Safety Laboratory chemist as "confusing and irrelevant").

[309] MLEM, *supra* note 14, at 9–17.

[310] Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, IMO Res. A.987(24) (Dec. 1, 2005) [hereinafter IMO Resolution].

[311] *Id.*

[312] *See* JAG REPORT, *supra* note 20, at 11–13.

[313] *See generally* MLEM, *supra* note 14, at 9–7 (noting the passing of IMO resolutions and the "potential impacts on foreign relations" during pollution incidents).

seafarer claims that the U.S. Government "criminalizes seafarers" during MARPOL 73/78-related prosecutions.[314]

V. M/T Wilmina: Lessons Learned for Today and Tomorrow

On May 4, 2010, the Norwegian-flagged, 260 meter long, 44 meter wide, and 149,775 deadweight tonnage[315] motor tanker vessel Wilmina[316] (Figure 8) arrived in the U.S. port of Corpus Christi, Texas, to discharge a cargo of crude oil.[317]

Figure 8. Photo of Motor Tanker Wilmina[318]

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[314] *See* COLIN DE LA RUE & CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT 1073–14 (2d ed. 2009) (noting that coastal and port states commonly detain seafarers pending the resolution of very lengthy state prosecutions); Rev. James D. Von Dreele, Vice President, N. Am. Mar. Ass'n & Exec. Dir. of the Seamen's Church Inst. of Phila. and South Jersey, Address at the International Maritime Organization's World Maritime Day Forum: Criminalization on the High Seas (Oct. 25, 2007) (advocating for the "decriminalization" of vessel pollution investigations; highlighting how foreign crew members remain away from their homes and families for up to ten months, live in remote motels, have difficulty receiving daily allotments, are forced to eat a foreign diet, and are often represented by legal counsel hired by the vessel's owner and operator); *Fair Treatment of Seafarers*, EIGHT UP, http://www.eightup.co.uk/eight-causes/fair-treatment-of-seafarers/ (last visited Jan. 23, 2012) (commenting that the "criminalization of seafarers" leads to detrimental morale aboard vessels as well as adverse efforts to recruit quality seafarers).

[315] As defined, "Deadweight tonnage refers to the carrying capacity of a vessel. Deadweight tonnage can be figured by taking the weight of a vessel which is not loaded with cargo and subtracting that figure from the weight of the loaded vessel." *See Deadweight Tonnage Definition*, ABOUT.COM, MARITIME, http://maritime.about.com/od/Glossary/g/Definition-Of-Deadweight-Tonnage.htm (last visited Jan. 23, 2012).

[316] *Wilmina*, MARINETRAFFIC.COM, http://www.marinetraffic.com/ais/shipdetails.aspx?MMSI=248922000 (last visited Mar. 20, 2011) [hereinafter *Wilmina*].

[317] Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, at *1 (S.D. Tex. May, 19, 2010); *accord* Memorandum from Chalos, O'Connor & Duffy on Ban of M/T Wilmina to Coast Guard District Eight (Aug. 25, 2010) [hereinafter COTP Appeal] (on file with author).

[318] *Wilmina*, *supra* note 316.

Upon arrival, the Coast Guard conducted a standard PSC exam and initially found no safety or environmental deficiencies aboard M/T Wilmina.[319] After off-loading its cargo and undergoing the PSC exam, M/T Wilmina prepared to sail to Mexico to load a cargo of crude oil that was destined for Spain.[320]

A. Why the Coast Guard Banned M/T Wilmina

On the evening of May 4, 2010, a crew member notified the Coast Guard that M/T Wilmina illegally discharged oily waste while en route to Corpus Christi; consequently, the Coast Guard immediately returned to M/T Wilmina and began an expanded PSC exam.[321] During the secondary exam, Coast Guard personnel found inconsistencies in the vessel's ORB, an inoperable OWS, sludge in the ship's overboard discharge piping, and a bypass hose with oil inside.[322] In addition, the vessel's master and chief engineer were unfamiliar with the vessel's safety management system and the record-keeping requirements associated with OWS alarm printouts.[323] Finding sufficient evidence to support APPS violations, the COTP effected M/T Wilmina's indefinite detention on May 5, 2010.[324]

On May 7, 2010, a district JA and legal counsel for M/T Wilmina's owner and operator began negotiating terms to a proposed surety agreement.[325] From the outset, the Parties disagreed on the amount of the surety,[326] the number of crew members necessary to support a DOJ prosecution,[327] and the amount of time each crew member was required to remain in the United States.[328] During negotiations, M/T Wilmina

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[319] *See* COTP Appeal, *supra* note 317, at 3.
[320] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *4.
[321] Coast Guard Ban, *supra* note 21.
[322] *Id.*
[323] *Id.*
[324] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *2–3.
[325] *Id.* at *3–6.
[326] *Id.* at *3–5. The Coast Guard initially sought an amount of $1.5 million; M/T Wilmina's owner and operator would only agree to an amount of $500,000. *Id.*
[327] *Id.* The Coast Guard sought the removal of twelve crew members (of the M/T Wilmina's twenty-five member crew); M/T Wilmina's owner and operator agreed to pay lodging, subsistence, per diem, and medical coverage for six crew members. *Id.*
[328] *Id.* at *3–6. The Coast Guard demanded that the twelve crew members remain in the United States for "an unspecified and unlimited time," whereas the M/T Wilmina's owner and operator sought a "limited period of time" provision. *Id.*

incurred daily fees for dock space, fuel, and provisions that totaled $242,054 within twelve days.[329] In addition, the detention prevented M/T Wilmina from completing a voyage that would have generated $809,912 in revenue.[330]

Frustrated by the surety negotiation impasse, M/T Wilmina's owner and operator petitioned the Southern District of Texas for relief on May 14, 2010.[331] Specifically, M/T Wilmina's owner and operator requested that the Court "fix" the surety agreement so that the CBP detention could be removed.[332] Finding no basis to assert subject matter jurisdiction, the Court dismissed the petition on May 19, 2010.[333]

Presented with a foreign-flagged vessel with environmental discrepancies and a surety negotiation impasse,[334] on May 21, 2010, the COTP—pursuant to 33 U.S.C. § 1228(a)(2)—banned M/T Wilmina from entering the port of Corpus Christi for three years.[335] On May 27, 2010, the Coast Guard's Office of Vessel Activities (CG-543) took the additional and "ground-breaking"[336] step of banning M/T Wilmina from entering any U.S. port for three years.[337] M/T Wilmina's ban was hailed as "the first such 'administrative remedy' used against alleged violators of [U.S.] laws, instead of criminal prosecutions that usually cost owners millions of dollars and force crews to remain in the [United States] for several months, with some of them potentially going to jail."[338] In CG-543's notification letter, the Coast Guard provided M/T Wilmina with the opportunity to reenter U.S. ports after one year under two conditions: (1) M/T Wilmina's owner and operator implement an environmental

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[329] *Id.* at *4. In fact, by the time M/T Wilmina departed Corpus Christi, the vessel's owner and operator estimated that it incurred $894,730 in total expenses. *See* COTP Appeal, *supra* at 317.
[330] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *4.
[331] *Id.* at *2.
[332] *Id.* at *1–2.
[333] *Id.* at *11.
[334] *See generally id.* at *2–6.
[335] Coast Guard Ban, *supra* note 21. It is possible that the parties' inability to sign a surety agreement was not the sole basis for the COTP's decision to administratively ban M/T Wilmina; on May 18, 2010, law enforcement authorities began investigating the whistle-blower, who was eventually indicted, for possession of child pornography. *See* United States v. Pabillar, No. 2:10CR00623 (S.D. Tex. dismissed Oct. 12, 2010).
[336] Rajesh Joshi, *Wilmina Owner to Challenge 3-Year Ban*, SAFE SEAS (May 28, 2010, 5:10 PM), http://safewaters.wordpress.com/2010/05/28/tankers-wilmina-owner-to-challenge-3-year-ban/.
[337] Coast Guard Ban, *supra* note 21.
[338] Joshi, *supra* note 336.

compliance plan (ECP); and (2), the ECP is approved by the Coast Guard.[339]

B. Why Administrative Bans Best Answer the Vessel Pollution Problem

The United States is the world's largest economy and leading importing nation.[340] As recently as 2008, the United States accounted for twenty-three percent of the world's GDP and thirteen percent of the value of world merchandise imports.[341] Presently, the United States receives exports from more than two hundred countries.[342] In addition, one container in every ten carrying global trade is bound for or originates in the United States, accounting for ten percent of worldwide container traffic.[343] Logically, the United States, through the Coast Guard's PSC program, can significantly influence the level of environmental stewardship in the global maritime community.

1. Vessel Banning Effects in the Maritime Community

From the maritime industry's perspective, a vessel ban has major adverse consequences that compel increased environmental compliance. Specifically, vessel owners and operators suffer significant stigma as a result of their vessels being banned from trading in U.S. waters.[344] Accordingly, vessel owners and operators are less likely to be hired by

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[339] Coast Guard Ban, *supra* note 21.
[340] RITA HIGHLIGHTS, *supra* note 17, at 2.
[341] *Id.* at 16 ("Crude oil, petroleum products, passenger motor vehicles, electrical machinery, and electronics are among the top imports by value.").
[342] *Id.* at 2.
[343] RESEARCH AND INNOVATIVE TECH. ADMIN., U.S. DEP'T OF TRANSP., AMERICA'S CONTAINER PORTS 8 (2009) [hereinafter RITA STATS].
[344] *See Current Awareness Bulletin*, INT'L MAR. ORG. BULL., Jun. 2010, at 4), *available at* http://www.imo.org/KnowledgeCentre/CurrentAwarenessBulletin/Documents/CAB%20164%20June%202010.pdf; COTP Appeal, *supra* note 317, at 10. For a sampling of internet news articles that instantly reported M/T Wilmina's ban in the international maritime community, see Joshi, *supra* note 336; *Port State Control Recent Detentions*, INTERSHIP NAVIGATION TRAINING CTR. (Jun. 3, 2010), http://isntc.org/?q=node/440; *Coast Guard Restricts Norwegian-Flagged Wilmina from U.S. Ports for Three Years*, CIB PUBL'NS (Jun. 1, 2010), http://cibpubs.com/Members/Archieves10/06_01_2010__3.shtml; Eoin O'Cinneide, *Awilco Fights U.S. Ship Ban*, TRADEWINDS.NO (May 31, 2010, 5:47AM), http://www.tradewinds.no/casualties/article560426.ece; *USCG Bans Norwegian-Flagged Wilmina from* [sic] *for Three Years*, MARINELINK.COM (May 28, 2010), http://www.marinelink.com/news/norwegianflagged-wilmina334403.aspx.

charter parties to move profitable cargo.[345] Second, a vessel ban results in incredible financial losses. In the matter of M/T Wilmina, the vessel's owner and operator estimated that they lost $1,815,000 in potential profits from just May 4, 2010, to August 25, 2010.[346] Dissecting that number even further, M/T Wilmina suffered over $500,000 in lost profits per month; overall, the M/T Wilmina will suffer $18 million in lost revenue during its three-year ban.[347] Not surprisingly, right after being banned from U.S. waters, M/T Wilmina's owner and operator touted future environmental compliance measures by announcing in its press release:

> [W]e are continuing to analyze the incident and a lot of work is focusing on how we in the best possible way can eliminate the risk for ever [sic] again being exposed to a similar incident. This will encompass new technical arrangements, improved procedures and routines[,] and increasing and documenting the environmental awareness for the crew . . . .[348]

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[345] COTP Appeal, *supra* note 317, at 10.

[346] *Id.* These losses are the result of M/T Wilmina being unable to secure freight rates available to similarly-situated tanker vessels that can call U.S. ports. *See* Chalos e-mail, *supra* note 59. When a vessel cannot call U.S. ports, a tanker vessel is forced to move cargo from "second-tier" oil majors that pay up to fifty percent less in "per day" or "per voyage" freight rates. Telephone Interview with Lieutenant Commander Brian Province, Chief, Investigations and Inspections Div., Atlantic Area, U.S. Coast Guard (Jan. 24, 2011).

[347] In the present global market—where rising oil prices and a tightening of global credit lines negatively influence freight rates and developing countries' abilities to afford maritime transportation costs—a vessel's financial solvency is exacerbated when it can't trade in the United States. *See* RITA HIGHLIGHTS, *supra* note 17, at 46 ("[O]il price fluctuations seriously impact[] freight carriers."); *see also Global Shipping Industry in Dire Straits on Mid-east, Africa Unrest*, MAR. SUN NEWS (Mar. 7, 2011), http://www.maritimesun.com/news/global-shipping-industry-in-dire-straits-on-mid-east-africa-unrest/ ("The global shipping industry is facing tough times as [it] brace[s] for mounting negative factors including high oil price[s], unrest in the Middle [E]ast[,] and [the] oversupply of vessels."); United Nations Conference on Trade & Dev., How are Maritime Freight Rates Affected by Rising Oil Prices? (Apr. 27, 2010), http://www.unctad.org/Templates/StartPage.asp?intItemID=5410&lang=1; United Nations Conference Nations Nations Conference on Trade & Dev., Challenging Times Ahead for the Shipping Industry (Dec. 8, 2009), http://www.unctad.org/Templates/StartPage.asp?intItemID=5242&lang=1.

[348] Press Release, Awilco & Wilhelmsen Marine Serv. AS, USCG Allegation Concerning Violation of MARPOL Regulation (May 28, 2010) (on file with author).

To some in the maritime community, the level of financial loss derived from a vessel ban may appear excessively harsh.[349] However, such a statement fails to account for the elimination of "front-end" costs typical in cases the Coast Guard refers to DOJ. For example, if a vessel is banned, the vessel's owner and operator no longer must: (1) post a bond as part of a surety agreement (typically in the range of $500,000 to $1.5 million),[350] (2) pay per diem, lodging, and medical expenses for half of the vessel's crew who must remain in the United States,[351] (3) pay travel costs to replace half of the crew in order to get the vessel sailing again,[352] and of course, (4) incur legal fees during the DOJ prosecution.[353] Put another way, when vessels are banned, vessel owners and operators no longer become self-proclaimed "putative defendants"[354] since they are no longer required to fund DOJ's prosecutions. More importantly, the vessel's owner and operator—assuming they have an interest in repairing their reputations and reducing the ban in years from three to one—can shift the costs it never incurred at the "front-end" to immediately invest in new environmental equipment and implement a Coast Guard-approved ECP.

2. Vessel Banning Advantages to the Coast Guard and DOJ

Consistent with and in furtherance of the Coast Guard's PSC objective to "identify and eliminate substandard ships from U.S. waters,"[355] administrative bans provide for swift and harsh penalties; at the same time, administrative bans re-emphasize the U.S. commitment to environmental stewardship in the marine environment.

a. Bans Hold the Unscrupulous Immediately Accountable

In 2010, DOJ secured its first plea against a vessel's owner, operator, or crew member, on average, eight months after the Coast Guard

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[349] Legal counsel for M/T Wilmina's owner and operator dubbed the Coast Guard's "legal machinery" as "draconian" after M/T Wilmina was banned. *See* Joshi, *supra* note 336.
[350] *See id.*
[351] *See* Chalos e-mail, *supra* note 59.
[352] *Id.*
[353] *See* OECD REPORT, *supra* note 18, at 50.
[354] Chalos e-mail, *supra* note 59.
[355] MLEM, *supra* note 14, at 9–12.

identified the MARPOL 73/78 violation.[356] Contrast that timeline to the time required to effect a vessel ban—where once the deficient environmental equipment is repaired or the offending crew member is replaced, the vessel is expelled within a week.[357]

b. Bans Compel the Greedy to Change their Financial Strategy

As evidenced by M/T Wilmina's ban, the financial impact of administrative bans—as opposed to the average court fines levied after a successful DOJ prosecution—is very severe.[358] In 2010, DOJ reported four cases where fines were levied against polluters operating foreign-flagged vessels.[359] Those fines—skewed because one vessel was a recidivist[360]—totaled $6,475,000, or $1,618,000 per case. Compared to the financial losses accrued by M/T Wilmina over just a three-month period ($1,815,000), a vessel ban's adverse financial consequences dwarf those levied after a successful DOJ prosecution.[361] More importantly, the

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[356] Press Release, Dep't of Justice, Shipping Company and Senior Crewmembers [sic] Convicted of Covering up Oil Pollution (Dec. 2, 2010) [hereinafter M/V Avenue Star] (on file with author) (from offense to plea thirteen months elapsed); M/V Iorana, *supra* note 102 (from offense to plea six months elapsed); M/T Chem Faros, *supra* note 102 (from offense to plea two and a half months elapsed); M/T Kerim, *supra* note 102 (from offense to plea fourteen months elapsed); Press Release, Dep't of Justice, Ship Crew Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation (Apr. 22, 2010) [hereinafter M/V Lowlands Sumida] (on file with author) (from offense to plea six months elapsed). This eight month average becomes significantly larger if the case goes to trial or has a significant motion practice. *See* United States v. Fleet Mgmt. Ltd., 2009 WL 2581710, at *1 (E.D. Pa. Aug. 20, 2009) (motion to suppress statements decided over two years after date of offense, i.e., January 24, 2007); United States v. Petraia Maritime, Ltd., 2007 WL 6150150, at *1 (D. Me. May 17, 2007) (crimes committed on December 14, 2004; jury verdict rendered on May 17, 2007).

[357] The M/T Wilmina did not leave port for nineteen days, but that is because the Coast Guard—as evidenced by its efforts to secure a signed surety agreement—initially sought to refer the case to DOJ. *See* Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, *1–5 (S.D. Tex. May, 19, 2010).

[358] *See* OECD REPORT, *supra* note 18, at 6 ("A deterrent fine should at a very minimum be equal to the costs avoided through noncompliance.").

[359] *See* M/V Avenue Star, *supra* note 356; M/V Iorana, *supra* note 102; M/T Chem Faros, *supra* note 102; M/T Kerim, *supra* note 102; M/V Lowlands Sumida, *supra* note 356.

[360] *See* M/V Iorana, *supra* note 102. In this case, the vessel's owner agreed to pay a $4 million fine due to the fact this was the vessel's second MARPOL violation in three years; moreover, the second offense involved the same chief engineer who perpetrated the first offense—after the vessel owner re-hired him. *See id.*

[361] At the same time, such harsh pecuniary effects will result in greater deterrence because the amount of the losses more closely equate to the costs saved from noncompliance, see OECD REPORT, *supra* note 18, at 6, 52, which can total up to $12.8

harsh pecuniary effects of a vessel ban force vessel owners and operators, who presently consider the occasional fine from getting caught polluting as the "cost of doing business,"[362] to immediately change their business practices.

c. Bans are Efficient

Under § 1228 of the PWSA,[363] COTPs can immediately expel tankers in violation of MARPOL 73/78, APPS, and any other international or domestic law without the delay and uncertainty associated with a criminal prosecution. No administrative hearing is required prior to a COTP's decision to ban a vessel; the only mechanism available to an aggrieved party seeking relief from a ban is to file a written appeal with the COTP.[364] If the COTP denies relief, the aggrieved party can petition the COTP's decision in writing to the District Commander, the Area Commander, and finally, CG-543.[365] Notably, a vessel owner and operator's right to file a written appeal occurs after the ban has taken place—not before.[366]

d. Bans Still Provide for International Awareness of the Unscrupulous

Regardless of whether the vessel is administratively banned or a case is referred for criminal prosecution, the Coast Guard's notification procedures with other port states remain the same. Specifically, the Coast Guard already shares and receives information directly with IMO and foreign countries about "major control actions" (i.e., denials of entry, expulsions, or detentions) the Coast Guard imposes on foreign-flagged

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million per year just for the illegal dumping of sludges. *See supra* note 112 and accompanying text.

[362] *See* Kehoe, *supra* note 2, at 41 ("[T]he corporate operators of these vessels are either willing to take the risk of getting caught in order to continue to keep compliance costs low as a way of doing business . . . .").

[363] 33 U.S.C § 1228 (2006).

[364] *See id.* § 1232(e); 33 C.F.R. § 160.7 (2011).

[365] *Id.*

[366] 33 C.F.R. § 160.7 (2011); *but see* COTP Appeal, *supra* note 317, at 3 (arguing that administrative bans are not authorized under 33 U.S.C. § 1228; in the alternative, administrative bans are civil actions that entitle the aggrieved parties to a hearing per Section 1232(a) of the PWSA).

vessels.[367] In addition, the Coast Guard supports the use of Equasis, an international database that shares the results of every PSC exam performed by participating member states.[368] Equasis is free-of-charge and accessible to anyone with an e-mail address.[369] For example, in the matter of M/T Wilmina, any port state, or any person, can access Equasis to learn the tanker's size, total crew, and its port state examination history—including its detention history.[370]

e. Bans are Consistent with Current U.S. Government Policy

A change in current Coast Guard practice, that is, an increased use of vessel bans in MARPOL 73/78 cases, while retaining its discretionary authority to refer select vessel pollution cases to DOJ, is consistent with current Coast Guard policy, it conserves Coast Guard and DOJ resources, and it allows the Coast Guard and DOJ to focus their efforts on those cases involving recidivists or egregious acts of vessel pollution.

First, as a matter of general policy, the Coast Guard employs no rigid requirements when deciding whether to refer a vessel pollution case to DOJ.[371] Instead, the Coast Guard considers severe environmental harm and a long history of misconduct as two bases for referral[372] then selects the best legal tool to deter future similar conduct.[373] In the case of M/T Wilmina—in accordance with its overarching marine environmental

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[367] *See* PSC REPORT, *supra* note 218, at 23; Grasso & Linsin, *supra* note 169 (noting that the basis for the Coast Guard's 2007 investigation of Overseas Shipping Group was a communication made by Transport Canada to the Coast Guard).
[368] *See* EQUASIS, http://www.equasis.org/EquasisWeb/restricted/About?fs=About (last visited Jan. 23, 2012).
[369] *Id.*
[370] *Wilmina Shipping Info*, EQUASIS, http://www.equasis.org/EquasisWeb/restricted/ShipInspection?fs=ShipHistory (last visited Jan. 23, 2012). The United States detained M/T Wilmina on May 4, 2010 for nineteen days for MARPOL 73/78 violations; Iran detained M/T Wilmina on November 30, 2010 for one day for four safety deficiencies. *Id.*
[371] MLEM, *supra* note 14, at 9–17.
[372] *Id.*
[373] *See* Baumgartner et al., *supra* note 271, at 10.

> The U.S. Government's overarching goal of protecting the environment is supported by Coast Guard policy and procedure for collecting and reviewing evidence, considering the conduct of a spiller, both before and after a spill, and choosing the right tool, from a wide range of tools, best suited to achieving that goal.

protection mission to keep substandard vessels from entering U.S. waters—it appears that the Coast Guard recognized the advantages of such a flexible policy when it banned M/T Wilmina. In a press release dated May 27, 2010, the Coast Guard announced:

> This action related to [M/T] Wilmina is a result of [the Coast Guard's] ongoing efforts to utilize the full range of available tools to ensure compliance with laws meant to protect the environment . . . . *Criminal prosecution is one such tool[,] but administrative alternatives, such as banning certain ships, can be extremely effective*.[374]

Likewise, the increased practice of banning vessels to encourage environmental compliance is harmonious with the Coast Guard and DOJ's intent to implement ECPs fleet-wide.[375] Supporting that initiative, at least one U.S. maritime law firm also ardently promotes the implementation of ECPs.[376] Environmental compliance plans (spell out if it starts a sentence) promote environmental compliance from the vessel owner all the way down to the lowest-ranking crew member,[377] and they reduce the possibility that DOJ will prosecute vessel owners and operators for pollution acts committed by individual crew members.[378] As set forth in CG-543's ban of M/T Wilmina,[379] future similar bans also incentivize environmental compliance since they allow for reentry into U.S. waters after one year—once an ECP is implemented and approved by the Coast Guard.

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[374] Coast Guard Ban, *supra* note 21 (emphasis added). On September 1, 2010, the Coast Guard expanded its vessel banning policy by announcing that it would ban any foreign-flagged vessel from entering U.S. waters if the vessel has a history of operating in U.S. waters in a substandard condition. *See* Ban Notice, *supra* note 215; Ban Policy, *supra* note 215.

[375] *See* Allain, *supra* note 124, at 75 (touting implementation of ECPs by convicted parties as well as "environmentally conscious" owners and operators); Udell, *supra* note 57, at 15; Linsin, *supra* note 294, at 16.

[376] *See* Grasso & Linsin, *supra* note 169 ("[T]he implementation of a robust ECP, one that incorporates elements of managerial oversight and independent verification, can improve the culture of compliance within a maritime company and can reduce the risks associated with noncompliance.").

[377] *See* Linsin, *supra* note 294, at 16 (emphasizing that corporate leadership, through environmental compliance, instills in every crew member that environmental stewardship is "a real and permanent priority of [the] organization").

[378] *See* Linsin, *supra* note 241, at 18 (noting that a corporation's dedication to a "meaningful environmental compliance plan" often dictates whether DOJ criminally charges culpable parties).

[379] *See* Coast Guard Ban, *supra* note 21.

Finally, vessel bans remove the need to dedicate Coast Guard and DOJ resources to cases where MARPOL 73/78 violations are identified.[380] Those resources include, but are not limited to, expert witnesses, additional forensic analysis, e.g., oil samples and computers, CGIS personnel, Coast Guard PSC teams testifying at hearings and trials, and district JAs serving as SAUSAs.[381] As a consequence, Coast Guard and DOJ personnel can dedicate more time and resources toward cases involving recidivists or egregious acts of pollution. Those cases tend to yield significantly higher fines, implementation of ECPs, and each matter includes a wide variety of evidence that is not necessarily whistle-blower driven.[382]

f. Bans are Harmonious with Current International Policy

Since vessel bans obviate the need to detain seafarers in the United States pending the outcome of a DOJ-based criminal prosecution, vessel bans more closely parallel IMO's resolution decreeing fair treatment of seafarers[383] and UNCLOS's requirement for the prompt release of vessels and crews.[384] Consequently, an implementation of vessel bans as standard Coast Guard practice will eliminate complaints that the United

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[380] *See* OCEAN COMM'N, *supra* note 1, at 240 (recognizing that the Coast Guard, already with limited resources, incurs a greater resource burden because of poor flag state oversight of its vessel fleet); Baumgartner et al., *supra* note 271, at 10 (identifying the vast number of Coast Guard personnel engaged in a vessel pollution investigation, referral, and prosecution); CG Missions Law, *supra* note 43, at 1 (criminal referrals are "resource intensive to investigate and prosecute").

[381] *See generally* MLEM, *supra* note 14, at 9–1, 9–18 (describing the federal, state, and local interests in an environmental crime investigation and the use of Coast Guard resources to support each investigation).

[382] *See* Press Release, Dep't of Justice, Overseas Shipholding Group Inc. Will Pay Largest Ever Penalty for Concealing Vessel Pollution (Dec. 19, 2006) (on file with author) (defendant pled guilty in six jurisdictions and ordered to pay $37 million fine; investigation commenced from tip provided to the Coast Guard by Transport Canada); Press Release, Dep't of Justice, Evergreen to Pay Largest-Ever Penalty for Concealing Vessel Pollution (Apr. 4, 2005) (on file with author) (defendant pled guilty in five jurisdictions and ordered to pay $25 million fine; investigation initiated from information provided to the Coast Guard by the Washington State Department of Ecology); Press Release, Dep't of Justice, Royal Caribbean to Pay Record $18 Million Criminal Fine for Dumping Oil and Hazardous Chemicals, Making False Statements (Jul. 21, 1999) (on file with author) (defendant pled guilty in six jurisdictions and ordered to pay $27 million—$18 million in one plea and $9 million in separate plea; investigation commenced by Coast Guard aerial surveillance team).

[383] *See* IMO Resolution, *supra* note 310.

[384] *See* UNCLOS, *supra* note 137, art. 292.

States criminalizes seafarers "caught in the middle of these pollution problems."[385]

C. Debunking Skepticism about Vessel Bans

Advocates for the referral of all intentional and illegal vessel pollution cases to DOJ argue that a shift away from criminal enforcement will empower unscrupulous vessel owners, operators, and crew members to pollute more.[386] However, this shift is not exclusive; it still incorporates the Coast Guard's discretionary authority to refer select cases. In addition, such an assertion presumes that DOJ will accept all Coast Guard's referrals—a less likely presumption if another more effective measure exists to deter and punish offenders.[387] Finally, the harsh financial consequences of a vessel ban, unlike fines levied after criminal prosecutions, are not the "costs of doing business."[388] Rather, such costs give the vessel's owner and operator two choices: (1) trade outside U.S. waters and continue to suffer the adverse consequences of not being able to trade where the highest freight rates are paid;[389] or (2), implement an ECP that allows the vessel to trade in U.S. waters after one year.[390]

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[385] Von Dreele, *supra* note 314.

[386] *See* Underhill, *supra* note 60, at 291 (advocating for more prosecutions pursuant to the FSA to deter vessel polluters); Gehan, *supra* note 90, at 183 (stating that an increased use of domestic law to counter the problem of vessel pollution has "the salutary effect of promoting the aims and spirit . . . of UNCLOS and MARPOL").

[387] *See* Linsin, *supra* note 241, at 18 ("[M]any cases referred to the DOJ are declined for criminal enforcement . . . [if] a non-criminal alternative [is] determined to be a more appropriate resolution."). In the criminal enforcement context, DOJ has also recently recognized the powerful utility of bans in vessel pollution cases. *See, e.g.*, United States v. Chang-Sig O, No. 2:06-cr-00599-SDW, Judgment, at 3 (D.N.J. filed Jan. 30, 2007) (defendant banned from seeking employment as engineer aboard any ship or motor vessel that travels in U.S. waters); United States v. Francisco M. Sabando, Jr., No. 3:07-CR-391-001 (GAG), Judgment, at 4 (D.P.R. filed Sept. 20, 2007); Kehoe, *supra* note 2, n.301; Press Release, Dep't of Justice, Shipping Conglomerate Pleads Guilty to Concealing Deliberate Pollution in "Magic Pipe" Case (Apr. 12, 2011) (four companies pled guilty and agreed to a ban of five years from trading in U.S. waters); Press Release, Dep't of Justice, Ship Captain Sentenced to 10 Months Confinement for Obstruction, Environmental and Ship Safety Violations (Oct. 15, 2009) [hereinafter M/V Theotokos] (vessel captain banned from entering United States for three years).

[388] Most fines in MARPOL 73/78-related prosecutions represent a "smaller outlay" than environmental compliance. *See* OECD REPORT, *supra* note 18, at 52.

[389] *See* COTP Appeal, *supra* note 317, at 3.

[390] *See* Coast Guard Ban, *supra* note 21.

1. Legal Authority and Judicial Precedent Supports Bans

At least one opponent of the Coast Guard's use of administrative bans believes that the PWSA provides no such authority under 33 U.S.C. § 1228.[391] However, such an argument ignores: (1) the plain language of § 1228(a), (2) the centuries of judicial precedent that support U.S. authority to subject foreign-flagged vessels to its jurisdiction while in U.S. waters,[392] (3) judicial precedent that consistently upholds the Coast Guard's authority to enforce criminal provisions of the PWSA—to include the mandatory reporting of hazardous conditions[393] and the control of a foreign-flagged vessel's movement, mooring, or anchorage,[394] and most importantly (4), the judicial precedent that supports U.S. authority to deny entry of foreign-flagged vessels from U.S. waters.[395] In *Patterson v. Eudora*, the Supreme Court noted:

> [T]he implied consent to permit [foreign-flagged vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may

[391] *See* COTP Appeal, *supra* note 317, at 3.

[392] *See* United States v. Diekelman, 92 U.S. 520, 525 (1875) ("The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923) ("The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter."); Spector v. Norwegian Cruise Line Ltd, 545 U.S. 119 (2005) (holding that the Americans with Disabilities Act applies to foreign-flagged cruise ships in U.S. waters).

[393] United States v. Canal Barge Co., Inc., 631 F.3d 347 (6th Cir. 2011) (upholding PWSA criminal convictions for failure to report a hazardous condition on board a barge carrying 400,000 gallons of benzene).

[394] United States v. Locke, 529 U.S. 89, 94 (2000) (discussing PWSA authority and the federal interest to regulate the maritime tanker transport industry—due to its "ever-present, all too real dangers of oil spills, spills which could be catastrophes for the marine environment"); Beveridge v. Lewis, 939 F.2d 859, 864 (9th Cir. 1991) (discussing the "extensive authority to regulate the anchoring, mooring, and movement of vessels" pursuant to the PWSA); Patentas v. United States, 687 F.2d 707, 712 (3d Cir. 1982) (generically discussing the PWSA as well as the government's authority to bring civil and criminal actions against persons who violate regulations under the PWSA); Llamera v. United States, 15 Cl. Ct. 593, 601 (1988) (noting that the Coast Guard did not exceed its statutory authority under the PWSA when it ordered a vessel's owner to move its vessel from an anchored position until regulatory violations aboard the vessel were corrected).

[395] Patterson v. Eudora, 190 U.S. 169 (1903) (upholding a lower court's application of provisions of "Act December 21, 1898" to British sailors engaged in trade in U.S. waters).

> be extended upon such terms and conditions as the government sees fit to impose. . . . Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this.[396]

2. Incarceration: A Viable Tool or an Inadequate Deterrent?

Undeniably, vessel bans preclude the possibility of incarceration for vessel polluters. However, as stated in Part V.B.2.e, a shift in Coast Guard practice toward vessel bans still retains discretionary authority to criminally refer recidivists and egregious acts of pollution in order to seek incarceration. Moreover, looking at the four 2010 cases reported by DOJ that involved the intentional discharge of oily waste by foreign-flagged vessels, DOJ obtained convictions and fines in each case, but no incarceration.[397] In 2009, in seven reported cases involving the intentional discharge of oily waste by foreign-flagged vessels, DOJ attained misdemeanor-level incarceration in four of the cases, with the amount of jail time among the six convicted parties averaging just over three months.[398]

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[396] *Patterson*, 190 U.S. at 178, *quoted in Cunard*, 262 U.S. at 125.

[397] *See* M/V Avenue Star, *supra* note 356; M/V Iorana, *supra* note 102; M/T Chem Faros, *supra* note 102; M/T Kerim, *supra* note 102.

[398] *See* Press Release, Dep't of Justice, Ship Operator Pleads Guilty for Concealing Pollution from Oil Tanker (Oct. 21, 2009) (on file with author) (vessel owner fined $1.25 million; no incarceration); M/V Theotokos, *supra* note 387 (vessel captain sentenced to ten months confinement); Press Release, Dep't of Justice, Liberian Ocean Shipping Company Admits Falsifying Oil Discharge Record Books (Sept. 3, 2009) (on file with author) (vessel owner fined $1.3 million; no incarceration); Press Release, Dep't of Justice, Ship Operator to Pay More than $2 Million Fine for Concealing Pollution on the High Seas (July 27, 2009) (on file with author) (vessel owner fined $2 million; two crew members sentenced to one week of incarceration and one month of incarceration); Press Release, Dep't of Justice, Korean Corporate Owner of Cargo Vessel Sentenced to Pay $2.2 Million for Conspiracy and Falsifying Records (June 5, 2009) (on file with author) (vessel owner fined $2.2 million; no incarceration); Press Release, Dep't of Justice, General Maritime Management (Portugal) Fined $1 Million for Environmental Crimes (Mar. 16, 2009) (on file with author) (vessel owner fined $1 million; two crew members sentenced to six months incarceration and three months incarceration); Press Release, Dep't of Justice, Shipping Line Pays $1.4 Million for Environmental Crimes (Mar. 10, 2009) (on file with author) (vessel owner fined $1.4 million; no incarceration).

Considering the aforementioned data, it appears that DOJ also focuses its efforts toward financially penalizing vessel owners and operators more than it seeks to incarcerate crew members discharging the oily waste.[399] Additionally, compared to the Coast Guard's ability to ban vessels and cause immediate and significant financial losses however, DOJ can only obtain sentences of incarceration after successful—and sometimes lengthy—prosecutions; during which time, offending vessels are still trading in U.S. waters while accruing enough profits to offset any future-imposed fines.

D. The Way Ahead: Bolstering the PWSA and Implementing Regulations

Tankers make up the second largest category of the world's merchant fleet.[400] However, alongside tankers sail cargo ships, bulk carriers, container ships, passenger ships, and fishing vessels.[401] Each vessel's primary source of propulsion is oil, and therefore, each type of vessel poses a significant risk to the marine environment.[402] In 2009, of the 161 ships detained for safety-related deficiencies by the Coast Guard, only eighteen were tankers.[403] Consequently, the Coast Guard must have clear statutory authority to ban all types of vessels found in violation of MARPOL 73/78, not just tankers.

Current Coast Guard Policy for Banning Vessels

On September 2, 2010, the Coast Guard issued a policy memo asserting PWSA authority to administratively ban all types of vessels—not just tankers.[404] Arguably, § 1223 of the PWSA,[405] coupled with the

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[399] *Contra* Kehoe, *supra* note 2, at 42 (arguing that prosecutions of the polluter—that result in less than a year of jail time—are worth pursuing since the crew member's engineering license and ability to obtain employment may be "severely impacted" by a U.S. conviction).
[400] *See* IMO FACTS, *supra* note 18, at 14–16.
[401] *Id.*
[402] OECD REPORT, *supra* note 18, at 41 ("Evidence of prosecution of oil pollution court cases reveal that . . . bypass pipes have been found on all types of ships, from decrepit cargoes to prestigious cruise ships."); UNEP BULL., *supra* note 4 ("Not only oil tankers, but various other cargo ships pose a constant threat of small to medium scale oil pollution from illegal dumping of oily wastes . . . .").
[403] PSC REPORT, *supra* note 218, at 2, 16.
[404] *See* Ban Policy, *supra* note 215, at 4–5, which states,

statutory language set forth in § 1232,[406] provides the Coast Guard with the requisite authority necessary to ban all types of vessels, not just tankers. And though the following analysis and research supports the Coast Guard's position, Congress should provide the Coast Guard with a clear statutory mandate to ban all types of vessels—rather than current PWSA law that provides explicit statutory authority to ban only tankers.

First, when comparing the plain language of each section's title, § 1228 discusses the COTP's authority as it relates to "Conditions for Entry to Ports in the United States"[407] whereas § 1223 discusses "Vessel Operating Requirements"[408] and § 1232 discusses "Enforcement Provisions." Just by comparison of these section titles, it is clear Congress contemplated then subsequently provided the Coast Guard with explicit authority to deny a vessel's entry in U.S. waters only in § 1228 of the PWSA.

> Nothing in this policy will restrict Commandant (CG-543) from utilizing the [ban] procedures . . . for a vessel which . . . in the opinion of the U.S. Coast Guard[,] the condition of such vessel may pose a significant risk to the safety of the vessel, crew[,] or the marine environment . . . .

[405] Section 1223(b) of the PWSA, in pertinent part, provides:

> The Secretary may order any vessel, in a port or place subject to the jurisdiction of the United States or in the navigable waters of the United States, to operate or anchor in a manner [the Secretary] directs if:
>
> (1) [the Secretary] has reasonable cause to believe such vessel does not comply with any regulation issued under this chapter or any other applicable law or treaty;
>
> (2) [the Secretary] determines that such vessel does not satisfy the conditions for port entry set forth in section 1228 of this title;
>
> . . . .

[406] Section 1232(e) of the PWSA, in pertinent part, provides:

> Denial of Entry. Except as provided in [S]ection 1228 of this title, the Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any port or place under the jurisdiction of the United States or to any vessel not in compliance with the provisions of this chapter or the regulations issued hereunder.

[407] *See id.* § 1228.
[408] *Id.* § 1223.

By process of elimination, if the Coast Guard possesses statutory authority to ban all types of vessels, that authority must be derived from either § 1223 or § 1232, or a reading of both statutes taken together. Section § 1223(b) reads in pertinent part, "The Secretary may order any vessel, *in a port or place subject to the jurisdiction of the United States or in the navigable waters of the United States*, to operate or anchor in a manner that [the Secretary] directs . . . ."[409] This provision clearly grants authority to a COTP to control a vessel's movement while the vessel is in U.S. waters.[410] Separately, § 1232 provides the U.S. Government with remedies, e.g., civil penalties, criminal penalties, in rem liability, injunction, denial of entry, withholding of clearance, *after* another provision of the PWSA has been violated.[411] Read collectively, § 1223 and § 1232 provides the Coast Guard with authority to ban all types of vessels, not just tankers.[412]

Finally, because a reading of each PWSA section may render opposing legal positions or ambiguity as to whether the Coast Guard possesses authority to administratively ban all types of foreign-flagged vessels, the Supreme Court has stated that canons of statutory interpretation are not mandatory but rather guides that can be overcome by evidence of congressional intent.[413] Upon review of congressional intent, it is clear that the Coast Guard was granted authority to deny entry to tankers in § 1228. Specifically, when the Committee on Merchant Marine and Fisheries discussed § 1228, it noted:

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[409] *See id.* § 1223(b) (emphasis added).

[410] To further underscore the point that vessel movement control in § 1223 should not be confused with denial of entry authority in § 1228, see Ray v. Atl. Richfield Co., 435 U.S. 151, 161 (1978) ("The focus of . . . 33 U.S.C. §§1221–1227 . . . is traffic control at local ports . . . .").

[411] *See* 33 U.S.C. § 1232(a)–(f) (emphasis added).

[412] As a note of caution, such an expansive view of § 1223 and § 1232, in the Supreme Court's opinion, could render the language of § 1228—and the seven prerequisite conditions that deny entry of tankers in U.S. waters—superfluous. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166–67 (2004) (where statute included an explicit "during or following condition," reading a separate sentence to eliminate such a condition would render part of the statute entirely superfluous—something "[the Court] is loath to do"). Nevertheless, the effect of a COTP's authority to control a vessel's movement in U.S. waters or ban the vessel from U.S. waters is the same—both authorities can result in a vessel's inability to trade in the United States.

[413] *See* Chickasaw Nation v. United States, 534 U.S. 84, 93–96 (2001) (rejecting argument that "every clause and every word of a statute should if possible be given effect" where particular language consists of surplus words or is repugnant to the rest of the statute).

> This Section includes, *in statutory language for the first time*, a prohibition against any vessel carrying oil or hazardous material operating in the navigable waters of the United States or transferring cargo or residue in any port or place of the United States, if such a vessel has an operational history which creates reason to believe that the vessel may be unsafe or may constitute a threat to the marine environment . . . .[414]

Likewise, when Congress discussed the expanded authorities the PTSA provides the Coast Guard, Congress made no distinction between tankers and vessels when highlighting the Coast Guard's authority to ban vessels. On February 21, 1977, Congressman Dicks noted that the PTSA "establishes a program to effectively prohibit substandard vessels from operating within the [U.S.] maritime zone, ..."[415] On May 25, 1977, Congress again discussed the PTSA's additional reach by noting that the PTSA "provide[s] clear authority . . . to bar substandard vessels from operating in U.S. waters."[416] Notably, neither discussion specified that the "substandard vessel" must be a tanker; rather, congressional intent supports a fleet-wide authority to ban vessels not in compliance with the PWSA.

Nevertheless, because prudence dictates that the Coast Guard possess a clear statutory mandate to ban all types of vessels from U.S. waters, Appendix A proposes such a revision to 33 U.S.C. § 1228. This revision incorporates the APPS into the text of § 1228, and as a consequence, the denial of entry authority granted to the Coast Guard explicitly extends to all types of vessels, not just tankers.[417] Appropriately, Appendix A roots any vessel's denial of entry in § 1228, the PWSA Section titled, "Conditions for Entry to Ports in the United States." Finally, Appendix B offers a revision to Section 160.107 of Title 33 of the CFR that clarifies the statutory authority by which COTPs may ban all foreign-flagged vessels from U.S. waters.

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[414] HOUSE REPORT, *supra* note 194, at 13 (emphasis added).
[415] 123 CONG. REC. 4779 (1977).
[416] 123 CONG. REC. 16515 (1977).
[417] To cover all types of vessels—not just tankers, Sections 1228(1)(a) and 1228(1)(a)(2) of Appendix A include the additional language "or chapter 33 of title 33" (Chapter 33 of Title 33 is the APPS.).

VI. Conclusion

> The world's maritime transport system has been an essential element in the growth of global prosperity since the first trading ships sailed several thousand years ago. . . . However, as with any industrial sector . . . , maritime transport has been the source of both spectacular releases of pollution as well as a more subdued and constant stream of waste . . . into the seas and onto the shorelines.[418]

A shift in Coast Guard practice toward more vessel bans reflects a tacit recognition that DOJ prosecutions of vessel pollution cases are not an adequate deterrent for a crime motivated primarily by financial greed. That sentiment is collectively shared[419] and supported with irrefutable data.[420] The number of vessel pollution cases is neither declining nor remaining steady; rather, vessel pollution cases are on the rise. Even worse, under current Coast Guard practice, substandard owners—as opposed to "good corporate citizens"—are rewarded for being environmentally noncompliant.[421]

The Coast Guard has in place a procedurally sound and very successful program to refer vessel pollution cases to DOJ. The Coast Guard should retain that discretionary authority for select cases. However, to strengthen the Coast Guard's marine environmental protection mission and to directly counter the economically motivated crime of intentional and illegal vessel pollution, the Coast Guard must continue to ride the forward momentum it created when it banned M/T Wilmina. The Coast Guard must shift its current vessel pollution enforcement practice from criminal referrals to administrative bans. Simultaneously, Congress must clarify the Coast Guard's PWSA authority to deny entry to all vessels, not just tankers. Finally, the Coast Guard, through its delegation to IMO's legal committee, should provide notice to the international maritime community about its movement toward vessel bans. Once these measures are implemented, vessel

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[418] OECD REPORT, *supra* note 18, at 7.
[419] *See supra* note 16 and accompanying text; *see also* UNEP BULL., *supra* note 4 ("Despite international and domestic conventions and legislation, oil dumping in the sea remains a troubling, unsolved[,] and uncontrolled environmental problem."); Grasso & Linsin, *supra* at 169; Chalos e-mail, *supra* note 59.
[420] *See supra* note 19.
[421] *See* OECD REPORT, *supra* note 18, at 4; Underhill, *supra* note 60, at 291.

owners and operators would be incredibly remiss if they fail to become more environmentally compliant. Otherwise, those same vessel owners and operators should expect to be denied entry from U.S. waters and to suffer the dire financial straits that accompany administrative bans.

Appendix A

1. 33 U.S.C. § 1228. Conditions for entry to ports in the United States:

(a) In general, no vessel, subject to the provisions of chapter 37 of title 46, or chapter 33 of title 33, shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel:

(1) has a history of accidents, pollution incidents, or serious repair problems which, as determined by the Secretary, creates reason to believe that such vessel may be unsafe or may create a threat to the marine environment; or

(2) fails to comply with any applicable regulation issued under this chapter, chapter 37 of title 46, or chapter 33 of title 33, or under any other applicable law or treaty; or

(3) discharges oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party; or

(4) does not comply with any applicable vessel traffic service requirements; or

(5) manned by one or more officers who are licensed by a certificating state which the Secretary has determined, pursuant to section 9101 of title 46, does not have standards for licensing and certification of seafarers which are comparable to or more stringent than United States standards or international standards which are accepted by the United States; or

(6) is not manned in compliance with manning levels as determined by the Secretary to be necessary to insure the safe navigation of the vessel; or

(7) while underway, does not have at least one licensed deck officer on the navigation bridge who is capable of clearly understanding English.

(b) Exceptions:

The Secretary may allow provisional entry of a vessel not in compliance with subsection (a) of this section, if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is not unsafe or a threat to the marine environment, and if such entry is necessary for the safety of the vessel or persons aboard. In addition, paragraphs (1), (2), (3), and (4) of subsection (a) of this section shall not apply if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is no longer unsafe or a threat to the marine environment, and is no longer in violation of any applicable law, treaty, regulation or condition, as appropriate. Clauses (5) and (6) of subsection (a) of this section shall become applicable eighteen months after October 17, 1978.

Appendix B

PROPOSED REGULATION.

TITLE 33: NAVIGATION AND NAVIGABLE WATERS

PART 160—PORTS AND WATERWAYS SAFETY—GENERAL
Subpart B—Control of Vessel and Facility Operations
§ 160.107 Denial of entry.
Each District Commander or Captain of the Port, subject to recognized principles of international law, may deny entry into the navigable waters of the United States or to any port or place under the jurisdiction of the United States, and within the district or zone of that District Commander or Captain of the Port, to any vessel not in compliance with the provisions of the Ports and Waterways Safety Act, as amended by the Port and Tanker Safety Act, (33 U.S.C. § 1221–1236) or the regulations issued thereunder.

TREATING THE SYMPTOMS BUT NOT THE DISEASE: A CALL TO REFORM FALSE CLAIMS ACT ENFORCEMENT

LIEUTENANT COLONEL CHARLES T. KIRCHMAIER*

I. Introduction

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act (FERA), thereby ushering in the most sweeping changes to the False Claims Act (FCA) that had occurred in over twenty years.[1] According to the law's congressional sponsors, amending the FCA was vital to restoring "the spirit and the intent" of the law, and reinvigorating the Act's usefulness as the federal government's premier anti-corruption law.[2] President Obama welcomed the FCA's

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[1] *See generally* The Fraud Enforcement and Recovery Act (FCA), Pub. L. No. 111-21, § 4(a)–(f), 123 Stat. 1625 (2009) (to be codified at 31 U.S.C. §§ 3729–3733 (2006)) [hereinafter the 2009 FCA Amendments], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ021.111. *See also* False Claims Act Correction Act, H.R. 1788, 111th Cong. (2009); False Claims Act Clarification Act, S. 458, 111th Cong. (2009); *accord* The Civil False Claims Act, 31 U.S.C. §§ 3729–3733 (2006) [hereinafter False Claims Act or FCA].

[2] *See generally* 155 CONG. REC. S2424 (daily ed. Feb. 24, 2009) (statement of Sen. Charles Grassley) (introducing S. 458, The False Claims Clarification Act of 2009). *See also* 155 CONG. REC. E1295 (daily ed. June 3, 2009) (statement of Rep. Howard L.

changes as part of his administration's effort to restore the public's trust and confidence in the government's ability to oversee a federal acquisition system he described as being broken.[3] Congress intended the amendments to strengthen and enhance the government's ability to combat corruption within the federal acquisition system. More specifically, FERA incentivized increasing private relator involvement in the FCA enforcement process. These incentives lowered the evidentiary threshold for establishing a false claim while simultaneously increased the scope of actions that could be prosecuted under the Act.

However, two key issues remain unanswered: tangible ways to improve FCA enforcement, and the government's role in overseeing and monitoring the FCA enforcement process. Legislation aimed solely at increasing private lawsuit filings incorrectly presumes that the more FCA lawsuits filed, the better the FCA enforcement process becomes. Yet even the President acknowledged upon signing FERA into law that "[the] Government must set the rules of the road that are fair and fairly enforced."[4] By promoting legislation that invites increased *qui tam* lawsuit filings, the government should also accept greater responsibility for ensuring FCA enforcement is limited only to those suits that have some veritable basis for being prosecuted on the government's behalf.[5]

Berman) (describing how the 2009 Fraud Enforcement and Recovery Act would strengthen the FCA).

[3] On March 4, 2009, President Obama declared that the federal procurement system was "broken" and "plagued by massive cost overruns, outright fraud, and the absence of oversight and accountability." *See* President Barack H. Obama, Remarks by the President on Procurement (Mar. 4, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Procurement-3/4/09.

[4] President Barack H. Obama, Remarks by the President at the Signing of the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act (Nov. 20, 2009), http:// www.whitehouse.gov/the-press-office/Remarks-President-Signing-Helping-Families-Save-Their-Homes-Act-and-Fraud-Enforcement-and-Recovery-Act. This article presumes that when President Obama uses the term "Government," he refers only to the federal government.

[5] *Qui tam* is a Latin phrase for "who as well for the King as for himself sues in this matter." BLACK'S LAW DICTIONARY 1289 (8th ed. 2004). *Black's Law Dictionary* describes a *qui tam* action as, "An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Id.* The individual who files a *qui tam* action on behalf of the Government is known as a relator. The FCA authorizes private citizens to enforce the law by filing lawsuits on the Government's behalf and keeping a portion of any recovery obtained from the defendant. *See, e.g.*, 155 CONG. REC., *supra* note 2, at E1295 (explaining that "[t]he 1863 Act authorized individuals, called 'qui tam relators,' to bring lawsuits on behalf of the United Sates to prosecute fraud against the Government and to recover funds that were wrongfully obtained").

This article outlines the problems underlying the government's current FCA enforcement practices and recommends a model for reforming how *qui tam* lawsuits are regulated by the Department of Justice (DoJ) before turning them over for private prosecution. Part II discusses the general concerns with the *qui tam* relator role in FCA prosecutions and current FCA enforcement practices. Part III provides a brief overview of the 1986 and 2009 FCA Amendments and explains how *qui tam* relators have gained a prominent role in litigating lawsuits on the government's behalf. The legislative history underlying the 2009 FCA Amendments demonstrates how Congress drafted FERA to further empower *qui tam* relators and overturn judicial precedent. Part IV assesses the future challenges in interpreting and applying the FCA's revised statutory scheme. This article predicts that the 2009 FCA Amendments may clarify little substantive law and actually raise new legal questions where it attempted to answer or resolve old ones. Part V examines recent FCA enforcement statistical trends and leads to the inevitable conclusion that the DoJ should be more proactive in dismissing frivolous *qui tam* lawsuits. Part VI provides an overview of how the DoJ outsources its prosecutorial function and proposes adopting stronger case screening guidelines to encourage earlier dismissal of frivolous lawsuits. Part VII proposes reforming current FCA enforcement practices by empowering agencies to employ alternate remedy procedures to resolve the majority of FCA lawsuits before they end up being dismissed in civil litigation. Finally, Part VIII summarizes the arguments for reforming current FCA enforcement practices in light of the changes wrought by FERA and the 2009 FCA Amendments.

II. The Expanded Role of the *Qui Tam* Relator

A. Treating the Symptoms But Not the Disease

Allowing *qui tam* relators to bring lawsuits under the FCA permits private individuals to perform a monitoring function for the government and thereby help protect the acquisition system's integrity.[6] Under the FCA, if the government does not bring an action against the defendant, relators may file a civil action in the government's name in return for a

[6] *See generally* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract* Law, 11 PUB. PROCUREMENT L. REV. 103, 103 (2002). Professor Schooner describes "integrity" within the federal procurement arena as the rules of conduct for government personnel and private industry. *Id*.

percentage of any money awarded by the court.[7] If the DoJ declines to intervene in the relator's lawsuit, the FCA allows relators to act as "private attorneys generals" and prosecute a civil action on the Government's behalf.[8] *Qui tam* relators appear to offer an attractive, low-cost alternative to increased public spending for improved oversight capabilities. Through the Act's *qui tam* provisions, Congress grants relators a license to perform the Government's prosecutorial function and outsources what would otherwise be an inherently governmental function.[9]

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[7] *See* 31 U.S.C. § 3730(d)(1)–(4) (2006) (providing, in part, the statutory basis for recovery awards to *qui tam* plaintiffs). If the Government proceeds with an action originally brought by a relator, the relator may receive at least 15% but not more than 25% of the proceeds or settlement obtained from the defendant. *Id.* § 3730(d)(1). If the Government declines to intervene in the relator's lawsuit, the court may award the relator at least 25% but not more than 30% from the proceeds of any judgment or settlement obtained from defendant. *Id*. § 3730(d)(2). The Government is therefore entitled to retain 85% of any recovery obtained from a defendant when the DoJ prosecutes a relator's lawsuit and up to 70% of any recovery obtained without the DoJ's intervention. *See also* 155 CONG. REC., *supra* note 2, at S2425 (remarking that the relator's incentive to bring a civil action on behalf of the Government is the relator's share of pecuniary compensation). *See generally* Press Release, Dep't of Justice, Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than $24 Billion Since 1986 (Nov. 19, 2009), http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.

[8] *See generally* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 680 (2001) (crediting Judge Jerome Frank with being the first legal practitioner to popularize the term "private attorney general" to describe *qui tam* relators). Professor Schooner suggests that "a robust private attorney general regime serves as a utilitarian substitute for a yet-to-be discovered optimal oversight mechanism." *Id*. at 685. *But see* Christina Orsini Broderick, Note, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 954 (2007) (relying on empirical analysis to demonstrate that the Government does not intervene in the overwhelming majority of privately-initiated FCA suits and questioning the "degree" to which these suits serve the public interest).

[9] *See generally* Schooner, *supra* note 8, at 685 (explaining that *qui tam* relators provide the government with a "second-best" alternative to a robust Government oversight regime). *But see* John T. Boese, *Written Statement of the Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in Opposition to S. 2041 The False Claims Act Corrections Act of 2007*, at 2 (Feb. 27, 2008), http://www.ffhsj.com/files/QTam/boese.pdf. In a written statement prepared on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to the 2007 False Claims Act Corrections Act, a noted FCA legal scholar summarized the inherent problem with outsourcing the Government's prosecutorial function this way:

> Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest. A qui tam statute eliminates any incentive for a benevolent exercise of prosecutorial discretion. The

A growing body of statistical data suggests Congress should reevaluate the perceived utility derived from outsourcing FCA prosecutions to *qui tam* relators whenever the government affirmatively declines to intervene in a relator's lawsuit.[10] On an annual basis, the DoJ routinely elects to prosecute only about 20% of all *qui tam* lawsuits it is statutorily required to review.[11] The DoJ's own FCA statistics call into question the justification for allowing 80% of all *qui tam* lawsuits to be prosecuted without government assistance, when over 90% of them will eventually end up being dismissed.[12] Congressional amendments designed to encourage *qui tam* lawsuit filings may bring more civil actions into the courtroom, but do little to improve the government's diminished ability to carry out its acquisition oversight responsibilities.[13]

Providing *qui tam* relators an even greater role in performing the Government's monitoring and regulatory functions likely contributes to an adversarial atmosphere toward contractors that one prominent legal

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> common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good.

Id. (citing J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 583 (2000)).

[10] *See, e.g.*, Broderick, *supra* note 8, at 975 (noting that between October 1987 and September 2004, at least 73% of all *qui tam* actions where the government did not intervene were ultimately dismissed); *see also* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1264 (2008) (noting that 94% of cases declined by the government and prosecuted by *qui tam* litigants result in no monetary recovery to either the relator or the government).

[11] *See generally* Civil Div., U.S. Dep't of Justice, Fraud Statistics—Overview, October 1, 1987–September 30, 2010, at 1–2 (2010), http://www.taf.org/FCA-stats-2010.pdf [hereinafter DoJ Fraud Statistics] (indicating the DoJ intervened in 23% of the *qui tam* suits under review as of September 30, 2010). *See also* Memorandum, U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits (n.d.), http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf [hereinafter DoJ-E.D. Pa. Memorandum] (noting that fewer than 25% of filed *qui tam* lawsuits will result in DoJ intervention).

[12] *See generally* DoJ Fraud Statistics, *supra* note 11, at 9.

[13] *See generally* Schooner, *supra* note 8, at 681 (citing to Jeremy A. Rabkin's observation that allowing private attorneys-general to drive "policy initiatives without taking full responsibility for the consequences" is an abdication of the government's oversight and regulatory functions). *See also* Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179 (1998).

scholar has described as "toxic."[14] A former administrator of the Office of Federal Procurement Policy has lamented that a 2010 advisory opinion by federal ethics officials discouraging participation by acquisition officials in programs sponsored by the National Contract Management Association "reflects a return to the older, dysfunctional view of government-industry communications."[15] Unfortunately, by not screening out more frivolous lawsuits, the DoJ inadvertently reinforces the public's perception that there is a "Global War on Contractors."[16] The Government should therefore assert its proper leadership role in helping tone down the "toxic" attitude toward contractors and, as Attorney General Eric Holder once said, pursue enforcement policies that "promote consistent adherence," and "emphasize the importance of pursuing False Claims Act cases in a fair and even-handed manner."[17]

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[14] *See generally* Elizabeth Newell, *Bad Press Makes Contracting an Unattractive Field* (Feb. 25, 2010), http://www.govexec.com/dailyfed/0210/022510e1.htm (quoting Professor Steven Schooner, co-director of the George Washington University Government Procurement Law Program while testifying before the House Armed Services Committee's Defense Acquisition Reform Panel). Professor Schooner testified to the committee in relevant part:

> The pervasive anti-contractor rhetoric emanating from the media, not-for-profit organizations, the legislature, the executive branch (including, among others, the Justice Department, Defense Contract Audit Agency, and the inspectors general) colors public perceptions of contractors and the acquisition profession. . . . There is more truth to black humor in Jacques Gansler's popular new moniker for the current environment—the "global war on contractors."

Id.; *see also* John T. Bennett, *In U.S., a Global War on Contractors?* (Dec. 1, 2009), http://www.defensenews.com/story.php?i=4399790 [hereinafter *Global War on Contractors*] (quoting former Deputy Under Secretary of Defense for Acquisition Jacques Gansler as describing recent acquisition reform efforts as "a global war on contractors" and "go[ing] in the wrong direction"). *But cf.* John T. Bennett, *U.S. Industrial-Policy Chief: Plan Will Take Time* (Feb. 5, 2010), http://www.defensenews.com/story.php?i=4487622 (quoting Brett Lambert, Dir. of Indus. Policy in the Office for the Assistant Sec'y of Def. for Acquisition, describing one of the DoD's current acquisition policy goals as "[r]e-establishing a true partnership with industry and the financial community").

[15] *See generally* Steve Kelman, *Agencies Should Not Fear Talking to Contractors* (Feb. 17, 2010), http://fcw.com/articles/2010/02/22/comment-steve-kelman-communications.aspx (arguing that "effective communication between government and industry can save money and prevent misunderstandings").

[16] *See Global War on Contractors*, *supra* note 14.

[17] *See generally* Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Guidance on the Use of the False Claims Act in Civil Health Care Matters (June 3, 1998), http://www.justice.gov/dag/readingroom/chcm.htm; *accord* Memorandum from Eric H. Holder, Jr., Deputy Attorney

B. Concerns Arising From Current FCA Enforcement Practices

Allowing relators to litigate *qui tam* actions that have limited chances of success in the courts produces few discernible public benefits and generates unrecorded costs to the public fisc.[18] In a 2008 hearing before the U.S. Senate Judiciary Committee, the Deputy Assistant Attorney General for the DoJ's Civil Division expressed his concerns about the "considerable resources" the DoJ expends supporting relators' lawsuits after the DoJ affirmatively declines to intervene in the suit.[19] Most often, a federal agency will spend publicly funded resources supporting what can become an expensive and protracted civil litigation process between a relator and a defendant.[20] Additionally, if a relator's lawsuit is eventually dismissed, as happens to most *qui tam* suits, then the contractor's litigation costs can potentially be passed back to the

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Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Review of June 3, 1998, Guidance on the Use of the False Claims Act in Civil Health Care Fraud Matters (Feb. 3, 1999), http://www.justice.gov/dag/readingroom/holder-02031999.pdf (formalizing the policy guidance presented in the Deputy Attorney General's June 1998 memorandum). *See also* Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations 17 (Dec. 2006), http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (providing policy guidance on evaluating the use of non-punitive alternatives to criminal prosecution).

[18] Telephone Interview with Rodney Grandon, in Alexandria, Va. (Mar. 30, 2010). Mr. Grandon, formerly the Director, Office of Fraud Remedies, Office of the General Counsel, Department of the Air Force. *See also* Rich, *supra* note 10, at 1259, 1260 (noting that the government, and therefore the public, absorb the litigation costs generated by the relator and defendant while also burdening an overtaxed judicial system).

[19] *See generally* Michael F. Hertz, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Div., The False Claims Corrections Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century 7 (Feb. 27, 2008), http://www.ffhsj.com/files/QTam/testimony_hertz.pdf [hereinafter Hertz Statement].

[20] In 2006, the Government Accountability Office (GAO) undertook a study of FCA litigation trends based on a request from several congressmen. The GAO report provided a comprehensive review of the DoJ's *qui tam* database on closed unsealed cases from 1987 to 2005. The study looked at relator cases where the DoJ intervened in some or all of a relator's claims and determined that it took the Attorney General a median of thirty-eight months to conclude an FCA lawsuit by settlement, judgment or dismissal. The DoJ does not collect data on how long it takes a relator to bring a case to conclusion where the government declines to intervene in a lawsuit. However, given the significant advantage in resources the government can bring to bear on resolving an FCA lawsuit, compared to a private relator, it is more likely that a conclusion can be brought about more quickly with government intervention than without it. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 30 (Jan. 31, 2006), *available at* http://www.gao.gov/new.items/d06320r.pdf.

public as a reimbursable cost for doing business with the Government.[21] By not resolving these lawsuits in a more expedient and efficient manner, the relator is able to drive up the amount of money the public spends on subsidizing private *qui tam* monitoring—with either limited regulation or oversight by the DoJ or the affected government agency.[22]

Because FCA enforcement practices are not consistently pursued using objective case screening criteria, the FCA's incentive structure may function more like a lottery game for relators than a well-regulated system for monitoring fraudulent conduct against the Government.[23] One legal observer has noted that the high dismissal rate for *qui tam* lawsuits prosecuted by relators is attributable to the DoJ's own case screening and selection process.[24] Congress provides the DoJ with the discretionary authority to determine whether the Government should intervene in a relator's lawsuit, affirmatively dismiss the case, or effectively outsource its prosecutorial function to the relator.[25] If the Government elects to

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[21] *See generally* JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST-REIMBURSEMENT CONTRACTING 880–81 (3d ed. 2004) (noting that under GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.205-47(b) (July 2011) [hereinafter FAR], the contractor's incurred costs associated with defending itself against a relator's lawsuit would be allowable "if the matter is dropped by the government after investigation or the contractor is successful in defending itself in a proceeding"). *See also* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1840–41 (June 1996) (identifying several types of impacts on public expenditures resulting from increased *qui tam* litigation activity).

[22] *See generally* Kovacic, *supra* note 21, at 1806–07 (arguing that using *qui tam* relators to perform regulatory and oversight functions as a way to curb agency costs can result in problems when the relator does not "act to maximize taxpayer interests").

[23] *See, e.g.*, Aaron S. Kesselheim, David M. Studdert, & Michelle M. Mello, *Whistle Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832 (2010) (studying the motivations and experiences of 42 whistle-blowers involved in *qui tam* lawsuits alleging FCA violations against pharmaceutical companies). One of the study's relators compared his reaction to receiving a large settlement from a defendant to "hitting the lottery." *Id.* at 1836. *But see id.* (describing a majority of the study's relators perceiving their net financial recovery to be small compared to the personal toll exacted for pursuing an FCA claim).

[24] *See generally* Rich, *supra* note 10, at 1256 (noting the majority of criticism regarding the delegation of prosecutorial discretion to relators arises when the DoJ neither dismisses nor intervenes in a relator's lawsuit). *See also id.* at 1260, 1264 (concluding that the DoJ's reluctance to dismiss relator's lawsuits is largely based on the possibility of a potential recovery obtained from the relator's litigation even though 94% of these non-intervened suits will be dismissed by the courts).

[25] *See* 31 U.S.C. § 3730(c)(2)–(5) (2006); *see also* Rich, *supra* note 10, at 1264–65 (arguing that although the DoJ should be able to evaluate a *qui tam* lawsuit's merits following the investigation into the relator's allegations, it fails to dismiss those lawsuits whose chances for success are assessed as questionable).

outsource its prosecutorial function, it can still recoup up to 60–70% of any resulting monetary recovery; the DoJ therefore has little incentive to dismiss a relator's lawsuit.[26]

A more comprehensive and useful approach to fighting acquisition-related corruption first would exhaust all of the government's available remedies before allowing *qui tam* relators to pursue lawsuits whose merits are questionable or weak.[27] Likewise, the DoJ should dismiss greater numbers of frivolous relator lawsuits instead of passing on this responsibility to the courts. False Claims Act enforcement practices should be reformed by allowing the government agency most affected by the alleged fraud to first attempt alternate dispute resolution (ADR) procedures through any available administrative means before the DoJ affirmatively declines to prosecute a civil FCA action.[28] Empowering agencies to take a greater role in resolving *qui tam* lawsuits through alternate remedies could provide a viable means to resolve potentially weak lawsuits the DoJ would otherwise decline to prosecute through the judicial process.[29] Policymakers should therefore be asking whether

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[26] *See generally* Rich, *supra* note 10, at 1264 (concluding that non-intervened lawsuits have returned $300 million to the public fisc with the government receiving an average of $57,000 per each lawsuit). *But cf.* DoJ Fraud Statistics, *supra* note 11, at 2 (indicating the government recovered a total of $23.5 billion from *qui tam* and non-*qui tam* lawsuits it prosecuted).

[27] *See generally* Michael Davidson, *Combating Small Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213, 233–36 (2008) (recommending legislative changes to the Program Fraud Civil Remedies Act to enhance the Agency's ability to combat acquisition-related fraud). *See also* Rich, *supra* note 10, at 1278 (concluding that the DoJ's reluctance to dismiss non-meritorious *qui tam* lawsuits results in significant costs being borne by defendants and the judicial system).

[28] *See generally* 31 U.S.C. § 3730(c)(5) (2006) (stating that the government may elect to pursue its claims through any alternate remedy available to the government, including administrative proceedings). Available alternate remedies may include, but are not necessarily limited to, the following: agency suspension and debarment proceedings (48 C.F.R. § 9.400 (2003)), the Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801–3812) (2006), and the use of administrative agreements. *See also* U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES ¶ 4.2 (4 June 2008) (stating that all investigations relating to fraud or corruption "shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations"). *Id.* The DoD's Instruction provides a list of approximately fourteen civil remedies and twenty-six administrative remedies that could be used to address a contractor's alleged misconduct. *Id.* ¶¶ E3.2–E3.4.10.

[29] *See generally* Anthony Ogus, *What Legal Scholars Can Learn from Law and Economics*, 79 CHI.-KENT L. REV. 383, 401 (2004) (suggesting that when evaluating legal or regulatory reforms, legal scholars should ask whether the administrative and

employing the government's regulatory response or the private law response is more effective at reducing the administrative and transaction costs associated with private *qui tam* monitoring efforts. Diverting greater numbers of *qui tam* lawsuits into an administrative process, instead of defaulting to civil litigation, would also help ensure FCA enforcement practices are being fairly enforced for all involved parties.

III. The 1986 and 2009 FCA Amendments—An Overview

Prior to the enactment of the 2009 amendments, the FCA had not undergone any significant revision for nearly twenty years. Taken together, the amendments demonstrate Congress's attempt to promote private monitoring and outsourced prosecutions as a viable approach to FCA enforcement. The amendments also illustrate Congress's sometimes testy relationship with the nation's federal courts when it appears the courts have attempted to regulate private monitoring and enforcement efforts.

A. The 1986 FCA Amendments: Increasing Private Monitoring

The 1986 FCA Amendments made several major changes to the Act at a time when Congress perceived that corruption within the Department of Defense (DoD) procurement sector reached crisis levels.[30] Unlike previous revisions to the Act, Congress did not pass the 1986 Amendments in response to widespread allegations of unchecked war

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transaction costs associated with a regulatory response to a market failure are lower or higher than the private law response). Making reasonable attempts to resolve a dispute efficiently and expeditiously before proceeding to trial reflects the Government's desire to minimize both informal and transactional costs associated with civil litigation. *See* Exec. Order No. 12,988 3 C.F.R. 189, 190 (1996), http://www.archives.gov/federal-register/executive-orders/1996.html (declaring that civil justice reform facilitates the just and efficient resolution of civil claims involving the U.S. Government, while also encouraging the filing of only meritorious civil claims).

[30] *See generally* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 7–8 (2009), *available at* http://www.fas.org/sgp/crs/misc/R40785.pdf (providing a summarized list of the 1986 FCA Amendments). For *qui tam* relators, the most important of these changes included the following: a new penalty provision for reverse false claims against the government, 31 U.S.C. § 3729(a)(7) (2006); the inclusion of a whistleblower's protection provision, *id.* § 3730(h)); an increase in the imposable penalty amount from double to treble damages, *id.* § 3729(a); and an increase in the maximum award available to relators for up to 30% of any recovered monies, *id.* § 3730(d)(2)).

profiteering, but out of a growing public concern that government anti-corruption efforts were largely ineffective.[31] Between 1980 and 1985, defense spending nearly doubled and the government's largest defense contractors were engaging in fraudulent business practices.[32]

A lack of confidence in the government's ability to detect and deter fraudulent activity within the DoD prompted Congress to give the FCA its most significant makeover since the American Civil War.[33] Several of the 1986 FCA Amendments reveal Congress's desire to attract a greater number of *qui tam* lawsuits in the hope of curbing what some perceived as the government's inability to properly regulate and oversee procurement system integrity.[34] Rather than address the underlying problems that led up to the perceived crisis in public confidence, one of the amendment's sponsors sought to lay blame on how courts

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[31] In 1863, at President Abraham Lincoln's urging, Congress enacted the FCA to combat the fraudulent contracting practices that undermined the federal government's efforts to supply and outfit the Union Army. DOYLE, *supra* note 30, at 5 (providing a historical overview of the FCA's legislative enactment). Historical research on the FCA's Civil War origins, reveals the bill's sponsor, Senator Jacob M. Howard of Michigan, as stating, "The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator." *Id*. (citing 33 CONG. GLOBE 952–60 (1863)).

[32] *See generally* Martin Feldstein, Remarks at the U.S. Military Acad., West Point, N.Y., Increasing Defense Spending (Nov. 2, 2006), http://www.nber.org/feldstein/WestPoint Speech2006.html. Professor Feldstein is a Harvard University Professor of Economics and President and Chief Executive Officer of the National Bureau of Economic Research. *See also Defense Budget Policy in a Constrained Environment: Hearing Before the H. Task Force Comm. on Budget, Defense and International Affairs*, 100th CONG. 1–3 (1987) (statement of Robert F. Hale, Assistant Dir. Nat'l Sec. Div., Cong. Budget Office), *available at* http://www.cbo.gov/ftpdocs/83xx/doc8379/87doc97.pdf.; *accord* 155 CONG. REC. E1296 (daily ed. Feb. 24, 2009) (noting that in 1985 "45 of the 100 largest defense contractors—including 9 of the top 10—were under investigation for multiple fraud offenses").

[33] *See generally* DOYLE, *supra* note 30, at 5–6.

[34] *Id*. at 7. Several of the 1986 FCA Amendments were meant to enhance the relator's role in the enforcement process including the following changes to the Act:

- Creating a distinct "whistleblower" provision that protected relators from retaliation;
- Increasing punitive sanctions to a penalty of not less than $5,000 nor more than $10,000 per violation and treble damages;
- Increasing the maximum available award to qui tam relators to not more than 30% of any recovery; and,
- Expanding the statute of limitations for filing a claim under the FCA.

Id. at 7–8.

misinterpreted several of the Act's provisions.[35] Additionally, Senator Charles Grassley expressed his concern that "due to limited Government resources, allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient."[36] One legal observer notes that the 1986 amendments incentivized relators to take on the "questionable" FCA cases, but not necessarily replace the government's prosecutorial function.[37] This last point illustrates Congress's expectation that *qui tam* relators would file lawsuits that are less valuable or meritorious than those selected for prosecution by the DoJ. What is omitted from the 1986 FCA Amendments is any guidance to the Attorney General on what measures should be taken to ensure only *qui tam* suits meriting further litigation go forward for prosecution. Thus, the nation's courts, instead of the DoJ, become the primary agent for regulating weak or frivolous *qui tam* lawsuits.

The 1986 FCA Amendments are notable for their attempt to empower and incentivize relators to increase the *volume* of FCA lawsuits being filed on the Government's behalf instead of the *quality* of lawsuits being litigated. Grasping the history behind the 1986 FCA Amendments is important to understanding the political motivations driving the subsequent 2009 FCA Amendments. Congress amended the FCA in 2009 to clarify its legislative intent for the 1986 FCA Amendments.[38] Congressional reformers criticized several judicial decisions they viewed as undermining the Act's usefulness by supposedly discouraging relators from filing *qui tam* lawsuits.[39] The 1986 FCA Amendments also reflect Congress's belief that *qui tam* litigation can succeed where the

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[35] *See generally* 155 CONG. REC., at E1295 (observing that several court decisions broadly interpreted the Act's government knowledge bar and arbitrarily awarded relators' shares which undermined the Act's usefulness). Representative Berman also cited a 1981 Government Accountability Report that concluded "widespread" government fraud had resulted in "loss of confidence in Government programs, government benefits not going to intended recipients, and harm to public health and safety." *Id.* at E1296; *accord* 155 CONG. REC., at S. 2424.

[36] *Id.* at E1296 (citing to testimony and evidence received by the Committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary).

[37] *See generally* Kovacic, *supra* note 21, at 1823 (noting that the 1986 Amendments attempted to reduce reliance on public authorities to prosecute FCA violations). *See also* S. REP. NO. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268, 1986 WL 31937, at *3 (citing a 1981 GAO study that had concluded "that most fraud goes undetected due to the failure of governmental agencies to effectively ensure accountability on the part of program recipients and government contractors").

[38] *See generally* False Claims Clarification Act, *supra* note 1.

[39] *See* discussion *infra* note 41.

government, supposedly, has failed at performing its regulatory and oversight capabilities. As a result, Congress expressed its preference for outsourcing regulatory and prosecutorial functions rather than addressing the underlying problems that gave rise to an atmosphere of permissive corruption. However, increasing the number of *qui tam* lawsuits to abate the perceived lawlessness within the federal procurement system did not hit a tipping point for almost eight years when the number of relator *qui tam* lawsuits finally exceeded those suits initiated by the DoJ.[40]

B. The 2009 FCA Amendments: Congress Clarifies the Act's True Intent

Congressional sponsors heralded the passage of the 2009 FCA Amendments as an attempt to clarify the "true" intent of the 1986 FCA Amendments.[41] When Senator Grassley introduced the Senate version of the 2009 FCA Amendments, he noted that the proposed legislation would protect taxpayer dollars and strengthen the government's hand in combating fraudulent conduct.[42] Senator Richard Durbin, a Senate bill cosponsor, claimed revising the Act would "enhance whistleblowers' ability to shine a light on fraudulent conduct involving government funds, and to hold the perpetrators accountable through legitimate qui tam claims."[43] Senator Patrick Leahy, borrowing a refrain used to rally support for the passage of the 1986 FCA Amendments, noted how several court decisions, including *Totten* and *Allison Engine*, had undermined the Act's effectiveness.[44] The criticism leveled at the nation's courts by the Act's congressional supporters appeared to be reminiscent of the same rhetoric used to garner favorable support for adopting the 1986 FCA Amendments. Following the 1986 Amendments, a handful of judicial decisions were eventually singled out as undermining the Act's scope and reach. Rather than addressing the quality or merits of the vast number of *qui tam* lawsuits that eventually

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[40] *See* DoJ Fraud Statistics, *supra* note 11, at 1 (indicating that *qui tam* lawsuit filings did not surpass Government initiated matters until 1995).

[41] *See* Statement by Sen. Charles Grassley. 155 CONG. REC. S2424 (stating that the purpose of Senate Bill 386 was to clarify the Act's 1986 Amendments and "strengthen" the Act). One of the Act's House sponsors, Rep. Howard Berman, stated that the 2009 FCA Amendments only were meant to "clarify the existing scope of False Claims Act liability." *See generally id*. at E1300.

[42] *See id*. at S2424.

[43] *Id*. at S2428.

[44] *See generally* Statement of Sen. Patrick Leahy *infra* note 79 (arguing that the FCA "must quickly be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis").

end up dismissed as weak or frivolous, Congress elected to focus on changing a handful of court decisions. In 2009, Congress' objective was still the same as it was in 1986—change the law to further incentivize relators to file more *qui tam* lawsuits. The realistic outcome of this objective was an increase in the volume, but not necessarily the quality, of outsourced prosecutions. However, rather than tinker with the incentives and protections designed to encourage relators to file *qui tam* lawsuits as was done in 1986, Congress instead chose to lower the evidentiary standards that might otherwise discourage relators from filing weak lawsuits or asserting legal theories designed to expand the Act's scope and reach.[45]

Attempting to restore the FCA's true intent as expressed in the 1986 FCA Amendments, Congress revised three of the Act's key provisions to increase the volume of successfully litigated *qui tam* lawsuits. These provisions include: eliminating the Act's former requirement that an individual knowingly present, or cause to be presented, a false or fraudulent claim to an officer, U.S. Government employee, or member of the Armed Forces;[46] relaxing the requirement to prove a defendant's creation, use, or causing the making or use of a false record or statement for obtaining payment or approval from the government;[47] and, broadly redefining a claim for triggering liability under the Act.[48] Finally, Congress also inserted a retroactivity provision in the 2009 FCA

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[45] *See generally* John T. Boese, *Civil False Claims Act: The False Claims Act Is Amended for the First Time in More Than Twenty Years As the President Signs the Fraud Enforcement and Recovery Act of 2009*, MONDAQ LTD., Apr. 27, 2009, *available at* 2009 WLNR 10089063. Reflecting on the Act's future impact on defendants and FCA jurisprudence in general, Mr. Boese noted in relevant part:

> The new amendments will adversely affect everyone, all government contractors and subcontractors, all healthcare providers, every public and private grantee and sub-grantee, and every other person, company, and entity that pays money to the government or receives Federal funds, by making it far easier to conduct FCA investigations and to win FCA recoveries. Quite simply, many logical defenses have been eliminated, and those who deal in any way with the Federal government are entering a whole new world in which FCA liability is much broader and easier to prove.

Id.

[46] 31 U.S.C. § 3729(a)(1)(A) (2006).

[47] *Id.* § 3729(a)(1)(B).

[48] *Id.* § 3729(b)(2)(A).

Amendments to legislatively overrule the *Totten* and *Allison Engine* court decisions.[49]

1. The Presentment Clause

Eliminating the Act's previous requirement that a false claim had to be presented directly to a U.S. Government employee, officer, or officer of the Armed Forces significantly expanded the universe of potential FCA violations.[50] Prior to the amendment's passage, liability for presenting a false claim attached only when a person knowingly presented, or caused to be presented, to an officer or employee of the U.S. Government or a member of the U.S. Armed Forces a false claim for payment or approval.[51] Congress revised this provision, also known as the presentment clause, due to concerns that an individual could submit a false claim for payment to a non-governmental actor or entity and potentially escape liability.[52] Eliminating the presentment requirement makes it possible for liability to attach "without qualification or limitation" as to how or where a false or fraudulent claim is submitted for payment or approval.[53] Thus, the 2009 FCA

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[49] *See id.* § 3729 note (explaining that Title 31, subparagraph (B) of § 3729(a)(1), takes effect as if enacted on June 7, 2008, and applies to all claims under the Act that are pending on or after that date).

[50] *Id.* § 3729(a)(1)(A) (stating that liability attaches whenever any person knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval).

[51] *See id.* § 3729(a)(1) (1988 ed.) (stating that liability attaches whenever any person, knowingly presents, or causes to be presented, to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval). The former presentment requirement to an officer, employee, or U.S. agent that previously existed under the section providing for liability under the Act is now used to help define what constitutes "a claim." *See also id.* § 3729(b)(2)(A)(i).

[52] *See generally* 155 CONG. REC. E1297 (daily ed. Feb. 24, 2009) (statement by Rep. Howard L. Berman) (noting that "[T]he Act does not impose liability for false claims on Government funds disbursed for a Government purpose by a Government contractor or other recipient of Government funds, even if such fraud damages the Government or its programs."). *See also* United States *ex rel*. DRC, Inc. v. Custer Battles LLC., 376 F. Supp. 2d 617 (E.D. Va. 2005) (setting aside the jury's verdict for the relator and finding as a matter of law that U.S. Government employees working for the Coalition Provisional Authority in Iraq were not Government agents for liability purposes), *aff'd in part, rev'd in part*, United States *ex rel*. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295 (4th Cir. 2009).

[53] *See generally* 155 CONG. REC., at E1297. *See also Custer Battles*, 562 F.3d at 306 (concluding that the lower court erred in assuming that U.S. Government personnel detailed to the Coalition Provisional Authority could not be working in their official

Amendments broadly expand the definition of who is a government agent, or is acting as a government agent, so long as that individual or entity has some care, custody, or control over U.S. Treasury funds being used to further a government interest.

2. False Records and Statements

The 2009 FCA Amendments significantly lower the threshold for finding a FCA violation by no longer requiring proof that the government actually relied on a defendant's false claim or statement.[54] Under its former version, the Act prohibited individuals from knowingly making, using, or causing to be made, a false record or statement to induce the government to pay or approve a false or fraudulent claim.[55] After the 2009 FCA Amendments, Congress eliminated this requirement so a relator need only prove that a defendant's false record or statement is "material" to the government's payment decision.[56] For a false record or statement to be material, it must have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[57] Proving the government's actual reliance on a false record or statement is no longer a material requirement to proving an FCA violation and thereby makes it more likely that a relator's claim will withstand a defendant's motion for dismissal based on evidentiary grounds.

3. Claims

The 2009 FCA Amendments effectively expand the universe of potential offenses arising under the Act by redefining a claim as any

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capacities as U.S. Government employees). The circuit court explained that the district court erred by assuming the Act required presentment to a U.S. officer or employee must be for payment or approval "by the U.S. government." *Id.* at 307. The court further explained that while Congress included a requirement of payment or approval "by the Government" in § 3729(a)(2), it did not include a parallel provision in § 3729(a)(1). *Id.* Given the statute's plain meaning, the circuit court declined to read a "by the Government" into the Act's presentment requirement where Congress had omitted it. *Id.*

[54] 31 U.S.C. § 3729(a)(1)(B) (2006) (stating liability will attach whenever any person knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim).

[55] *Id.* § 3729(a)(2) (1988).

[56] *Id.* § 3729(a)(1)(B).

[57] *Id.* § 3729(b)(4).

request or demand for federal money or property, regardless of whether or not the United States has title to the sought after money or property.[58] Prior to the 2009 FCA Amendments, a false claim could only be found whenever a claim was made against money or property owned or directly controlled by the United States. However, Congress deliberately rewrote the Act to broadly redefine its scope and reach of what might constitute a claim and thereby expand the potential pool of civil lawsuits filed under the Act.[59] Senator Grassley argued that claims should be given the most inclusive interpretation as possible, thereby ensuring almost any request or demand for payment or property falls under Act's jurisdiction.[60] Representative Howard L. Berman noted that "Congress intended in 1986 to make sure that the FCA would impose liability even if the claims or false statements were made to a party other than the government, if the payment thereon could potentially result in a loss to the government or cause the government to wrongfully pay out money."[61] Likewise, Senator Grassley asserted that the 2009 FCA Amendments clarified that even "non-taxpayer funds under the control of the U.S. Government subject to fraud are actionable under the False Claims Act."[62] By expanding the definition of what constitutes a claim under the Act, Congress expressed its preference for encouraging civil litigation as the primary means of enforcing the law.

In yet another significant expansion of the FCA's jurisdictional reach, a "claim" may also arise when the request or demand for money or property is made to "a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest" and the government

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[58] *Id.* § 3729(b)(2).

[59] *See generally* 155 CONG. REC. E1296 (daily ed. Feb. 24, 2009) (noting that the term should be read broadly and not used as an "exclusive checklist").

[60] *Id.* (stating the Act's definition "applies to any request or demand for Government money or property, regardless of whether it is submitted to the Government or to another entity, such as a Government contractor, agency, instrumentality, quasi-governmental corporation, or a non-appropriated fund"); *see also* Burton, *infra* note 86 (urging Sen. Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary to "clarify that the FCA does not require presentment of a claim to a U.S. official or ownership by the federal government of the relevant funds").

[61] *See generally* 155 CONG. REC., at E1297.

[62] *See generally id.* at S2424. It is not readily apparent from Sen. Grassley's remarks what he meant by the use of the term "non-taxpayer" funds. The Act defines a claim as a demand or request for money or property where the U.S. Government has provided *any* portion of the money or property being requested or demanded. *Id.* (emphasis added); *see also* 31 U.S.C. § 3729(b)(2)(A)(i)(I) (2006).

"provides or has provided any portion of the money or property requested or demanded."[63] Expanding the claim definition now makes it possible for the government to unilaterally create an agency relationship with governmental and non-governmental actors whenever or wherever a request or demand for payment is to be satisfied with funds or property drawn from the public treasury.[64] Redefining the Act's claim definition may allow relator's to allege novel legal theories about agency relationships that would not have been previously considered actionable under the former Act.

4. Retroactive Application

Inserting a retroactivity clause into the 2009 FCA Amendments was a legislative means to overturn the judicial interpretations set forth in both the *Totten* and *Allison Engine* decisions. At least one congressman, Rep. Berman, proclaimed that the House version of the 2009 FCA Amendments included a retroactivity provision so as "to avoid the extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 FCA amendments."[65] However, the focus of the Act's retroactivity clause was most likely the Supreme Court's *Allison Engine* decision—decided on June 9, 2008, just two days after the Act's retroactive provision was meant to take effect.[66] Senator Grassley expressed his desire to create a unified body of jurisprudence by announcing the 2009 FCA Amendments would "bring a level of reason and sanity instead of the current hodgepodge of laws across

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[63] *See generally* 31 U.S.C. § 3729(b)(2)(A)(ii). *See also id.* § 3729(2)(A)(ii)(I). The revised FCA definitions do not include a description of what might constitute a "government interest" for purposes of defining a claim. *Id*.

[64] *Id.* (explaining that "[a]ny fraud that reduces the effectiveness of programs and initiatives the Government has sought to advance also undermines the Government's purpose in supplying funding support").

[65] *See* 155 CONG. REC. E1295, E1300 (daily ed. June 3, 2009).

[66] Senator Leahy, who cosponsored the Senate version of the Act, expressly noted that one of the primary motivations to amend the FCA was to reverse the judicial decisions in *Allison Engine* and *Totten II*. *See generally* Press Release, Office of U.S. Senator Patrick Leahy, Leahy, Grassley Introduce Anti-Fraud Legislation: Bill Would Give Federal Government More Resources to Combat Mortgage Fraud (Feb. 5, 2009), http://leahy.senate.gov/press/press_releases/release/?id=c556b483-a161-4e19-894d-dc9221b8cac3. *See also* discussion *supra* note 58 (describing Assistant Deputy Attorney General Burton's recommendation to Sen. Leahy that the Senate Judiciary committee "consider additional modifications to address the impact" of the Supreme Court's *Allison Engine* decision).

various circuit courts of appeals.[67] Inserting a retroactivity clause into the Amendments works to either reverse any existing decisions, or restrict any further judicial interpretations deemed antithetical to the Act's purpose.[68]

C. Defining the Act's Scope and Reach: Two Key Judicial Decisions

Several years after the 1986 FCA Amendments' passage, two key judicial decisions limiting the FCA's jurisdictional scope and reach became the focus for criticism by *qui tam* relators and their congressional supporters.[69] In a *déjà vu* moment from almost twenty-five years before, Senator Grassley decried what he described as a hodgepodge of FCA decisions that undermined the FCA's intent.[70] Senator Grassley, among others, reserved his strongest criticism for the Court of Appeals for the District of Columbia Circuit Court's *Totten v. Bombardier* decision and the U.S. Supreme Court's *Allison Engine v. U.S. ex rel. Sanders* decision.[71] The 2009 False Claims Clarification Act title reveals Congress's desire to clarify the Act's true intent for the nation's courts.[72] Understanding how these amendments were passed into law also demonstrates congressional favoritism for promoting outsourced FCA prosecutions despite the relatively high dismissal rates for the vast majority of *qui tam* prosecutions.

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[67] *See* 155_CONG. REC. S2424, at S2425 (stating that the Supreme Court's *Allison Engine* decision created a legal loophole that threatened to undermine the Act's spirit and intent).
[68] *Id*.
[69] *See generally* 155_CONG. REC., at S2424. *See also* Press Release, Grassley, Durbin, Leahy, Specter Sponsor Legislation to Fortify Taxpayers Against Fraud (Sept. 12, 2007), http://pogoblog.typepad.com/pogo/2007/09/legislation-to-.html (describing the senate bill's sponsors collective intent to amend the FCA in response to several important judicial decisions viewed as narrowly restricting the Act's jurisdictional scope).
[70] *See generally* 155 CONG. REC., at S2424, S2425 (suggesting that these two key court decisions effectively undermined the 1986 FCA Amendments' spirit and intent).
[71] *Id*. Senator Leahy introduced the 2009 Fraud Enforcement and Recovery Act legislation on the senate floor and declared that the FCA's effectiveness had, "been undermined by court decisions which limit the scope of the law and allow subcontractors paid with government money to escape responsibility for proven frauds." 155 CONG. REC. S1681, 1682 (daily ed. Feb. 5, 2009) (statement of Sen. Patrick Leahy introducing S. 386, the Fraud Enforcement and Recovery Act of 2009).
[72] *See* discussion, *supra* note 1; *see also* Letter from John T. Boese, to the Honorable Patrick Leahy, Chairman, Comm. on the Judiciary 3 (Mar. 19, 2008), http://www.friedfrank.com/files/QTam/John%20T.%20Boese%20Letter%20on%20S.%202041.pdf [hereinafter Boese Letter] (describing the Totten decision as having a limited impact on FCA prosecutions).

1. Totten v. Bombardier[73]

In *Totten v. Bombardier*, the D.C. Circuit Court concluded that in order for liability to attach under the FCA, a false or fraudulent claim has to be presented to an officer or employee of the U.S. Government to satisfy the Act's presentment requirement.[74] Writing for the court's majority, then Circuit Judge John G. Roberts explained that the court's analysis of the presentment clause would begin and end with the Act's statutory language.[75] The question before the Court was whether a federal grantee, the National Railroad Passenger Corporation (Amtrak), who had received grant funds drawn from the public treasury and allegedly used them to pay out a false claim, was an authorized government agent for the presentment requirement.[76] The relator argued that because public funds were involved, a false claims submission to Amtrak acted as the functional equivalent of presenting a false claim to the federal government.[77] Focusing on the statute's plain meaning, the Court rejected the relator's argument and determined the language of the

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[73] United States *ex rel.* Edward L. Totten v. Bombadier Corp. & Envirovac, Inc., 380 F.3d 488 (D.C. Cir. 2004).

[74] *See id.* at 502. *But see id.* at 503 (finding that 31 U.S.C. § 3729(a)(2) (2006) does not impose a presentment requirement) (Garland, M., dissenting)).

[75] *See id*. at 496. As the *Totten* Court noted,

> [I]f the overriding intent of Congress were in fact to delete the requirement that claims be presented to a Government officer or employee, Congress could readily have done just that - amend subsection (a)(1) to provide that claims be presented to the Government or a *grantee* or *recipien*t of Government funds.

Id. *See also* 31 U.S.C. § 3729(a)(1) (1988 ed.) *infra* note 76. For liability to attach, the government or relator must prove the defendant presented or intended to present a false claim for payment or approval to to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States.

[76] *See Totten*, 380 F.3d at 490 (affirming the district court's opinion dismissing the relator's complaint and determining the plain language of § 3729(a)(1) requires a false claim to be presented to an officer or employee of the government before liability can attach); *see also* United States *ex rel*. Totten v. Bombardier Corp., No. 98-0657, mem. op. at 7, 2003 WL 22769033 (D.D.C. Sept. 3, 2003).

[77] *See Totten*, 380 F.3d at 491–92. The circuit court's decision significantly narrowed the universe of potential *qui tam* lawsuits seeking to expand the Act's liability provisions whenever public funds were used to satisfy a false claim. *See generally* Boese Letter, *supra* note 45, at 13 (observing that *Totten* potentially would have a significant impact on the government's larger federal block grant programs).

Act's presentment requirement was not broad enough to support the relator's assertion.[78]

Senator Grassley, among others, assailed the D.C. Circuit Court's *Totten* decision for relying upon the FCA's statutory presentment requirement to preclude recovery of public funds where a false claim for payment is presented to a contractor or someone other than a government employee.[79] Eliminating the Act's presentment clause would therefore remove a significant evidentiary hurdle for the government and *qui tam* relators; claimants would only have to demonstrate that someone with an agency relationship with the government received a false or fraudulent claim for payment or approval to establish a prima facie case.[80] Eliminating the presentment requirement also raises questions about when and how the government may create an agency relationship with anyone who has received, controls, or exercises custody over public funds or property.[81]

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[78] *See Totten*, 380 F.3d at 496 (noting in *obiter dictum* "we can remain agnostic on the question whether Congress intentionally left the presentment requirement in *Section 3729(a)(1)* or simply forgot to take it out").

[79] *See* 155 CONG. REC. S2425 (daily ed. Feb. 24, 2009) (describing the Court's *Totten II* decision as the first of several cases that "created problems for the False Claims Act"); *see also* 155 CONG. REC. S.1682 (daily ed. Feb. 5, 2009) (statement by Sen. Patrick Leahy introducing S. 386, The Fraud Enforcement and Recovery Act of 2009). Senator Leahy stated, "The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and allow sub-contractors paid with government money to escape responsibility for proven frauds." *Id.*

[80] Congress did establish at least one limitation to the Act's expanded liability provisions. *See, e.g.*, 31 U.S.C. § 3729(b)(2)(B) (2006) (excluding from the Act's claim definition any requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property); *see also* Boese Letter, *supra* note 45, at 11 (arguing that the then-proposed FCA Amendments required modification to comport with judicial decisions rejecting liability theories based on fraud being committed against federal employees who are paid from the public treasury). Mr. Boese illustrated his point by referencing a *qui tam* lawsuit where a relator sued the United Way for allegedly misrepresenting its eligibility to participate in the Combined Federal Campaign. *Id.* (citing United States *ex rel.* Bustamante v. United Way/Crusade of Mercy, Inc., No. 98C5551, 2000 WL 690250, at *4 (N.D. Ill. May 25, 2000)).

[81] *See generally* Michael Murray, Comment, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 YALE L.J. 981, 985 (2008) (concluding that the *Totten* court limited the expansion of FCA liability as a way of protecting individuals who were unaware they were associating with the Government).

2. Allison Engine v. United States *ex rel.* Sanders[82]

A unanimous U.S. Supreme Court declared that under 31 U.S.C. § 3729(a)(2), liability only attaches if a defendant's false record or statement is material to the government's payment decision.[83] Like *Totten*, the Court rejected the government's request to examine the Act's legislative history and conclude that liability should attach whenever a defendant's false statement results in a payment or claim approval.[84] The Court rejected the government's contention that a plaintiff asserting a claim need only demonstrate that "government money was used to pay the false or fraudulent claim."[85] By rejecting the government's request to examine the FCA's legislative history, the Court ultimately provided Congress further impetus for introducing legislation intended to clarify the 1986 FCA Amendments and including a retroactivity provision to invalidate *Allison Engine*'s precedential value in future lawsuits.[86]

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[82] 553 U.S. 662 (2008).

[83] *See generally id*. at 667 (noting that 31 U.S.C. § 3729 (a)(2) requires that a claimant must make a false record or statement with the intent to get the government itself to pay a claim).

[84] *Id*. at 2126 (concluding that a plaintiff must demonstrate how a defendant's conduct materially affected the Government's payment decision on a false claim).

[85] *Id*.; *see also* Peter B. Hutt & Steven C. Wu, Allison Engine*: The Supreme Court Addresses Liability Under the False Claims Act*, 44 PROCUREMENT L. 13 (Fall 2008) (observing that by requiring a defendant's false record or statement to be material to the government's payment decision, the Supreme Court foreclosed future liability claims where "the direct link between the false statement and the government's decision to pay or approve a false claim is too attenuated to establish liability").

[86] *See generally* M. Faith Burton, Acting Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep't of Justice (Feb. 24, 2009), http://www.friedfrank.com/files (requesting Sen. Leahy, the Senate Judiciary Committee Chairman, introduce for the committee's consideration several modifications to the proposed 2009 FCA Amendments so as to address the Supreme Court's *Allison Engine* decision). In an appendix to Ms. Burton's letter, she expresses the Department's view that the Supreme Court unduly narrowed the jurisdictional scope of § 3729(a)(2) and (a)(3). *Id*. app. 3. The letter goes on to state in relevant part:

> *Allison Engine* will require the government to expend substantial time and resources proving an intent requirement that, in our view, Congress never intended. Indeed, the fact that the Supreme Court imposed such a requirement in a classic case of fraud on the Treasury —a subcontractor alleged to have supplied defective parts for use in naval vessels—demonstrates the problems with this decision, and the appropriateness of a legislative response.

Id.

The Supreme Court used its *Allison Engine* decision to validate the FCA's mandatory presentment requirement expressed in *Totten* and rejected the Sixth Circuit Court's conclusion that the FCA's presentment requirement did not apply under 31 U.S.C. § 3729(a)(2) and (a)(3).[87] The underlying theory of the relator's lawsuit asserted the defendants had violated the FCA by fraudulently submitting false compliance certifications to a prime contractor in order to obtain payments for work that did not conform to the government's required contractual specifications.[88] The District Court dismissed the relator's action after finding that the defendant's false compliance certifications had been submitted to a prime contractor and not the Government as required.[89] Reversing the lower district court's findings, the Sixth Circuit Court of Appeals concluded the defendants' intent to submit false certifications to obtain payment from a prime contractor would violate the law.[90] By determining that false claim presentment to a government official was not a prerequisite to finding liability, the Sixth Circuit Court's decision ultimately represented a significant departure from the D.C. Circuit Court's *Totten* decision.

The Supreme Court rejected the Sixth Circuit Court's interpretation of 31 U.S.C. § 3729(a)(2) by finding the lower court had "impermissibly" deviated from the statute's plain meaning.[91] The

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[87] *See Allison Engine*, 128 S. Ct. at 2123; *see also* United States *ex rel*. Sanders v. Allison Engine Co., 471 F.3d 610, 622 (6th Cir. 2006) (finding that the FCA's plain language and legislative history indicate that while § 3729(a)(1) requires false claim presentment to a government official, § 3729(a)(2) and (a)(3) do not), *rev'd*, 128 S. Ct. 2123 (2008).

[88] *See generally Allison Engine*, 128 S. Ct. at 2126–27. A prime contractor is a term used to describe a person or organization entering into a contract directly with the United States. RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 230 (3d ed. 2007).

[89] *See Allison Eng.*128 S. Ct. at 2127 (noting that the trial court granted defendants' motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a)).

[90] *Id*. at 2128 (acknowledging that the Court's rationale for finding liability under the FCA potentially would contradict the D.C. Circuit Court's *Totten II* decision).

[91] *Id*. *But see* Brief of Senator Charles E. Grassley as Amicus Curiae Supporting Respondents at 7, Allison Engine Co. v. United States *ex rel* Sanders, 128 S. Ct. 2123 (Jan. 22, 2008) (No. 07-214) (arguing to the Supreme Court that the 6th Circuit Court's lower decision correctly held that there is no presentment requirement under 31 U.S.C. § 3729(a)(2) and (a)(3)). Senator Grassley explained his support for the Sixth Circuit's findings in relevant part:

> This statute [31 U.S.C. § 3729(c)] added in 1986 to cover precisely situations such as this, establishes—and was intended to establish—that if the Act was violated by Petitioners, the violation was complete

Supreme Court concluded the FCA's intent requirement, "to get" a false claim paid by the Government, was not the same as getting a false claim paid with "government funds."[92] Citing the *Totten* decision, the Court also noted that eliminating the intent requirement would extend the law's reach to "almost boundless" civil actions that might arise under the False Claims Act.[93]

IV. Examining How the DoJ Outsources its Prosecutions to *Qui Tam* Relators

The government, as represented by the DoJ and the various agencies impacted by *qui tam* actions, should take affirmative steps to improve current FCA enforcement practices—including affirmatively dismissing frivolous FCA lawsuits. The DoJ's *qui tam* intervention decision involves more than just a prognostication about a lawsuit's chances for success, or the size of a potential monetary recovery because the DoJ's decision requires a thoughtful determination as to whether litigation is in the public's best interest.[94] Congress also has vested the DoJ with

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> when the subcontractor submitted a false claim to the shipbuilder. If the shipbuilder failed to present a subcontractor's false claim to the United States (something which could result as easily from book-keeping error as a prime contractor's payment system) but still paid the subcontractor with government money, the subcontractor has used a false document to get a false claim paid, as prohibited by subsection (a)(2).

Id. Senator Grassley's brief asks the Court to reject the D.C. Circuit Court's *Totten* holding and argues that requiring presentment to a federal actor before FCA liability attaches is contrary to Congress's legislative intent. *Id.* at 14.

[92] *Id*. The Court clarified that it was not reading a presentment requirement into 31 U.S.C. § 3729(a)(2); rather, the proof required for liability under the Act need only show that a claimant made a false record or statement with the intent of getting a claim paid or approved by the Government. *Id.* at 2128; *see also* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:27 (Supp. 2009) (explaining how the Court distinguished the implied intent requirement under § 3729(a)(2) from the Act's intent requirement concerning the defendant's knowledge of a statement's falsity).

[93] *Allison Engine*, 128 S. Ct. at 2128.

[94] *See generally* 31 U.S.C. §§ 3730(b)(1), (c)(2)(A) (2006) (authorizing the government to dismiss the relator's lawsuit upon filing a motion with the appropriate court and the court providing the relator with an opportunity to be heard on the government's motion). *See also id.* § 3730(b)(1) (stating that a relator's lawsuit may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting); Kovacic, *supra* note 21, at 1820 (suggesting that Congress delegated a

plenary authority as a gatekeeper in deciding which *qui tam* lawsuits should or should not go forward.[95] Some legal commentators have concluded that the DoJ's lack of intervention in 80% of all *qui tam* lawsuits, coupled with a 90% dismissal rate for declined lawsuits, demonstrates that the DoJ may not be performing its gatekeeping function as aggressively as it could be.[96] As a result, the courts assume *de facto* responsibility for separating what one U.S. Attorney has called "the wheat from the chaff" and the government forgoes a valuable opportunity to help control the various economic costs generated by not dismissing frivolous lawsuits in a more expeditious fashion.[97]

A. The DoJ's Intervention Decision Process

The government's decision as to whether it will intervene in some or all of a relator's claims against a contractor is largely a collaborative process involving Assistant U.S. Attorneys (AUSA) from DoJ's Civil Fraud section, AUSAs at the district level, Federal Bureau of Investigation (FBI) investigators, the affected agency's legal counsel,

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"gatekeeping function" to the DoJ by giving the Attorney General the discretion to dismiss meritless suits).

[95] *See generally* 31 U.S.C. § 3730(b)(1). *See also* Boese Letter, *supra* note 45 at 6 (arguing that declined cases are usually meritless and hurt small businesses that often lack the depth of resources to defend against frivolous lawsuits); Rich, *supra* note 10, at 1255 (explaining the Government's ability to dismiss a *qui tam* suit acts as "a safety valve" to "minimize damage" from potentially frivolous lawsuits).

[96] *See generally* Kovacic, *supra* note 21, at 1820 (noting the DoJ rarely moves to dismiss a realtor's lawsuit). *Accord* Broderick, *supra* note 8, at 975–76 (comparing DoJ's intervention data to the dismissal rates for declined cases and determining that 72% of all *qui tam* lawsuits are frivolous). *See also* Rich, *supra* note 10, at 1259 (suggesting that the DoJ is "not fulfilling its responsibility to counterbalance relator's financial motivations with appropriate consideration of the public interest"); and Elizabeth Murphy, Justice Department Celebrates 25 Years of False Claims Act (1 February 2012), http://www.mainjustice.com/2012/02/01/justice-department-celebrates-25-years-of-false-claims-act/ (quoting John T. Boese, as saying, "[I]t is a myth that the Department can't enforce the False Claims Act without private firms. To argue the Department is not tough enough, smart enough, well enoughed staffed or politically inclined to enforce [the] law is wrong in 1986 and it is wrong today.").

[97] *See, e.g.*, Kathleen McDermott, Qui Tam*: An AUSA's Perspective*, 11 FALSE CL. ACT AND QUI TAM Q. REV. 20, 25 (Oct. 1997), *available at* http://www.taf.org/publications/PDF/oct97qr.pdf (explaining the DoJ and the affected Agency almost exclusively bear the cost of investigating and evaluating the relator's allegations against a contractor). Ms. McDermott also observed "[b]ecause *qui tam* suits divert law enforcement resources from existing investigations, it is imperative to separate the wheat from the chaff as soon as possible." *Id.* at 24.

and other agency investigating personnel.[98] Once the relator files a complaint under seal in federal court, the DoJ assumes responsibility for overseeing and coordinating the investigation into the alleged FCA violations.[99] If the AUSA assigned to review a *qui tam* lawsuit is not prepared to render an intervention decision within sixty days of the relator's complaint filing, the AUSA may request an extension from the court for good cause shown.[100] While the relator's complaint remains under seal, the AUSA, with assistance from a specific agency's fraud counsel, will oversee the investigation into the contractor's alleged wrongdoing. The investigation is usually an interagency undertaking involving FBI agents working with the agency's own law enforcement agents.[101] Once the AUSA determines that sufficient evidence has been collected, the DoJ and the agency will render a decision on whether the government should intervene in the *qui tam* lawsuit.[102]

B. Establishing Screening Guidelines

The DoJ performs a very important function within the FCA enforcement process by determining whether a *qui tam* lawsuit should be prosecuted or dismissed, yet little information is readily available on how

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[98] *See generally* THE NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT (2008), *available at* http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf (detailing the government's interagency efforts to combat procurement fraud throughout the federal acquisition process).

[99] 31 U.S.C. §§ 3730(a)–(b)(2) (stating the Attorney General shall diligently investigate alleged violations of the Act and the relator shall file the complaint with the appropriate court *in camera* where it will remain under seal for at least sixty days).

[100] *Id.* § 3730(b)(2)–(4). It may be time for Congress to reconsider the sixty-day time period it allots to the DoJ for reviewing a relator's FCA complaint and making an intervention decision. In FY 2010, the DoJ identified 573 lawsuits as new *qui tam* matters. *See, e.g.*, DoJ Fraud Statistics, *supra* note 11, at 2. It took the DoJ an average of 12.3 months to review each of these *qui tam* lawsuits before making an intervention decision. *See generally* Grassley Press Release, *infra* note 147, at 1. These figures suggest that the DoJ attorneys requested 573 review extensions before a federal district court judge every sixty days for one year. In sum, the DoJ requested an average of 3438 extensions during FY 2010 so that it could have sufficient time to review each new relator's complaint before making an intervention decision. Amending 31 U.S.C. § 3730(b)(4) to increase the amount of time allotted to the DoJ for reviewing a relator's complaint would reduce the number of annual court filings for seeking an extension and perhaps more accurately reflect the amount of time required to review a relator's complaint. *See* 31 U.S.C. § 3730(b)(4).

[101] *See generally* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 1.

[102] 31 U.S.C. § 3730(b)(4)(A)–(B).

the DoJ performs its statutorily mandated gate-keeping function.[103] This DoJ decision process should address at least two separate but related issues before opting to decline intervention in a relator's lawsuit. First, a determination must be made as to whether the government can marshal sufficient evidence to sustain a conviction against an individual for an alleged FCA violation.[104] If such evidence exists, the AUSA should then determine whether it is in the government's best interest to seek redress through either judicial or administrative means. The U.S. Attorney's Manual enumerates a list of factors for AUSAs to consider when deciding how to proceed against a corporate target for alleged violations of criminal law.[105] Similar factors are not provided for determining how

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[103] The DoJ enjoys significant discretion to dismiss *qui tam* lawsuits. *See, e.g.*, Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 64 (D.C. Cir. 2008) (finding that the FCA does not require the court's consent if the Government moves to dismiss a relator's suit). *But see* Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005) (adopting the two-prong test used by the Ninth Circuit in United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998)). In *Sequoia*, the Ninth Circuit held that the government's motion to dismiss a relator's suit must successfully demonstrate: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. *See id.* at 1145.

[104] To obtain an affirmative judgment against a defendant for violating 31 U.S.C. § 3729, the government would need to demonstrate the contractor's liability by a preponderance of the evidence. *See generally* DOYLE, *supra* note 30, at 19 (citing United States *ex rel.* Sikkenga v. Regence Blue Cross Blue Shield, 472 F.3d 702, 724 (10th Cir. 2006)).

[105] *See generally* U.S. ATTORNEY'S MANUAL § 9-28.300 (Aug. 2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html [hereinafter DoJ-U.S. ATTORNEY'S MANUAL]. Several key factors that could be used to guide an AUSA's decision on whether to intervene in a relator's lawsuit are:

> 1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crimes;
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> 2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
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> 3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
>
> 4. the existence and effectiveness of the corporation's pre-existing compliance program;
>
> 5. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or

to proceed against a contractor in a civil action, but the DoJ's criminal charging factors could easily be adopted as guidelines for assessing how to proceed with a *qui tam* relator's lawsuit. If there is insufficient evidence to prove that an individual's conduct did not amount to an FCA violation, or there are other factors that individually or collectively weigh in favor of declining intervention, then the relator's lawsuit should probably be dismissed.[106]

While an AUSA may exercise her prosecutorial discretion and decide against seeking judicial redress in federal court, this election does not preclude pursuing accountability through any other available alternate remedy or administrative proceeding.[107] Congress has granted the Attorney General the discretion to determine whether it is appropriate to seek relief on behalf of the United States though administrative

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> terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
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> 6. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
>
> 7. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
>
> 8. the adequacy of remedies such as civil or regulatory enforcement actions.

Id.

[106] *Id.* § 9-42.010(F) (noting that when coordinating criminal and civil fraud cases, a civil suit should be instituted "unless there is doubt as to collectability or doubt as to the facts or law"). This policy statement suggests that the DoJ should intervene in a relator's civil lawsuit unless there is some doubt about the suit's merits. Of course, the DoJ may also elect to file its own complaint stating additional facts or pleadings not contained within the relator's original claim. *See generally* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 3 (noting that the DoJ's intervention decision does not necessarily mean that it will endorse, adopt or agree with every factual allegation or legal conclusion in the relator's complaint).

[107] *See generally* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 9-28.300A.9 (suggesting that prosecutors evaluate the adequacy of remedies such as civil or regulatory enforcement actions). *See also* 31 U.S.C. § 3730(c)(5) (2006) (providing that the government may elect to pursue its claim through any alternate remedy available to the government including any administrative proceeding to determine a civil money penalty). The use of the term "governmental interest" is not meant to connote a legal predicate that must be met before the government may pursue its claim through any alternate remedy available to the government.

means.[108] The Attorney General may decide, in consultation with the affected agency, the public's best interest is served by pursuing accountability through administrative channels before opting to decline intervention in a relator's lawsuit.[109]

C. Exploring All Available Alternate Remedies

Congress empowered all federal agencies to pursue accountability for FCA violations through the use of any available alternate remedy including any administrative remedy to determine a civil monetary penalty.[110] Under 31 U.S.C. § 2730(c)(5), the government may use its regulatory authority to pursue an FCA violation in any manner other than judicial redress in federal district court.[111] A plain reading of the FCA's alternate remedies provision indicates that Congress did not seek to impose any limitation on the government's ability to "pursue its claim through any alternate remedy available."[112] Instead of automatically defaulting to *qui tam* litigation when the government opts out of seeking judicial redress, the government should first evaluate whether it is in the public's best interest to pursue administrative redress through all

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[108] *See generally* James B. Helmer, Jr. & Erin M. Schenz, *Alternate Remedies and the False Claims Act*, 40 FALSE CL. ACT & QUI TAM Q. REV. 15 (Jan. 2006) (citing to the D.C. District Court's reliance upon S. Rep. No. 345, at 27, 1986 U.S.C.C.A.N. at 5292, *in* Ervin & Assocs., Inc. v. United States, 2003 U.S. Dist. LEXIS 25064 (D.D.C. 2003)).

[109] *See generally* McDermott, *supra* note 97, at 25 (stating that a U.S. Attorney's intervention decision is "influenced by the affected agency's recommendation and the merits established by the investigation"). *See also* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 1 (stating that the Agency's views are taken into account when determining whether to intervene in a relator's lawsuit).

[110] *See generally* 31 U.S.C. § 3730(c)(5) (2006). *See also* Helmer & Schenz, *supra* note 150, at 108 (describing congressional efforts to ensure the government could pursue any alternate remedy for recovering false claims using an administrative process).

[111] *See* Helmer & Schenz, *supra* note 108 at 121–26 (citing to three separate judicial opinions that determined an administrative proceeding qualified as an alternate remedy under 31 U.S.C. § 3730(c)(5)). One of the opinions cited by the authors held that a settlement agreement between the government and the defendants could also qualify as an alternate remedy. *See generally* United States *ex rel.* Bledsoe v. Comty. Health Sys., 342 F.3d 634, 649 (6th Cir. 2003). However, in a second appeal to the Sixth Circuit, the *Bledsoe* court later concluded that a *qui tam* action that fails adequately to state a claim for relief does not entitle the relator to a portion of any recovery obtained from the defendant through the government's use of an alternate remedy. *See* United States *ex rel.* Bledsoe v. Comty. Health Sys. (*Bledsoe II*), 501 F.3d 493, 522–23 (6th Cir. 2008).

[112] The government's election to assess a "civil money penalty" is in addition to any other available remedy the government may pursue. *See* 31 U.S.C. § 3730(c)(5) (2006).

available remedies before declining intervention in the relator's lawsuit.[113]

Requiring the government to first intervene in a relator's lawsuit before pursuing an alternate remedy is an important procedural requirement providing notice to the relator of the government's intention, while simultaneously protecting the relator's financial interests in any subsequent recovery obtained by the government.[114] In *United States* ex rel. *Bledsoe* v. *Community Health Systems*, the Sixth Circuit adopted the government's position that the FCA required the government's intervention in a relator's lawsuit as a prerequisite to pursuing an alternate remedy.[115] In *Bledsoe*, the government argued that requiring intervention as a prerequisite to pursuit of an alternate remedy protects

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[113] For example, DoD Instruction 7050.05 lists fifty-eight separate actions that may be taken by the DoD's subordinate agencies to redress procurement-related fraud. *See generally* U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES encl. 3 (4 June 2008), *available at* http://www.dtic.mil/whs/directives/corres/pdf/705005p.pdf. The listed remedies are further broken down into subject categories as follows: criminal (18); civil (14); contractual (16); and, administrative (10). *Id.* The instruction also directs that, "[w]hen appropriate, contractual or administrative remedies should be taken *before* final resolution of the criminal or civil case." *Id.* para. 4.3 (emphasis added). The purpose for the prescriptive nature of the DoD's policy is to protect the agency's interests by recovering lost funds where possible and ensuring "the integrity of DoD programs and operations." *Id.*

[114] *See generally* Final Brief for Appellee, United States *ex rel.* Bledsoe v. Comty. Health Sys., No. 01-6375, 2001 WL 35992712 (2001) [hereinafter Appellee's Brief] (asserting that the United States can only pursue an alternate remedy under 31 U.S.C. § 3730(c)(5) if it first intervenes in the relator's lawsuit) [hereinafter Appellee's Brief]. *See also Bledsoe II*, 501 F.3d at 522.

[115] *See* 31 U.S.C. § 3730(c)(5). The Act states in relevant part, "If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section." *Id.* § 3730(d)(1) (noting that a relator is entitled to receive at least fifteen percent but not more than twenty-five percent of any recovery obtained from a defendant "depending upon the extent to which the person substantially contributed to the prosecution of the action"). Likewise, a relator may receive up to ten percent of any recovery where the government's action is based on information other than that provided by the relator. *Id.* This last section could possibly be used as a catch-all provision to reward those relators who significantly assist the government in identifying and stopping an otherwise fraudulent or harmful business practice that otherwise went undetected. *But see Bledsoe II*, 501 F.3d at 522–23 (holding that a relator cannot recover settlement or damage proceeds without first alleging a valid *qui tam* action). The DoJ has taken the position that for a relator's complaint to be valid, and preserve the relator's right to a share of the recovery, the relator's action must satisfy the criteria of Rule 9(b) of the *Federal Rules Civil Procedure* by pleading with particularity. *See generally* Appellee's Brief, *supra* note 114, at *11.

the relator's interest in any subsequent recovery.[116] Requiring government intervention as a matter of policy would therefore protect both the government's and relator's interests while a decision is made as to how a particular case should be resolved.

The government could expand alternate remedy usage to give federal agencies a more active role in resolving the 80% of FCA disputes the DoJ elects not to pursue through judicial redress. The government should only decline intervention in a relator's suit after the DoJ and the affected agency have determined that judicial or administrative redress is not in the public's best interest and a relator's suit is neither frivolous or without merit. This suggested approach would not frustrate the FCA's legislative intent, as relators are still incentivized to help identify fraudulent and corrupt activities being committed against the government.[117] However, the increased use of alternate remedies could encourage agencies to take a more proactive role in the coordination of

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[116] *See generally* Appellee's Brief, *supra* note 114, at *11. *See also Bledsoe II*, 501 F.3d at 522–23. *But see* Thomas L. Harris, *Alternate Remedies & The False Claims Act: Protecting* Qui Tam *Relators in Light of Government Intervention and Criminal Prosecution Decisions*, 94 CORNELL L. REV. 1293, 1310 (July 2009) (arguing that the Government's intervention decision should not affect whether it has pursued an alternate remedy). Harris argues that what should drive the court's determination is whether the government has utilized the information provided by the relator to recover against the same defendant in a manner outside of the qui tam action . . . mak[ing] an actual monetary recovery by the relator in the *qui tam* action, either impossible or futile." *Id.* at 1311–12 (citing United States v. Bisig, No. 100CV335JDTWTL, 2005 WL 3532554, at *4 (S.D. Ind. Dec. 21, 2005)). The problem with this assertion is that not all alternate remedies will or must result in a monetary recovery for the government. Intervention in a relator's suit publicly commits the government to informing all the stakeholders in the FCA enforcement process that it has a public interest in taking over the relator's suit. The government would then have at least three choices it would have to exercise in every *qui tam* lawsuit: intervene to protect a government interest; dismiss those lawsuits that run counter to the public's interest (including frivolous or meritless suits); or, declination when there is no superseding governmental interest to protect.

[117] *See, e.g.*, United States *ex rel*. Folliard v. CDW Tech. Servs. Inc., No. 07-2009, mem. op., 8 (D.C.C. June 28, 2010) (noting that the FCA's statutory language suggests the primary purpose of filing a *qui tam* complaint is to notify the DoJ of an alleged violation); *accord* 31 U.S.C. § 3730(c)(5) (2006) (preserving the relator's rights if any alternate remedy is pursued such that the relator shall have the same right in such proceeding as if the action were resolved through judicial redress). Since the Government would be proceeding with the relator's action, albeit through administrative redress, the relator should still be entitled to receive at least fifteen percent but not more than twenty-five percent of any recovered proceeds from the defendant. *See id.* § 3730(d)(1).

administrative proceedings and employ the full panoply of available remedies before declining to join a relator's lawsuit.[118]

V. A Proposed Model

Using the 2009 FCA Amendments to promote increased levels of *qui tam* litigation without first reforming the systems designed to manage these lawsuits is like treating a patient's symptoms while ignoring her ailment.[119] The impetus for proposing a model for improving how the civil FCA enforcement is threefold. First, the nation's premier anti-corruption law has evolved significantly since introduced in Congress in 1863, but in over 147 years the manner in which it has been enforced has changed very little.[120] The FCA operates like an anomaly because it

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[118] *See generally* Memorandum from The Attorney Gen., U.S. Dep't of Justice, subject: Coordination of Parallel Criminal, Civil, and Administrative Proceedings (July 28, 1997), *available at* http://www.justice.gov/ag/readingroom/970728.htm. The Attorney General stated in relevant part:

> In order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions, and to agency administrative actions, and that they discuss all significant issues that might have a bearing on the matter as a whole with their colleagues. When appropriate, criminal, civil, and administrative attorneys should coordinate an investigative strategy that includes prompt decisions on the merits of criminal and civil matters; sensitivity to grand jury secrecy, tax disclosure limitations and civil statutes of limitation; early computation and recovery of the full measure of the Government's losses; prevention of the dissipation of assets; global settlements; proper use of discovery; and compliance with the Double Jeopardy Clause. By bringing additional expertise to our efforts, expanding our arsenal of remedies, increasing program integrity and deterring future violations, we represent the full range of the government's interests.

Id.; *see also* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 1-12.000, Coordination of Parallel Criminal, Civil, and Administrative Proceedings (updated Feb. 1998) (encouraging "effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies").

[119] *See generally* Kovacic, *supra* note 21, at 1846–47 (observing that "the loss of prosecutorial discretion is one element of a larger loss of institutional power to set policy and be held accountable for its results"). *See also* Rich, *supra* note 10 (noting that through the FCA, Congress essentially has delegated to the relator "the power to fulfill nearly all of the responsibilities typically reserved to the government").

[120] *See generally* DOYLE, *supra* note 30, at 5.

encourages litigation as the primary remedy, despite long-standing government policies promoting ADR for civil disputes in a more cost-efficient and expeditious manner.[121] Second, past concerns or criticisms about the Executive Branch's ability to oversee and regulate the federal acquisition process are largely political and therefore subject to periodic change.[122] Federal Claims Act enforcement requires regulatory reform that emphasizes the role each affected agency must play to resolve alleged contractor misconduct. Third, the historical and empirical evidence for the past twenty-two years continually demonstrates that almost 80% of the *qui tam* suits not prosecuted by the DoJ will eventually end up being dismissed, providing little or no recovery to the government.[123] These lawsuits generate real costs to the public fisc, but the government cedes its ability to control these costs when it declines intervention in a relator's lawsuit.[124]

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[121] *See generally* Exec. Order No. 12,988, *supra* note 29 (directing government counsel to "make reasonable attempts" at resolving litigation disputes "expeditiously and properly *before* proceeding to trial). The President also directed, "Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlement rather than through utilization of any formal court proceeding." *Id.* at 190; *see also* Joshua Bolten & James L. Connaughton, Office of Mgmt. & Budget and President's Council on Environmental Quality, Memorandum on Environmental Conflict Resolution para. 1(d) (Nov. 28, 2005) (setting forth "basic principles for engaging federal agencies in environmental conflict resolution and collaborative problem solving"), *available at* http://www.adr.gov/pdf/ombceqjointstmt.pdf. The authors noted, "Alternate dispute resolution helps make the government more results-oriented, citizen-centered and provides for effective public participation in government decisions, encourages respect for affected parties and nurtures good relationships for the future." The environmental compliance and dispute resolution reforms urged by Bolten & Connaughton reflects similar challenges encountered by the government in managing FCA enforcement practices in the federal acquisition process. The authors' recommendations encourage greater emphasis on agency participation in the dispute resolution process and could be incorporated into the expanded alternate remedies use to resolve FCA disputes.

[122] *See, e.g.*, Schooner, *supra* note 8, at 670 n.144. Professor Schooner captures the observation of a well-known government contracting expert who noted during a previous period of acquisition reform, "The Pendulum swings back and forth. . . . What's going to happen now is that there will be some abuses, and then there will be some hearings, and then congressmen will say they're shocked—and then there will be a new wave of legislation." *Id.*

[123] *See generally* DoJ Fraud Statistics, *supra* note 11.

[124] *See, e.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Aug. 1, 2008), *available at* http://www.actl.com (reporting the results of 1494 Academy of Trial Lawyer fellows who routinely engage in civil litigation practice). Of those surveyed, ninety-two percent of respondents said that the longer a case is litigated the more costs are incurred for both parties; and eighty-five percent thought that litigation in general, and discovery in particular, were too expensive. *Id.* at 4. Sixty-four percent said that the economic

Through a combination of policy and legislative changes, agencies could take a more proactive role in overseeing and regulating civil FCA enforcement for the 80% of relator lawsuits that do not merit prosecution or judicial redress. Resolving the majority of *qui tam* lawsuits by first using any available administrative measure to achieve an expeditious resolution will not require extensive regulatory changes. By utilizing existing administrative processes, the government's ability to realize improved FCA compliance results will decrease the number of *qui tam* lawsuits that are processed through federal court. Likewise, enhancing the use of the Program Fraud Civil Remedies Act (PFCRA) and Suspension and Debarment (S&D) process can provide agencies the means to take a more proactive role in resolving FCA disputes.

A. Incentivizing Government Intervention

Congress should properly resource and empower agencies to assume greater oversight and regulatory responsibilities for FCA enforcement within the federal acquisition system. With the proper mix of agency incentives and external monitoring by the DoJ, the majority of *qui tam* lawsuits could be put on track for resolution through alternate remedies. If agencies are properly resourced, then maintaining government control over the FCA enforcement process can be accomplished using administrative procedures.

A new initiative should develop a cost mechanism to account for the public resources currently being spent to support *qui tam* litigation. Once these "unseen" costs are captured, an agency will be better positioned to justify increased resource allocations to help regulate and enforce FCA compliance. Congress should also grant agencies the authority to retain a portion of any proceeds recovered through the use of alternate remedy procedures. Like the DoJ, agencies could then use this money to help fund or offset the costs associated with conducting FCA enforcement, compliance and dispute resolution efforts, similar to a working capital fund.[125] Because Congress already has granted a similar exception to the

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models of many law firms encourage more discovery than is necessary. *Id.* Ultimately, these costs are passed back either indirectly by the contractor to the public in the form of reimbursable costs, or more directly when agency resources are being utilized to support resource exhaustive discovery requests.

[125] *See, e.g.*, Establishment of a Working Capital Fund, Debt Collection Improvement, 28 U.S.C. § 527 (2006) (authorizing the establishment of a working capital fund for the DoJ and allowing the Attorney General to credit "up to 3% of all amounts collected pursuant

DoJ, the same external monitoring and reporting controls imposed on the DoJ could be imposed on other agencies to ensure the funding program's integrity and transparency. Granting agencies the authority to keep a portion of any recovery obtained through the FCA's alternate remedies provision would help offset unreimbursed costs to the public fisc.[126]

Increasing the use of alternate remedies should not diminish a relator's incentives to file *qui tam* suits since the FCA already provides that a relator's rights are identical to the government seeking judicial redress.[127] The agency should take on the responsibility of first attempting to resolve a relator's FCA claims against a defendant before the DoJ affirmatively declines to take over the relator's lawsuit. Since an agency's actions are reviewable by the DoJ and the court in which the lawsuit was filed, the relator helps monitor the agency's actions throughout the alternate remedy process.[128] Giving agencies an opportunity to resolve *qui tam* lawsuits that the DoJ declines to prosecute would help reduce the overall volume of weak or frivolous *qui tam* lawsuits, while potentially helping expedite the resolution of other suits that might otherwise languish in civil litigation.

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to civil debt collection litigation activities of the Department of Justice"). Allowing agencies to keep a portion of any recovery under the False Claims Act would require Congress to first grant the agency an exception to the Miscellaneous Receipts Act. *See* 31 U.S.C. § 3302(b) (requiring that any Government official or agent receiving money from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim); *see also* Memorandum of Understanding (MOU) between the Def. Fin. & Accounting Serv. (DFAS), the Dep't of the Army, the Dep't of Justice (DoJ), and the U.S. Courts, subject: Collection of Army Procurement Fraud Recovery Funds (June 10, 2010) (establishing an inter-agency understanding to ensure the timely return of procurement fraud funds to Army command accounts before fund cancellation) (on file with author).

[126] *See generally* Brian D. Miller, *Five Ideas to Fight Fraud that IG's Should Be Interested In* ¶ 5 (30 June 2008), http://oig.gsa.gov/otherdocs/Five_ideas_to_fight_fraud.pdf (recommending that agencies be allowed to retain a portion of any recovery obtained from a contractor through the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801–3812). Mr. Miller is the Vice Chair of the National Procurement Fraud Task Force, Co-Chair of the Task Force's Legislation Committee, and the General Services Administration's Inspector General. *Accord* NPFTF White Paper, *infra* note 171, at iv (proposing the establishment of a working capital fund, "possibly located at the DoJ and comprised of a portion of procurement fraud-related recoveries," to be used for funding various Inspector Generals' fraud investigations and related activities).

[127] *See* 31 U.S.C. § 3730(c)(5).

[128] *See id.* §§ 3730(c)(2)(A)–(B) (granting the relator the opportunity to be heard on a Government motion to dismiss and at the hearing of any government proposed settlement).

B. Enhancing Existing Agency Remedies

Once an agency opens an investigation into a defendant's alleged misconduct, the affected agency should begin coordinating with the assigned AUSA to help develop a comprehensive remedies plan.[129] If the DoJ and the agency determine that a contractor has committed fraud against the government, the DoJ should intervene to seek accountability through judicial redress. However, if the investigation reveals that the contractor's conduct does not merit seeking judicial redress, then the DoJ should notify the agency that it intends either to dismiss the lawsuit or seek resolution through an alternate remedy. At this juncture, the agency should take the administrative lead in resolving the relator's *qui tam* lawsuit with the DoJ providing oversight and assistance to the agency and the relator acting as a monitoring agent over the agency.

Two of the most powerful, but perhaps underutilized, administrative remedies available to agencies are the Program Fraud Civil Remedies Act (PFCRA) and the Suspension and Debarment (S&D) process. The primary difference between them is the latter is designed to protect the Government's interests by looking prospectively, while the former operates as an adjudicative process and looks back retrospectively to establish accountability. The PFCRA has been criticized as being generally ineffective and administratively cumbersome, thereby making it less desirable as an alternate remedy option.[130] An agency could use its S&D process, where appropriate, to examine a relator's allegations of fraud against a contractor.[131] For the Air Force, the S&D process is an

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[129] *See, e.g.*, U.S. DEP'T OF THE ARMY, REG. 27-40, LITIGATION para. 8-8a (19 Sept. 1994), *available at* http://www.army.mil/usapa/epubs/pdf/r27_40.pdf (advising counsel assigned to the Army's Procurement Fraud Division to develop a "comprehensive remedies plan" for each significant investigation into a contractor's alleged fraudulent activities).

[130] *See generally* Davidson, *supra* note 27, at 220–21 (describing the systemic challenges an agency faces when attempting to bring an action under the Program Fraud Civil Remedies Act (PFCRA).

[131] The agency's authority to suspend or debar a contractor is premised upon the principle that the government should only be contracting with responsible individuals. *See generally* FAR, *supra* note 21, 9.402(a) (prescribing the policies and procedures governing the debarment and suspension of contractors by executive agencies). A contractor who, allegedly, has violated the law or a regulatory statute, may be ordered by the agency head to show cause as to its present responsibility to continue contract performance for the government. *See, e.g.*, Delta Rocky Mountain Petroleum, Inc. v. Dep't of Def., 726 F. Supp. 278, 280 (D. Colo. 1989) (finding that the test for whether debarment is warranted is the contractor's present responsibility). Additionally, a debarment sanction is a non-punitive means of ensuring compliance with statutory goals and protecting the government's interests. *See generally* Janik Paving & Constr. v. Brock,

effective tool for examining a contractor's business integrity, honesty, and capability to perform.[132] Additionally, agencies can aggressively wield the FAR Mandatory Disclosure Rule, FAR 52.203-13(b)(3), as a valuable administrative tool for gaining a contractor's compliance with an agency's request for demonstrating ethical business conduct.[133] With a few additional legislative changes, both the PFCRA and the S&D processes could become the preferred means for seeking redress in the majority of *qui tam* lawsuits alleging contractor fraud against the Government.

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828 F.2d 84, 91 (2d Cir. 1987) (noting that "a measure, such as debarment, may incidentally punish while it deters a statutory violation does not transform it into a purely punitive sanction").

[132] *See generally* Rodney A. Grandon & Christine S. McCommas, Administrative Agreements/Compliance Agreements 4 (providing a general overview of the Air Force's approach to the Suspension and Debarment (S&D process) (slides on file with author). Ms. McCommas is the former Chief, Army Procurement Fraud Branch, Department of the Army.

[133] *See generally* FAR, *supra* note 21, 52.203-13(b)(2)–(3). The Contractor Code of Business Ethics and Conduct, also known as "FAR Mandatory Disclosure Rule," states in relevant part that the Contractor shall:

> (2)(i) Exercise due diligence to prevent and detect criminal conduct; and
>
> (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> (3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has *credible evidence* that a principal, employee, agent, or subcontractor of the Contractor has committed—
>
> (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
>
> (B) A violation of the civil False Claims Act (31 U.S.C. 3729–3733).

Id. (emphasis added). Once the government has intervened in the relator's lawsuit and intends to seek redress through an alternate remedy, the agency should draft and forward a contact letter to the contractor carefully outlining the allegation(s) against the contractor and reminding the contractor of its contractual obligations under, *id.* 52. 203-13. *See also* Office of the Deputy Inspector Gen. for Pol'y and Oversight—Investigative Pol'y and Oversight, Pol'y & Programs Dir. (describing the DoD's Mandatory Disclosure program as "an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation"), *available at* http://www.dodig.mil/Inspections/IPO/voldis.htm.

1. The Program Fraud Civil Remedies Act

The PFCRA can and should become an agency's primary tool for fighting contractor corruption that does not merit prosecution under the FCA.[134] One legal commentator has described the PFCRA as "an administrative or mini version of the civil False Claims Act."[135] While primarily designed to fight small dollar fraud, the relatively low jurisdictional threshold hardly justifies the investment of agency resources to enforce the PFRCA. The National Procurement Fraud Task Force's Legislative Committee has expressed its support for extending the PFCRA's jurisdiction by increasing the monetary ceiling under which claims may be resolved.[136] The Committee specifically recommended raising the PFCRA's jurisdictional limit from $150,000 to $500,000 "to keep up with inflation from 1986 to today."[137] It might make even more sense to tie the PFCRA's jurisdictional ceiling to a U.S. Attorney's authorized settlement authority so that a supervisory AUSA overseeing a *qui tam* action could easily seek approval on any potential settlement offers.[138] As a result, the PFCRA jurisdictional limit could be

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[134] Michael Davidson's article on combating small dollar fraud with the PFCRA is an excellent primer on the law's background, the challenges agencies historically have faced when trying to apply it, and several recommendations as to how the law could be changed to increase its overall effectiveness as a fraud fighting tool. *See* Davidson, *supra* note 27, at 213.

[135] *Id.*

[136] *See generally* NPFTF White Paper, *supra* note 171, at 8.

[137] *Id.* (citing 2008 U.S. Bureau of Labor Statistics to demonstrate that "[i]t takes nearly $300,000 in today's dollars to equal the purchasing power of $150,000 in 1986").

[138] *See generally* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 9-42.010(I) (citing Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (Apr. 6, 1995)). The Manual states in relevant part:

> Any fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds $1,000,000 will "normally" not be delegated to United States Attorneys. Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed $5,000,000 where the circumstances warrant such delegations. Any authority exercised by the United States Attorneys under Directive No. 14-95 may be re-delegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation.

Id. When the above directive was drafted in 1995, the DoJ Civil Division only reviewed 269 *qui tam* FCA lawsuits compared to 573 lawsuits for 2010. *See generally* DoJ Fraud

raised to $1,000,000 with limited changes to the DoJ's current regulations. This change would increase the overall number of potential disputes that could be resolved under the PFCRA.[139]

2. The Suspension and Debarment Process

Suspension and debarment (S&D) proceedings provide agencies with another effective means of evaluating whether a contractor has engaged in a course of conduct that is detrimental to the government's interests.[140] Unlike the PFCRA, the S&D process promotes regulatory compliance over punishment as its ultimate goal.[141] The consequences of being suspended or debarred, while not punitive in nature, are considered by some to be detrimental in their effect.[142] Thus, the S&D process provides

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Statistics, *supra* note 11, at 1–2. Given the increased volume of FCA litigation that has occurred since 1995, the Attorney General should examine whether increasing the current regulatory settlement authorities outlined under Civil Division Directive No. 14-95 could lead to a more efficient administration of FCA enforcement and compliance. *See also* Davidson, *supra* note 27, at 235 (recommending the DoJ's PFCRA approval authority parallel its FCA approval authority).

[139] Actions brought by agencies under the PFCRA are heard before an administrative law judge (ALJ). *See generally* Davidson, *supra* note 27, at 227. Not all agencies have ALJs, so an agency may have to pay to arrange for an ALJ to preside over a PFCRA hearing. *Id.* This requirement is an unreimbursed cost to the government and may serve as a disincentive for using the PFCRA by those agencies, like the DoD, that lack an ALJ. However, if Congress were to approve legislation allowing agencies to keep a portion of any recovery obtained under 31 U.S.C. § 3730(c)(5), then those agencies could use these monies toward funding a dedicated ALJ position.

[140] *See generally* FAR, *supra* note 21, 9.402 (stating that the "serious nature of debarment and suspension requires that sanctions be imposed only in the public interest for the government's protection"). The causes for suspension include, among other things, the agency receiving adequate evidence of "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor or subcontractor." *See also id.* 9.407-2(9) (describing "adequate evidence" as information sufficient to support the reasonable belief that a particular act or omission has occurred); *accord id.* 2.101. An agency's S&D official has significant discretion in reviewing a contractor's business practices as an alternate remedy to seeking judicial redress for an alleged FCA violation.

[141] *See generally id.* 9.402 (noting that S&D proceedings should not be used by agencies as a means to punish a contractor).

[142] *See generally id.* 9.405-9.405-2 (describing the consequences resulting from a contractor being listed on the Excluded Parties List System (EPLS)). As a practical matter, once a contractor has been listed on the EPLS, any subsequent attempts to compete for a government contract award will be difficult since a contractor's "Past Performance" is invariably a required source selection criterion. *See also* RALPH NASH & JOHN CIBINIC, FORMATION OF GOVERNMENT CONTRACTS 420 (3d ed. 1998) (observing that the Comptroller General has determined that the causes for suspension under FAR

the government with an effective alternate remedy for reviewing a contractor's responsibility in light of any derogatory information that is either self-disclosed or obtained during the FCA investigative process.

Agencies should expand the use of S&D proceedings as an alternate remedy to seeking administrative redress to alleged FCA violations. Once the government intervenes in the relator's suit, the agency can issue a "show cause" letter to the contractor outlining the relevant allegations against the contractor and reminding the contractor of his disclosure obligations under the FAR Mandatory Disclosure Rule.[143] If an agency's S&D official decides that proceeding with a S&D hearing is unnecessary, the official may still require the contractor to enter into an administrative agreement to ensure the contractor will meet its obligations to the government.[144] The agency's compliance agreements may require the contractor to adopt ethics and compliance training standards, hiring an independent monitor, and paying any of the government's costs associated with administering an agreement.[145] The compliance agreement is essentially a settlement agreement between the agency and the contractor; thus, any financial recovery paid by the contractor to the agency could be used to compensate the relator for assisting the government in performing its regulatory and compliance function. The agency's compliance agreement, like the agency debarring official's S&D determination, could be made publicly available and also

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9.407-2 may be used to evaluate a bidder's integrity). *But see How Convicts and Con Artists Receive New Federal Contracts: Before the H. Comm. On Oversight and Gov't Reform*, 111th Cong. 123–25 (2009) (statement of Scott Amey, Gen. Counsel, Project on Government Oversight) (testifying before the House Committee on Oversight and Government Reform that federal agencies "under-utilize suspension and debarment against large contractors that supply the majority of the $530 billion worth of goods and services to the federal government each year"). *Id.* Mr. Amey is the General Counsel and Senior Investigator with the Project on Government Oversight (POGO). In his testimony, Mr. Amey observed there were only 4296 suspensions or debarments of contractors in FY 2007 which was down from 9900 in FY 2005. *Id.* (citing data obtained from the Council of the Inspectors General on Integrity and Efficiency).

[143] *See* FAR, *supra* note 21, para. 52.203-13(b)(3)(i). Once the agency supplies the contractor with sufficient evidence to undertake its own internal investigation, the contractor is then bound by its obligation to disclose any legal or regulatory violations wherever it may find credible evidence of potential wrongdoing. *Id.*

[144] *See, e.g.*, U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. 209.406-1(a)(i)(B) (July 2011) (providing the agency debarring official with the discretion to impose appropriate requirements on the contractor to ensure its present responsibility).

[145] *See, e.g.*, Administrative Compliance Agreement, ITT Corporation 19 (Oct. 10, 2007) *available at* https://www.jagcnet.army.mil/JAGCENTInternet/Homepages/AC/ArmyFraud.nsf (requiring the contractor to compensate the Army for the cost of negotiating and administering the compliance agreement between the parties).

would be reviewable by the court overseeing the relator's lawsuit.[146] By making the compliance agreements publicly accessible and subject to judicial review, the agency helps ensure the transparency and integrity of the settlement process.

VI. Statistical Trends: Most *Qui Tam* Lawsuits Should Be Affirmatively Dismissed

The DoJ's own FCA statistical data suggests that roughly 8 out of 10 *qui tam* lawsuits could be affirmatively dismissed instead of being outsourced for private prosecution.[147] From 1987 through 2011, the DoJ has tracked FCA litigation outcomes for approximately 10,650 *qui tam* and non-*qui tam* lawsuits.[148] Examining this body of empirical data reveals three significant trends.[149] First, when the DoJ affirmatively intervenes in a relator's lawsuit, the resulting outcomes tend to return

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[146] *See generally* Robert Brodsky, *Federal Acquisition Councils Anticipate Mandate to Increase Transparency* (May 13, 2010), http://www.govexec.com/dailyfed/0510/051310rb1.htm (reporting on how the FAR councils are exploring ways to amend the FAR and "enable public posting of contract actions, should such posting become a requirement in the future, without compromising contractors' proprietary and confidential commercial or financial information"). The FAR Councils are primarily focused on efforts to promote transparency in the awarding of government contracts; however, the same underlying principles for promoting transparency in the contract and grant awarding process also can be applied to opening up how an agency performs its regulatory and compliance functions on behalf of the public.

[147] *See* DoJ Fraud Statistics, *supra* note 11, at 9. Unlike prior reporting years, the DOJ's latest version of Fraud Statistics for FY 2011 does not include the total number of cases where the government declined intervention and those *qui tam* suits reported as dismissed. The last year this information was made available to the public was for FY 2010.

[148] *See generally id.* According to the DoJ's statistical overview, non-*qui tam* matters and judgments do not include FCA lawsuits delegated to the U.S. Attorney's offices. *Id.*

[149] Unfortunately, other useful statistical information about *qui tam* monitoring is not tracked by the DoJ and, therefore, makes it difficult to conduct a more comprehensive cost-benefit analysis. Ideally, the following information also would be tracked and reported to Congress and the public: the overall amount of public resources spent investigating *qui tam* lawsuit allegations; the amount of Government money spent on investigating *qui tam* lawsuits that are affirmatively declined for prosecution; the overall amount of public resources spent on supporting *qui tam* lawsuits after they are affirmatively declined for prosecution; and, the overall amount of public funds spent on reimbursing defendants after they have successfully defend themselves against a *qui tam* lawsuit the Government affirmatively declined to prosecute. *See also* GAO-04-863 No Fear Act Cost Accounting, *supra* note 186 (providing information on how the DoJ says it can account for personnel and non-personnel costs associated with handling employment discrimination cases under the No Fear Act).

significant financial sums back to the U.S. Treasury.[150] Second, when the DoJ affirmatively declines to intervene in a relator's action, the resulting *qui tam* prosecution returns very little money to the public fisc. Third, the public would derive greater benefits from private *qui tam* monitoring efforts if the DoJ affirmatively dismissed the weak and frivolous *qui tam* lawsuits as quickly as possible. From a policy standpoint, private *qui tam* monitoring reaps financial benefits in roughly twenty percent of all *qui tam* lawsuits, but a more complete picture would show that those financial benefits are offset, to some degree, by the remaining eighty percent of relators' lawsuits generating uncaptured costs to the Government.[151]

The DoJ's available statistical data illustrates the need for reevaluating the costs and benefits of granting *qui tam* relators a license to prosecute actions on the Government's behalf. In examining FCA statistical trends, most legal commentators traditionally have focused their examinations on several areas of reporting information: Government intervention rates; Government and relator share of recovered monies; the types of actions being filed; and the dismissal rate for *qui tam* initiated lawsuits.[152] From this body of information, these same commentators have drawn various conclusions about *qui tam* monitoring and the lawsuits relators prosecute on the Government's behalf. One commentator argues that the DoJ's relatively low *qui tam* lawsuit intervention rates, coupled with the relatively high dismissal rate where the Government has declined intervention, suggests the vast majority of *qui tam* lawsuits are essentially frivolous.[153] Another commentator observes that *qui tam* litigation trends reveal more about

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[150] *See, e.g.*, Jack A. Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck* 1 (July 2006), http://www.taf.org/FCA-2006report.pdf (demonstrating in a study prepared for the Taxpayers Against Fraud Education Fund that for every dollar spent investigating and prosecuting health care fraud in civil cases, the Government receives fifteen dollars back in return).

[151] *See generally* GAO-04-148R Contractor Litigation Costs, *supra* note 181.

[152] *See, e.g.*, Broderick, *supra* note 8, at 971–81; *see also* Rich, *supra* note 10, at 1243–49.

[153] *See generally* Broderick, *supra* note 8, at 964–75 (arguing that a high Government intervention rate would indicate that the *qui tam* provision is in the public interest, while a low intervention rate would indicate that it is not). *See also id.* at 974–76 (noting that between October 1987 and September 2004, seventy-three percent of all *qui tam* cases were dismissed and, of that figure, ninety-two percent of all "declined" *qui tam* cases were eventually dismissed).

potential cash recoveries than they do about actual fraudulent activities occurring within the Government's acquisition system.[154]

The picture that emerges from the DoJ's statistical data shows a very high dismissal rate for *qui tam* lawsuits that are outsourced for private prosecution and a relatively low rate of monetary return for the 80% of *qui tam* lawsuits the DoJ affirmatively declines to prosecute. The following tables illustrate data collected by the DoJ regarding the amount of money returned to the U.S. Treasury through private *qui tam* monitoring efforts. The first table summarizes the general types of FCA actions being prosecuted and the overall amount of money recovered for the past five years. The second table shows the overall judgment and dismissal rates for *qui tam* lawsuits since Congress implemented the 1986 FCA Amendments.

Fiscal Year	New Matters Health and Human Services	New Matters Department of Defense	New Matters Agencies other than HHS or DoD	Settlements and Judgments with Government Intervention	Settlements and Judgments without Government Intervention
2004	275	50	106	$560,977,502	$9,261,879
2005	271	49	86	$1,149,047,524	$7,481,593
2006	223	68	93	$1,485,706,466	$22,661,363
2007	202	51	111	$1,283,305,474	$160,212,814
2008	230	43	106	$1,032,878,939	$10,678,936
2009	279	52	102	$1,957,296,965	$33,667,002
2010	382	56	135	$2,294,671,076	$97,282,508

Table 1: Types of *Qui Tam* Lawsuits Filed and Dollar Amounts Recovered Since 2004[155]

[154] Rich, *supra* note 10, at 1248–49 (noting that the increase in *qui tam* lawsuits alleging health care fraud over defense acquisition fraud is attributable to the potential for a number of actionable claims where providers are submitting a claim for each patient or procedure being billed to the Government). Rich notes, "In light of these incentives, [the] relator's shift in focus is unsurprising: they simply followed the money." *Id.*

	Active Cases	Settlement or Judgment	Dismissed	TOTAL
Govt. Intervened	139	1,128	60	1,327
Govt. Declined	412	253	3,962	4,628
Pending Intervention Decision				1,246[156]

Table 2: *Qui Tam* Intervention Decisions & Case Status[157]

A. A Minority of *Qui Tam* Lawsuits Recover Substantial Sums

Based on historical trends, the DoJ only elects to intervene in about 2 of 10 *qui tam* lawsuits.[158] Of those lawsuits, Table 1 demonstrates that when the DoJ intervenes or otherwise pursues a realtor's cause of action, those cases routinely generate 90% or more of all of the funds recovered through private monitoring efforts.[159] Conversely, when the Government affirmatively declines to prosecute a *qui tam* lawsuit, the amount of money returned to the U.S. Treasury will be significantly lower.[160] This trend suggests that either the DOJ only intervenes in those suits likely to

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[155] *See generally* DoJ Fraud Statistics, *supra* note 11, at 1. The DoJ started tracking private *qui tam* monitoring data in 1987 following the passage of the 1986 FCA Amendments. *Id.* Table 1 is a sampling of the last five years of statistical data and reflects more recent trends in *qui tam* monitoring efforts. In contrast, Table 2 provides a snapshot of the number of *qui tam* lawsuits that result in dismissal where the United States declines intervention. The table is also noteworthy for the number of *qui tam* lawsuit cases under investigation and pending an intervention decision.

[156] On October 7, 2009, Senator Grassley issued a press release indicating that over 1040 *qui tam* lawsuits were actually pending a DoJ intervention decision. *See* Grassley Press Release, *supra* note 178.

[157] *See generally* DoJ Fraud Statistics, *supra* note 11, at 9.

[158] *See generally* Rich, *supra* note 10, at 1263 (noting that the government intervenes in approximately twenty-two percent of all *qui tam* actions).

[159] *See, e.g.*, DoJ Fraud Statistics, *supra* note 11, at 1. As an example, during FY 2007, *qui tam* lawsuits affirmatively declined for prosecution still resulted in settlements or judgments worth $160,212,814. *Id.* This amount represented the largest amount of settlements and judgments awarded to *qui tam* relators without government intervention between fiscal years 2004 and 2010. In contrast, *qui tam* lawsuits selected for intervention by the DoJ during FY 2007 recovered approximately $1,283,305,474. *Id.* For the one year that saw the highest amount of money obtained by *qui tam* relators without government intervention, this amount still only represented 12% of the overall recovered amounts. Roughly 20% of the FY 2007 lawsuits generated.

[160] *Id.* at 9 (comparing only fifty-eight dismissals out of 1076 cases where the government elected to intervene to 3681 dismissals out of 4366 cases where the government declined to intervene).

return a high recovery yield, or *qui tam* relators simply don't fare as well as the government in obtaining favorable financial outcomes. As noted in Table 2, out of the 1327 reported *qui tam* lawsuits selected for DoJ intervention, almost 95% of these lawsuits resulted in a favorable settlement or judgment for the government.[161] Overall, the DoJ's statistics suggest *qui tam* lawsuits selected for prosecution have a high probability of generating a substantial recovery for the government.

B. A Majority of *Qui Tam* Lawsuits Recover Significantly Smaller Sums

From fiscal year (FY) 1987 through September 30, 2010, relator lawsuits affirmatively declined by the DoJ for prosecution contributed less than three percent of the overall amount recovered through private *qui tam* monitoring efforts.[162] During this twenty-two year time period, the U.S. Treasury recovered $13,181,167,640 through private *qui tam* monitoring efforts; the Treasury recovered only $389,661,334 of that overall amount after the DoJ affirmatively declined to join the relators' lawsuits.[163] As noted in Table 2, out of the 3,921 *qui tam* lawsuits the DoJ affirmatively declined for prosecution, only 239 or roughly 6% of all declined lawsuits generated a settlement or judgment.[164] Overall, the DoJ's statistics for affirmatively declined *qui tam* lawsuits suggests the vast majority those lawsuits not dismissed by the DoJ will offer little or nothing in monetary recovery to the public fisc.

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[161] *Id.*

[162] *Id.* at 2. From 1987 through September 2009, when the DoJ elected to intervene in *qui tam* lawsuits, the resulting settlements and judgments amounted to $15,186,360,670 in total recovery from defendants minus $2,394,854,364 for the relators' share of the award. *Id.* During this same time frame, when the DoJ affirmatively declined to take over *qui tam* lawsuits, the total recovery from defendants was only $472,043,167 minus $82,381,883 for the relators' share of the award. *Id.*

[163] *Id.* Recalling the Comptroller General's finding that the DoE reimbursed contractors for $330.5 million from October 1, 1998 through March 2003, it becomes apparent that the costs associated with supporting *qui tam* litigation by one government agency for a five-year-period quickly offsets the monies recovered by all privately prosecuted *qui tam* actions over a twenty-two year period. *See generally* GAO-04-148R Contractor Litigation Costs, *supra* note 181.

[164] *Id.*

C. Most *Qui Tam* Lawsuits Should Be Disposed of Expeditiously

Improving FCA enforcement practices and disposing of weak *qui tam* lawsuits suits as expeditiously as possible is in the Government's best interests. Since 1986, eighty-four percent of all *qui tam* lawsuits affirmatively declined for prosecution by the DoJ ultimately ended in some form of dismissal during the litigation process.[165] The DoJ rarely exercises its authority to dismiss a weak or frivolous *qui tam* lawsuit because it lacks the appropriate incentives to do so.[166] Under the FCA's recovery scheme, the government is able to retain up to eighty-five percent of any recovery the DoJ obtains after intervention in a *qui tam* lawsuit and a minimum of seventy-five percent of any recovery obtained after outsourcing its prosecution to a relator.[167] Forgoing a ten percent difference in a potential recovery that requires a relatively minor investment in time and resources fails to incentivize the DoJ to affirmatively dismiss frivolous lawsuits. A more comprehensive cost-benefit analysis should look at whether the DoJ should affirmatively dismiss more *qui tam* lawsuits then it historically does, particularly when only 6% of them will likely yield any type of financial recovery for the government.

Congress authorizes the DoJ to retain up to three percent of what it recovers from the settlements and judgments it obtains through its enforcement efforts,[168] thereby offsetting some of the costs incurred from

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[165] *See generally* DoJ Fraud Statistics, *supra* note 11.

[166] *See also* Rich, *supra* note 10, at 1264–67 (noting that the FCA "allows the government to purchase the prosecution of minor fraud at the cost of the relator's increased recovery, thus freeing up limited government resources to pursue higher value cases"). Professor Rich argues that the FCA creates a disincentive for dismissing cases early in the litigation process since the Government can still recover some money if the relator recovers a settlement or judgment against a defendant. *See also* 31 U.S.C. §§ 3730(d)(1)–(2) (2006) (stating that a relator is entitled to at least 15% but not more than 25% of any recovery obtained with Government intervention and at least 25% but not more than 30% of any recovery obtained without Government intervention).

[167] 31 U.S.C. §§ 3730(d)(1); *see id.* § 3730(d)(1).

[168] *See generally* 28 U.S.C. § 527 (2009), Pub. L. No. 107-27, div. C, tit. I, § 11013(a), 116 Stat. 1823 (2002) (authorizing the Attorney General to credit, as an offsetting collection to the DoJ Working Capital Fund, up to 3% of all amounts collected pursuant to civil debt collection litigation activities). These funds may used for paying the costs of processing and tracking civil and criminal debt collection litigation and other operating expenses related to civil debt collection. *Id.* On January 5, 2009, Congress granted this authority to the DoJ as an exception to the Miscellaneous Receipts Act, 31 U.S.C. §§ 3302(b)–(c)(1) (2006) (requiring that except as otherwise provided for in law, any money

supporting *qui tam* litigation.[169] However, Congress has not enacted a similar provision to help individual agencies offset the costs they incur providing support to relators whose lawsuits were affirmatively declined by the DoJ for prosecution.[170] If agencies were given the opportunity to take a greater role in resolving *qui tam* lawsuits through administrative remedies, the overall recovery rate for both the government and relators could potentially increase. To offset any costs associated with pursuing administrative remedies, in lieu of litigation, Congress could grant an agency the authority to retain a portion of any recovery obtained from a defendant.[171]

VII. Future Challenges: Interpretation and Enforcement

The 2009 FCA Amendments change how federal courts interpret and apply the Act, but it is unclear whether these same changes will improve the quality of cases being filed by *qui tam* relators on the government's behalf. Lowering the FCA's evidentiary thresholds for proving civil liability, while simultaneously increasing the Act's jurisdictional scope and reach, provides a strong incentive for bringing more *qui tam* actions into the nation's courts. However, it is unclear whether these changes will also improve the overall quality of *qui tam* lawsuits seeking judicial redress through civil litigation.[172] Under the FCA's revised guidelines,

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received by a Government official or agent for the Government shall be deposited into the U.S. Treasury as soon as practicable without deduction for any charge or claim).

[169] *Id.*; *see also* Hertz Statement, *supra* note 19, at 7 (explaining that the DoJ expends considerable resources supporting relators lawsuits even in those cases where the Department has declined intervention).

[170] *See generally* Nat'l Sci. Found.—Disposition of False Claims Act Recoveries, Comp. Gen. B-310725, 2008 WL 229784 (C.G. May 20, 2008) (determining that the National Science Foundation Inspector General's office is not authorized to retain or credit to its appropriations any monies recovered in a False Claims Act settlement). In contrast, the Comptroller General noted the DoJ is authorized to deduct a 3% fee for "its services from the total recovery." *Id.* at *2.

[171] *See, e.g.*, Brian D. Miller & Richard L. Skinner, Letter to Matthew W. Friedrich, Acting Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, National Procurement Fraud Task Force, Legislation Committee White Paper, at iv (June 9, 2008), http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf [hereinafter NPFTF White Paper] (noting that the committee had "considered general proposals to amend appropriations-related statutes in order to allow closed or expired funds to be credited back to the accounts of agencies that have experienced a procurement fraud-related loss").

[172] *See, e.g.*, The Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong., §§ 4(a)–(f) (2009). The section containing the amendments is entitled, "Clarifications to the False Claims Act to Reflect the Original Intent of the Law." *Id.*

qui tam relators are essentially incentivized to explore the Act's boundaries in cases that might have previously been considered questionable or frivolous.[173]

Increasing the volume of *qui tam* litigation under the FCA will generate increased and unrecorded costs to the public fisc. The DoJ's own statistics call into question the justification for allowing eighty percent of all *qui tam* lawsuits to be prosecuted without government assistance, when over ninety percent of them eventually are dismissed.[174] When the government intervenes in a relator's lawsuit, the resulting settlement and judgment helps defray any costs associated with pursuing the action. However, when the majority of *qui tam* lawsuits do not result in any recovery to the government, there are real and tangible costs being absorbed by the DoJ, the agency, and the courts where these lawsuits are allowed to play out until their conclusion. The government should therefore focus on improving agency oversight and regulation of *qui tam* lawsuits to obtain better control over the unreimbursed costs these lawsuits generate. Implementing improved case screening criteria could help identify weak lawsuits and benefit the public by ensuring these cases are resolved in an expeditious manner.

A. Expanding the FCA's Scope and Jurisdiction

Using the 2009 FCA Amendments to broaden what actions will constitute a "claim" for liability purposes significantly expands the types of violations that can now be alleged under the Act. Including sub-contractors, grantees and recipients in the scope of individuals who may pass a false claim onto the government will help capture fraudulent conduct that may previously have escaped accountability under the original Act.[175] Expanding the Act's jurisdictional scope, while simultaneously lowering its evidentiary thresholds, effectively increases the number of *qui tam* lawsuit filings, while encouraging novel legal theories and testing the law's jurisdictional boundaries. Increasing the overall volume of FCA lawsuit filings may relieve the government from investing its resources to investigate and prosecute questionable cases,

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[173] *See* discussion *supra* note 37.
[174] *See* Table 2, *Qui Tam* Intervention Decisions & Case Status, *infra* note 157.
[175] *See generally Allison Engine*, 553 U.S. at 669 (finding that a subcontractor could be held liable for submitting a false claim to a prime contractor working directly for and in privity with the government).

but fails to address how the government can improve its ability to encourage ethical business practices from its commercial partners.[176] The DoJ should take a more proactive role in screening *qui tam* actions to dismiss those lawsuits that go too far in attempting to redefine the FCA's civil liability provisions before allowing these actions to become embroiled in protracted civil litigation.

Additionally, by not defining what constitutes a "government interest," the FCA may fail to provide sufficient notice as to what conduct runs afoul of an undisclosed or unknown government interest.[177] The inclusion of the government interest provision leaves open the opportunity for the *qui tam* relator to initially define where government's interest lies under the Act. While the FCA's legislative history suggests that the government interest provision should not be used in this manner, drafting history alone is no substitute for adopting a uniform standard to ensure the Act is enforced consistently and fairly in all instances of

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[176] *See generally* Kovacic, *supra* note 21, at 1799. Professor Kovacic suggests a framework for evaluating *qui tam* monitoring to help determine its net value to society by helping police the procurement system against fraudulent activity. *Id.* This framework is useful because it asks whether legislation designed to increase *qui tam* monitoring through the filing of lawsuits adequately addresses the problems plaguing regulatory compliance within the federal procurement system. The four questions comprising the inquiry ask:

> First, are there adequate controls to deal with plausible scenarios of relator error and opportunism? Second, are there less costly alternative methods for monitoring contractor behavior and for discouraging shirking by public enforcement officials? Third, are the underlying substantive conduct standards that qui tam monitoring seeks to enforce appropriate? Fourth, are penalties for violations calibrated to correspond to the seriousness of the underlying offense as measured by its economic harm?

Id.

[177] The FCA is not a criminal statute; but it is a punitive one as indicated by the Government's ability to impose civil fines and treble damages for statutory violations. *See* 31 U.S.C. § 3729(a)(1)(G) (2006). In the context of criminal statutes, the Supreme Court has stated that vague laws "may trap the innocent by not providing fair warnings." *See* Musser v. Utah, 333 U.S. 95, 97 (1948). In the context of regulatory statutes, the Supreme Court has explained, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). Creating liability based upon the vaguely defined notion of a "governmental interest" likely will provide future cannon fodder for defendant's counsel to attack the amended Act's constitutionality.

alleged violations.[178] By not defining what constitutes a "government interest" within the FCA's liability provisions, Congress likely sought to preserve maximum flexibility for initiating prosecutions under the Act. However, defining the Government's interests for purposes of obtaining accountability under the Act should be regarded as an inherently governmental function.

B. The Costs and Effects of FCA Expansion

The 2009 FCA Amendments didn't just clarify the Act's intent, they also expanded the potential pool of civil actions that can be brought under the Act's revised statutory scheme.[179] Enforcing the Act becomes less predictable; relators will inevitably raise and litigate issues based on revised statutory thresholds that were previously precluded under the *Totten* and *Allison Engine* decisions. Creating new grounds for litigating FCA claims increases the types of issues that can be litigated and thereby increases the potential volume of cases being litigated.[180] The discussion of costs to the government is largely missing; contractors who successfully defend themselves against frivolous suits may eventually pass their litigation costs back to the public.[181] In the end, the courts

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[178] *See, e.g.*, 31 U.S.C. § 3729(b)(2)(B) (stating in relevant part that a claim under the FCA does not include, "requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property"). Representative Berman explains that the Act's "government interest" clause should be interpreted as follows:

> To ensure that the Act is not interpreted to federalize fraud that threatens no harm to Government purposes or federal program objectives, the Amendment explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for federal employment or as an income subsidy, such as Social Security retirement benefits, with no restrictions on that individual's use or the money or property at issue.

See 155 CONG. REC. E1298 (daily ed. Feb. 24, 2009).

[179] *See* discussion *supra* note 37.

[180] *See, e.g.*, 155 CONG. REC. at E1300 (statement of Rep. Howard L. Berman) (explaining that the purpose of including a retroactivity provision is to "avoid the extensive litigation over whether the amendments apply retroactively as occurred following the 1986 False Claims Act").

[181] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-148R, DEPARTMENT OF ENERGY: REIMBURSEMENT OF CONTRACTOR LITIGATION COSTS 1 (Nov. 26, 2003)

become the default FCA enforcement regulators and expend their own publicly funded resources overseeing and managing the *qui tam* litigation process.[182]

Increasing private monitoring efforts to deter fraud may result in the federal government spending more money to acquire its goods and services. A 2009 poll involving more than 800 business professionals reflects a growing concern among many in the private sector that encouraging increased *qui tam* enforcement drives up the cost of doing business with the government.[183] Unfortunately, there is no readily available data on the amount of public funds being spent on reimbursing contractors who successfully defend themselves against *qui tam* relator lawsuits. A 2003 Government Accountability Office (GAO) Report examining the Department of Energy's (DOE) experience with

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[hereinafter GAO-04-148R CONTRACTOR LITIGATION COSTS]. The GAO report noted in relevant part:

> The DOE reimbursed contractors for $330.5 million in litigation costs associated with 1,895 cases from fiscal year 1998 through March 2003, including $249.4 million for litigation costs and $81.1 million for judgments and settlements. During the same period, DOE estimates that contractors spent about $12 million without being reimbursed.
>
> DOE does not pay litigation costs when the contractor's actions involved either willful misconduct; lack of good faith; or failure to exercise prudent business judgment by the contractor's managerial personnel; nor does DOE pay in certain other circumstances, such as when the contractor is liable under the False Claims Act. When a contractor prevails in a False Claims Act case or prevails in other cases where a government entity has sued the contractor, DOE pays a maximum of 80% of reasonable litigation costs.

Id.

[182] The 2009 Fraud Enforcement and Recovery Act did include funding authorizations for increased spending on fraud prevention and enforcement; however, there is no indication how much of that money will be spent on supporting FCA-related litigation. *See* The White House, Office of the Press Sec'y, Reforms for American Homeowners and Consumers (May 20, 2009), http://www.whitehouse.gov/the-press-office/reforms-american-homeowners-and-consumers-president-obama-signs-helping-families-save-their-homes-act-and-fraud-enforcement-and-recovery-act (noting that the passage of The Fraud Enforcement and Recovery Act provides the Department of Justice spending authorization up to $165 million for fraud prevention and investigation resources in FY 2010 and 2011, including the hiring of fraud prosecutors and investigators).

[183] *See generally* Press Release, Deloitte Poll: Nearly Two Thirds of Business Professionals Expect Uptick in Recovered Government Funds (Jan. 27, 2010), http://www.deloitte.com/view/en_US/us/press/Press-Releases/press-release.

reimbursing contractors' litigation expenses offers a glimpse into the magnitude of costs being passed back onto the public.[184] The Comptroller General observed the DOE spent $330.5 million reimbursing its contractors' for litigation costs associated with defending themselves from frivolous lawsuits beginning in October 1998 and running through March 2003.[185] The cost to the public fisc likely would be even more significant when considering what likely was spent on litigation reimbursement within the Department of Defense and Health and Human Services agencies during the same five year time period. *Qui tam* litigation costs could be offset by charging fees similar to those charged for supporting Freedom of Information Act requests.[186] Federal agencies could track the time and resources expended supporting *qui tam* litigation requests and require both relators and defendants to pay for the expenditure of public resources used to support what is essentially a private endeavor.

The DoJ's responsibility to oversee and regulate private monitoring efforts increases in proportion to the number of *qui tam* suits being filed in the nation's courts. According to the DoJ's 2010 statistics, approximately 1246 FCA lawsuits were pending investigation and an intervention decision.[187] The statutory review period for conducting a

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[184] *See* GAO-04-148R Contractor Litigation Costs, *supra* note 181, at 1.

[185] *Id.*

[186] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-863, NO FEAR ACT: METHODS THE JUSTICE DEP'T SAYS IT COULD USE TO ACCOUNT FOR ITS COSTS PER CASE UNDER THE ACT 3 (July 2004), http://www.gao.gov/new.items/d04863.pdf [hereinafter GAO-04-863 NO FEAR ACT COST ACCOUNTING] (describing the DoJ's ability to account for litigation-related costs while handling employment discrimination and whistleblower lawsuits brought against a federal agency under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002). Within the DoD, certain components are able to track the costs associated with processing Freedom of Information Act (FOIA) requests and then require individuals who submit FOIA requests to defray certain costs of preparing the agency's response. *See, e.g.*, 32 C.F.R. § 286.29 (2009) (providing a fee schedule for the collection of fees associated with supporting FOIA requests). Opponents of collecting fees to support *qui tam* litigation may argue that this approach will stifle private monitoring efforts. However, if public resources are expended to support *qui tam* litigation, then the parties to that litigation could reimburse the government's agencies for these costs to the public's fisc.

[187] *See* DoJ Fraud Statistics *supra* note 11, at *Qui Tam* Intervention Decisions & Case Status; *see also* Press Release, Sen. Charles Grassley, More Than a Thousand Fraud Cases Await Government Action (Oct. 7, 2009), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=23563 [hereinafter Grassley Press Release] (relaying the number and types of *qui tam* cases pending DoJ review). According to Senator Grassley's press release:

legal review and investigation into the allegations cited in a *qui tam* relator's lawsuit is sixty days.[188] It takes the DoJ almost six times the allotted statutory review period, or an average of 12.3 months, to investigate, review, and decide whether to intervene in a relator's lawsuit.[189] Adding more lawsuits to the DoJ's screening backlog likely will increase the overall reviewing and case processing times. As a result, evidence may grow stale, memories may fade, and prosecutorial interest in good, but lesser valued *qui tam* lawsuits, may wane. As congressional pressure on the DoJ to expedite its *qui tam* lawsuit investigations and case reviews increases, so too does the temptation to respond by outsourcing even more *qui tam* lawsuits. Considering that over 90% of all affirmatively declined *qui tam* lawsuits will end up being dismissed, Congress first should address how the DoJ could improve its ability to regulate the quality of cases being outsourced to private attorneys general. A revamped *qui tam* screening process at DoJ could avert some of the costs being passed onto the public as frivolous lawsuits and those cases identified for affirmative dismissal and reimbursement costs arising out of defending these lawsuits are therefore avoided.

> [T]here are 985 qui tam health care fraud cases pending, 200 qui tam cases have to do with pricing and marketing pharmaceuticals, and 205 qui tam cases allege procurement fraud with the Defense Department. In addition to cases pending a Justice Department decision to join the case, there are 130 pending qui tam cases the Justice Department has joined and about 490 cases that the Justice Department has declined to intervene. The Justice Department data also shows that, on average, it takes 12.3 months for the Justice Department to make a decision on whether to join a qui tam case.

Id.

[188] *See* 31 U.S.C. § 3730(b)(2)–(4) (2006) (stating that the Government may elect to intervene in a relator's suit within 60 days after receiving the complaint or move the court for an extension of time during which the complaint remains under seal).

[189] *Id.*; *see also* DoJ-E.D. Pa. Memorandum, *supra* note 11 (explaining that a *qui tam* complaint must be filed under seal for a period of at least sixty days to allow the DoJ sufficient time to review the matter for potential criminal prosecution and civil intervention). If at the conclusion of the sixty-day review period the DoJ requires an extension of time, the DoJ must file a motion showing "good cause" why the complaint should remain under seal. *Id.* (noting that such extensions, when granted, are usually for six months at a time). According to the DoJ's own description on current review times for a *qui tam* case filed under seal, a relator must wait an average 12.3 months before even going forward, with or without the Government's intervention, in a civil action alleging another's fraudulent conduct against the public fisc.

VIII. Conclusion

The 2009 FCA amendments will usher in a new era of FCA enforcement reforms, but changing the law without also changing how it is enforced may ultimately prove to be counterproductive. Proponents for amending the Act to enhance *qui tam* litigation tend to focus on the huge recoveries returned to the U.S. Treasury obtained in just 20% of the lawsuits brought into court, while failing to account for the costs to the public fisc in the remaining 80% of relator lawsuits that continue to be litigated after the Government declines intervention. In light of the empirical evidence demonstrating the importance of government intervention in relator lawsuits, the government effectively cedes its ability to control the costs these lawsuits generate back to the public fisc. Thus, the government should be promoting smarter FCA enforcement to counter the phenomenon of increased *qui tam* litigation.

Now that Congress has changed the FCA's rules of the road, the executive branch needs to put forth the requisite effort to ensure those rules are fairly enforced and take the lead in reversing the toxic environment in Government contracting. The most effective way to achieve these important acquisition policy goals is to ensure the government utilizes its full range of judicial and administrative remedies before declining intervention in a relator's lawsuit. Of all the stakeholders in the FCA enforcement process, agencies are best positioned to promote regulatory compliance and pursue accountability in a fair and even-handed manner. Expanding the use of administrative remedies to dispose of weak, frivolous, or smaller value *qui tam* lawsuits will promote a more expedient process for resolving these lawsuits than the current FCA enforcement process. By intervening in a greater proportion of the *qui tam* lawsuits it currently declines to prosecute, the government can realize cost savings and improved compliance results through the use of available alternate remedies.

Finally, if agencies are going to take a more enhanced role in obtaining FCA enforcement and compliance, then Congress should grant agencies the same incentives it provides to others to offset the costs of increased anti-fraud activities. Allowing agencies to keep a portion of any recovery obtained through any available alternate remedy procedure likely will promote interest within the agency to improve its fraud-fighting capabilities. The government should continue to promote and acknowledge the value relators provide in detecting fraudulent activities, but also recognize that agencies are best positioned to resolve the vast

majority of FCA disputes involving the government and its business partners.

ROCK THE CASBAH: RAGE AND REBELLION ACROSS THE ISLAMIC WORLD[1]

REVIEWED BY MAJOR MARK D. SAMEIT[*]

For a decade, the outside world was so preoccupied with its "war on terrorism" that it gave little credence to efforts among Muslims to deal with the overlapping problems—autocratic regimes and extremist movements—that fed off each other.[2]

I. Introduction

Since September 11, 2001, Americans have become all too familiar with Islamic extremist movements and the wars in the Middle East. Over the past decade, journalists have filled newspapers with daily accounts of American travails in Iraq and Afghanistan.[3] Unfortunately, the larger question of the overall appeal of Islamic extremism throughout the Islamic world has received little coverage. The recent events in Tunisia, Egypt, Libya, Syria, and Bahrain have brought this question to the forefront of American minds.[4]

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[1] ROBIN WRIGHT, ROCK THE CASBAH: RAGE AND REBELLION ACROSS THE ISLAMIC WORLD (2011).

[2] *Id.* at 3.

[3] *See* Sherry Ricchiardi, *Whatever Happened to Iraq?*, AM. JOURNALISM REV., June/July 2008, *available at* http://www.ajr.org/article.asp?id=4515 (detailing how Iraq filled twenty-three percent of TV news in early 2007); Katherine Tiedemann, *Afghanistan vs. Iraq Media Coverage, the Redux*, AFPAK CHANNEL (Sept. 17, 2009, 10:55 AM), http://afpak.foreignpolicy.com/posts/2009/09/17/afghanistan_vs_iraw_media_coverage_the_redux (detailing how coverage of Afghanistan picked up in 2009 as Iraq coverage trailed off).

[4] For a brief description of these events, see *The Arab Spring: A Year of Revolution*, NAT'L PUB. RADIO (Dec. 17, 2011), http://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution (describing the overthrows of President Ali in Tunisia, President Mubarak in Egypt, and Muammar Gaddafi in Libya); Thomas Erdbrink, *Bahrain Crackdown Fuels Tensions in Gulf Region*, at A08, WASH. POST (Apr. 23, 2011) (describing the unsuccessful protests of the Al-Khalifa monarchy in Bahrain); Rick Gladstone & Neil MacFarquhar, *U.N. Official Rebukes Syria over Violence*, N.Y. TIMES, at A4 (Feb. 14, 2012) (describing the Syria conflict and steps taken over the past year).

In *Rock the Casbah: Rage and Rebellion Across the Islamic World*, Robin Wright paints an optimistic account of how individuals are moving the Islamic world toward a more open and accepting society. Wright discusses many cultural topics that are pushing Islamic societies in that direction, from the women's rights movement in Egypt to the anti-extremist Islamic hip-hop movement. Her message is twofold: First, only Muslims can overcome the extremist movement, not Western armies; and second, Muslim society is in the midst of a counter-jihad movement that is doing exactly that.[5] While the book minimizes the United States' contributions to the counter-jihad movement and provides selective use of statistics, it succeeds in educating the reader on current cultural trends against extremism as well as the historical background to the recent revolutions from the perspective of the inhabitants.

II. Wright's Background

Robin Wright has covered the Middle East since 1972 for the *Washington Post*, *Los Angeles Times*, and several other newspapers. She is a senior fellow at the U.S. Institute for Peace and has written seven books on the Middle East.[6] Wright first addressed the topic of Islamic extremism in 1985 in her book, *Sacred Rage: The Wrath of Militant Islam*.[7] In this first book, she presciently warned that the United States' continued intervention in Middle Eastern politics would cause a backlash of extremism.[8]

Wright authored three more books before returning to the subject of extremism in the Middle East in 2008 in her book *Dreams and Shadows: The Future of the Middle East*.[9] In this book, she speaks more optimistically about "a budding culture of change" that stems from "defiant judges in Cairo, rebel clerics in Tehran, satellite television station owners in Dubai, imaginative feminists in Rabat and the first female candidates in Kuwait, young techies in Jeddah, daring journalists in Beirut and Casablanca, and brave writers and businessmen in Damascus."[10] At the time, critics dismissed her as overly optimistic

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[5] WRIGHT, *supra* note 1, at 3.
[6] *Robin Wright*, Biography, U.S. INST. FOR PEACE, http://www.usip.org/experts/robin-wright (last visited Mar. 7, 2012).
[7] ROBIN WRIGHT, SACRED RAGE: THE WRATH OF MILITANT ISLAM (1985).
[8] *Id*. at 262.
[9] ROBIN WRIGHT, DREAMS AND SHADOWS: THE FUTURE OF THE MIDDLE EAST (2008).
[10] *Id*. at 2.

about the overthrow of repressive regimes,[11] but history has proved her correct. Wright brings a journalistic perspective to all her books as she discusses emerging trends from hundreds of interviews and extrapolates them into potential macro-level trends. Her prior books prove to be accurate in her trend analysis more often than not.[12]

III. Wright's Optimistic Outlook for the Future of the Islamic World

Wright opens *Rock the Casbah* with the now familiar story of Mohamed Bouazizi lighting himself on fire in front of the governor's mansion in Tunisia on December 17, 2010.[13] She succinctly describes how this event set off the Jasmine Revolution and caused Ben Ali to flee from Tunisia after twenty-three years of rule.[14] Wright then describes the events in Egypt that led to Hosni Mubarak, the dictator "had ruled longer than all but three pharaohs" stepping down.[15] Wright gives mention to the protests and reforms carried out in Iran, Jordan, Bahrain, Iraq, Yemen, and Syria, as well as giving credit to the role *Facebook* played in the organization of the demonstrators.[16]

After detailing the events of the Arab Spring, Wright lays out her thesis that "[t]he counter-jihad will define the next decade as thoroughly

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[11] Patrick Cockburn, *The End of Jihad*, N.Y. TIMES, Mar. 2, 2008, at BR8.

[12] *E.g.*, WRIGHT, *supra* note 9, at 1-18 (predicting that the democratic movement in the Middle East will be the major story of the coming decades); WRIGHT, *supra* note 7, at 262 (arguing continued U.S. intervention in Middle Eastern politics would lead to a backlash of extremism).

[13] Mohamed Bouazizi was a fruit vendor in Sidi Bouzid who refused to pay a bribe to a city inspector. Due to his refusal, the city inspector confiscated his fruit and his electronic scale. With no fruit, and no other means to support himself and his family, Bouazizi went to the local governor's office to protest. When his complaints went unanswered, he returned with lighter fluid and shouted, "How do you expect me to earn a living?" and set himself alight. WRIGHT, *supra* note 1, at 15–16.

[14] The Jasmine Revolution is another name for the revolution in Tunisia, named after the country's national flower. *Id*. at 15–21.

[15] *Id*. at 23.

[16] *Id*. at 37–40. Organizers commonly used *Facebook* (an online communications network founded on February 4, 2004) to communicate because it was beyond the government's control and offered privacy to its users. There were numerous demonstrations organized through *Facebook* accounts and there was even a sign in Liberation Square in Egypt that declared "Thank you Facebook" because of its power to organize demonstrators. *Id.* at 27–28. *See also Facebook*, http://www.facebook.com/facebook (last visited Mar. 5, 2012) (noting its mission is "to give people the power to share and make the world more open and connected").

as the extremists dominated the last one"[17] and that "[w]estern armies can win only battles . . . only Muslims can defeat the most serious threat to global security."[18] Her definition of this counter-jihad is not a movement toward the West or secular values, but a rejection of extremism in favor of a conservative and peaceful interpretation of Islam.[19] Wright attempts to place this counter-jihad in historical context as the "fourth phase of the Islamic revival." She defines the three prior phases as, first, the politicization of Islam to fight Israel; second, the rise of religious extremists; and third, the rise of political Islamic parties in Algeria, Palestine, and elsewhere.[20] The demarcation that Wright lays out seems forced and unnecessary, but only briefly interrupts the flow of her argument. She credits the symbolic turning point against extremism to Sheikh Salaman al Oudah, an early role model for Osama Bin Laden, who publicly repudiated Bin Laden and his methods in an open letter in 2007.[21]

After laying out her thesis, the reader can detect Wright's minimization of U.S. policy in her discussion of Iraq. She starts by definitively stating the U.S. military conceded in 2006 that "it had 'lost' Iraq's largest region," referring the Al Anbar province.[22] Looking to Wright's footnotes, the reader finds that the United States made no such declaration, but she cites to a news story on an alleged secret assessment by a Marine staff colonel, not a commander.[23] She moves on to describe the Awakening, "just as the United States was giving up on Anbar, the province's tribal elders began turning against their Sunni brethren . . . . And the Awakening . . . was launched."[24] Wright does not make any

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[17] WRIGHT, *supra* note 1, at 43.

[18] *Id*. at 45. The "Arab Spring" refers generally to the protests against autocratic rule that swept across North Africa and the Middle East starting with the Jasmine Revolution in December 2010. Roger Hardy, *Egypt Protests: An Arab Spring as Old Order Crumbles*, BRIT. BROAD. CORP. (Feb. 2, 2011), *available at* http://www.bbc.co.uk/news/world-middle-east-12339521.

[19] WRIGHT, *supra* note 1, at 46.

[20] *Id*. at 47–53.

[21] *Id*. at 65. An English translation of the letter can be found online. Amad, *Saudi Cleric's Ramadan Letter to Osama Bin Laden on NBC*, DAILY KOS, Sept. 18, 2007, http://www.dailykos.com/story/2007/09/18/386670/-Saudi-Clerics-Ramadan-Letter-to-Osama-Bin-Laden-on-NBC.

[22] WRIGHT, *supra* note 1, at 60.

[23] Thomas E. Ricks, *Situation Called Dire in West Iraq*, WASH. POST, Sept. 11, 2006, at A2.

[24] WRIGHT, *supra* note 1, at 61. The "Awakening" refers to the decision by Sunni tribal leaders to stop fighting the American military and begin fighting Al Qaeda in Iraq. For a more in depth description, *see Awakening Movement in Iraq*, N.Y. TIMES, Oct. 19, 2010,

mention of the developing counter-insurgency doctrine in the U.S. military or the shift in strategy to recruit local leaders to fight the insurgency that enabled the Awakening.[25] She then points to "the charismatic young sheikh [Abdul Sattar Abu Risha]—not the American military" as the key to al Qaeda's defeat.[26] Wright overlooks the fact that enabling local leaders is one of the key tenets of the United States' counter-insurgency strategy and that their support was arguably gained due to prior successes of the U.S. military.[27] The reader is left to conclude either that Wright does not have an understanding of the U.S. role in Iraq, which seems unlikely with her extensive background, or that she is intentionally downplaying any role that the United States may have had in the success of Al Anbar, Iraq.

After laying out her thesis and detailing the Arab Spring and the Sunni Awakening in Iraq, Wright moves from the role of historian to her more comfortable role as a journalist providing individual accounts of the counter-jihad movement. She begins by addressing the Islamic hip-hop movement through the perspective of artists from seven different nations.[28] She then covers a variety of topics: women's rights, poetry, reformist sheikhs and imams, and finally Muslim comedians, comic book writers, and playwrights.[29] Each chapter is narrated from the perspective of a few individuals and is filled with lyrics and their experiences. The overall message is that the Muslim youth are rejecting extremism and tyranny in favor of free speech and democracy.[30]

One potential criticism is that it is difficult to tell how widespread and defining these stories are of the larger trends throughout Islamic culture. Wright provides some statistics to reinforce her optimistic message, but

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available at http://topics.nytimes.com/top/news/international/countriesandterritories/iraq/awakening_movement/index.html.

[25] U.S. MARINE CORPS WARFIGHTING PUB. 3-33.5, COUNTERINSURGENCY foreword (15 Dec. 2006) ("Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services.").

[26] WRIGHT, *supra* note 1, at 61.

[27] 1 AL-ANBAR AWAKENING: AMERICAN PERSPECTIVES 146 (Chief Warrant Officer Four Timothy S. McWilliams, USMC & Lieutenant Colonel Kurtis P. Wheeler, USMC, eds., 2009) (stating that the Awakening was due to a variety of factors including Al Qaeda's atrocities, American successes in other cities, American staying power, and convincing tribal sheikhs to turn against the insurgency).

[28] WRIGHT, *supra* note 1, at 115–37.

[29] *Id*. at 138–226.

[30] *Id*.

she uses them selectively.[31] She cites a Pew Research study that "[s]upport for bin Laden had dropped to 2 percent in Lebanon and 3 percent in Turkey," and in Egypt, Pakistan, and Indonesia "only around one in five Muslims has confidence in the al Qaeda leadership."[32] What she leaves out is that the exact same poll showed a fifty-one percent and fifty-four percent approval for Osama Bin Laden in the Palestinian Territory and Nigeria.[33] Additionally, the poll showed a simmering resentment for Israel with more than ninety percent of Egyptians, Lebanese, Jordanians, and Palestinians expressing a negative view of Jewish people.[34] This resentment could spur future extremism as evidenced by the attack on the Israeli Embassy in Cairo shortly after Mubarak's removal.[35] Wright fails to address these unfavorable statistics for counter-jihad and peace in the Middle East to the detriment of her argument.

It would be easy to dismiss Wright's assertion of the counter-jihad gaining momentum when the reader notes her selective use of statistics and one-sided analysis of Iraq; however, her extensive experience in the area seems to give her a better sense of emerging trends than most authors and journalists in the field. In Wright's 2008 book, *Dreams and Shadows*, she argued that there is a budding culture of change in the Middle East repressed by many of the autocratic regimes.[36] She specifically highlighted Egypt as a country on the brink of change.[37] She was dismissed as overly optimistic by a *New York Times* critic stating that

> autocratic regimes in the Middle East may be sclerotic, corrupt and detested by their own people, but they are very difficult to remove. Governments in Egypt, Syria and Libya that came to power by military coups in the distant past have learned how to protect themselves against their own armies and security forces.[38]

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[31] *E.g.*, *id*. at 52.
[32] *Id*. (citing *Mixed Views of Hamas and Hezbollah in Largely Muslim Nations*, PEW GLOBAL ATTITUDES PROJECT, Feb. 4, 2010, at 13).
[33] *Mixed Views of Hamas and Hezbollah in Largely Muslim Nations*, PEW GLOBAL ATTITUDES PROJECT, Feb. 4, 2010, at 13.
[34] *Id*.
[35] Aya Batrawy, *Egyptians Break into Israel Embassy in Cairo*, WASH.TIMES, Sept. 9, 2011, at A1.
[36] WRIGHT, *supra* note 9, at 1–18.
[37] *Id*. at 65–97.
[38] Cockburn, *supra* note 11.

Clearly, the recent history of the Arab Spring has proven Wright's experienced views quite prescient. With this in mind, the reader should not simply dismiss her optimistic views of the cultural movements within the Middle East.

After her discussion of the recent history of the Jasmine Revolution and the micro-trends in the Islamic world, Wright concludes her book with a hasty and superficial criticism of U.S. foreign policy in the Middle East.[39] She devotes only eleven pages to her discussion of the complex issue and begins with the statement that American foreign policy is being "shattered . . . after six decades of rock-solid relations with impervious monarchies and sclerotic autocrats."[40] She goes on to criticize the United States for its differing responses to protests throughout the region. Specifically, she cites the quick support in Libya, the late support in Tunisia and Egypt, the tepid support in Syria and Yemen, and the complete lack of support in Bahrain.[41] Wright poses that this varied response will carry a cost in "credibility and cooperation down the road."[42] The reader is left to conclude that Wright's foreign policy recommendation for the United States is to embrace democracy in the region above any other national interest.

Wright ignores the elephant in the room: How would this shift in U.S. foreign policy affect its oil supply?[43] Four of the top ten oil-producing nations fit the definition of autocratic regimes in the Middle East: Saudi Arabia, Iran, United Arab Emirates, and Kuwait.[44] If the United States strained relations with all of these Middle East suppliers because of their non-democratic governments, the United States would significantly increase risk to its oil supply by becoming more reliant on other top suppliers with equally difficult policy considerations: Venezuela,

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[39] WRIGHT, *supra* note 1, at 244–55.
[40] *Id*. at 244.
[41] *Id*. at 244–55.
[42] *Id*. at 249.
[43] For an excellent history of the United States dependence on the Organization of Petroleum Exporting Countries (OPEC) and the importance of oil in our national policy, see JAREER ELASS & AMY JAFFE, THE HISTORY OF U.S. RELATIONS WITH OPEC: LESSONS TO POLICYMAKERS (2010), *available at* http://www.rice.edu/energy/publication/docs/Jaffe%20Elass%20Carbon.pdf.
[44] *The World Factbook*, U.S. CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/ publications/the-world-factbook/rankorder/2173rank.html (last visited Sept. 11, 2011).

Nigeria, and Russia.[45] The reader is left disappointed in the lack of in-depth analysis of how this change in policy would affect the United States on such an important issue, given her forty years of experience in the region.

Another significant foreign policy issue that Wright simply bypasses is the loss of influence in the Middle East and the loss of military bases if the United States pursued a unilateral policy of supporting any democratic movement in the region. The United States has significant military influence in Egypt due to grants of billions of dollars of aid and conducting high level training with Egypt's military over the past thirty years.[46] Arguably, this is a crucial factor that led to a more professional military and ultimately influenced the Egyptian military to support Egypt's citizens over its dictator.[47] Contrast the Egyptian military response with that of Syria, Iran, and Libya, and the reader can easily see the importance relations between professional militaries can play. None of this military influence is discussed by Wright either in her analysis of Egypt's revolution or in her analysis on U.S. policy.

Turning to military bases, Bahrain hosts U.S. Naval Central Command, which commands 28,000 military personnel on any given day.[48] If the United States came out in support of Bahraini protestors, there is little doubt that the United States would lose the host government's support for the base and be forced to quickly relocate 3000 personnel and much equipment elsewhere. Similar problems would likely occur in Kuwait, a crucial logistics hub into Iraq.[49] This would leave the United States without a long-term presence or a strategic foothold in one of the most volatile regions in the world and likely lead to an increase in Iran's influence in the region.[50]

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[45] *U.S. Total Crude Oil and Products Imports*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbl_.html (last visited Sept. 5, 2011).

[46] Robert Burns, *Military Ties Help U.S. Influence Egypt Subtly*, NAVY TIMES, Feb. 4, 2011, *available at* http://www.navy times.com/news/2011/02/ap-military-ties-help-us-influence-egypt-subtly-020411/.

[47] *Id*.

[48] *See Command Overview*, NAVCENT/5TH FLEET, http://www.cusnc.navy.mil/command/command.html (last visited Sept. 11, 2011).

[49] Brian Murphy, *Kuwait Port Plan Stirs Tension with Old Enemy Iraq*, ASSOCIATED PRESS, Aug. 24, 2011.

[50] *See generally* Lara Jakes, *Leaked UN Letter May be Trouble for US/Iraq Talks*, ASSOCIATED PRESS, Sept. 2, 2011, *available at* http://www.google.com/hostednews/ap/article/ALeqM5jmJ-ZBvhJxHgf3vJXMC5sXCwIP-w?docID=9274d5b94984a6d828636a

IV. Conclusion

Wright succeeds in educating the reader on the democratic movement that swept through the Middle East and North Africa in early 2011. She also provides excellent accounts of how individuals are expressing a counter-jihad attitude through a variety of mediums. The reader is left uncertain about how widespread and deep the counter-jihad sentiments run in Islamic society, but hopeful and optimistic of the overall direction. While Wright stumbles slightly with her selective use of statistics, her downplaying of the role of the U.S. military, and her cursory discussion of U.S. policy, she succeeds in making the reader believe in her overall message: a counter-jihad movement has caught on in the Islamic world, and it is effectively countering extremism. Nevertheless, the role of western armies is left in doubt.

Despite its shortcomings, *Rock the Casbah* is well worth the read. First, it broadens the reader's knowledge of the recent historical events in Tunisia, Egypt, and Libya as well as their underlying causes. Additionally, the book adds depth to the average reader's knowledge of Islamic culture, the cultural differences that exist in different Middle Eastern countries, and the overall movement away from extremists. This depth comes from the unique perspective of an American who has spent four decades covering the region. On balance, the book is a resounding success at both informing and entertaining the reader, but fails to provide the full picture of the events in the region.

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af127f29e (discussing how the presence of U.S. military in Iraq beyond 2011 is still in question).

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U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001