

MILITARY LAW REVIEW



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BOOK REVIEWS

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BOOK REVIEWS

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DEFENSE DEPARTMENT PURSUIT OF INSURERS FOR SUPERFUND COST RECOVERY*

MAJOR MICHELE McANINCH MILLER**

Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense.¹

I. Introduction

In the past several years, the Department of Defense (DOD) has embarked on an environmental cleanup effort that “represents nothing less than a new strategic goal for the military.”² With some 17,500 defense sites on over 1800 installations being examined for environmental problems, the financial stakes are high.³ In 1991 alone the Defense Department spent some 900 million dollars on environmental restoration, with additional

*Practitioners should note that a number of new cases recently have been reported dealing with the environmental insurance issues that are the subject of this article.—ED.

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¹Address by Secretary of Defense Dick Cheney to a national environmental conference, Sept. 4, 1990, quoted in Dianne Dumanoski, *Pentagon Takes First Steps Toward Tackling Pollution*, BOSTON GLOBE, Sept. 9, 1990, at 79.

²Keith Schneider, *Military Has New Strategic Goal in Cleanup of Vast Toxic Waste*, N.Y. TIMES, Aug. 5, 1991, at A1.

³*Id.*

expenditures of 1.3 billion dollars projected for fiscal year 1992.⁴ The official total estimated cost for completing all necessary environmental cleanup is forty billion dollars, but some commentators estimate that the Defense Department cleanup eventually could cost as much as ten times that estimate, and take as long as thirty years to complete.⁵

While much of the cleanup effort may be driven by the Defense Department's recognition of the magnitude of its environmental damages and a spirit of voluntary compliance, that is not entirely the case. In the past two decades, government contractor operations—particularly at industrial facilities for the production or destruction of munitions—have come under increasing scrutiny by federal and state regulators and environmental groups. As a result of past operation and disposal practices, the military now is faced with a plethora of environmental and hazardous waste problems at current and formerly used defense sites.⁶

In addition, since the mid-1980s, the United States Environmental Protection Agency (EPA) has adopted a policy of aggressive pursuit of government contractors operating at military facilities and bases.⁷ In 1991, ninety-four defense facilities were listed as priorities for cleanup on the National Priority List (NPL),⁸ established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or Superfund.⁹

The military has a substantial interest in the progress and outcome of CERCLA actions at federal facilities. As a current owner and operator of the facility, the DOD itself is a potentially

⁴Helaine Olen, *Huge Military Toxic Cleanup Fund Urged*, L.A. TIMES, Mar. 14, 1992, at A34.

⁵Schneider, *supra* note 2, at A1. The article's author notes that at a potential cost of \$400 billion, the military's environmental cleanup program would be four times as expensive as the Mercury, Gemini, and Apollo space programs combined, and would cost \$100 billion more than the building of the interstate highway system.

⁶Roger N. Boyd et al., *Who Pays for Superfund Cleanups at DOD-Owned Sites?*, 2 A.B.A. NAT. RESOURCES ENV'T. REP. 11, 12 (Spring 1986).

⁷United States Environmental Protection Agency, Office of Federal Activities, *Federal Facilities Compliance Strategy*, app. A-18 (Nov. 1988), cited in Mark J. Connor, *Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?*, 131 MIL. L. REV. 1, 18 n.110 (1991).

⁸137 CONG. REC. S14966-01 (1991) (statement of Sen. Baccus). The NPL, mandated by CERCLA section 106, 42 U.S.C. § 9605(a)(8)(B) (1988), is a listing of sites nationwide that the EPA has deemed to present the greatest threat to public health and welfare or to the environment.

⁹42 U.S.C. §§ 9601-9675 (1988) (amended 1991).

responsible party in these situations.¹⁰ Although the federal government cannot sue the DOD agencies directly for CERCLA enforcement actions, the military agencies are subject to cost recovery actions by states or private parties for the money they expend for cleanup costs.¹¹

The military departments are also subject to suits by states acting as natural resources trustees under CERCLA, and may be brought into a case on a claim for contribution or indemnification.¹² In addition, executive requirements compel the DOD to conduct cleanup operations on its installations in conjunction with EPA priorities and plans.¹³

Under certain circumstances, the military departments may bear all or part of the CERCLA cleanup costs for a defense contractor's hazardous waste and other environmental pollution at active or former defense sites.¹⁴ These expenses may be the result of cost recovery clauses under the applicable contract or indemnification procedures authorized by the *Federal Acquisition Regulation (FAR)* or statute.¹⁵ If the contractor's operations were covered by a commercial insurance policy, the DOD can seek indemnification from the insurer for the costs the military expended on behalf of the contractor.

Seeking recovery from the contractor's insurance company is no simple matter. The dispute between policyholders and insurers over coverage under the comprehensive general liability policy for environmental damage and hazardous waste cleanup costs has spawned one of today's hottest legal battles.¹⁶ State and federal courts, in their attempts to apply state insurance laws, have created a patchwork of inconsistent decisions in this area.¹⁷

Many courts have denied coverage for environmental cleanup costs based on their interpretations of pollution exclusion clauses and policy terms such as "sudden" and "damages." Others have held in favor of policyholders, rejecting overly technical constructions and artificial distinctions in interpreting insurance policy terms. This article reviews and analyzes the court's

¹⁰See *infra* Part II.B.

"Boyd, *supra* note 6, at 12; see also *infra* Part II.A.

¹²See *infra* Part II.C.

¹³See *infra* Part II.C.

¹⁴See *infra* Part III.B.

¹⁵*Id.*

¹⁶David E. Hoskins, *Striking a Balance: A Proposal for Interpreting the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies*, 19 ENVTL. L. REP. 10351, 10351 (Aug. 1989).

¹⁷See Peter E. Hapke, *Federal Circuit Court Insurance Decisions Contaminate Superfund Policy*, 19 ENVTL. L. REP. 10393, 10393 (Sept. 1989).

decisions interpreting the scope of the comprehensive general liability policy.

As background, this article first generally reviews the CERCLA statutory scheme. It then examines the relationships between the DOD and defense contractors that give rise to Defense Department payment of contractors' environmental cleanup costs. After reviewing and analyzing the extensive body of case law addressing insurance coverage for environmental costs, this article will conclude with suggestions for Defense Department representatives contemplating litigation in this area.

11. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

A. General Scheme

Congress passed CERCLA in 1980 to provide a mechanism for cleaning up inactive hazardous waste disposal sites. In 1986, CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA), which generally was designed to strengthen existing authority to clean up Superfund sites.¹⁸

The Environmental Protection Agency generally has several options for achieving this goal. Section 106 of CERCLA allows the EPA to order the responsible party to clean up the site.¹⁹ Alternatively, the EPA may clean up the site and then seek reimbursement from the responsible parties.²⁰ CERCLA also provides that the government may sue responsible parties for loss of value to the environment caused by the pollution.²¹ The EPA and the responsible party may enter an agreement on how the party will handle the cleanup, which usually is formalized in a consent decree.²²

In addition, state governments may—with EPA approval—carry out CERCLA cleanup actions using state funds, and then seek reimbursement from responsible parties. The statute also authorizes any person²³—including the United States—to file a citizen suit in federal court against any party—including the United States—who is allegedly in violation of any CERCLA

¹⁸Pub. L. No. 99-499, 100 Stat. 1614 (codified at 10 U.S.C. §§ 2701-2710 (1988)), 26 U.S.C. § 9507 (1988)).

¹⁹42 U.S.C. § 9606 (1988).

²⁰*Id.* § 9607(a)(4)(A). Money for CERCLA remedial actions generally comes from the Hazardous Substance Superfund (Superfund), 26 U.S.C. § 9507 (1988).

²¹42 U.S.C. § 9607(a)(4) (1988).

²²*Id.* § 9606(a).

²³The statute defines "person" to include states. *Id.* § 9601(21).

standard, regulation, or order.²⁴ These suits can seek injunctive relief and civil penalties.²⁵

B. Potentially Responsible Parties

CERCLA reaches a broad spectrum of potential polluters, referred to as “potentially responsible parties” or “PRPs.” PRPs include the following four categories of parties: (1) current owners and operators of facilities; (2) past owners and operators at the time during which hazardous wastes were disposed; (3) generators—that is, those who arranged for disposal, treatment, or transport of hazardous substances; and (4) transporters of hazardous substances.²⁶

The 1986 SARA extended CERCLA application to facilities owned or operated by federal agencies and instrumentalities, including the Department of Defense.²⁷ The DOD, therefore, can be a PRP for cleanup costs at DOD facilities as owner, operator, generator, or transporter. The military department remains a PRP even if the facility is leased or operated by a government contractor. The contractor operating or leasing a government facility is also potentially responsible as an “operator,” despite government ownership of the facility.

Under CERCLA section 107(a), present and past contractors and other third persons operating on government-owned installations and facilities are also potentially liable for hazardous waste cleanup costs as “generators.”²⁸ They will be liable even if they did not own the hazardous material or facility or generate the waste, but only operated the facility or made arrangements to dispose of the hazardous waste.²⁹ Under CERCLA section 107(a)(4), contractors also can be liable as PRPs if they merely transport hazardous waste for disposal.³⁰

²⁴*Id.* § 9659(a)(1).

²⁵The citizen suit provision is not available if the EPA has begun, and is prosecuting diligently, an action under CERCLA that would, if successful, compel compliance and remedy the injury that is the subject of the complaint. *Id.* § 9659(d)(2).

²⁶*Id.* § 9607(a)(1)-(4).

²⁷*Id.* § 9620. Unlike generic EPA cleanup actions, which are paid from Superfund, cleanup of DOD facilities is funded by the Defense Environmental Restoration Account (DERA), 10 U.S.C. § 2703 (1988).

²⁸42 U.S.C. § 9607(a) (1988).

²⁹See Margaret O. Steinbeck, *Liability of Defense Contractors for Hazardous Waste Cleanup Costs*, 125 *MIL. L. REV.* 55, 58-59 (citing *United States v. Bliss*, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428-29 (S.D. Ohio 1984); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 579 F. Supp. 823, 847 (D. Mo. 1984)).

³⁰42 U.S.C. § 9607(a)(4) (1988).

C. CERCLA Liability Standards

One of CERCLA's key features is that the standard of liability is strict.³¹ Claims of due care, lack of negligence, and unforeseeability do not avoid liability under CERCLA. Under a strict liability standard, liability attaches to a PRP regardless of when the hazardous waste was deposited, who was at fault, or the degree of fault. Liability for CERCLA response costs is also retroactive.³² Specifically, responsible parties can be held liable for releases that occurred before the statute was enacted, even if they acted reasonably and employed state-of-the-art technology.³³

A third important feature of CERCLA is that liability also may be joint and several if the harm is not readily divisible.³⁴ Although CERCLA does not provide for joint and several liability explicitly, courts have created federal common law in this area by finding that joint and several liability is supported by CERCLA's scope and importance.³⁵ Accordingly, a PRP's liability may increase as a result of the actions of another party over whom the PRP actually has no control. Apportionment of response costs is allowed if the PRPs' proportionate shares can be established, but

³¹*Id.* § 9601(3). The statute's definition of liability refers to the standard of liability found in the "Oil and Hazardous Substance Liability" section of the Clean Water Act (CWA), 33 U.S.C. § 1321 (1988). Courts have consistently construed section 1321 of the CWA as applying a strict liability standard. Consistent with these rulings and the CERCLA's legislative history, courts also construe the CERCLA as standard as one of strict liability. *See, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Northeast Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (Pa. D. & C. 4th 1982).

³²*See J.V. Peters & Co. v. Administrator, Env'tl. Protection Agency*, 767 F.2d 263, 265-66 (6th Cir. 1985); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043-44 (2d Cir. 1985).

³³Courts have refuted claims of unconstitutionality of CERCLA's retroactive liability scheme in two ways. Under the first theory, courts find that liability is contingent on a release that is a present condition or effect of a past disposal act. Even if considered retroactive, this liability bears a rational relationship to the government's legitimate goal of cleaning up the environment at the polluters' expense. *See Katherine T. Eubank, Note, Paying the Costs of Hazardous Waste Pollution: Why is the Insurance Industry Raising Such a Stink?*, 1991 U. ILL. L. REV. 173, 184 (citations omitted).

The second approach is that, even if the polluting activity occurred before enactment of the CERCLA, the response costs were incurred after the legislation was enacted. Therefore, the CERCLA is not truly retroactive. *Id.* (citations omitted).

³⁴*See Shore Realty Corp.*, 759 F.2d at 1052-53; *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983). *But cf.* *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984) (court may apportion damages even if defendant cannot prove its causal contribution).

³⁵*See, e.g., A & F Materials Co.*, 578 F. Supp. at 1254; *Chem-Dyne Corp.*, 572 F. Supp. at 807-08; *see also Barbara J. Gulino, A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668, 673-76 (1986).

the burden of establishing proper proportions is on the defendants.³⁶

D. Right of Contribution

CERCLA section 113(f) was added by SARA in 1986 to create an express right of contribution between liable PRPs,³⁷ codifying the common-law right previously recognized by courts.³⁸ Accordingly, a CERCLA PRP held jointly and severally liable may seek contribution from other PRPs. The amendment also gives courts latitude in resolving contribution claims to allocate response costs among PRPs using such equitable factors as the court determines are appropriate.³⁹

Parties who resolve their liabilities to the United States or to a state in an administrative or judicially approved settlement are protected under the amendment from claims for contribution from other PRPs for liabilities resolved in the settlement.⁴⁰ Parties entering into settlement agreements with the government, however, may seek contribution from responsible parties who are not parties to the settlement.⁴¹

III. Department of Defense and Defense Contractors

A. General

Under CERCLA section 107(e), agreements between parties to insure, hold harmless or indemnify each other for CERCLA liability are not prohibited.⁴² "CERCLA expressly reserves the right of parties to contractually transfer to or release another from the financial responsibility arising out of CERCLA liability."⁴³ Therefore, the DOD may agree in the applicable contract to assume a government contractor's hazardous waste cleanup costs. No such contractual arrangement or other agreement, however, can shift or negate CERCLA liability.⁴⁴

³⁶*E.g., Chem-Dyne Corp.*, 572 F. Supp. at 810.

³⁷42 U.S.C. § 9613(f) (1988).

³⁸*See, e.g., United States v. New Castle County*, 642 F. Supp. 1258, 1265 (D. Del. 1986).

³⁹42 U.S.C. § 9613(f) (1988).

⁴⁰*Id.* § 9613(f)(2).

⁴¹*Id.* § 9613(f)(3).

⁴²*Id.* § 9607(e)(2).

⁴³*Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988).

⁴⁴42 U.S.C. § 9607(e)(1) (1988).

Even if the military department agrees to pay a contractor's cleanup costs, the contractor remains a potentially responsible party. The military will have a contractual claim for reimbursement, and possibly a claim for contribution, from the contractor. If the contractor is insured, the military's claim for reimbursement can be made against the contractor's insurer.

B. Defense Department Payment of Contractors' Cleanup Costs

A number of different scenarios could arise in which the military department may agree to pay contractors' hazardous waste or pollution cleanup costs, but in which the military later may seek recovery from a contractor's insurance carrier.

1. Defense Department Cleanup of Sites.—The Secretary of Defense has responsibility and authority for enforcing CERCLA cleanups on DOD facilities.⁴⁵ At facilities owned and operated by the DOD, or DOD-owned and contractor-operated facilities, the DOD is generally responsible for either financing response actions or ensuring that another party does so.⁴⁶ If a release of hazardous substances results only in contamination on the military facility itself, the DOD is required to conduct and finance the response action or ensure that someone else conducts and finances it.⁴⁷

If contamination occurs both on and off the facility, and the evidence clearly demonstrates that the military is the only source, the DOD again is required to take action.⁴⁸ When contamination has occurred off the installation and the DOD may not be the only source, the EPA is required to finance and conduct the investigations and studies off the facility, while the DOD is responsible for the same actions on the installation. If the investigation reveals that the military facility was the sole source of contamination, the DOD will conduct and finance cleanup actions and reimburse EPA for its costs.⁴⁹

2. Cost Recovery Under the Contract.—Perhaps the most significant area in which recovery for environmental cleanup costs arises is with government-owned, contractor-operated (GOCO) munitions facilities. GOCO facilities are the prime suppliers of the country's military munitions.⁵⁰ The GOCO arrangement calls for government ownership of the production facilities and

⁴⁵Boyd, *supra* note 6, at 13.

⁴⁶*Id.* at 14-15.

⁴⁷*Id.*

⁴⁸*Id.* at 15.

⁴⁹*Id.* at 15-16.

⁵⁰Connor, *supra* note 7, at 1.

equipment, and contractor management and operation of the production facility pursuant to one or more contracts with the government.

Two contracts form the basis for most GOCO operations. The first is a facilities contract, which is in the nature of a lease arrangement. The other is a production contract, which addresses the goods and services to be produced at the facility.⁵¹ Under the facilities contract, the military provides the contractor the facilities to be used in producing products or providing services under the production contracts. Both facilities contracts and production contracts are normally cost-type contracts, with the government reimbursing the contractor for expenses involved in maintaining the facility.⁵²

In the case of a cost-reimbursement contract of this type, the military may allow recovery of the contractor's costs associated with environmental cleanup. Cost principles in the Federal Acquisition Regulation (*FAR*)⁵³ authorize payment for "allowable" costs, which—as a general rule—must be reasonable, allocable, and not specifically prohibited by regulation or the terms of the contract.⁵⁴ Although environmental cleanup costs are not addressed specifically in the *FAR* or the Defense Federal Acquisition Regulation Supplement (*DFARS*)⁵⁵, these expenses can be allowed as direct costs if they are allocable to the contract. Alternatively, the contractor may have included the costs of environmental cleanup in its overhead costs as an indirect cost of production under the production contract.⁵⁶

3. Indemnification.—The military also may reimburse a contractor for environmental response costs pursuant to an indemnification provision in the contract. This type of indemnification is authorized by both regulation and statute, and can be used in either fixed-price or cost-type contracts.

(a) Contractual Indemnification.—A contract that covers a GOCO facility includes a FAR clause entitled "Insurance—Liability to Third Persons."⁵⁷ This clause provides

⁵¹Laurent R. Hourcle et al., *Environmental Law in the Fourth Dimension: Issues of Responsibility and Indemnification with Government Owned-Contractor Operated Facilities*, 31 A.F. L. REV. 245, 246 (1989).

⁵²*Id.*

⁵³48 C.F.R. ch. 1 (1991).

⁵⁴GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 16.301-1, 31.201-2 (1 Apr. 1984) [hereinafter *FAR*].

⁵⁵48 C.F.R. ch. 2 (1990).

⁵⁶Robert K. Huffman & Willard L. Boyd, *Government Contractors' Recovery of Environmental Response Costs, Environmental Risks of Government Contracts*, A.B.A. SEC. PUB. CONT. L. D1, at D3 (May 18, 1990).

⁵⁷*FAR*, *supra* note 54, at 52.228-7.

for military indemnification of contractors for liabilities and related expenses to third persons arising out of performance of the contract. Reimbursable liabilities are for death and bodily injury, and for property damage or loss.⁵⁸

Military indemnification for property liability, however, is not unlimited. The *FAR* restricts reimbursement to property loss or damage other than to property owned, occupied, or used by the contractor; rented to the contractor; or in the care, custody, or control of the contractor.⁵⁹ Accordingly, government financial support for environmental cleanup costs incurred on the government property occupied by the contractor's facility is disallowed. The military, however, normally would indemnify for off-site cleanups compelled by the government or private citizen suit, provided the contractor can show that the costs are allocable against the current contract.⁶⁰

Several other restrictions significantly limit the scope of indemnification under the "Insurance—Liability to Third Persons" clause. Government liability under the clause is subject to the availability of appropriated funds at the time the contingency occurs.⁶¹ Indemnification is prohibited for liabilities resulting from the contractor's willful misconduct or lack of good faith.⁶² Finally, the *FAR* limits indemnification to liabilities "not compensated by insurance or otherwise."⁶³ Although the *FAR* contains no further definition of the phrase "not compensated by insurance or otherwise," a plain reading indicates that it allows indemnification of a contractor who is insured, but whose policy limits fall short of its actual liability, thereby rendering the full liability noncompensable under the policy.⁶⁴

(b) Statutory Indemnification.—The National Defense Contracts Act, Public Law 85-804,⁶⁵ provides broad authority for federal agencies, including Department of Defense, to protect contractors from financial harms not otherwise reimbursable

⁵⁸*Id.* at 52.228-7(c).

⁵⁹*Id.* at 52.228-7(c).

⁶⁰Huffman & Boyd, *supra* note 56, at D12.

"**FAR**, *supra* note 54, at 52.228-7(d).

⁶²*Id.* at 52.228-7(e).

⁶³*Id.* at 52.228-7(c).

⁶⁴More unclear is the issue of whether the Liability to Third Persons clause allows indemnification if the contractor has a CGL policy, but the insurance company providing the policy denies coverage based on the insurer's interpretation of a pollution exclusion clause or other policy term. *See infra* Parts V, VI (providing a comprehensive discussion on the positions taken by insurance companies with regard to coverage of environmental cleanup costs under CGL policies).

⁶⁵50 U.S.C. §§ 1431-35 (1988).

under FAR provisions. In pertinent part, Public Law 85-804 provides:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.⁶⁶

Although the statute never specifically addresses indemnification, the National Defense Contracts Act's legislative history clarifies that Congress intended to provide this authority in facilitation of the national defense.⁶⁷ The authority to indemnify is an extraordinary remedy, not to be used when other adequate legal relief exists within the agency.⁶⁸

The executive order implementing the act further defines the parameters of Public Law 85-804.⁶⁹ The Executive Order limits indemnification to previously authorized and appropriated fund ceilings, with one significant exception. The exception allows

⁶⁶*Id.* at § 1431.

⁶⁷*See* S. Rep. No. 2281, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4043. The Senate report clarifies that facilitating the indemnification of defense contractors is one of the primary reasons for the act. The report notes the following:

[T]he departments authorized to use this authority have heretofore utilized it as the basis for the making of indemnity payments under certain contracts. The need for indemnity clauses in most cases arises from the advent of nuclear power and the use of highly volatile fuels in the missile program. The magnitude of the risks involved under procurement contracts in these areas have rendered commercial insurance either unavailable or limited in coverage. At the present time, military departments have specific authority to indemnify contractors who are engaged in hazardous research and development, but this authority does not extend to production contracts (10 U.S.C. 2354). Nevertheless, production contracts may involve items, the production of which may include a substantial element of risk, giving rise to the possibility of an enormous amount of claims. It is, therefore, the position of the military departments that to the extent that commercial insurance is unavailable, the risk of loss in such a case should be borne by the United States.

Id. at 4045.

⁶⁸FAR, *supra* note 54, at 50.102(a).

⁶⁹Exec. Order No. 10789, 23 F.R. 8897 (1958), *as amended by* Exec. Order No. 10151, 27 F.R. 9683 (1962); Exec. Order No. 11382, 32 F.R. 16247 (1967); Exec. Order No. 11610, 36 F.R. 13755 (1971); Exec. Order No. 12148, 44 F.R. 43239 (1979), *reprinted in* 50 U.S.C. § 1431 (1988).

contractor indemnification without regard to appropriated fund limitations for “claims or losses arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature.”⁷⁰

Given the absence of an Anti-Deficiency Act concern, the Defense Department has come to regard Public Law 85-804 indemnification as the primary means to protect contractors from catastrophic financial harm and to ensure a pool of defense contractors willing to operate munitions facilities.⁷¹ Accordingly, the Secretary of the Army has applied an expansive definition of the term “unusually hazardous activities.”

The Army’s definition includes “exposure to toxic chemicals or other hazardous materials arising from the receiving, handling, storage, transportation, loading, assembling, packing, and testing of such chemicals or materials and thus damages arising out of the use, disposal, or spillage of such toxic chemicals and other hazardous materials are covered, including environmental damages.”⁷²

Consequently, the Army provides broad financial support for government contractors whose activities involve substances that are not nuclear related or obviously hazardous in nature, but which are toxic or considered hazardous within the meaning of environmental statutes.⁷³

⁷⁰See sources cited *supra* note 69. Although “unusually hazardous” was not defined, the Defense Department’s stated position in 1984 was that the phrase meant risks “generally . . . associated with nuclear-powered vessels, nuclear-armed guided missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas.” Hearings on H.R. 4083, Government Contractors Product Liability Act of 1983 and H.R. 4199, Contractor Liability: An Indemnification Act Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., 98th Cong., 2d Sess. 45 (1984) (testimony of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management). See generally Connor, *supra* note 7, at 37-38.

⁷¹See Connor, *supra* note 7, at 35-37.

⁷²Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in Contracts for Lake City and Newport Army Ammunition Plants (31 May 1985).

⁷³See generally Connor, *supra* note 7, at 37-38. In the years following the Public Law 85-804 determinations for the Lake City and Newport Army Ammunition Plants (AAPs), the Secretary of the Army has further refined the scope of activities warranting indemnification. For example, the 1989 approval for indemnification at the Radford U.P., which is considered the model for all remaining Public Law 85-804 determinations, extended indemnification to cover use of toxic or hazardous materials in performance of contracts other than the defense munitions contract, with written approval of the contracting officer. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under 50 U.S.C. §§ 1431-1435 (Pub. L. 85-804) to Include an Indemnification Clause in a Contract With Hercules Incorporated (30 Oct. 1989), cited in Connor, *supra* note 7, at 39-40 & nn.263-65.

In addition to the instructions found in Executive Order 10789, policies and procedures for Public Law 85-804 indemnification appear in the FAR.⁷⁴ The FAR provides that indemnification may not be used in a manner that “encourages carelessness and laxity on the part of persons engaged in the defense effort.”⁷⁵ This requirement is underscored by the Department of the Army’s prohibition against indemnification for intentional and knowing acts of contractor misconduct.⁷⁶

Recent determinations by the Secretary of the Army concerning Public Law 85-804 clarify that indemnification is not available for a “non-sudden release”⁷⁷ if the government can show that the release was the result of action or inaction by the contractor’s principal officers, in which they knowingly or intentionally failed to comply with environmental laws or regulations applicable at the time of the release.⁷⁸

In summary, through contractual and statutory indemnification provisions, the government may reimburse its contractors for costs of environmental compliance and restoration. Subsequent to the indemnification, the agency may be able to pursue reimbursement of some or all of its costs from the contractor’s insurance carrier if the contractor is insured under a comprehensive general liability policy.

C. Insurance Requirements for DOD Contractors

Government contractors are not, as a general rule, required to maintain comprehensive general liability insurance. The FAR, however, outlines specific insurance requirements based on the type of contract being performed.

⁷⁴FAR, *supra* note 54, at 50.000 to 50.403-3.

⁷⁵*Id.* at 50.102.

⁷⁶*See* Memorandum of Decision, *supra* note 73.

⁷⁷A “non-sudden release” is defined as a release of toxic, nuclear, or hazardous chemicals or materials that “takes place over time and involves continuous or repeated exposure.” Sudden release is a release which is not repeated or continuous in nature. Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in a Contract for the Iowa Army Ammunition Plant (1 Apr. 1988), *quoted in* Connor, *supra* note 7, at 39, n.262.

⁷⁸*Id.*, *quoted in* Connor, *supra* note 7, at 40-41 & n.267. This 1989 Secretary of the Army determination is significant in that it expands the scope of the indemnity by limiting exclusions to cases in which a non-sudden release is caused by the contractor’s noncompliance with environmental laws or regulations, but only with the knowledge or intent of the contractor’s principal officers. Consequently, absent a senior-level decision knowingly to violate laws or regulations, a contractor is well protected by indemnification. *See* Connor, *supra* note 7, at 41 & nn.268-70.

For contractors operating under fixed-price contracts, the government normally is not concerned with the contractor's insurance coverage.⁷⁹ Insurance for fixed-price contractors, however, may be required under some circumstances. If, for example, the contract involves government property or the work is to be performed on a government installation, the agency may specify insurance requirements.⁸⁰ When the agency requires a contractor to maintain insurance, the premiums are generally allowable costs.⁸¹

The *FAR* ordinarily requires the following types of insurance in cost-reimbursement contracts: (1) workers' compensation in accordance with applicable federal and state statutes; (2) general third-party bodily injury liability; (3) automobile liability for operation of all automobiles used in connection with the contract; and (4) aircraft and vessel liability when applicable.⁸²

The *FAR* requires property damage liability under cost-reimbursement contracts only in special circumstances as determined by the agency.⁸³ For example, the agency may require this insurance if the risk of contract operations is "such as to warrant obtaining the claims and investigating services of an insurance carrier."⁸⁴ Examples of high risk operations include contractors engaged in the handling of explosives or in extrahazardous research and development activities.

In addition to the *FAR* requirements outlined above, the agency may require insurance when deemed necessary because of the commingling of property, type of operation, circumstances of ownership, or condition of the contract.⁸⁵ Therefore, a large **GOCO** weapons or ammunition facility that engages in sales of products to other Defense Department suppliers or for export normally will be required to maintain, at a minimum, property damage liability coverage, and possibly a comprehensive general liability (**CGL**) policy covering general liabilities to third persons.

In summary, although no general rule requires a government contractor to maintain a **CGL** policy, a number of circumstances may arise in which the agency may require coverage. In the absence of a specific requirement, a contractor always may carry

⁷⁹*FAR*, *supra* note 54, at 28.306(a).

⁸¹*Id.* at 31.205-19.

⁸²*Id.* at 28.307.

⁸³*Id.*

⁸⁴DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 28.307-2(b) (1 Dec. 1984).

⁸⁵*FAR*, *supra* note 54, at 28.301(b).

the insurance at its own option—particularly if the firm is engaged in production other than under the government contract.

IV. Comprehensive General Liability Insurance

A. General

Most businesses, including many government contractors, purchase insurance policies to provide protection against liability arising from activities incident to their operations. Since 1966, the insurance industry's primary form of commercial insurance coverage has been the comprehensive general liability (CGL) policy. The CGL policy does just what its name implies—that is, it insures policyholders in a comprehensive way against liability to third persons, embracing all hazards not specifically excluded.⁸⁶

Unlike most ordinary contracts, the typical insurance contract is not the product of negotiation and compromise between the contracting parties. Rather, it is a contract of adhesion; the insurance company drafts it and the policyholder must take it or leave it as written.⁸⁷ A CGL policy can be described as litigation insurance as well as indemnification insurance, because it also requires the insurance carrier to defend the policyholder in suits in which the complaint arguably falls within the policy terms.⁸⁸ The duty to defend is distinct from, and broader than, the duty to indemnify. For example, an insurer must defend multiple-count complaints if any one of the counts contains issues potentially within the scope of the policy's coverage.⁸⁹

⁸⁶ See Sawyer, *Comprehensive Liability Insurance: The Inside*, BEST'S FIRE & CASUALTY NEWS, May 1941, at 60, cited in Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. REP. 357, 359 n.6 (1991).

⁸⁷ Salisbury, *supra* note 86, at 361-62 (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)).

"Under the standard CGL policy, the insurance carrier assumes five different duties. The first two duties are as follows: (1) the duty to indemnify damages because of injury or damage covered by the policy; and (2) the duty to defend the insured in litigation when the complaint arguably falls within the policy terms. These two obligations are the focus of the bulk of insurance litigation. The insurance company also is obligated to perform the following: (3) provide "loss control" to the policyholder, by assisting in promoting safety and reducing claims; (4) investigate claims made by the policyholder; and (5) provide loss mitigation costs—that is, pay expenses to mitigate losses that already have occurred and prevent further loss or damage to the insured or others. See *id.* at 359 n.6.

⁸⁹ See Hapke, *supra* note 17, at 9. Courts are not reluctant to find that an insurer is obligated to defend, even if the duty to indemnify is questionable or appears on its face to be excluded by the policy. See, e.g., *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, 807 (D. Del. 1989) (insurance

Between 1940 and 1971, the CGL policy sold by American commercial liability insurance carriers was drafted by either the Insurance Rating Bureau (IRB) or the Mutual Insurance Rating Bureau (MIRB).⁹⁰ In 1971, the IRB and MIRB merged to form the Insurance Services Office, Inc. (ISO). The ISO, the insurance industry trade organization that encompasses the majority of all major insurance companies in the United States, now drafts and revises the standard-form CGL policy.⁹¹

B. Insurance Coverage for Pollution Damage

Insurance coverage for pollution damage increasingly has been the subject of litigation in state and federal courts. As a general rule, the CGL policies litigated in courts today were drafted long before CERCLA was enacted in 1980. Therefore, when the insurance industry used terms such as "property damage" and "occurrence," they described traditional types of liability with which both insurers and policyholders were familiar.⁹² The CERCLA, however, has created new forms of liability that do not fit readily into the preexisting policies' traditional definitions and descriptions.⁹³ Accordingly, a number of issues involving insurance coverage for pollution damage have arisen in the past two decades. The three issues litigated most frequently involve the following determinations: (1) the scope of the pollution exclusion clause; (2) the meaning of the "as damages" clause; and (3) the definition of "occurrence."⁹⁴

company has a duty to defend the policyholder in any suit seeking damages on account of property damage or bodily injury even if that suit is "groundless, false or fraudulent"). As a result, the insured in a Superfund cost recovery action may find the insurance company paying its defense costs, while reserving its right to indemnify for the cleanup costs—a right that will require additional litigation to resolve.

⁹⁰The IRB succeeded the National Bureau of Casualty Underwriters (NBCU). The bureaus were trade associations that issued revised standard provisions for CGL policies, which they distributed to member insurance underwriters. The bureaus also represented members in submitting proposed revisions in standard policy language for state insurance regulatory approval. See S. Hollis M. Greenlaw, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J.L. & SOC. PROBS. 233, 236-37 (1990). The distinction between the IRB and the MIRB was that the former consisted of stock insurance companies and the latter of mutual insurance companies. Salisbury, *supra* note 86, at 361 n.8.

⁹¹Salisbury, *supra* note 86, at 361 n.8.

⁹²See Hapke, *supra* note 17, at 8.

⁹³*Id.*

⁹⁴Richard M. Gold & Dennis L. Arfmann, *The Insurance Industry and Superfund: Current Trends in Private Party and Government Cost Recovery Litigation, Analysis & Perspective*, Toxics L. Rep. (BNA) 347 (Aug. 14, 1991).

The standard CGL policy has undergone a number of revisions in the past three decades.⁹⁵ Each change has impacted on coverage for environmental pollution significantly. Accordingly, a review of the history and evolution of the CGL policy is vital to an understanding of the policy issues currently being litigated.

C. Evolution of the Standard CGL Policy

1. *Pre-1966 Accident-based Coverage.*—The insurance industry's trade associations drafted standard-form CGL policies in 1941, 1947, 1955, 1966, and 1973.⁹⁶ Before 1966, the CGL policy provided accident-based coverage—that is, it indemnified for damage caused by “accidents.”⁹⁷ Because the word “accident” never was defined in the standard policy, courts struggled with the distinction between accidents and nonaccidents.⁹⁸

In interpreting the pre-1966 accident-based policy, one of the more troublesome areas for courts was determining whether injuries or property damage caused by gradual events or processes could be considered “accidents.”⁹⁹ Although the policy did not contain an exclusion for injury or damage resulting from gradual events, such as contamination, many courts limited their interpretations of “accident” to sudden and identifiable events.¹⁰⁰ This ambiguity led, in part, to the 1966 amendment of the CGL policy language to occurrence-based coverage.

2. *1966 Occurrence-based Coverage.*—In 1966, the new CGL policy shifted to occurrence-based coverage, providing that “the company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of

⁹⁵ See generally Greenlaw, *supra* note 90, at 235-52; Thomas A. Gordon & Roger Westendorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 IDAHO L. REV. 567, 575-76 (1989).

⁹⁶ See American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *affd as modified*, 748 F.2d 760 (2d Cir. 1984).

⁹⁷ Accident-based CGL policies provided coverage under the following language: “The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages because of bodily injury or property damage caused by accident.” *Id.* at 1502-03 (emphasis added).

⁹⁸ *Id.* at 1500-01. See generally Salisbury, *supra* note 86, at 363-65.

⁹⁹ *American Home Prods.*, 565 F. Supp. at 1500-01.

¹⁰⁰ *Id.* at 1489; Clark v. London & Lancashire Indem. Co., 124 N.W.2d 29 (1963). A large number of other courts, however, held that the pre-1966 policy covered gradual pollution damage. See, e.g., Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prods., 256 F. Supp. 145 (D. Or. 1966); City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W. 2d 632 (1973); Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360 (1972); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368 (1970); White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969); Taylor v. Imperial Casualty & Indem. Co., 144 N.W.2d 856 (1966).

bodily injury or property damage to which this insurance applies *caused by an occurrence*¹⁰¹

The new policy defined the word "occurrence" as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."¹⁰² The insurance industry made this change for several reasons. The first was to clarify the meaning of the word "accident," because the lack of that definition had been at the heart of frequent litigation in the past.¹⁰³

Another reason the insurance industry shifted from accident-based to occurrence-based coverage was to satisfy public demand for expanded coverage, particularly for manufacturers who were concerned about gradual pollution damage.¹⁰⁴ According to insurance industry representatives, the new policy not only continued to provide coverage for unexpected or unintended pollution damage—as it always had—but also provided significantly expanded coverage.¹⁰⁵

For example, the Assistant Secretary of Liberty Mutual Insurance Company stated in a paper presented at an insurance industry technical conference, that "it is in the waste disposal

¹⁰¹"Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1986) (emphasis added).

¹⁰²*Id.*

¹⁰³See *American Home Prods.*, 565 F. Supp. at 1500-03; see also *supra* note 100 and accompanying text.

¹⁰⁴*Gordon & Westendorf*, *supra* note 95, at 575; *Salisbury*, *supra* note 86, at 364.

¹⁰⁵*Salisbury*, *supra* note 86, at 364-65; see also OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.02 (1988) ("The purpose of amending the standard CGL form from an 'accident'-based policy to an 'occurrence'-based policy was to confirm that the insured event was not limited to sudden events, but also included 'personal injuries and property damage sustained as a result of gradual processes, or as a result of repeated exposures to the same or similar conditions'") (citation omitted).

Case law reveals that an additional reason for the shift from accident-based to occurrence-based coverage was to clarify that the term "accident" was to be defined from the viewpoint of the *insured policyholder*, not the injured party. In other words, some courts were interpreting the term, "accident" based on whether the injured party expected or intended the injury or damage. In doing so, these courts were finding damages within the CGL policy even when the policyholder acted intentionally, or knew or should have known that his or her conduct or product caused damage. See, e.g., *Moffat v. Metropolitan Casualty Ins. Co. of N.Y.*, 238 F. Supp. 165 (M.D. Pa. 1964) (damages resulting from an accident are within the CGL policy notwithstanding the fact that the insured knew or should have known of the nature of his products and the likelihood of causing damage); *Lancaster Area Refuse Auth. v. Transamerica Ins. Co.*, 214 Pa. Super. 80, 251 A.2d 739, *aff'd* 437 Pa. 493, 263 A.2d 368 (1970) (court should not be concerned with insured's conduct being intentional or reckless).

area ... that coverage is liberalized most substantially.”¹⁰⁶ The paper continued to make clear that manufacturers who produce substances such as insecticides, fertilizers, paints, and chemicals also typically produce smoke, fumes, or other air or stream pollution, which causes these manufacturers to experience severe gradual property damage exposure.¹⁰⁷ The author concluded that “[t]hey need this protection and should legitimately expect to be able to buy it, so we have provided it.”¹⁰⁸

Many other public statements in a similar vein were made by insurance industry representatives—the very people who helped draft and approve the CGL policy language.¹⁰⁹ Virtually all of the public statements supported the proposition that the 1966 occurrence-based CGL policy was intended to cover liabilities resulting from gradual pollution events that neither were expected nor were intended by the insured.¹¹⁰ This background is key to understanding the scope of the CGL policy’s coverage after its further modification in 1970.

3. 1970/1973 Pollution Exclusion Policy.—In 1970, the insurance industry began issuing an endorsement excluding coverage for certain types of pollution damage and, in 1973, incorporated the clause into the standard policy form as an exclusion.¹¹¹ The clause excluded insurance coverage for property

¹⁰⁶Salisbury, *supra* note 86, at 364-66 (citing G. Bean, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, paper presented at Mutual Insurance Technical Conference, Nov. 15-18, 1965, at 6). Bean was a member of the committee that approved the standard policy language for the insurance industry trade associations.

¹⁰⁷*Id.* at 365-66 (citing Bean, *supra* note 106, at 6, 10).

¹⁰⁸*Id.* at 366 (citing Bean, *supra* note 106, at 6, 10) (emphasis omitted). In a second paper, which Bean presented in early 1966, he clarified that the new policy language was intended to cover gradual pollution damage. He explained that the new CGL policy would cover gradual bodily injury or gradual property damage “resulting over a period of time from exposure to the insured’s waste disposal. Examples would be gradual adverse effects of smoke, fumes, air or stream pollution, contamination of water supply or vegetation.” G. Bean, Summary of Broadened Coverage Under the New CGL Policies with Necessary Limitation to Make This Broadening Possible, at 1 (1966).

¹⁰⁹See Salisbury, *supra* note 86, at 366-68 (citing R. Elliot, The New Comprehensive General Liability Policy 4 (1965) (Secretary of the NBCU); Address by Lyman J. Baldwin, Jr. to the American Society Insurance Management (Oct. 20, 1965) (Secretary of Underwriting at Insurance Co. of North America and member of the Joint Drafting Committee); H. Mildrum, Implications of Coverage for Gradual Injury or Damages (presentation at Sheraton Boston Hotel, Nov. 11, 1965) (Hartford Insurance Co. executive and insurance industry spokesman who participated in the drafting process)).

¹¹⁰See generally I S. MILLER & P. LEFEBVRE, MILLER’S STANDARD INSURANCE POLICIES ANNOTATED 409 (1969 Supplement).

¹¹¹Gordon & Westendorf, *supra* note 95, at 575; see also Greenlaw, *supra* note 90, at 244; Salisbury, *supra* note 86, at 368-69. The pollution exclusion was originally adopted by the IRB at the 15 April 1970 meeting of the General

damage caused by pollution unless the discharge was "sudden and accidental."¹¹² In full, the clause provides that coverage is not available for:

Contamination or Pollution Exclusion. Bodily injury or property damages arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water-course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*¹¹³

The meaning of the clause, when coupled with the language of the occurrence-based CGL policy, is not immediately clear. The definition of "occurrence" in the standard policy indicates that pollution damage is covered.¹¹⁴ The pollution exclusion clause, however, appears to eliminate coverage for all pollution damage.

Finally, the last phrase in the exclusion clause shifts the focus from the result or damage caused by the polluting event to the polluting acts themselves. The last phrase appears to restore coverage if the pollution—not the damage—was "sudden and accidental." The clause, however, does not define "sudden and accidental." The clause's ambiguity has spawned a tremendous amount of litigation over the scope of the pollution exclusion clause.¹¹⁵

4. 1986 Pollution Exclusion Clause.—In response to increasing numbers of environmental claims and unfavorable court rulings on the scope of the **1973** pollution exclusion clause, the insurance industry again changed the CGL policy.¹¹⁶ In 1986, the pollution exclusion was rewritten with greater clarity to exclude coverage for pollution-based claims; this revision resulted in the

Liability Governing Committee. Agenda & Minutes of the Insurance Rating Board Meeting of the General Liability Governing Committee (Mar. 17, 1970) (available in Exhibits to Brief of *Amici Curiae* American Petroleum Inst., *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989)).

¹¹²Greenlaw, *supra* note 90, at 244-45.

¹¹³*Id.* at 244-45 (citing Insurance Rating Board Confidential Circular to Board Members and Associate Members (May 15, 1970)) (emphasis added).

¹¹⁴"Occurrence" in the standard CGL policy is defined as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damages neither expected nor intended from the standpoint of the insured." *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33 (1st Cir. 1986).

¹¹⁵See *infra* Part V and accompanying notes.

¹¹⁶Gold & Arfmann, *supra* note 94, at 347.

so-called absolute pollution exclusion.¹¹⁷ Pollution coverage today is generally available only through Environmental Impairment Liability (EIL) policies, which provide minimal coverage at great expense.¹¹⁸

Virtually all of the cases that a military litigator will address involve insurance policies written prior to the latest CGL policy change. Therefore, this article will not address the 1986 absolute pollution exclusion further. Because CERCLA cleanup claims are retroactive and can span decades, however, litigation over the meaning of the 1973 standard pollution exclusion remains a key coverage issue.

¹¹⁷*Id.*; Stephen C. Jones, *Debate Rages Over Insurance Coverage*, NAT'L L. J., Feb. 24, 1992, at 20, 22 n.1. In full, the 1986 CGL revision of the standard form pollution exclusion provides that coverage does not apply to the following:

(1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises you own, rent, or occupy;

(b) at or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) which are at any time transported, handled, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) at or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Insurance Services Office, Inc., *Commercial General Liability Program* ed. 11-85: Explanatory Memorandum, CG00020286 at 2.

¹¹⁸Gold & Arfmann, *supra* note 94, at 347. A 1987 GAO study indicates that as of 1987, only one principal insurance supplier actively was marketing pollution insurance under the EIL policy. A small group of other companies occasionally wrote pollution insurance policies as an accommodation to clients holding existing policies. In addition, only two reinsurers of pollution insurance were on the market. Reinsurers are companies that assume, for a share of the premium, a part of the potential liability risks that the insurance company underwrites. United States General Accounting Office, *Hazardous Waste: Issues Surrounding Insurance Availability*, GAO/RCED-88-2, at 20-21 (Oct. 1987).

V. Judicial Interpretation of Pollution Exclusion Clause

Litigation over the meaning of the pollution exclusion clause has focused primarily on the meaning of the "sudden and accidental" exception to the exclusion. The pivotal interpretation issue has been whether, as insurance companies argue, the word sudden carries only a temporal meaning, as in "abrupt" or "instantaneous," or whether, as policyholders argue, it is ambiguous and can include an unexpected and unintended release of pollutants or unexpected and unintended pollution damage.¹¹⁹

Courts interpreting the clause have developed two diverging lines of cases. As a general rule, the early decisions held that the pollution exclusion clause is only a restatement of the definition of "occurrence."¹²⁰ Under this analysis, coverage was barred only if the insured expected or intended the pollution damage.¹²¹ After 1984, however, a line of decisions emerged which generally held that the exclusion clause barred coverage for all pollution-related damage unless the polluting activity occurred instantaneously.¹²²

This part first will review the rules of construction that courts use in interpreting insurance policy terms, followed by a detailed review of the opposing lines of cases. The courts' differing interpretations then will be analyzed.

A. Rules for Construing Insurance Policies

As contracts, insurance policies are subject to the rules of construction normally used in interpreting regular contracts. The rules generally require that words be given their plain meanings, unless to do so violates public policy.¹²³ A court usually begins its analysis of insurance policy terms by determining the clarity of the policy's clauses. If the court finds the provisions to be ambiguous, it normally applies the common-law maxim of *contra proferentum*.¹²⁴

¹¹⁹See generally John O'Leary, *Coming Full CERCLA: The Release of Superfund Insurance Coverage Decisions from State Supreme Courts*, Vol. 6, No. 3 A.B.A. NAT. RESOURCES & ENV'T RPT. 31, 32 (Winter 1992).

¹²⁰Hoskins, *supra* note 16, at 10352.

¹²¹*Id.*

¹²²*Id.*

¹²³See Eubank, *supra* note 33, at 203.

¹²⁴Translated "[a]gainst the party who proffers or puts forward a thing." BLACK'S LAW DICTIONARY 296 (5th ed. 1979); see also Salisbury, *supra* note 86, at 361-62; Greenlaw, *supra* note 90, at 271. Salisbury points out that one reason that courts apply rules such as *contra proferentum* that favor policyholders is because the insurance industry shares information and collaborates on policy terms in a way that would constitute antitrust violations in other industries. Salisbury,

Contra proferentum requires that, because an insurance policy is a contract of adhesion, ambiguities in it must be strictly construed against the instrument's drafter to maximize coverage.¹²⁵ This is especially true of exclusions.¹²⁶ In interpreting the scope of exclusions, the insurer has the burden of proving that the facts fall within the exclusion, rather than in the coverage provisions.¹²⁷

In the context of insurance policy construction, courts generally hold that when a term is capable of more than one reasonable interpretation, it must be construed against the drafter and in favor of the policyholder.¹²⁸ On the other hand, if the court finds the clause to be unambiguous, it usually holds in favor of the insurance company.¹²⁹

Exceptions to the general rule of *contra proferentum* in the insurance policy context exist. If, for example, the court finds that the policyholder and the insurance company are in relatively equal bargaining positions, the court will be less likely to find the insurance policy to be an adhesion contract. Consequently, the

supra note 86, at 361-62. Federal law, however, exempts the industry from significant aspects of the antitrust laws. 15 U.S.C. §§ 1011-1015 (1988).

¹²⁵United States v. Seckinger, 397 U.S. 203, 210 (1970) ("Among these principles [of contract interpretation] is the general maxim that a contract should be construed most strongly against the drafter").

¹²⁶See Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 992 (N.J. Super. 1982); Allstate Ins. Co. v. Klock Oil, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

¹²⁷Jackson Township, 451 A.2d at 992.

¹²⁸See, e.g., International Minerals & Chem. Corp. v. Liberty Mutual Ins. Co., 522 N.E.2d 758, 762 (Ill. 1988); Reliance Ins. Co. v. Martin, 467 N.E.2d 287, 289 (Ill. 1984) ("Where the terms of an insurance contract are ambiguous or are subject to more than one reasonable construction, the policies are to be liberally construed in favor of the insured"); Aetna Casualty & Surety Co. v. Haas, 422 S.W.2d 316, 321 (Mo. 1968) ("Exclusion clauses are strictly construed against the insurer, especially if they are of uncertain import. An insurer may ... cut off liability under its policy with a clear language, but it cannot do so with that dulled by ambiguity"); Boswell v. Travellers Indem. Co., 120 A.2d 250, 254 (N.J. Super 1956) ("Since insurance contracts are phrased by the insurer, it is for the insurer to make them so clear that they contain no ambiguity as to their meaning; otherwise they must be construed most strong against the insurer"). See generally Salisbury, *supra* note 86, at 362; Greenlaw, *supra* note 90, at 271.

¹²⁹See, e.g., C.L. Hathaway & Sons Corp. v. American Motorist Ins. Co., 712 F. Supp. 265 (D. Mass. 1989); Fireman's Fund Ins. Co. v. Ex-Cell-0 Corp., 702 F. Supp. 1317 (E.D. Mich. 1988); United States Fidelity & Guar. Co. v. Murray Ohio Mfg., 693 F. Supp. 617 (M.D. Tenn. 1988), *affd* 875 F.2d 858 (6th Cir. 1989); Borden, Inc. v. Affiliated F.M. Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *affd* 875 F.2d 858 (6th Cir. 1989); American Motorists Ins. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987); Centennial Ins. Co. v. Lumbermen's Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987); Fischer & Porter Co., v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986); Hicks v. American Resources Ins. Co., 522 N.E.2d 758 (Ill. App.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988); Technicon Elecs. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Waste Management v. Peerless Ins. Co., 340 S.E.2d 374 (N.C.), *reh'g denied*, 346 S.E.2d 134 (N.C. 1986).

court will be less likely to construe ambiguous terms against the insurer automatically.¹³⁰

Courts that decline to construe ambiguities against the insurance company automatically have found that the policyholder is in an equal bargaining position with the insurer when the insured is not an "innocent," but instead is an immense corporation that carries insurance with large annual premiums, employs sophisticated businessmen, and retains legal counsel on the same professional level as counsel for insurers.¹³¹ Likewise, if a court finds that the insured actually bargained over the significant terms of the CGL policy or pollution exclusion, the court may decline to construe the terms in favor of the insurance company.¹³²

B. The Early Cases

One of the earliest cases to interpret the pollution exclusion clause was *Lansco, Inc. v. Department of Environmental Protection*.¹³³ In *Lansco*, vandals broke into the plaintiffs oil storage facility and opened storage tank valves, leaking 14,000 gallons of oil onto the property. The oil entered a drainage system and eventually entered the Hackensack River.¹³⁴ *Lansco* swiftly cleaned up the spill in accordance with instructions from the New Jersey Department of Environmental Protection. *Lansco's* insurer refused to pay the \$140,000 of clean up costs eventually incurred.¹³⁵ The insurer argued that the occurrence was neither sudden nor accidental within the meaning of the pollution exclusion clause.¹³⁶

The New Jersey Superior Court reviewed the CGL policy, the pollution exclusion clause, and the pollution exclusion's exception, focusing on the term "sudden and accidental."¹³⁷ The court found that the policy covered *Lansco's* cleanup costs because the occurrence that caused the oil spill was both sudden and

¹³⁰ See, e.g., *Diamond Shamrock Chems. Co. v. Aetna Casualty & Sur. Co.*, No. C3939-84, (N.J. Super. June 6, 1988).

¹³¹ *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257 (5th Cir. 1976).

¹³² See, e.g., *Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur*, No. 278-953, (San Mateo County Cal. Super. Ct. July 13, 1988), cited in Gordon & Westendorf, *supra* note 95, at 603 n.125.

¹³³ 350 A.2d 520 (N.J. Super. 1975), *affd*, 368 A.2d 363 (N.J. Super 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

¹³⁴ *Id.* at 521.

¹³⁵ *Id.* at 522-23.

¹³⁶ *Id.* at 523.

¹³⁷ *Id.* at 523-24.

accidental “within the ordinary accepted meaning of those words.”¹³⁸ Because the policy did not define “sudden and accidental,” the court reasoned that the plain, ordinary, and commonly understood meaning of the words must be used.¹³⁹

The Lansco court determined that “sudden” meant happening without notice, as in an unexpected and unforeseen incident. It similarly defined “accident” as something that happens unexpectedly.¹⁴⁰ Focusing on the insured’s viewpoint, the court concluded that because the oil spill was neither expected nor intended by Lansco, the spill was sudden and accidental under the pollution exclusion clause even if caused by the deliberate act of a third party.¹⁴¹

Another early case in which the court found the meaning of the pollution exclusion clause ambiguous was *Farm Family Mutual Insurance Co. v. Bagley*.¹⁴² In *Bagley*, neighbors of a farmer whose land had been sprayed with pesticides sued the sprayers for damages to their vineyards and crops. The sprayer’s insurance company refused coverage, citing the pollution exclusion clause.¹⁴³

Finding the meaning of the pollution exclusion clause ambiguous, the court concluded that the focus was not on *Bagley*’s intent with respect to the occurrence—in this case, the crop spraying—but whether the damage caused by the dispersal onto the neighbor’s property was expected and intentional.¹⁴⁴ Although the insured intended to spray the chemicals onto his own land, the court distinguished that discharge from the unexpected, unusual, and unforeseen dispersal of the pesticide onto neighboring land.¹⁴⁵

Although the *Bagley* court, like the New Jersey court in *Lansco*, construed the pollution exclusion terms in favor of the policyholder, the court departed from the *Lansco* analysis by focusing on the damage, rather than on the original polluting activity. With this analysis, the *Bagley* court added a twist to the *Lansco* analysis that soon was to be followed by a number of courts in the northeast.

The court in *Allstate Insurance Co. v. Klock Oil*¹⁴⁶ followed the *Bagley* line of reasoning. At issue in *Klock Oil* was property

¹³⁸*Id.* at 523.

¹³⁹*Id.*

¹⁴⁰*Id.* at 524.

¹⁴¹*Id.*

¹⁴²64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978).

¹⁴³*Id.* at 1014, 409 N.Y.S.2d at 295.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 1014, 409 N.Y.S.2d at 296.

¹⁴⁶73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

damage sustained by landowners caused by a leaking gasoline storage tank that Klock Oil had installed and maintained.¹⁴⁷ Finding the pollution exclusion clause ambiguous, the court opined that the policy must be construed most favorably to the policyholder and strictly against the insurance company.¹⁴⁸ The *Klock Oil* court noted that this is especially so as to an ambiguity found in an exclusionary clause.¹⁴⁹

The court ruled that the term "sudden" did not mean that the pollution discharge had to occur instantaneously.¹⁵⁰ Instead, as in *Bagley*, the court defined the phrase "sudden and accidental" by focusing on the resulting damage—not on the incident causing the damage.¹⁵¹ The court concluded that "regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the *resulting damage* could be viewed as unintended by the factfinder, the total situation could be found to constitute an accident and therefore within the coverage . . ."¹⁵²

The court in *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*¹⁵³ adopted a similar analysis. *Jackson Township* involved a landfill used by the municipal utilities authority, the seepage from which contaminated a nearby aquifer. Town residents sued for personal injury and property damage caused by the contaminated drinking water, alleging that the township negligently selected, maintained, and designed the landfill from which the pollutants had been seeping.¹⁵⁴

The New Jersey Superior Court attempted to synthesize the holdings of *Lansco*, *Bagley*, and *Klock Oil* by noting that the trend in other jurisdictions was to allow coverage despite the pollution exclusion clause for the unintended results of intentional discharges of pollution.¹⁵⁵ The *Jackson Township* court found that the pollution exclusion clause was ambiguous, noting that the courts of other jurisdictions were nearly unanimous in finding the same. Accordingly, the court resolved the ambiguity in favor of the policyholder.¹⁵⁶

¹⁴⁷*Id.* at 486-87, 426 N.Y.S.2d at 603-04.

¹⁴⁸*Id.* at 488, 426 N.Y.S.2d at 604.

¹⁴⁹*Id.*

¹⁵⁰*Id.* at 489, 426 N.Y.S.2d at 605.

¹⁵¹*Id.* at 488-89, 426 N.Y.S.2d at 604-05.

¹⁵²*Id.* at 488-89, 426 N.Y.S.2d at 605 (citation omitted) (emphasis added).

¹⁵³451 A.2d 990 (N.J. Super. 1982).

¹⁵⁴*Id.* at 991.

¹⁵⁵*Id.* at 993.

¹⁵⁶*Id.* at 992-94.

The ambiguity, in turn, led the court to focus on the resulting damage, rather than on the discharge.¹⁵⁷ The court concluded that the pollution exclusion clause “can be interpreted as simply a restatement of the definition of ‘occurrence’—that is, that the policy will cover claims where the injury was neither ‘expected nor intended.’”¹⁵⁸ Under this analysis, the pollution exclusion clause precludes coverage for damage caused when the person who discharged the pollutant knew or should have known that the discharge would result in the injury. If, however, the damage was not expected or intended—as typically is the case when damage is caused by materials that have leaked from a landfill—the pollution exclusion will not apply.

Consequently, *Bagley*, *Klock Oil*, and *Jackson Township* differ from previous cases finding for policyholders. These cases effectively restrict the type of occurrences for which the pollution exclusion clause precludes coverage. In *Lansco*, for example, the court found that despite the pollution exclusion clause, the CGL policy covers damages and injuries resulting from an *unexpected event*.¹⁵⁹ The latter three courts, however, held that the pollution exclusion clause precludes coverage only when the policyholder intended or expected to cause the *injury or damage*.

In the years following *Jackson Township*, several courts followed its rationale, finding that the pollution exclusion bars coverage only when actual damages caused by pollution—as opposed to releases of pollution—were intended or expected by the policyholder.¹⁶⁰ Other courts, however, followed the *Lansco* example, determining coverage based on whether the policyholder intended or expected the discharge, release, or dispersal.¹⁶¹

C. Trend of Proinsurer Decisions

Beginning in 1984, courts began diverging from the viewpoint described above, producing a series of proinsurer decisions. Most of this later line of cases added an element of duration in deciding whether a release of pollutants was sudden and accidental. In these decisions, courts generally held that the

¹⁵⁷*Id.* at 994.

¹⁵⁸*Id.* at 992-94.

¹⁵⁹*Lansco*, 350 A.2d at 524.

¹⁶⁰*E.g.*, *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977); *United States Aviox Co. v. Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. App. 1983).

¹⁶¹*E.g.*, *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984); *CPS Chem. Co. v. Continental Ins. Co.*, 489 A.2d 1265 (N.J. Super. 1984).

phrase "sudden and accidental" in the pollution exclusion clause only provides coverage for pollution that is virtually instantaneous.

One of the first of this line was *Techalloy Co. v. Reliance Insurance Co.*¹⁶² *Techalloy* involved a toxic tort action in which the injured parties alleged that *Techalloy* recklessly disposed of trichloroethylene onto their properties for over twenty-five years.¹⁶³ Finding the pollution exclusion clause to be unambiguous, the Pennsylvania Superior Court held that coverage was barred because the discharge took place over the years. Although it could be construed as an "occurrence," it was not instantaneous and, therefore, was not "sudden."¹⁶⁴

The North Carolina Supreme Court, in the 1986 case of *Waste Management v. Peerless Insurance Co.*,¹⁶⁵ explicitly rejected the holdings of *Lansco*, *Klock Oil*, and *Jackson Township*. At issue in *Waste Management* was a suit by the federal government against the company for damages that its landfill had caused to the well water of neighboring homes. *Waste Management* impleaded the trash removal company that brought landfill to the site, who in turn requested defense and indemnification from its insurance company.¹⁶⁶ Holding in favor of the insurance company, the court found the pollution exclusion clause to be clear and unambiguous.¹⁶⁷

The *Waste Management* court found that because the word "occurrence" relates to whether an event was intentional or expected, the occurrence-based policy covers only unintentional and unexpected events.¹⁶⁸ Next, the court looked at whether the pollution exclusion clause addresses the type of damage resulting from the event—that is, whether the event causes pollution.¹⁶⁹ Finally, the court determined that coverage is reinstated under the exception to the pollution exclusion clause only if the events happened instantaneously or precipitously.¹⁷⁰

Under this three-part analysis, the court concluded that because the trash removal company did not expect the pollutants to enter the groundwater, the event was an "occurrence" under

¹⁶² 487 A.2d 820 (Pa. Super. 1984).

¹⁶³ *Id.* at 820-22.

¹⁶⁴ *Id.* at 827.

¹⁶⁵ 340 S.E.2d 374 (N.C.), *reh'g denied*, 346 S.E.2d 134 (N.C. 1986)

¹⁶⁶ *Id.* at 374-76.

¹⁶⁷ *Id.* at 380.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 380-81.

¹⁷⁰ *Id.* at 382.

the terms of the CGL policy.¹⁷¹ The pollution exclusion clause, however, excluded coverage because pollution resulted. The exception to the pollution exclusion clause did not support finding coverage because no evidence existed to prove that the release of pollutants was “sudden.”¹⁷²

The *Waste Management* court rejected the *Lansco* analysis because, by construing “sudden” as synonymous with “occurrence” and “accidental,” the *Lansco* court rendered the terms redundant and indistinguishable.¹⁷³ The court also refused to follow *Jackson Township* and *Klock Oil* because those courts did not focus on the temporal significance of the term “sudden.”¹⁷⁴

Some courts addressing the pollution exclusion clause have taken a slightly different approach. Specifically, they find no need to determine whether the word “sudden” is ambiguous. These courts have found that insureds who regularly discharge or deposit materials in the course of business cannot later argue that the damage from their discharging activities were unintended or unexpected. Illustrative of this approach is *Transamerica Insurance Co. v. Sunnes*,¹⁷⁵ an Oregon case involving the discharge of acid and caustic wastes into a city sewer system by the Culligan Water Conditioning Company. Culligan argued that the pollution exclusion clause should not apply because the damage was unintentional.¹⁷⁶ The court rejected the argument, finding that the clause operated to exclude coverage because, although the *damage* was unintentional, the *discharge* of the waste was intentional.¹⁷⁷

The First Circuit in *Great Lakes Container Corp. v. National Union Fire Insurance Company of Pittsburgh*¹⁷⁸ took a similar approach. Great Lakes, a barrel reconditioning business adjacent to a stream and a wetland, was sued for contaminating soils, surface waters, and groundwater.¹⁷⁹ The court found that the company’s practice of emptying used barrels of their contents, including chemicals and other waste products, was a normal function within the company’s regular business activity. As such, no “occurrence” arose within the meaning of the CGL policy, nor did any allegation of a sudden and accidental discharge arise.¹⁸⁰

¹⁷¹*Id.* at 383.

¹⁷²*Id.*

¹⁷³*Id.* at 381-82.

¹⁷⁴*Id.* at 382.

¹⁷⁵711 P.2d 212 (Or. App. 1985), *review denied*, 717 P.2d 631 (Or. 1986).

¹⁷⁶*Id.* at 214.

¹⁷⁷*Id.* (emphasis added).

¹⁷⁸727 F.2d 30 (1st Cir. 1984).

¹⁷⁹*Id.* at 31.

¹⁸⁰*Id.* at 33-34.

D. Clarification of the Temporal Element

As previously discussed, many courts have held that the term "sudden" contains a temporal element of brevity,¹⁸¹ while others have found that "sudden" needs no temporal element.¹⁸² A 1989 case heard before the Georgia Supreme Court provides perhaps the most well-reasoned analysis on record of the temporal element of "sudden."

*Claussen v. Aetna Casualty & Surety Co.*¹⁸³ involved discharges of industrial and chemical waste on land owned by the plaintiff and used under contract by the city of Jacksonville as a landfill. After six years of dumping waste on the property, the city returned it to the plaintiff. Despite the owner's claims that he had no knowledge that the site had been used for dumping hazardous waste, the EPA informed the owner that he was responsible for taking corrective action. The plaintiff's insurance company attempted to deny coverage, arguing that the discharge of waste was not sudden and accidental.¹⁸⁴

The Georgia court concluded that the word "sudden" is susceptible of at least two interpretations and, therefore, is ambiguous in the context of the pollution exclusion.¹⁸⁵ The court determined that the primary definition of the term "sudden" is "unexpected."¹⁸⁶ The court acknowledged that "abrupt" is a common use of the word, and is also the definition of "sudden" found in some dictionaries. The court concluded, however, that the commonly understood temporal element of "sudden" is not brevity, but rather, an unexpected onset.¹⁸⁷

The *Claussen* court rejected the insurance company's argument that construing "sudden" to mean "unexpected" violates the

¹⁸¹ See *supra* Part V.C. and accompanying notes; see also Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 618 n.24 (1990).

¹⁸² See *supra* Part V.B. and accompanying notes; see also Ballard & Manus, *supra* note 181, at 618 n.25.

¹⁸³ 380 S.E.2d 686 (Ga. 1989). In *Claussen*, the Georgia Supreme Court answered questions certified to it by *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1987). The Georgia court's answer to the certified questions is contained as an appendix to the decision in *Claussen v. Aetna Casualty & Sur. Co.*, 888 F.2d 747 (11th Cir. 1989), *rev'g* 676 F. Supp. 1571 (S.D. Ga. 1987).

¹⁸⁴ *Claussen*, 380 S.E.2d at 686-87.

¹⁸⁵ *Id.* at 688.

¹⁸⁶ *Id.* at 688.

¹⁸⁷ *Id.* In so holding, the court explained as follows:

[O]n reflection, one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness; a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring.

rule of construction that the contract be read to give all parts meaning. Aetna contended that such an interpretation merely restates the definition of "occurrence."¹⁸⁸ The court disagreed, finding that the occurrence-based CGL policy focuses on whether the property damage is unexpected and unintended, while the exclusion clause focuses on whether the discharge or release is unexpected and unintended. The exclusion clause, therefore, eliminates coverage for damage resulting from intentional or reckless polluting activities.¹⁸⁹

Aetna's third argument was similarly unsuccessful. The court rejected the contention that the plaintiffs construction violated a cardinal rule of contract interpretation because it was inconsistent with the parties' intentions.¹⁹⁰ The insurance company argued that pollution liability is an enormous risk that neither party anticipated when underwriting the policy sixteen years earlier. The *Claussen* court, however, found persuasive documents presented by the Insurance Rating Board to the Georgia Insurance Commissioner when the pollution exclusion first was adopted. These documents suggested that the clause was intended to exclude only intentional polluters.¹⁹¹

The Wisconsin Supreme Court issued an equally well-reasoned opinion in the 1990 case, *Just v. Land Reclamation, Ltd.*¹⁹² The facts described in *Just* are similar to those in *Claussen*. Property owners near a municipal landfill alleged that negligent operation of the landfill by Land Reclamation gradually had contaminated their water supply, generated foul odors, and allowed debris to blow onto their lands.¹⁹³ Citing a line of Wisconsin cases in support, the defendant's insurer moved for summary judgment, arguing that "sudden and accidental" unambiguously means abrupt and immediate.

The Wisconsin court, like the court in *Claussen*, noted that different dictionaries offered different primary definitions of the word "sudden," rendering the term ambiguous.¹⁹⁴ The court also noted that its conclusion was consistent with "substantial evidence indicating that the insurance industry itself originally intended the phrase to be construed as 'unexpected and

¹⁸⁸*Id.* at 689.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 689.

¹⁹¹*Id.*

¹⁹²456 N.W.2d 570 (Wis.), *reconsid. denied and opinion modified*, 461 N.W.2d 447 (Wis. 1990).

¹⁹³*Id.* at 572.

¹⁹⁴*Id.* at 573.

unintended.”¹⁹⁵ The court then conducted one of the most careful judicial scrutinies on record of the drafting and marketing of the 1966 CGL policy and the 1970/1973 revision. It also closely examined the insurance industry’s and drafting organizations’ representations regarding the pollution exclusion.¹⁹⁶

Rejecting Wisconsin precedent to the contrary, the *Just* court concluded that the phrase ((sudden and accidental” means unexpected and unintended.¹⁹⁷ The court noted that its interpretation was consistent with the IRB’s suggestion that the pollution exclusion clause was intended to exclude only intentional acts of pollution and otherwise was not intended to reduce the scope of existing coverage.¹⁹⁸

The Third Circuit recently addressed the same issues in *New Castle County v. Hartford Accident & Indemnity Co.*¹⁹⁹ That case, like *Claussen* and *Just*, involved allegations of environmental damage and injuries caused by gradual dispersals from a municipal landfill. Following the Georgia and Wisconsin courts’ leads, the Third Circuit first reviewed numerous dictionary definitions of the word “sudden,” concluding that it is ambiguous in the context of the pollution exclusion clause.²⁰⁰ Applying Delaware law, the court held that the word “sudden” should be interpreted as meaning “unexpected.”²⁰¹

The *New County* court’s conclusion also was aided by an examination of the pollution exclusion clause’s drafting history. The court concluded that the proper focus of the debate was not over whether the pollution damage was sudden and accidental, but instead over whether the polluting activity or discharge was unexpected and unintended.²⁰²

E. Analysis

The appropriate starting point for an analysis of the scope of the pollution exclusion clause is the recognition that the pollution exclusion, like any other exclusion, is intended to exclude

¹⁹⁵*Id.* at 573.

¹⁹⁶*Id.* at 574-75.

¹⁹⁷*Id.* at 578.

¹⁹⁸*Id.* at 575.

¹⁹⁹933 F.2d 1162 (3d Cir. 1991).

²⁰⁰*Id.* at 1168-69.

²⁰¹*Id.*

²⁰²*Id.* at 1169.

coverage for acts that otherwise are insured.²⁰³ In other words, a finding of an “occurrence” is necessary before coverage will be available. If no “occurrence”)has arisen within the meaning of the policy terms, addressing the question of whether the pollution exclusion clause applies is unnecessary.²⁰⁴

“Occurrence” in the CGL policy is defined as “an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”²⁰⁵

Once the court determines that a polluting “occurrence” has happened, the pollution exclusion clause comes into play. The clause first generally excludes coverage for “property damage arising out of” a polluting occurrence. The exclusion clause then provides the exception that the exclusion “does not apply if such discharge, dispersal, release or escape is sudden and accidental.”²⁰⁶ Accordingly, the focus of the exclusion’s exception shifts from pollution damage, which is generally excluded, to the polluting activity or discharge giving rise to the damage or injury.²⁰⁷ If the activity is “sudden and accidental,” the exception kicks in to reinstate coverage. Alternatively, if the discharge was intentional or reckless, coverage is precluded.

Because of the use of the phrase “sudden and accidental” to modify the polluting activity, the entire exclusion clause becomes ambiguous. The phrase “sudden and accidental” is not defined,

²⁰³ See Barry R. Ostrager, *Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-Up Litigation*, ALI-ABA COURSE OF STUDY 1061, 1063 (June 24, 1991).

²⁰⁴ See *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 767 (Ill. App. 1987) (“if there were no “occurrence,” there would be no coverage in the first instance and it would be unnecessary to reach the question whether the pollution exclusion clause applied”).

²⁰⁵ *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33 (1st Cir. 1986).

²⁰⁶ Greenlaw, *supra* note 90, at 244-45 (citing Insurance Rating Board Confidential Circular to Board Members and Associate Members (May 15, 1970)) (emphasis added).

²⁰⁷ See *New Castle County & Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1168-69 (3d Cir. 1991) (the occurrence clause focuses on damages, whereas the pollution exclusion clause focuses on discharge); *United States Fidelity & Guar. Co., v. Star Fire Coals, Inc.*, 856 F.2d 31, 35 (6th Cir. 1988) (“While the district court may have been correct that the damage resulting from the discharges were unintended and unexpected, that is not the ultimate question. The ultimate question is whether the discharges of coal dust were sudden and accidental”); *Technicon Elects. Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 144, 533 N.Y.S.2d 91, 94 (1988) *affd*, 542 N.E.2d 1048 (N.Y. 1989) (“The relevant factor is not whether the policy holders anticipated or intended the resultant injury or damage, but whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally”).

and is capable of at least two differing interpretations. On the one hand, the words can have a temporal meaning as an "instantaneous event." The phrase, however, also can mean simply that the pollution discharge or dispersal was unexpected.

The exclusion clause's ambiguity is so patent that even members of the insurance industry are on record as being confused over the meaning of the phrase.²⁰⁸ Some commentators speculate that the choice of words was purposeful—that is, "[v]iewed in the light of the pollution programs existing in the early 1970's and the state of relevant case law, the insurance industry's choice of the terms 'sudden and accidental' suggest a calculated effort to assure ambiguity."²⁰⁹ The EPA also has suggested that the insurance industry knew of the exclusion clause's ambiguity when it was drafted.²¹⁰

Understanding the meaning of the pollution exclusion clause is not possible without an analysis of the historical context and the policy drafters' intent. The insurance industry has not readily made available its committee meeting minutes, reports, and analyses, which would shed light on the ambiguity.²¹¹ The drafting history documents that are available, however, indicate that the pollution exclusion clause was drafted because of the perceived need to clarify the definition of "occurrence" as it relates to the insured's intent.²¹²

²⁰⁸Thomas L. Ashcroft, then-Secretary, Policyholders Service Division, Insurance Company of North America, in speaking before a convention of the Federation of Insurance Counsel, revealed that while "there is no question as to intent, that is, that the pollution exclusion coverage is confined to the unintended sudden happening or accident, just what is or is not sudden has puzzled insurance men since the advent of liability insurance." Thomas L. Ashcroft, *Ecology, Environment, Insurance and the Law*, 21 FED'N OF INS. COUNS. Q. 37, 54-55 (1970-71).

²⁰⁹Chesler et al., Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 RUTGERS L.J. 9, 37 (1986), cited in Greenlaw, *supra* note 90, at 245 n.73.

²¹⁰Notice of Proposed Rulemaking and Request for Comment Regarding Insurance for Waste Disposal Industry, 50 Fed. Reg. 33,905 (1985). The EPA has speculated that the insurance industry, in including the pollution exclusion clause in the policy, was aware of its potential ambiguity.

"Salisbury, *supra* note 86, at 369-71. Salisbury alleges that the insurance industry has created difficulties in obtaining drafting history materials that would aid in understanding the purpose and intent of the pollution exclusion clause. *Id.* at 369, n.36. The Insurance Services Office (ISO), which is the custodian for this material, routinely refuses discovery of the documents unless the parties agree to a protective order that will keep the material secret. The drafting history documents that are available are generally those introduced as exhibits in insurance coverage lawsuits in which a protective order was not granted. *Id.*

"Salisbury, *supra* note 86, at 370-71. The minutes of a March 1970 meeting of the General Liability Governing Committee of the IRB include the following discussion:

[C]overage for pollution may not be provided in most cases under present policies because the damages could be said to be expected or

For example, in a letter of explanation to its members, the MIRB wrote, "The above exclusion clarifies this [pollution coverage] situation so as to avoid any question of intent. Coverage is continued for pollution or contamination[-]caused injuries when the pollution or contamination results from an accident"²¹³ The term "accident" refers back to the definition of "occurrence" in the 1966 CGL policy, in which "accident" includes "continuous or repeated exposure to conditions, resulting in property damage or bodily injury *neither expected nor intended* from the standpoint of the insured."²¹⁴

A leading insurance company's published statements also stressed intent and the need to clarify the existing coverage. An Aetna Life and Casualty Insurance Company representative stated the following:

We believe that loss, injury or damage due to uncontrolled or inadequately controlled emissions or pollutants is an uninsurable business risk, since most managements are well aware of [pollution] problems and have made decisions to continue operations. We have never intended that liability insurance policies should cover injury or damage which might be "expected or intended" by the insured. However, to make absolutely certain that policy coverage was understood, specific endorsements were developed to clarify such coverage intent as regards pollution.²¹⁵

Statements by insurance industry representatives to insurance commissioners and state insurance regulatory agencies, during the process of obtaining approval for the new exclusion, are additional important sources for determining the meaning and intent of the clause.²¹⁶ These representations consistently

intended and thus be excluded by the definition of occurrence and, therefore, the adoption of an exclusion *could be said to be a clarification, but a necessary one to avoid any question of intent.*

Id. at 370 (quoting Minutes of the Meeting of the General Liability Governing Committee of the Insurance Rating Board, Mar. 17, 1970) (emphasis added).

²¹³*Id.* at 371 (quoting Letter from Mutual Rating Bureau to Members and Subscribers Writing General Liability Insurance (June 9, 1070)).

²¹⁴1 S. MILLER & P. LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 409 (1989 supp.) (emphasis added).

²¹⁵Greenlaw, *supra* note 90, at 247 (citing Stamos, *Pollution and Its Insurance Implications*, AETNA-IZER, July-Aug. 1971, at 6 (available in Exhibits to Brief of *Amici Curiae* American Petroleum Inst., *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989)).

²¹⁶*See generally* Salisbury, *supra* note 86, at 372-74. Salisbury notes that courts often consider statements by drafters of standard-form insurance contracts to be dispositive of the question of the parties' intent. The author cites a California Superior Court judge as concluding that "[t]he primary evidence on the

support the explanation that the pollution exclusion was added merely to clarify existing coverage under the "neither expected nor intended" language in the definition of "occurrence."²¹⁷

Consequently, the insurance industry apparently had two focuses when it introduced the 1973 pollution exclusion clause. First, it intended that coverage would be denied for reckless, as well as willful, polluters. The industry did not want courts to interpret the CGL policy as providing coverage for polluters who did not intend specifically to do the damage, but who knew that their polluting activities would cause the damage and who failed to take reasonable steps to prevent it.²¹⁸

intent of the parties drafting the contracts, and their expectations about scope of coverage, will be obtained through document productions from key industry-wide organizations, and depositions of their personnel." Travelers Reply Memorandum in Support of Coordination, at 7-8 (filed Jan. 8, 1981), *Armstrong Cork Co. v. Aetna Casualty and Sur. Co.*, No. C315367 (Cal. Super. Ct., L.A. County), *quoted in Salisbury, supra* note 86, at 367, n.31.

²¹⁷For example, the Manager of the IRB wrote to the Georgia Insurance Department:

The impact of the new proposals in the vast majority of risks would be no change. It is rather a *situation of clarification* which will make for a complete understanding by the parties to the contract of the intent of coverage. Coverage for *expected or intended pollution* and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued except for the risks described in the filing.

Letter from R. Stanley Smith to Georgia Ins. Dep't (June 10, 1970) (emphasis added) (attached as appendix to decision in *Claussen v. Aetna Casualty & Sur. Co.*, 676 F. Supp. 1561 (S.D. Ga. 1987)).

Representatives of the MIRB presenting the pollution exclusion policy for approval made similar representations. They explained that the pollution exclusion clause was intended to clarify "that the definition of occurrence excludes damages that can be said to be expected or intended." Statement by MIRB to West Virginia Commissioner of Insurance (cited in *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 575 (Wis. 1990), *motion for reconsideration denied and opinion modified*, No. 88-1656 (Wis. Sept. 19, 1990)).

Based on statements made by insurance industry representatives, the West Virginia Insurance Commissioner approved the pollution exclusion, noting the following:

(1)The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions ... are merely clarifications of existing coverage as defined and limited in the definition of the term "occurrence," contained in the respective policies to which said exclusion would be attached.

(2)To the extent that said exclusions are mere clarifications of existing coverages, the insurance Commissioner finds that there is no objection to the approval of such exclusions.

Proceedings Before Samuel H. Weese, Insurance Commissioner of West Virginia, *In re* "Pollution and Contamination" Exclusion Filings, Admin. Hearing N. 70-4, Order at 3 (Aug. 19, 1970) (emphasis added).

²¹⁸See *Greenlaw, supra* note 90, at 246.

Second, the use of the phrase "sudden and accidental" in the pollution exclusion clause was meant only to clarify the words "unintended and unexpected" in the original policy. Accordingly, the primary meaning of the word "sudden" is not, as the industry now argues, "instantaneous" or "immediate." Rather, its intended connotation is "unexpected."

Despite their prior statements to the contrary and the lack of support for any other interpretation, insurers have reacted with a concerted effort to disclaim coverage for pollution damage, arguing that the phrase "sudden and accidental" limits coverage to *instantaneous* mishaps.²¹⁹ The insurance industry therefore has developed the position that, when it included the phrase "sudden and accidental" in the pollution exclusion clause, it intended the term "sudden" to be given a temporal meaning.²²⁰

The insurance industry's present arguments, however, are specious in light of the use of the phrase "sudden and accidental" in insurance contracts for the past several decades. Long before the industry included it in the standard pollution exclusion clause, the phrase "sudden and accidental" was used to define the scope of coverage in machinery and boiler policies.²²¹ In interpreting the phrase, courts were unanimous in concluding that "sudden" was synonymous with "unexpected and unforeseen," and did not bear a temporal connotation.²²² Accordingly, when industry representatives met to draft the 1970/1973 pollution exclusion, they knew well the precise connotation of the phrase "sudden and accidental."

The industry's published representations and drafting documents are clear. The industry stated repeatedly that the "sudden and accidental" language merely was intended to clarify the phrase "neither expected nor intended from the standpoint of the accused." Moreover, virtually every court that specifically has examined and addressed the drafting history of the pollution exclusion clause has held in favor of the insured.²²³ While the

²¹⁹Hoskins, *supra* note 16, at 10351-52.

²²⁰Ballard & Manus, *supra* note 181, at 630; *see also* Ostrager, *supra* note 203, at 6-9.

²²¹Hoey, The Meaning of "Accident" in Boiler and Machinery Insurance and New Developments in Underwriting, *cited in* Salisbury, *supra* note 86, at 379-80.

²²²Hoey, *supra* note 221, at 468-69; *see also* Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Casualty Co., 333 P.2d 938 (Wash. 1959); New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 116 N.E.2d 671 (Mass. 1953).

²²³Salisbury, *supra* note 86, at 376-77 n.52. *See, e.g.*, Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071 (Ill. App. 1989); Kipin Indus. Inc. v. American Universal Ins. Co., 535 N.E.2d 334 (Ohio App. 1987); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. Super 1987).

issue is far from settled, the growing number of courts now willing to consider the industry's intent in drafting the clause indicates that the trend may prove favorable for policyholders.

VI. Judicial Interpretation of the "As Damages" Clause

A. General

The second insurance coverage issue that has been litigated heavily in the past two decades is whether the insured has incurred "damages" that are covered by the CGL policy. The typical CGL policy provides, in pertinent part, as follows:

The insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of ... property damage to which this insurance applies, caused by an occurrence, and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent.²²⁴

Property damage is defined as "physical injury to or destruction of tangible property which occurs during the policy period."²²⁵ If the court finds that property damage has occurred, then the court must determine whether the policy covers any "damages" incurred by the policyholder. Accordingly, in the context of litigation over the scope of an insurance policy, the pivotal issue is whether the contractor's CERCLA costs constitute damages covered by the CGL policy.

The CERCLA gives the government several tools with which to protect the environment and clean up hazardous waste. Section 107(a)(4) of the CERCLA establishes liability for the following:

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of

²²⁴Hapke, *supra* note 17, at 7

²²⁵*Id.*

assessing such injury, destruction, or loss resulting from such a release.²²⁶

In addition, pursuant to its broad powers under CERCLA section 106(a), the government may, in response to an actual or threatened release of a hazardous substance, seek equitable relief through an order or injunction directing one or more PRPs to remedy the environmental damage.²²⁷

Given the EPA's broad powers either to incur costs itself and seek reimbursement or to seek equitable relief, insurers often dispute coverage for response costs. In doing so, the industry has generally relied on the following three related arguments: (1) that no property damage within the meaning of the CGL policy has occurred; (2) that the policies do not cover prophylactic actions—that is, measures taken to prevent threatened releases; and, most frequently cited, (3) that suits for equitable relief do not constitute suits for “damages.”²²⁸

B. Property Damage as Defined in CGL Policy

The standard CGL policy defines property damage as “physical injury to or destruction of tangible property which occurs during the policy period.”²²⁹ Insurers litigating environmental coverage disputes occasionally have argued that governmental cost recovery actions for soil, air, and water contamination do not constitute claims for “physical injury to or destruction of tangible property,” but instead are merely claims for economic injury.²³⁰ That argument has been generally unsuccessful.²³¹

Mraz v. Canadian Universal Insurance Co.,²³² however, represents a success for the insurance industry. *Mraz* involved massive amounts of gradually leaking chemical wastes at a

²²⁶ 42 U.S.C. § 9607(a)(4) (1988).

²²⁷ *Id.* § 9606(a).

²²⁸ Hapke, *supra* note 17, at 9.

²²⁹ *Id.* at 7.

²³⁰ Gordon & Westendorf, *supra* note 95, at 584.

²³¹ *Id.*; see, e.g., Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. Inc. (NEPACCO I), 811 F.2d 1180 (8th Cir. 1987) (panel opinion), *rev'd on other grounds on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988); Port of Portland v. Water Quality Ins. Syndicate, 549 F. Supp. 233 (D. Or. 1982), *modified on other grounds*, 796 F.2d 1188 (9th Cir. 1986); United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W. D. Mich. 1988); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987); United States Aviox Co. v. Travelers Ins. Co., 336 N.W.2d 838 (Mich. App. 1983); Lansco, Inc. v. Dept. of Envtl. Protection, 350 A.2d 520 (N.J. Super 1975), *aff'd*, 368 A.2d 363 (N.J. Super. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

²³² 804 F.2d 1325 (4th Cir. 1986).

disposal site that, after the disposal company refused to take action, required an EPA cleanup. The government subsequently sued the disposal company for the EPA's cleanup costs, alleging environmental damage to the surrounding area.²³³

The Fourth Circuit, applying Maryland insurance law, held that the government had not sought recovery for damage to natural resources as described under the CERCLA. Examining the CERCLAs liability provisions,²³⁴ the court determined that "natural resources" are limited to resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States ... , any state or local government, or any foreign government."²³⁵

The court further reasoned that, although the complaint alleged that property damage had occurred, the disposal company did not allege that it actually had suffered property damage. Instead, it alleged only response costs for the site cleanup which, the court noted, are independent from property damage costs.²³⁶ Citing no case authority for support, the court held that response costs compose an economic loss that cannot be equated with injury to, or destruction of, tangible property.²³⁷

In contrast to *Mraz* is the Eighth Circuit's opinion in *Continental Insurance Cos. v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO I)*.²³⁸ In *NEPACCO I*, a panel of the Eighth Circuit examined the issue of whether damage to the environment constituted "property damage" within the meaning of the CGL policy. The panel concluded that, in addition to the actual owners of the polluted land, water, or air, the federal and state governments also suffered property damage because of their quasi-sovereign "interest[s in natural resources] independent of and behind the titles of [their] citizens in all the earth and air within [their] domain."²³⁹

Having found the property damage to be covered, the panel then reviewed the statutory policy and language. It concluded

²³³ *Id.* at 1326.

²³⁴ 42 U.S.C. § 9607(a) (1988).

²³⁵ *Mraz*, 804 F.2d at 1329 (quoting 42 U.S.C. § 9601(16) (1988)).

²³⁶ *Id.* at 1327-28.

²³⁷ *Id.* at 1329.

²³⁸ 811 F.2d 1180 (8th Cir. 1987), *rehearing en banc*, 842 F.2d 977 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988).

²³⁹ *NEPACCO I*, 811 F.2d at 1187 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). In contrast, the *en banc* Eighth Circuit in *NEPACCO II* analyzed damages strictly in the insurance context, not engaging in the analysis of whether property damage had occurred. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988).

that cleanup costs under the CERCLA are compensatory damages for property damage within the meaning of the CGL policy.²⁴⁰

C. Equitable Relief and Preventive Measures as Damages

By far the most litigated issues involving damages have centered on whether suits for equitable relief, such as injunctions, cleanup orders, or prophylactic measures designed to prevent future releases, constitute legal damages. In these cases, courts have split over the meaning to be given the term "as damages." Some courts have found that the phrase is an unambiguous term of art in the insurance context that obligates insurers to pay only legal damages.²⁴¹ Under this analysis, CERCLA response costs are not covered. Other courts have held that the phrase is open to interpretation and that, if the law of the applicable state requires a layperson's reading, CERCLA response costs are recoverable.²⁴²

In addressing the scope of the "as damages" clause, courts claim that they base their decisions on applicable state laws. Different courts interpreting the same state's law, however, have reached different results.²⁴³

Insurers generally argue that environmental restitution represents a different amount than damages. The insurance industry actually contends that restoring the environmental status quo may cost far more than paying for property loss or damage.²⁴⁴ A second argument insurers employ is that compelling them to bargain over whether to cover preventive measures would

²⁴⁰*NEPACCO I*, 811 F.2d at 1187.

²⁴¹*See, e.g.*, *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988); *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987).

²⁴²*E.g.*, *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723 (E.D. Pa. May 10, 1989); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987).

²⁴³For example, in *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723 (E.D. Pa. May 9, 1989), *question certified*, No. 89-1729/59 (3d Cir. Feb. 15, 1990), *question declined*, No. 72650 (Mo. July 13, 1990), the court found that the Eighth Circuit in *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.* (*NEPACCO II*), 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied*, 109 S. Ct 66 (1988), clearly had misread Missouri state law.

Similarly, the District of Columbia Circuit recently rejected the Eighth Circuit's reading of Missouri law. Finding the State's law unsettled because State appellate courts had not spoken to the issue, the D.C. Circuit found that the *NEPACCO* court failed to apply basic principles of contract construction under Missouri law. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 89-5367, slip op. at 9-10 (D.C. Cir. Sept. 13, 1991).

²⁴⁴*Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

encourage inefficient overutilization of insurance coverage, which eventually could impact on the entire market.²⁴⁵

Until the recent past, insurers have been generally successful with this line of argument. Courts traditionally have held that injunctive relief or restitution are not covered damages under the CGL policy.²⁴⁶ The courts reasoned that a lawsuit seeking injunctive relief against the insured is not covered because it does not seek compensatory damages.²⁴⁷ For example, in a 1982 CGL case the Third Circuit explained that damages are "awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss."²⁴⁸ Courts have found this concept of damages as "substitutional redress" to be distinct from equitable relief.²⁴⁹ Courts also have held that response costs are not damages because they are "merely part of the cost of doing business."²⁵⁰

Two federal circuit courts—the Fourth and Eighth Circuits—have relied on this distinction in finding that CERCLA response costs do not constitute damages under the CGL policy. In *Maryland Casualty Co. v. Armco*,²⁵¹ the underlying suit was a claim by the federal government against Armco for reimbursement and injunctive relief because of contamination at a Missouri hazardous waste site. Armco's insurer sought a declaratory judgment concerning its liability.²⁵² A unanimous Fourth Circuit panel, applying Maryland law, held that legal damages—as distinguished from claims for injunctive or restitutionary relief—include only payments to third persons for actual, tangible injury.²⁵³ The court reasoned that to give damages a broader interpretation would render the phrase "as damages" in the CGL policy mere surplusage, giving rise to a duty to pay any form of

²⁴⁵*Id.*

²⁴⁶*See, e.g.,* Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955); Crist v. Ins. Co. of N. Am., 529 F. Supp. 601 (D. Utah 1982); Haines v. St. Paul & Marine Ins. Co., 428 F. Supp. 435 (D. Md. 1977); Jaffe v. Cranford Ins. Co., 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (Cal. App. 1985); Board of Educ. v. Country Mutual Ins. Co., 459 N.E.2d 273 (Ill. App. 1984); City of Thief River Falls v. United Fire & Casualty Co., 336 N.W.2d 274 (Minn. 1983); O'Neill Investigations, Inc. v. Illinois Employers Ins. of Wausau, 636 P.2d 1170 (Alaska 1981).

²⁴⁷Ostrager, *supra* note 203, at 18.

²⁴⁸United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982).

²⁴⁹*See* Maryland Dept. of Human Resources v. Dept. of Health & Human Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985).

²⁵⁰Hoskins-Western-Sonderegger, Inc. v. American & Foreign Ins. Co., No. 402, slip op. at 5 (D. Neb. Feb. 1, 1989).

²⁵¹822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

²⁵²*Id.* at 1350.

²⁵³*Id.* at 1352.

obligation.²⁵⁴ The Fourth Circuit further contended that insurers are reluctant to cover what are essentially prophylactic measures, which are subject to the discretion of the insured and not connected with any specific harm.²⁵⁵ In reaching its conclusion, the court did not even address the CERCLA statutory language.

Perhaps the most significant case holding that cleanup costs are not legal damages is *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO II)*.²⁵⁶ In 1971, NEPACCO arranged to have eighty-five drums of highly toxic chemical wastes, including dioxin, dumped into a trench on a farm in rural Missouri. Many of the drums were in a deteriorated condition at the time of disposal, breaking open when they were dumped. Over the next three years, NEPACCO also disposed of more hazardous wastes, all of which resulted in personal injury and property damage.²⁵⁷

In an EPA investigation of the disposal site, high concentrations of dioxin and other toxic chemicals were found. The EPA cleaned up the site and sought abatement costs under the Resource Conservation and Recovery Act (RCRA)²⁵⁸ and injunctive relief and reimbursement of response costs under the CERCLA.²⁵⁹ The district court held NEPACCO and others, jointly and severally, strictly liable for the CERCLA cleanup costs. On appeal, a panel of the Eighth Circuit in *NEPACCO I* held that the cleanup costs under the CERCLA are compensatory damages within the meaning of the CGL clause.²⁶⁰ *NEPACCO II*, an en banc hearing, was the result of NEPACCO's insurer seeking a declaratory judgment concerning its liability.

The two *NEPACCO* decisions diverged in their approaches to the "as damages" issue, yielding differing results. The panel in *NEPACCO I* first began with a determination that covered

²⁵⁴The typical CGL policy provides, in pertinent part, that "[t]he insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of ... property damages to which this insurance applies." The court reasoned that the addition of the words "as damages" restricts the insurer's coverage from *any* financial obligation of the insured. *Id.*

²⁵⁵*Id.* at 1353.

²⁵⁶842 F.2d 977 (8th Cir.) (en banc), *cert. denied*, 109 S. Ct. 66 (1988).

²⁵⁷In addition to dumping the barrels, NEPACCO had also hired a firm to dispose of additional hazardous materials, which was performed by mixing the dioxin-laced wastes with oil and applying that mixture as a dust suppressant on area roads. In addition, dirt contaminated with NEPACCO's hazardous wastes was sold to an individual to be used as landfill on his property. *Id.* at 979.

²⁵⁸42 U.S.C. § 6973(a) (1988).

²⁵⁹*Id.* §§ 9604, 9606, 9607.

²⁶⁰*United States v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180 (1987).

property damage had been sustained.²⁶¹ Finding property damage within the meaning of the CGL policy, the panel in *NEPACCO I* then rejected the insurance industry's argument that, even if environmental contamination had caused property damage, CERCLA cleanup costs were not recoverable as damages.²⁶² The panel reviewed the statutory policy and language, concluding that cleanup costs under the CERCLA are compensatory damages for property damage within the meaning of the CGL policy.²⁶³

The en banc panel followed the Fourth Circuit's lead in holding that under Missouri law, the term "damages" is not ambiguous in the insurance context and refers only to legal damages, not cleanup costs.²⁶⁴ Analyzing "damages" strictly in the insurance context, the court contended that black letter insurance law provides that claims for equitable relief do not constitute claims for damages under liability contracts.²⁶⁵ Citing *Maryland Casualty*, the court reasoned that the insurer did not agree to pay *all* sums that the insured is legally obligated to pay, but rather, only sums that the insured is obligated to pay *as damages*.²⁶⁶

The *NEPACCO II* court also addressed the issue of prophylactic measures, finding that from the insurance company's viewpoint, the EPA's investigative and remedial actions constituted merely safety measures. Through these measures, contended the court, the government was hoping to stop the

²⁶¹ See *supra* notes 238-40 and accompanying text.

²⁶² *Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d at 1189.

²⁶³ *Id.*

²⁶⁴ *Id.* at 985-87.

²⁶⁵ *Id.* at 985-86.

²⁶⁶ *Id.* at 985. Quoting *Maryland Casualty*, the *NEPACCO* court stated, "If the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract ... would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated." *Id.* (quoting *Maryland Casualty*, 822 F.2d at 1352).

The Eighth Circuit reached a similar result in its 1991 decision in *Grisham v. Commercial Union Ins. Co.*, 927 F.2d 1039 (8th Cir. 1991). *Grisham* involved environmental claims arising from ownership and operation of a wood treatment facility from which, over the course of 20 years, facility operators had pumped chemical preservatives onto the ground as a means of weed and dust control. Among other actions, the EPA issued an order under 42 U.S.C. § 9606(a) (1988) (CERCLA § 106(a)), ordering specific remedial actions with respect to releases or threatened releases. No payment to the government or third parties was sought.

The district court relied on *NEPACCO*, holding that Arkansas law was substantially similar to Missouri law as applied in *NEPACCO*. In affirming the lower court's decision, the Eighth Circuit gave substantial deference to the district court. The result was not surprising, considering that *NEPACCO* was also an Eighth Circuit case.

future spread of contamination, rather than to repair or clean up present damage.²⁶⁷

The Fourth and Eighth Circuits' analyses have been followed in many cases.²⁶⁸ On the other hand, many courts have begun to question the distinction between the costs of an injunction or restitution to a government agency, and the costs of paying damages to third parties to compensate for property damage. Accordingly, since *NEPACCO II* and *Maryland Casualty*, a rash of decisions holding for policyholders has occurred.²⁶⁹

Successful insureds have urged that the plain meaning of the word "damages" controls under the applicable state law and that the plain meaning encompasses equitable relief, such as restitution and injunctions.²⁷⁰ The Second Circuit, for example, had little difficulty in finding coverage for equitable relief in *Auondale Industries, Inc. v. Travelers Indemnity Co.*²⁷¹ *Avondale* involved property damage and personal injury from salvaged oils and chemical wastes seeping from an oil recycling facility. Avondale, a builder and repairer of ships and a customer of the recycling facility, was identified as a PRP and was ordered by the state to take remedial action or pay the state's response costs.²⁷²

Avondale's insurers cited *Maryland Casualty* and *NEPACCO II*, arguing the distinction between legal damages and equitable response costs. The Second Circuit refused to follow the logic shared by the Fourth and Eighth Circuits. The court, applying New York law, found that an insurance policy term is to be

²⁶⁷ *NEPACCO II*, 842 F.2d at 987.

²⁶⁸ *E.g.*, *Grisham v. Commercial Union Ins. Co.*, 927 F.2d 1039 (8th Cir. 1991); *Johnson v. Aetna Casualty & Sur. Co.*, No. 86-3305-WD (D. Mass. June 29, 1990); *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252 (D. Md. 1989); *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, No. 87-0323-R (E.D. Va. June 20, 1988); *Fort McHenry Lumber Co. v. Pennsylvania Lumbermen's Mut. Ins. Co.*, No. HAR 88-825 (D. Md. Sept. 28, 1988); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988); *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347 (D.D.C. Sept. 7, 1988); *Travelers Ins. Co. v. Ross Elec., Inc.*, 685 F. Supp. 742 (W.D. Wa. 1988); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950 (N.D. Ill. 1988).

²⁶⁹ *E.g.*, *Boeing v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990); *C.D. Spangler Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990); *Jones Truck Lines v. Transp. Ins. Co.*, No. 88-5723 (E.D. Pa. May 10, 1989), *question certified*, Nos. 89-1729/59 (3d Cir. Feb. 15, 1990), *question declined*, No. 72650 (Mo. July 13, 1990); *Aerojet Gen. Corp. v. Superior Court*, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621 (1st Dist.), *modified and reh'g denied*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1st Dist. 1989).

²⁷⁰ *E.g.*, *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987).

²⁷¹ 887 F.2d 1200 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498, *cert denied*, 110 S. Ct. 2588 (1990).

²⁷² *Id.* at 1201.

accorded its "natural and reasonable meaning," corresponding to the reasonable expectations and purposes of ordinary businessmen. If uncertainty remains, the terms must be construed to embrace coverage.²⁷³

The court determined that an ordinary businessman reading the policy would have believed himself covered "for the demands and potential damage claim" that the state asserted.²⁷⁴ The court reasoned that if the insurer drafting the policy wanted to except this type of coverage, it must do so in clear and unambiguous language. Because the term "damages" was not defined in the CGL policy, it must be construed to favor the policyholder.²⁷⁵

A 1991 Third Circuit case also rejected the legal-equitable distinction of *NEPACCO II*. *Federal Insurance Co. v. Susquehanna Broadcasting Co.*²⁷⁶ involved an EPA order, under CERCLA section 107(a),²⁷⁷ to clean up soil and water contamination resulting from a waste hauling and disposal business. The plaintiffs insurer relied primarily on *NEPACCO* and Maryland Casualty in arguing that it should not have to cover CERCLA response costs.²⁷⁸

Although the Third Circuit acknowledged that its analysis was not very different from the en banc discussion in *NEPACCO II*, it reached a different result. The court, applying Pennsylvania law interpreting insurance contracts, noted that a word of common usage will be construed in its natural, plain, and ordinary sense. A technical word, however, will be construed in its technical sense unless a contrary intention appears.²⁷⁹ The court interpreted "damages" in this context in its technical sense, as it is generally recognized in the law. Accordingly, it concluded that the term does not include equitable relief.²⁸⁰

Not satisfied with this finding, however, the court noted that, to recognize that the term "damages" does not include equitable relief does not answer the specific question of whether the costs of restoring land to its original condition are, nevertheless, recoverable as damages. Examining Pennsylvania precedent, the court went on to determine that costs of restoring

²⁷³*Id.*

²⁷⁴*Id.* at 1207.

²⁷⁵*Id.*

²⁷⁶928 F.2d 1131 (3d Cir. 1991).

²⁷⁷42 U.S.C. § 9607(a) (1988).

²⁷⁸*Susquehanna*, 928 F.2d at 173

²⁷⁹*Id.* (citation omitted).

²⁸⁰*Id.*

and cleaning up property are, under Pennsylvania law, recoverable in damages.²⁸¹

D. Analysis and Trend

The analysis in *NEPACCO II* contains an essential flaw. The court initially recognized that under applicable state law, terms in insurance contracts are to be given a layperson's, or normal meaning. If the language is unambiguous, the policy must be enforced according to the language, but if ambiguous, it will be construed against the insurer.²⁸² Nevertheless, the court proceeded to adopt a technical meaning of the term "damages" as it is used in black letter insurance law.²⁸³ Placing the term in the insurance context, the court had no difficulty in finding it unambiguous.

A recent case decided by the District of Columbia (D.C.) Circuit recognized the Eighth Circuit's flawed reasoning on the interpretation of the term "damages." In *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*,²⁸⁴ a case arising out of the same facts as the *NEPACCO* litigation,²⁸⁵ the court sharply rejected the en banc Eighth Circuit's holding.

Finding Missouri law unsettled because the state's appellate courts had not addressed the damages issue, the D.C. Circuit refused to give deference to the Eighth Circuit's application of Missouri law. Missouri law requires that insurance policy language is to be given the meaning that ordinarily would be understood by the layperson who bought the policy.²⁸⁶ The D.C. Circuit noted that, rather than relying on the common understanding of the word "damages"—as the *NEPACCO II* court said it would—the Eighth Circuit instead analyzed the term as it

²⁸¹*Id.* The court, however, did find a limit to coverage for CERCLA response costs. Under Pennsylvania law, the measure of damages for injury to property, if the injury is reparable, is the cost of repairs, unless that cost is equal to or greater than the value of the damaged property. Therefore, CERCLA response costs are covered only to the extent that they do not exceed the value of the property. *Id.* Accordingly, the court noted, the fears of some courts that deciding for coverage would impose unlimited liability upon insurers need not be addressed. *Id.* at n.8.

²⁸²*NEPACCO II*, 842 F.2d at 985-86 (construing Missouri law).

²⁸³*Id.* at 985-86. The Fourth Circuit applied the same flawed analysis in *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law).

²⁸⁴944 F.2d 940 (D.C. Cir. 1991).

²⁸⁵The plaintiffs arranged for disposal of a customer's waste material containing dioxin; the hazardous waste was *NEPACCO*'s. *Independent Petrochemical*, 944 F.2d at 942-43.

²⁸⁶*Id.* at 945.

would be used by "astute insurance specialists or perspicacious counsel."²⁸⁷

After determining that the term "damages" should be construed in layperson's terms, the court thoroughly analyzed Missouri law concerning whether the term includes the costs of restoring or repairing property.²⁸⁸ The D.C. Circuit concluded that liability for environmental cleanup costs "quite naturally fits this common and ordinary understanding of damages."²⁸⁹

Thus *Independent Petrochemical* significantly limits the future precedential value of *NEPACCO II*. Because of the Eighth Circuit's reliance on the Fourth Circuit's analysis, *Maryland Casualty's* continued validity is equally questionable. The D.C. Circuit's analysis is persuasive, particularly in light of the number of cases and other sources of support the court examined. Courts taking a similarly thorough approach in addressing the issue of damages should have little difficulty in seeing and rejecting the essential weakness of the previous two decisions.

The distinction between, on the one hand, complying with a cleanup order or making restitutionary payments to the government and, on the other hand, payment of damages to third persons for the same property damage, is artificial and strained. After all, is it not a mere fortuity that the insured is required to pay court-mandated cleanup costs instead of court-ordered damages for specific loss or injury? Both involve "compensation or satisfaction imposed by law for a wrong or injury caused by violation of a legal right."²⁹⁰

The artificial distinction serves only as a disincentive for policyholders to cooperate with the state or federal government in cleaning up a site.²⁹¹ Furthermore, addressing the damages issue

²⁸⁷*Id.* at 946 (quoting *Hammontree v. Central Mut. Ins. Co.*, 385 S.W.2d 661, 666 (Mo. App. 1965)).

²⁸⁸*Id.* at 947 (citations omitted).

²⁸⁹*Id.*

²⁹⁰*Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1513 (9th Cir. 1991).

²⁹¹To facilitate cleanup and avoid the costs of litigation, federal and state governments often enter into a consent decree or settlement that requires the policyholder to perform cleanup operations. These settlements, which contain injunctive orders, in the past have resulted in denials of coverage. Consequently, insureds might refuse to enter into consent decrees, choosing to wait for the government to sue for its costs after cleanup. Although coverage for these costs also has been denied in past, an insured may decide that to wait and hope for a more favorable coverage decision on the judicially-mandated liability is in its best interests. Hapke, *supra* note 17, at 20-21.

A recent Massachusetts Supreme Court ruling illustrates this situation. In *Augat Inc. v. Liberty Mut. Ins. Co.*, No. S-5578 (Mass. June 14, 1991), a company

in a vacuum that ignores consideration of the CERCLA's statutory scheme defeats the federal statute's environmental goals of hazardous waste cleanup.

With the exception of NEPACCO **11** and its progeny, in virtually every case in which the applicable state's rules of construction require application of the common and ordinary, layperson's understanding, the word "damages" has been construed to cover reimbursement for environmental response costs.²⁹² Courts that reject blind deference to precedent and conduct a meaningful examination of the law should reach the same conclusion.

A recent Supreme Court decision should ensure that appeals courts take a closer look at a district court's determination of state law, rather than simply deferring to the district court's analysis. In *Parker Solvents Co. v. Royal Insurance Cos. of America*,²⁹³ the Supreme Court vacated an Eighth Circuit ruling that affirmed a proinsurer ruling by the lower court.²⁹⁴ In addressing the issue of whether CERCLA cleanup costs are covered damages, the district court had relied on NEPACCO **11**, finding Arkansas law to be similar to Missouri law in interpreting insurance clauses. The Eighth Circuit then affirmed the district court ruling, stating that it gave great weight to decisions of district court judges on questions of law.²⁹⁵

The Supreme Court, however, recently had ruled in an unrelated case that an appeals court should take a fresh look at a district court's determination of state law in diversity cases, rather than simply deferring to the district court's analysis.²⁹⁶ Based on this recent ruling, the Supreme Court granted the policyholder's motion for vacation of the proinsurer ruling. This pronouncement by the Supreme Court should provide support for policyholders seeking to avoid undue deference to decisions like NEPACCO **11** and its progeny.

executed a consent decree with the State of Massachusetts, in which it agreed to perform environmental cleanup at its own expense. After performing the cleanup, the company filed a claim for its costs with its insurer. The insurer, however, refused to pay, claiming that the company incurred its obligations voluntarily. The Massachusetts Supreme Court held that the insurer was not liable for the company's costs because the company had violated the insurance policy's voluntary payment provision by agreeing to pay for the cleanup.

"Independent Petrochemical Corp. v. Aetna Casualty & Sur. Corp., 944 F.2d 940, 946 (D.C. Cir. 1991).

293112 S. ct. 40 (1991).

²⁹⁴*Parker Solvents Co. v. Royal Ins. Cos. of Am.*, 1991 U.S. App. LEXIS 15972 (8th Cir. Mar. 12, 1991).

²⁹⁵*Id.* at 2-3.

²⁹⁶*Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

VII. Practical Considerations

Faced with the tremendous costs for environmental restoration of military installations and facilities, the Defense Department has great incentive to pursue indemnification from defense contractors' insurers. Military officials contemplating litigation will have several practical considerations to face before making such a decision. The initial consideration, of course, is the benefit of a monetary recovery for the agency if litigation is successful.

The first step in evaluating the possible recovery is to locate all of the policies the insured maintained during the period in which releases or discharges of waste are alleged.²⁹⁷ Because property damage from hazardous wastes can go undetected for years, going back in time to locate long-dormant policies can be difficult.²⁹⁸ In the case of large-scale government contractor operations, encountering a contractor that has held several different policies during the relevant time frame is not unusual. Each policy, however, should be located and examined as a potential basis for recovery.

Next, the amount of coverage the CGL policy provides must be determined. For policies issued prior to 1966, the policy limits are on a "per accident" basis.²⁹⁹ After 1966, coverage is based on "occurrences."³⁰⁰ A close examination of the polluting activities is necessary to determine if they fall within the policy's definition of accident or occurrence.³⁰¹ Cases of gradual, long-standing, and undetected pollution raise the issue of whether only one covered occurrence arose, or whether the activity can be separated into distinct occurrences, thereby increasing the potential recovery.

²⁹⁷Gordon & Westendorf, *supra* note 95, at 572.

²⁹⁸*Id.* The authors suggest that if a policy cannot be located, the insured may attempt to prove its existence by secondary evidence such as letters, canceled checks, and statements of agents who issued the policy.

²⁹⁹*See supra* Part IV.C.1.

³⁰⁰*See supra* Part IV.C.2.

³⁰¹As discussed *supra* Parts IV.C.2 and V.E, determining whether a covered occurrence has arisen also entails an examination of the "expected or intended" language of the CGL policy. As previously noted, the courts have been inconsistent in interpreting the terms. Therefore, analyzing the insured's knowledge, intent, and degree of foreseeability, as well as determining whether the pollution occurred as a regularly conducted business activity, is essential.

Like the definitions of "sudden and accidental" and "as damages," this issue has generated tremendous litigation. A detailed analysis and survey of the case law addressing the definition of "occurrence" and what triggers coverage are beyond the scope of this article. For a comprehensive overview of these issues, see Stephen N. Goldberg, *Insurance Coverage for Toxic Exposure and Environmental Damage Under Standard Form CGL Policies*, Environmental Insurance Coverage Claims and Litigation, 1992 P.L.I. Commercial Law and Practice Course Handbook Series; R. Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9 (1986).

The agency next should determine if any policy exclusions may apply to preclude recovery. The most common are the exclusion for property damage to property owned by, occupied by, or rented to the insured contractor; the exclusion for property in the contractor's care, custody, or control;³⁰² and the 1971/1973 pollution exclusion clause.³⁰³ As discussed in detail in Part V above, the scope and applicability of the pollution exclusion clause is unsettled. What is clear, however, is that if the court hearing the issue is presented with the substantial amount of available evidence showing the intent of the insurance industry at the time the exclusion was adopted, the court's construction of the terms almost certainly will favor the insured.³⁰⁴

Balanced against the potential recovery from the insurer is the potential cost of the litigation—in terms of both dollars and time. Litigation in this area can be complex, particularly if multiple PRPs exist or if a PRP has more than one insurer. For example, in a lawsuit by the federal government against Shell Oil for environmental damages in Colorado and California, the policyholder has impleaded almost three hundred current and former insurers as possible indemnifiers.³⁰⁵ The stakes in this arena are high. An insurance industry representative testifying before the Senate estimated that litigation costs under the Superfund can equal twenty-four to forty-four percent of direct cleanup costs.³⁰⁶

Finally, military officials considering pursuing an insurance coverage case should consider the appropriate forum for the litigation, to the extent that a choice is possible. As the discussion in Part VI above indicates, this is particularly critical in cases involving the issue of whether "damages" within the meaning of the CGL policy were incurred. Courts finding that under applicable state law, the term "damages" must be accorded a normal, layperson's interpretation likely will find in favor of

³⁰² Gordon & Westendorf, *supra* note 95, at 596-97. As a general rule, the owned property exclusion will not bar coverage automatically for an insured who expends funds for preventive measures on its own property in response to government directives designed to abate the discharge of pollutants onto adjacent lands. *See, e.g.*, Broadwell Realty Servs., Inc. v. The Fidelity & Casualty Co. of New York, 528 A.2d 76 (N.J. Super. 1987); CPS Chem. Co., Inc. v. Continental Ins. Co., 536 A.2d 311 (N.J. Super. A.D. 1988); Bankers Trust Co. v. Hartford Accident & Indem., 518 F. Supp. 371 (S.D.N.Y. 1981).

³⁰³ *See supra* Parts IV.C.3, V.

³⁰⁴ *See supra* notes 211-23 and accompanying text.

³⁰⁵ Eubank, *supra* note 33, at 174.

³⁰⁶ Insurance Issues & Superfund: Hearing Before the Senate Commission on Environment & Public Works, 99th Cong., 1st Sess. 61, at 99 (1985) (statement by the American Insurance Association).

coverage.³⁰⁷ Courts finding that state law requires a technical reading in the insurance context, however, normally will deny coverage.³⁰⁸

VIII. Conclusion

Whether to pursue a contractor's insurers for indemnification of environmental cleanup costs is not an easy decision. In addition to the practical matters that must be considered, the likelihood of success must be weighed. The current patchwork pattern of inconsistent decisions renders predictions difficult. Recent court holdings, however, indicate that in examining the pollution exclusion clause, courts are beginning to explore the drafting history and industry representations. Courts following the insurance industry's intentions, as manifested in the drafting documents, are giving a clear and consistent meaning to the pollution exclusion clause.

Likewise, on the issue of whether Superfund response costs constitute damages, a number of courts recently have refused to give blind deference to artificial distinctions. Courts that undertake an aggressive scrutiny of the applicable state's law more often are finding in favor of coverage. Although the issues are too complex and the precedents too well entrenched to be overlooked quickly, the recent trends are encouraging.

³⁰⁷ See *supra* notes 282-92 and accompanying text.

³⁰⁸ See *supra* notes 241-68 and accompanying text.

JUDICIAL PRIVILEGE: DOES IT HAVE A ROLE IN MILITARY COURTS-MARTIAL?

MAJOR ROBERT E. NUNLEY*

I. Introduction

What is “judicial privilege”? Is it like pornography, evasive of any common definition, but one knows it when he or she sees it?¹ Very few reported cases have mentioned the words “judicial privilege,” and even fewer have addressed it in the context of a testimonial and discovery privilege.² Only a couple of legal scholars have attempted to define judicial privilege, and their articles have addressed it from an historical perspective, leaving the practicing attorney and judge to ponder its practical, day-to-day application.³

The purpose of this article is to define the scope of judicial privilege, identify its bases, and review its development as a testimonial and discovery privilege.⁴ The article will examine the

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¹Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”).

²See *infra* notes 122-30, 157-59, 185-284, and accompanying text. The term “judicial privilege” has many contexts. Most authors and cases use the term to describe claims of privilege other than the testimonial and discovery privilege covered by this article. Another context of the term is to generally describe all judicially created—as opposed to legislatively created—evidentiary privileges. See, e.g., Boyd v. Gullett, 64 F.R.D. 169 (D. Md. 1974); Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 (1990). Frequently, the term is used to describe a form of immunity from liability for statements made in the course of judicial proceedings. See, e.g., Silver v. Mendel, 894 F.2d 598 (3d Cir.), *cert. denied*, 110 S. Ct. 2620 (1990); Owen v. Kronheim, 304 F.2d 957 (D.C. Cir. 1962). Others use the term to describe a court’s right to summarize or comment on a matter before it. See, e.g., *In re* Application of Wilbur H. McKellin, 529 F.2d 1324, 1332 (C.C.P.A. 1976) (Markey, J., concurring) (“[Exercising] the judicial privilege of additional comment, I append these few remarks.”); Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958) (dealing with a distortion of the evidence in an instruction to the jury that was “beyond the judicial privilege of summary or comment”). Still others use it to describe the actions of a court to label a cause of action. See, e.g., Gumz v. Morrissette, 772 F.2d 1395, 1405-06 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986) (“Substantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand.”). For more on the distinction between judicial privilege and judicial immunity, see *infra* notes 115-21 and accompanying text.

³See Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89 (1987); Kevin C. Milne, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213 (1987).

⁴See *infra* notes 18-308 and accompanying text.

role of judicial privilege in courts-martial, focusing on the role it plays in the military's unique trial procedure, which permits the *voir dire* of the military judge.⁵

The existence and scope of judicial privilege is important to all practitioners and judges—both military and civilian—in light of recent politicized struggles between the branches of government invoking the separation of powers doctrine.⁶ Furthermore, both the military courts⁷ and the federal bar⁸ recently have experienced several publicized inquiries into alleged judicial misconduct. Investigations into these allegations necessarily involve the potential for, and have resulted in the increased invocation of, judicial privilege.⁹

⁵See *infra* notes 309-88 and accompanying text.

⁶See, e.g., *United States v. Nixon*, 418 U.S. 683, 708 (1974) (discussing "executive privilege" and analogizing the President's expectation of confidentiality of his conversations to the "claim of confidentiality of judicial deliberations"); *New York Times v. United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting) ("Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations"); *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., concurring in part, dissenting in part) ("The judicial branch of our government claims a similar privilege, grounded on an assertion of independence from the other branches.").

⁷Three recent cases involving the Navy-Marine Corps Court of Military Review (NMCMR) have arisen since 1988. See *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); *Wilson v. Ouellette*, No. 913025M (N.M.C.M.R. 9 Dec. 1991), *petition denied*, No. 92-07/MC (C.M.A. 17 Jan. 1992); *Clarke v. Breckenridge*, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). These cases are discussed in depth later in the article. See *infra* notes 247-84 and accompanying text.

⁸No federal judges were impeached by the United States Senate from 1936 through 1985. Since 1986, the Senate has impeached three federal district court judges: Nevada District Judge Harry E. Claiborne for failure to pay income tax (1986); Mississippi District Judge Walter L. Nixon for perjury (1989); and Florida District Judge Alcee L. Hastings for conspiracy to solicit a bribe (1989). Deborah Pines, *Disciplinary Rules Revised for U.S. Judges; Changes in 2d Circuit Part of Uniform Process*, N.Y.L.J., Jan. 6, 1992, at 1. More recently, California District Judge Robert Aguilar was convicted for obstruction of justice in August 1990, and Louisiana District Judge Robert F. Collins was found guilty of bribery, conspiracy, and obstruction of justice in June 1991. These cases raise the possibility of yet more impeachment proceedings. Jack Brooks et al., *Lessons of Judicial Impeachment*, THE RECORDER, May 17, 1991, at 4; Henry J. Reske, *Collins Guilty of Bribery*, A.B.A. J., Sept. 1991, at 32.

⁹See, e.g., *Matter of Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir.) (*Hastings II*), *cert. denied sub nom. Hastings v. Godbold*, 477 U.S. 904 (1986) (suit objecting to the enforcement of subpoenas seeking testimony and documents from present and former staff members of the Honorable Alcee L. Hastings, United States District Judge); *Clarke v. Breckenridge*, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.) (repeated invocation of judicial privilege by a military judge to avoid answering questions by counsel during *voir dire*); see also Reid H. Weingarten, *Judicial Misconduct: A View from the Department of Justice*, 76 KY. L.J. 799, 800-04 (1987-88) (describing the procedures used by the Department of Justice to "get inside the chambers" during judicial misconduct investigations).

When a military judge claims judicial privilege in a court-martial, an inherent friction arises. The conflict is between the interests served by the protections of the privilege, and the interests of the parties in a criminal trial in securing a fair and impartial trier of fact through *voir dire*.¹⁰ Before practitioners and judges can appreciate this friction, and ultimately resolve the conflict, they must understand the development of judicial privilege and its bases.

An examination of the historical evolution of privileges, up through and including the adoption of the Federal Rules of Evidence in 1975,¹¹ is fundamental to the analysis of any privilege. Additionally, a review of the Military Rules of Evidence is necessary in this case because two rules provide potential bases for a judicial privilege.¹²

The Constitution and the federal common law are also sources of specific bases giving rise to judicial privilege. The Constitution expressly provides for a legislative privilege, and courts have recognized an implied executive privilege since the 1970s.¹³ Through an examination of the development of the legislative and executive privileges, this article analyzes court dicta and decisions leading to the ultimate recognition of a coequal, implied judicial privilege. This constitutional judicial privilege is broad in scope, yet qualified; and it applies to Article I judges—including military judges—as well as to Article III judges.¹⁴ Finally, this author recognizes a federal common law “deliberative process” privilege for the judiciary through analogy to the well-recognized “deliberative process” privilege held by the executive branch.¹⁵

Having established the development and bases of judicial privilege, the article next examines the history and purposes of *voir dire*, focusing on the interests served by *voir dire* of the military judge in a court-martial.¹⁶ Finally, the article discusses the conflicting interests created by a military judge’s claim of judicial privilege, and proposes the adoption of a bright-line rule to best protect the interests of both the judiciary and the parties to a court-martial.¹⁷

“See *infra* notes 269-84, 375-88 and accompanying text.

“See *infra* notes 20-41 and accompanying text.

“See *infra* notes 42-87 and accompanying text.

¹³ See *infra* notes 90-101, 160-83, and accompanying text.

¹⁴ See *infra* notes 205-99 and accompanying text.

¹⁵ See *infra* notes 131-48, 172, 180, 300-04, and accompanying text.

¹⁶ See *infra* notes 309-59 and accompanying text.

¹⁷ See *infra* notes 360-97 and accompanying text.

II. The Development of a Judicial Privilege

A. Historical Development of Privileges

To understand the purposes and scope of the specific privileges, including judicial privilege,¹⁸ one must first review the history and purposes of privileges in general.¹⁹ The earliest privileges arose in England during the sixteenth century in response to the imposition of compulsory process and the creation of the universal duty to testify when called.²⁰ Unlike other rules of evidence designed to exclude unreliable evidence in the search for truth, privileges implement other societal interests and preclude the admission of otherwise reliable evidence. Invoking a privilege effectively subordinates the truth-seeking goal to the particular societal interest giving rise to the privilege.²¹

1. Common Law and State Privileges.—The first privilege was created in the 1500s to protect the communications between an attorney and client.²² A second, broader privilege followed in

¹⁸For purposes of this article, the author uses the term “privileges” to refer to testimonial and evidentiary privileges available to a participant in a judicial proceeding. The testimonial privileges, or “privileged communications,” encompass “statements made by certain persons within a protected relationship ... the like of which the law protects from forced disclosure on the witness stand...” BLACK’S LAW DICTIONARY 1078 (5th ed. 1979). Evidentiary privileges include governmental secrets or records, identity of informants, grand jury proceedings, certain accident reports, and attorney work product. *Id.* (“privileged evidence”).

¹⁹For more complete coverage of the historical development of privileges, see *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455-71 (1985) [hereinafter *Developments in the Law*]; Catz & Lange, *supra* note 3, at 91-100.

²⁰*Developments in the Law*, *supra* note 19, at 1455 (citing I J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 6, 8, 8a (P. Tillers rev. ed. 1983)); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5001-05 (1977)). Most authors and courts cite to Dean Wigmore’s summation of the duty. See, e.g., *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting WIGMORE, EVIDENCE § 2192 (3d ed.)). Dean Wigmore stated,

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence.... [W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

Id. (quoting WIGMORE, EVIDENCE § 2192 (3d ed.) (citing to 12 PARL. HIST. ENG. 693 (1812) (speech of Lord Chancellor Hardwicke on May 25, 1742, in the House of Lords))).

²¹*Developments in the Law*, *supra* note 19, at 1454. No single theory or justification for all privileges exists. Over time, authors and courts have tried cost-benefit balancing, cited to a privacy rationale, and explained privileges from a political power or image theory. See *id.* at 1471-1500 (discussing the various theories and justifications). An in-depth discussion of these theories and justifications is beyond the scope of this article.

²²*Id.* at 1456; Catz & Lange, *supra* note 3, at 93 (the earliest recorded recognition of the privilege by a court was in 1557).

the 1600s, developed to shield the communications between spouses.²³ The primary rationale for these first two privileges was to protect and foster private communications in the attorney-client and spousal relationships.²⁴ This purpose of protecting and fostering private communications is the basis upon which all privileges, including judicial privilege, are founded.²⁵

By the 1800s, the “English courts had begun to develop a common law of evidentiary privileges, and American judges tentatively looked to this emerging law to help them decide privilege questions.”²⁶ This common law of privileges was the sole source of precedent and authority used by American courts until American dissatisfaction with the English common-law system led to attempts at codifying the evidentiary privileges.²⁷ Starting with the creation of a statutory physician-patient privilege in New York in 1828, state legislatures began modifying the common-law rules of evidence and eroded any uniform application of the rules of evidence.²⁸

As state codifications of the evidentiary rules became more divergent, individuals and organizations attempted to standardize the rules. The first national effort began in 1922,²⁹ yet the first code, the Model Code of Evidence, was not completed until 1942.³⁰ By 1949, most states had not adopted the Model Code of Evidence, and the National Conference of Commissioners on Uniform State Laws (National Conference) drafted the Uniform Rules of Evidence, approved in 1953.³¹ These rules initially failed to gain acceptance as well, and a substantial number of the states adopted them only after the National Conference revised the rules in 1974.³² The revised Uniform Rules of Evidence served to

²³Catz & Lange, *supra* note 3, at 94. Also during the 1600s, the English courts recognized a short-lived “obligation of honor among gentlemen.” *Id.* (citing WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 530-31 (J. McNaughton rev. ed. 1961) (citing Countess of Shrewsbury’s case, 12 Coke 94 (1613))). This “point of honor” privilege gradually disappeared as other privileges began to emerge. *Id.*

²⁴*Id.* at 95 n.25.

²⁵See *id.* at 112-15.

²⁶*Developments in the Law, supra* note 19, at 1457.

²⁷*Id.* at 1458-59.

²⁸*Id.* at 1460.

²⁹*Id.* at 1461 & n.58 (the Committee to Propose Specific Reforms in the Law of Evidence).

³⁰*Id.* at 1462 (produced by the American Law Institute and comprised of 806 rules).

³¹*Id.*

³²*Id.*

reduce some, but not all, of "the discrepancies between state privilege laws,"³³

2. Federal Court Privileges.—Prior to the enactment of the Federal Rules of Evidence³⁴ in 1975, the issue over which evidentiary privileges applied to cases appearing in the federal courts was unsettled.³⁵ In an attempt to consolidate and identify the privileges applicable in the federal courts, Article V of the proposed Federal Rules of Evidence provided for nine specific privileges.³⁶ The proposed privileges generated some of the most heated controversy in the subsequent legislative hearings.³⁷ Congress ultimately dropped proposed Article V in its entirety and substituted in its place a general rule of privilege—Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.³⁸

³³*Id.* at 1463. A detailed analysis of state court privileges is beyond the scope of this article. Such an analysis would be an enormous undertaking in its own right because of the large number of variations of state-legislated privileges.

³⁴Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (1988)).

³⁵*Developments in the Law, supra* note 19, at 1463 & n.74.

³⁶The proposed Federal Rules of Evidence contained 13 rules on privileges, all located in Article V, "Privileges." Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1972). Only the following nine of the proposed rules addressed specific privileges: Required reports privileged by statute (Rule 502); Lawyer-client privilege (Rule 503); Psychotherapist-patient privilege (Rule 504); Husband-wife privilege (Rule 505); Communications to clergymen (Rule 506); Political vote (Rule 507); Trade secrets (Rule 508); Secrets of state and other official information (Rule 509); and Identity of informer (Rule 510). *Id.* at 234-57. The remaining four proposed rules addressed the scope of privileges recognized (Rule 501), waiver by voluntary disclosure (Rule 511), disclosure under compulsion or without opportunity to claim privilege (Rule 512), and commenting upon a claim of privilege (Rule 513). *Id.* at 230-33, 258-61.

³⁷*Developments in the Law, supra* note 19, at 1465-70; see also Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) (critical assessment of the Supreme Court's involvement in the promulgation of the rules and of the substance of the proposed privilege rules); Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5, 6-7 (1981).

³⁸FED. R. EVID. 501.

Adoption of Rule 501 resulted in two divergent bodies of privilege law in this nation's courts:

In state courts, and in federal cases applying state law, the law of evidentiary privilege is a diverse collection of rules, developed mostly by statute, sometimes by common law.... In federal cases in which state law is not binding, federal courts have begun to develop a federal common law of evidentiary privileges "in the light of reason and experience."³⁹

Today, American federal civilian courts continue to interpret and develop the law of privileges on this two-tracked arrangement.⁴⁰ If a judicial privilege for federal question issues before federal courts exists, the privilege arises from one of three sources: the Constitution, federal statutes, or the federal common law.⁴¹

B. Privileges Under the Military Rules of Evidence

1. Adoption of the Military Rules of Evidence.—The President promulgated the Military Rules of Evidence⁴² in 1980.⁴³ Presently located in Part III, Section V, of the Manual for Courts-Martial⁴⁴ (Manual), the rules on privileges represented a combination of those privileges contained within the proposed Federal Rules of Evidence,⁴⁵ Rule 501 of the adopted Federal Rules of Evidence,⁴⁶ and the law of privileged and nonprivileged communications⁴⁷ then in effect within the military justice system.⁴⁸ Divided into twelve numbered rules, the military rules on privileges cover not only oral testimony, but also situations in which a person claims a privilege not to testify at all or to decline to produce real evidence.⁴⁹

³⁹*Developments in the Law*, *supra* note 19, at 1471.

⁴⁰*Id.*

⁴¹*See id.* at 1470.

⁴²MANUAL FOR COURTS-MARTIAL, United States, 1984, MIL. R. EVID. [hereinafter MCM].

⁴³Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

⁴⁴*See generally* MCM, *supra* note 42.

⁴⁵Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1972).

⁴⁶FED. R. EVID. 501.

⁴⁷MANUAL FOR COURTS-MARTIAL, United States, ¶ 151 (1969 rev. ed.) [hereinafter 1969 MANUAL].

⁴⁸*See* MCM, *supra* note 42, MIL. R. EVID. 501 analysis, at A22-35; STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 535-36 (3d ed. 1991); Woodruff, *supra* note 37, at 5-7.

⁴⁹MCM, *supra* note 42, MIL. R. EVID. 501(b); SALTZBURG ET AL., *supra* note 48, at 536.

Rule 501 is the basic rule of privilege, and it restricts the scope of privileges that may be claimed:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.⁵⁰

The language of Rule 501(a)(4) expressly permits the incorporation into courts-martial of federal common law privileges developed by the federal courts. The federal courts have flexibility to recognize federal common law privileges because of the “in the light of reason and experience” language found in Federal Rule of Evidence 501.⁵¹ Incorporation of federal common law privileges has its limitations. For instance, military courts may use them only to the extent they do not conflict with the practicalities of courts-martial practice and are not inconsistent with the Uniform Code of Military Justice, (UCMJ or Code)⁵² the Military Rules of Evidence, and the *Manual*.⁵³ Additionally, Military Rule of Evidence 1102 automatically incorporates any amendments to the Federal Rules of Evidence into the Military Rules of Evidence, absent contrary action by the President.⁵⁴ Given the plain language of Rule 501(a), any automatic incorporation of a rule of privilege also would be subject to the “conflict or inconsistent with” analysis applied to the federal common law privileges.

Rules 502 through 509, generally derived from the proposed Federal Rules of Evidence, provide eight specific privileges

⁵⁰MCM, *supra* note 42, MIL. R. EVID. 501(a).

⁵¹See *supra* note 38 and accompanying text.

⁵²10 U.S.C. §§ 801-940 (1988) [hereinafter UCMJ].

⁵³MCM, *supra* note 42, MIL. R. EVID. 501 analysis, app. 22, at A22-35; SALTZBURG ET AL., *supra* note 48, at 536.

⁵⁴MCM, *supra* note 42, MIL. R. EVID. 1102. This incorporation is automatic 180 days after the effective date of an amendment. *Id.*

deemed necessary by the drafters of the rules to "provide the certainty and stability necessary for military justice."⁵⁵ Of the eight recognized privileges, only two arguably may constitute a basis for invocation of judicial privilege—the government information privilege found in Rule 506, and the privilege for deliberations of courts and juries found in Rule 509. If judicial privilege does not spring from these two military rules, then, to arise in courts-martial, the privilege must derive from either the Constitution or federal common law. These two sources will be discussed later.

2. Rule 506: Unclassified Government Information.—Rule 506(a) sets forth the following general statement of the privilege: "Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest."⁵⁶ By its language, the scope of the rule is broad, for it defines "government information" as including unclassified "official communication and documents and other information within the custody or control of the Federal Government."⁵⁷ In practice, however, the rule is much more restricted than it first may appear. The circumstances in which the privilege may be claimed reduce its viability as a day-to-day source for a judicial privilege, and virtually eliminate its use as a privilege for the individual trial judge.

Rule 506(c) divides the information covered by the rule into two types—government information in general and investigations of the Inspector General.⁵⁸ While the subject matter of an Inspector General investigation well may be alleged judicial

⁵⁵MCM, *supra* note 42, MIL. R. EVID. 501 analysis, app. 22, at A22-35. The exception is Rule 509, "Deliberations of Courts and Juries," which had no equivalent in the proposed Federal Rules of Evidence. The privileges explicitly recognized are the lawyer-client privilege (Rule 502), the privilege for communications to clergy (Rule 503), the husband-wife privilege (Rule 504), a classified information privilege (Rule 505), a privilege for government information other than classified information (Rule 506), a privilege protecting the identity of informants (Rule 507), a political vote privilege (Rule 508), and a privilege for deliberations of courts and juries (Rule 509). *Id.* MIL. R. EVID. 502-09. The physician-patient privilege is specifically rejected. *Id.* MIL. R. EVID. 501(d). Rule 501(d) provides that "information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." *Id.* This privilege traditionally has been considered incompatible with the services' interests "in ensuring the health and fitness for duty of [their] personnel." *Id.* analysis, app. 22, at A22-35; *see also* 1969 MANUAL, *supra* note 47, ¶ 151c(2).

⁵⁶MCM, *supra* note 42, MIL. R. EVID. 506(a). For an in-depth discussion of Military Rules of Evidence 505 and 506, see Stephen A.J. Eisenberg, *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, ARMY LAW., Mar. 1991, at 9.

⁵⁷MCM, *supra* note 42, MIL. R. EVID. 506(b).

⁵⁸*Id.* MIL. R. EVID. 506(c).

misconduct,⁵⁹ the privilege against disclosure of such an investigation's contents to members of the executive branch could not fairly be called "judicial privilege." Rather, it would be the claim of privilege by the subject of the investigation, a judge, or a court, that would raise the specter of judicial privilege. The remainder of the focus on Rule 506, therefore, is directed toward the other type of information covered by the rule—that is, the privilege for government information in general.

While apparently few published judicial opinions have interpreted Rule 506,⁶⁰ the drafters intended that it be narrower in scope than the broad-based privilege for classified information found in Rule 505.61 Rule 506 is based in part on the privileges for military and state secrets⁶² and for the confidential evidence of Inspector General investigations,⁶³ both found in previous editions of the *Manual*.⁶⁴ Additionally, the drafters relied heavily on the language in proposed Federal Rule of Evidence 509 for the language used in Rule 506's sections concerning the scope of the privilege, who may claim it, and the procedures for invoking it.⁶⁵

Proposed Federal Rule of Evidence 509 was one of the most controversial of the proposed privileges.⁶⁶ Congress's ultimate rejection of the rule militates against any expansive interpretation of its coverage. That the rule requires the privilege to "be claimed by the head of the executive or military department or government agency concerned,"⁶⁷ further demonstrates an intent by the drafters that the privilege operate only in those "extraordinary cases"⁶⁸ in which release of the information is "detrimental to the public interest."⁶⁹ Little information exists at

⁵⁹See, e.g., United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988) (involving attempts by the Inspector General of the Department of Defense to question members of the court concerning anonymous allegations of misconduct).

⁶⁰See SALTZBURG ET AL., *supra* note 48, at 594.

⁶¹MCM, *supra* note 42, MIL. R. EVID. 506 analysis, app. 22, at A22-38.

⁶²1969 MANUAL, *supra* note 47, ¶ 151b(1).

⁶³*Id.* ¶ 151b(3).

⁶⁴*Id.* ¶ 151; MANUAL FOR COURTS-MARTIAL, United States, ¶ 151 (1951) [hereinafter 1951 MANUAL].

⁶⁵Compare MCM, *supra* note 42, MIL. R. EVID. 506 with Proposed FED. R. EVID. 509, 56 F.R.D. 184, 251-52 (1972). For a more thorough analysis of the procedures required under the rule, see Woodruff, *supra* note 37, at 39-52.

⁶⁶Krattenmaker, *supra* note 37, at 76-82. The author described this proposed rule as, "by far the most amazing of all the privilege provisions," with "[t]he only apparent purpose of . . . [permitting] the federal government to obstruct the ordered process of litigation when it has such an interest and is so inclined." *Id.* at 76-77.

⁶⁷MCM, *supra* note 42, MIL. R. EVID. 506(c).

⁶⁸*Id.* MIL. R. EVID. 506 analysis, app. 22, at A22-38.

⁶⁹*Id.* MIL. R. EVID. 506(a).

the local trial court or appellate court level—except for “deliberative process” information promulgated as judiciary-wide policy, which is similar to, but broader than, the information covered by Military Rule of Evidence 509—that could meet such a high threshold.

Decisions on the assignment of judges to particular positions or to specific cases, communications between judges on subjects that fail to implicate their deliberations on specific cases, and sentencing policies, never should rise to the level of being information, the release of which would be detrimental to the public interest. Similarly, the release of information on acts of judicial misconduct never should be considered detrimental to the public interest.

If Rule 506 gives rise to a privilege for the judiciary, it does so only for the highest levels at which policy decisions are made, and not for the trial court or appellate court judges. Accordingly, any specific basis for a judicial privilege, applicable to the trial or appellate courts in the military and arising from the Military Rules of Evidence—if such a privilege exists at all—must derive from Rule 509.

3. Rule 509: *Deliberations of Courts and Juries.*—The “deliberations” privilege is set forth in Military Rule of Evidence 509:

Except as provided in Mil. R. Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.⁷⁰

This rule was taken from paragraph 151b(1) of the 1969 Manual for Courts-Martial, with a modification “to ensure conformity with Rule 606(b) which deals specifically with disclosure of deliberations in certain cases.”⁷¹ The development of Rule 509 appears to be based upon two separate rationales. The first rationale is to encourage the members to have open discussions during deliberations without fear of their comments later being disclosed to military authorities, including their military superiors. The second rationale is to promote the finality

⁷⁰*Id.* MIL. R. EVID. 509.

⁷¹1969 MANUAL, *supra* note 47, ¶ 151b(1). The language found in the 1969 Manual comes verbatim from the language found in the 1951 Manual, which was the first service-wide court-martial manual following the enactment of the Uniform Code of Military Justice in 1950. Compare 1951 MANUAL, *supra* note 64, ¶ 151b(1) with 1969 MANUAL, *supra* note 47, ¶ 151b(1).

of verdicts.⁷² To those ends, the rule allows for disclosure of deliberations only in limited circumstances pursuant to Rule 606:

(b) *Inquiry into validity of findings or sentence.*

Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.⁷³

When read in conjunction with the limitations of Rule 606(b), Rule 509 serves to insulate the finder of fact from harassment and second-guessing in the routine case. The rule thereby promotes the independence of courts-martial,⁷⁴ while still providing a method for investigating and addressing extraneous prejudicial information, improper outside influences, and the occasional incident of unlawful command influence.⁷⁵

⁷²See SALTZBURG ET AL., *supra* note 48, at 633; Larry R. Dean, *The Deliberative Privilege under M.R.E. 509*, ARMY LAW., Nov. 1981, at 3.

⁷³MCM, *supra* note 42, MIL. R. EVID. 606(b).

⁷⁴*Cf.* Tanner v. United States, 483 U.S. 107, 119-20 (1987) (discussing the policy considerations for the rule prohibiting jurors from impeaching the jury's verdict and the necessity to shield the jury's deliberations from public scrutiny).

⁷⁵MCM, *supra* note 42, MIL. R. EVID. 606(b) analysis, app. 22, at A22-41; SALTZBURG ET AL., *supra* note 48, at 633. The three exceptions to the sanctity of deliberations are extraneous prejudicial information, unlawful command influence, and improper outside influences. Dean, *supra* note 72, at 4. "Extraneous prejudicial information" is prejudicial information brought to the court's attention. *Id.* The thrust of the "improper outside influences" exception is to prevent jury tampering—a problem rarely occurring in courts-martial. *Id.* at 5. The exception for "unlawful command influence" applies whether it is exerted from inside or outside the deliberations room. *Id.* at 4. Unlawful command influence is an evil that continually has shadowed the military justice system. Article 37 of the Uniform Code of Military Justice, entitled "Unlawfully influencing action of court," prohibits all attempts to coerce or wrongfully "influence the actions of a court-martial or any other military tribunal or any member thereof." UCMJ art. 37(a). An in-depth discussion of unlawful command

The plain language of the rule makes it applicable to deliberations of "courts." The term "courts" is not defined in the *Manual for Courts-Martial*, but the terms "court-martial," "member," and "military judge" are.⁷⁶ The terms "member" and "military judge" are used to denote parties of a court-martial,⁷⁷ while the term "court-martial" has five meanings:

(A) The military judge and members of a general or special court-martial;

(B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);

(C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;

(D) The members of a special court-martial when a military judge has not been detailed; or

(E) The summary court-martial officer.⁷⁸

The first and fourth contexts apply to situations in which the members are the triers of fact, while the third context describes a court-martial composition in which the military judge is the trier of fact. From these possible variations of courts-martial, the term "court," as used in Rule 509, should be understood to mean a court composed either of members or a military judge alone.

Several points can be raised in argument against such an interpretation. First, the language in Rule 509 originated from versions of the *Manual* that were in effect before 1968—the year that Congress created the position of "military judge" in courts-martial and provided for the accused's option of being tried by military judge alone.⁷⁹ The term "courts" contained within the rule, therefore, would refer only to courts-martial composed of

influence is beyond the scope of this article. For additional information on unlawful command influence, see HOMER E. MOYER, *JUSTICE AND THE MILITARY* § 3 (1972); Samuel J. Rob, *From Treacle to Thomas: The Evolution of the Law of Unlawful Command Influence*, *ARMY LAW.*, Nov. 1987, at 36; James B. Thwing, *An Appearance of Evil*, *ARMY LAW.*, Dec. 1985, at 13; see also *infra* notes 232, 234, 236 (discussing the independence of military courts, unlawful command influence, and the text of UCMJ art. 37).

⁷⁶MCM, *supra* note 42, R.C.M. 103(8), (14), (15).

⁷⁷*Id.* R.C.M. 103(14), (15).

⁷⁸*Id.* R.C.M. 103(8).

⁷⁹See Military Justice Act of 1968, Pub. L. No. 90-632, § 2(3), (9) (arts. 16, 26), 82 Stat. 1335, 1335-37 (codified as amended at 10 U.S.C. §§ 816, 826). Article 16 provides an accused with the option of selecting trial by military judge only. UCMJ art. 16(1)(B). Article 26 provides for military judges in trials by courts-martial. *Id.* art. 26(a).

members as the triers of fact. Second, the language of Rule 606(b) addresses the ability of “members” to testify about deliberations, and omits any reference to the military judge testifying concerning his or her deliberations while sitting as a court-martial composed of military judge alone. Finally, if a rationale for the rule is to encourage the members to have open discussions during deliberations, applying Rule 509 to a military judge sitting as the trier of fact obviously would have no effect, because the judge is the sole deliberator in that type of court-martial.

The last argument is the most easily dismissed. The encouragement of open discussions is only one of several rationales for Rule 509. Bringing the military judge’s deliberations within the protection of Rule 509 would further the arguably more important rationale of insulating the trier of fact—in this case the military judge—from harassment and second-guessing of his or her decisions by military authorities, thereby curbing the potential for unlawful command influence. Such protections under Rule 509 also would further the rationale of promoting finality in verdicts by preventing a military judge from later impeaching his or her verdicts, absent the existence of one of the exceptions found in Rule 606(b).

The assertion that the language of Rule 509 refers to “courts” as the term was used prior to the advent of the military judge is unconvincing. The title of Rule 509 is, “Deliberations of *Courts* and *Juries*,”⁸⁰ and at the time of the rule’s adoption in 1980,⁸¹ the “court” could be either members or a military judge under Article 26 of the UCMJ. The drafters of the rule, therefore, must have intended the term “courts” to have the common 1980s meaning, as opposed to a pre-1968 definition.

Finally, while Rule 606(b) fails to refer to the “military judge,” this omission easily is explained by the historical development of the rule. Military Rule of Evidence 606(b) was derived from Rule 606(b) of the adopted Federal Rules of Evidence,⁸² with only one substantive change made to recognize unlawful command influence as a legitimate subject of inquiry into deliberations.⁸³ As noted in the introductory analysis to the Military Rules of Evidence, several changes were made to adapt these civilian rules to military terminology. Two of those changes were to substitute “court members” for “jury” and “military judge”

⁸⁰MCM, *supra* note 42, MIL. R. EVID. 509 (emphasis added).

⁸¹See *supra* note 43 and accompanying text.

⁸²Compare MCM, *supra* note 42, MIL. R. EVID. 606(b) with FED. R. EVID. 606(b); see also MCM, *supra*, MIL. R. EVID. 606 analysis, app. 22, at A22-41; SALTZBURG ET AL., *supra* note 48, at 631.

⁸³MCM, *supra* note 42, MIL. R. EVID. 606 analysis, app. 22, at A22-41.

for “court.”⁸⁴ Because the federal rule dealt with the competency of *jurors* as witnesses, the drafters of the military rules merely translated the heading and language of the rule to read “court member” and “member.”

The failure to include military judges, when sitting as triers of fact, in the language of Rule 606(b) most likely was an oversight. Accordingly, like a court-martial composed of members, a military judge sitting as a trier of fact is prohibited from impeaching his or her verdict. This position is supported by the decision of the Air Force Court of Military Review in *United States v. Rice*,⁸⁵ in which the court held that a military judge could not impeach a sentence that he or she adjudged unless doing so would satisfy the exceptions of Rule 606(b).

Rule 509, therefore, provides for a “deliberations” privilege applicable to the deliberations of the trier of fact of a court-martial. To the extent the privilege belongs to the military judge sitting as the trier of fact, or to a military appellate court judge, it is a “judicial privilege.”

Rule 509, through its express reference to Rule 606, defines the scope of this judicial privilege for court deliberations. Accordingly, the actual deliberations, impressions, emotional feelings, or mental processes used by the trier of fact to resolve an issue are privileged, absent the existence of one or more of the three exceptions in Rule 606(b).⁸⁶

Consequently, under the Military Rules of Evidence, only one specific privilege—Rule 509—provides for a trial court or appellate court judicial privilege, and that privilege is limited to the deliberations process as defined by the language of Rule 606(b). While Rule 506 may provide for a judicial privilege in the rarest of situations involving a judiciary-wide policy decision, the circumstances under which it would apply appear to be so narrow that it cannot be recognized as a specific, routine basis for invoking judicial privilege. Certainly, Rule 506 does not provide a military trial court or appellate court judge with a judicial privilege. If another form of judicial privilege exists in court-martial, then under the language of Rule 501(a), it must be based upon either the Constitution or the federal common law.⁸⁷

⁸⁴*Id.* at A22-1.

⁸⁵20 M.J. 764 (A.F.C.M.R. 1985), *affd*, 25 M.J. 35 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988); *cf.* *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982) (en banc), *reu'd on other grounds*, 466 U.S. 668 (1984) (impermissible for trial judge to testify in habeas proceeding that his sentence would not have been different had the defense offered mitigation evidence).

⁸⁶*See* SALTZBURG *ET AL.*, *supra* note 48, at 632.

⁸⁷*See supra* note 50 and accompanying text.

C. The Constitution and Federal *Common Law*

1. Introduction.—The United States Constitution does not expressly provide for a judicial privilege.⁸⁸ Likewise, Congress has not passed a statute creating such a privilege. Nevertheless, the courts have found an implied judicial privilege in the Constitution.⁸⁹

To understand the development of the judicial privilege derived implicitly from the Constitution, one first must analyze the development of the constitutional legislative and executive privileges. At the same time, a discussion of the recognition of a judicial privilege based on the federal common law is necessary because both types of judicial privilege are intertwined hopelessly in the relevant cases discussed below. The analysis of the executive privilege is especially important to any study of judicial privilege because the courts have recognized the implied constitutional judicial privilege from the same constitutional underpinnings as the implied executive privilege.

The text of the Constitution expressly grants a privilege to only one branch of government—the legislative branch. Article I of the Constitution contains the “Speech and Debate Clause,” which states, in part,

Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.⁹⁰

As noted by the Supreme Court in *Gravel v. United States*,⁹¹ the quoted language provides members of Congress with two distinct privileges. The first part of the sentence shields them from “civil” arrest⁹² in the course of their duties during a session

⁸⁸See U.S. CONST. art. III (providing for judicial branch, but making no mention of a judicial privilege or judicial prerogative to maintain confidentiality or secrecy).

⁸⁹See *infra* notes 214, 218-21, and accompanying text.

⁹⁰U.S. CONST. art. I, § 6, cl. 1. For a complete history on the development of the legislative privileges arising from this clause, see Richard D. Batchelder, Note, *Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384 (1990).

⁹¹408 U.S. 606 (1972).

⁹²*Id.* at 614. “When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies.” *Id.* (quoting *Long v. Ansell*, 293 U.S. 76, 83 (1934)). This language in the clause does not exempt members of Congress from either “service of process as a defendant in civil matters, ... [or] from the operation of the ordinary criminal laws, even

of Congress,⁹³ while the last part shields them from being “questioned in any other place for any speech or debate in either House.”⁹⁴

The purpose of these legislative privileges was “to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. They thus protect Members against prosecutions that directly impinge upon or threaten the legislative process.”⁹⁵ As one federal court observed, “[t]he theory is that in a democracy a legislature must not be deterred from frank, uninhibited and complete discussion; since [o]ne must not expect uncommon courage even in legislators,”⁹⁶

Initially interpreted very broadly,⁹⁷ these legislative privileges have been construed more narrowly by the courts since 1972.⁹⁸ Nevertheless, even with the courts limiting the conduct of a legislator that falls within the scope of these privileges, the Supreme Court, in *Gravel*, reviewed the rationale for the privileges and extended the “Speech and Debate” privilege to an aide acting at the behest of a congressman.⁹⁹ The Court reasoned,

[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; ... [aides] must be treated as ... [members’] alter egos; and that if they are not so recognized, the central role of the Speech and Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.¹⁰⁰

though imprisonment may prevent or interfere with the performance of their duties as Members.” *Id.* at 614-15 (citing *Ansell*, 293 U.S. at 82-83; *Williamson v. United States*, 207 U.S. 425, 446 (1908)).

⁹³ *Id.* at 614.

⁹⁴ *Id.* at 615.

⁹⁵ *Id.* at 616.

⁹⁶ *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (Frankfurter, J.)).

⁹⁷ *See, e.g., id.* at 346 (“Thus the privilege is absolute: purpose, motive or the reasonableness of the conduct is irrelevant.”).

⁹⁸ *Batchelder*, *supra* note 90, at 387-91.

⁹⁹ 408 U.S. at 616-17 (Dr. Rodberg, an aide to Senator Gravel, had assisted the Senator in disclosing the Pentagon Papers during a congressional committee hearing).

¹⁰⁰ *Id.* at 616-17 (citation omitted).

This reasoning by the Court, as well as the language from the Constitution, provides direct support for co-equal privileges for the executive and judicial branches of the United States government under the doctrine of separation of powers.¹⁰¹

The Constitution sets forth protections for the judiciary to ensure its independence. First, Article III judges receive life tenure and protection against their compensations being diminished during their tenures in office.¹⁰² Second, the Constitution provides for the removal of judges from office, but only by impeachment and only for a limited number of reasons.¹⁰³ Finally, the Constitution sets forth a procedurally difficult mechanism for the impeachment process,¹⁰⁴ ensuring that the power to impeach will not be considered lightly by the legislative branch.¹⁰⁵

Certainly, the framers of the Constitution were aware of the dangers facing the independence of the judicial branch. They had the experiences of the English judiciary,¹⁰⁶ as well as known instances of judicial tampering by legislatures in the colonies, from which to draw.¹⁰⁷ These protections should be viewed as an attempt to insulate and protect the independence of the judicial branch—an act in furtherance of the doctrine of separation of powers set up by the first three articles of the Constitution.¹⁰⁸

2. *Dicta: Executive and Judicial Privilege.*—During the first two hundred years of the United States, no court addressed—to

¹⁰¹See *infra* notes 180, 218-21, and accompanying text.

¹⁰²"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

¹⁰³"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4.

¹⁰⁴The Constitution gives the House of Representatives the sole province of making the decision to impeach. "The House of Representatives shall chuse their Speaker and other officers; and shall have the sole Power of Impeachment." *Id.* art. I, § 2. It grants the Senate the sole power to try all impeachments. "The Senate shall have the sole Power to try all Impeachments.... And no Person shall be convicted without the Concurrence of two thirds of the Members present." *Id.* art. I, § 3.

¹⁰⁵See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 651 (1987-88).

¹⁰⁶See Milne, *supra* note 3, at 214-16 & nn.6-9.

¹⁰⁷*Id.* at 216 (citing *Trevett v. Weeden* (Providence 1787), cited in R. POUND, *THE SPIRIT OF THE COMMON LAW* 61-62 (1921)). In *Trevett*, the judges hearing a defendant's challenge to the constitutionality of a Rhode Island statute sustained the challenge. Thereafter, the Rhode Island General Assembly summoned the judges to appear before the Assembly to explain their basis for the holding. When the judges appeared, but objected to answering questions, the Assembly attempted to remove them from office. This attempt ultimately failed. *Id.* at 216-17.

¹⁰⁸See U.S. CONST. arts. I-III.

any significant degree—the issue of whether an executive or judicial privilege, concomitant with the express legislative privileges in the Constitution, existed. Certainly, confrontations occurred between Congress and the executive branch, some of which undoubtedly caught the fancy of the media of the day.¹⁰⁹ Nevertheless, courts managed to avoid the issue until the 1970s when, during the Nixon Administration, they were forced to define the scope and basis of the executive privilege.¹¹⁰ Not until the mid-1980s did a federal court finally find itself in a position to address whether judicial privilege existed and, if it did, to what extent it could be invoked.¹¹¹ That the issue did not arise before a federal judge until the 1980s is surprising, given past attempts by the executive branch to “stack” the courts to arrive at a federal judiciary and Supreme Court more in step with an administration’s perspective.¹¹² As late as 1987, authors were describing “judicial privilege” as “an obscure doctrine of evidentiary law”¹¹³ that, prior to the Nixon administration, had “barely [received] a passing mention ... in a court of law.”¹¹⁴

The constitutional executive and judicial privileges are both implied privileges. They share the same constitutional underpinnings and supporting rationales. The earliest cases touching on executive and judicial privilege did so in the context of civil and criminal immunities—forms of immunity that are distinct from the judicial privilege examined in this article. The courts, however, historically have mixed the two forms of immunity

¹⁰⁹ See *Nixon v. Sirica*, 487 F.2d 700, 731-37 (D.C. Cir. 1973) (per curiam) (MacKinnon, J., concurring in part, dissenting in part) (a detailed listing of the disputes between Congress and specific Presidents from George Washington (in 1796) through Harry Truman (in 1947)). For a more thorough discussion of *Sirica*, see *infra* notes 160-72 and accompanying text.

¹¹⁰ See *United States v. Nixon*, 418 U.S. 683, 708 (1974) (finding a qualified presidential privilege). For a more thorough discussion of *Nixon*, see *infra* notes 173-84 and accompanying text.

¹¹¹ *Matter of Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1520-21 (11th Cir.) (*Hustings ZZ*, cert. denied sub nom. *Hastings v. Godbold*, 477 U.S. 904 (1986) (finding a qualified judicial privilege for federal judges). For a thorough discussion of *Hustings ZZ*, see *infra* notes 205-31 and accompanying text. The United States Supreme Court has yet to hear a case in which it has had to address specifically the existence and scope of judicial privilege.

¹¹² See, e.g., 29 THE NEW ENCYCLOPAEDIA BRITANNICA 257 (15th ed. 1985) (discussing President Roosevelt’s 1937 court-packing plan and his confrontations with the Supreme Court over New Deal legislation).

¹¹³ Milne, *supra* note 3, at 213.

¹¹⁴ *Catz & Lange*, *supra* note 3, at 121. Actually, very few of the modern treatises on privileges even have a section acknowledging a “judicial privilege.” Those that do cite only to the *Hustings ZZ* decision, or confuse the privilege with judicial immunity. See, e.g., SCOTT N. STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES § 9.06A (Supp. 1990).

together under the title of "judicial privilege."¹¹⁵ The law of judicial immunity has evolved to the point that judges enjoy immunity from civil liability not only for the actual decisions they make in particular cases, but also for allegedly defamatory statements and other tortious conduct occurring during the course of the judicial proceedings.¹¹⁶ This immunity from liability is extended to the parties in the proceedings and to officials exercising "quasi-judicial" authority.¹¹⁷ A judge's civil immunity for his or her "judicial" conduct is absolute; however, a judge's actions in a purely administrative capacity receive only qualified immunity.¹¹⁸ Judges have no immunity from criminal liability.¹¹⁹

While this article does not discuss in depth the law of judicial immunity, the rationale cited for granting judges immunity is pertinent. Authors discussing immunity consistently offer "judicial independence" as the most important rationale.¹²⁰ That same desire to protect judicial independence supports a judicial privilege in the context of a testimonial and evidentiary privilege.¹²¹

The first modern situation in which judges asserted judicial privilege occurred in 1953. In response to a subpoena to testify

¹¹⁵ See, e.g., *McGovern v. Martz*, 182 F. Supp. 343, 348 (D.D.C. 1960); see also *supra* note 2 (other cases using judicial privilege in this context). Authors have done little better. See, e.g., Batchelder, *supra* note 90, at 392.

¹¹⁶ See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 14.01 (1990); Batchelder, *supra* note 90, at 392.

¹¹⁷ See SHAMAN ET AL., *supra* note 116, § 14.02; see also *Jones v. Mirgon*, No. 88-7001, 1989 U.S. App. LEXIS 13197 (D.C. Cir. Aug. 31, 1989) (per curiam) (extending the doctrine to quasi-judicial action of a Federal Communications Commission licensing board). A party's actions during a judicial proceeding are protected as long as the act has "some relation—a standard broader than legal relevance—to the proceeding." *Jones*, No. 88-7001, at *4-5 (quoting *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058, 1059 (D.C. 1983) (quoting *Brown v. Collins*, 402 F.2d 209, 212 (1968))).

¹¹⁸ See SHAMAN ET AL., *supra* note 116, §§ 14.02-.04; see also *Nixon v. Fitzgerald*, 457 U.S. 731, 755-56 (1982) (citing *Stump v. Sparkman*, 435 U.S. 349, 363 & n.12 (1978) (finding by analogy an absolute Presidential immunity)); *McGovern*, 182 F. Supp. at 348 ("While a judge has an absolute privilege for the official publication of a judicial statement ... there is only a qualified privilege for the unofficial circulation of copies of a defamatory opinion.").

¹¹⁹ See SHAMAN ET AL., *supra* note 116, § 14.11. "The judicial title does not render its holder immune from criminal responsibility even when committed behind the shield of judicial office." *Id.* § 14.11 at 456. Judges do enjoy limited immunity from criminal liability "for malfeasance or misfeasance in the performance of their judicial tasks undertaken in good faith." *Id.* § 14.11 at 457.

¹²⁰ See, e.g., *id.* § 14.01, at 442; Batchelder, *supra* note 90, at 392. Judge Learned Hand observed that "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 404 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), cert. denied, 339 U.S. 949 (1950)).

¹²¹ See *infra* notes 221, 251-52, and accompanying text.

before a House of Representatives subcommittee investigating the Department of Justice, the justices of the United States District Court for the Northern District of California wrote the Statement of *the Judges*.¹²² All seven judges in the district court signed the statement, and District Judge Louis E. Goodman, the subpoenaed judge, appeared in person to deliver it to the subcommittee. The statement reminded the congressional investigators of the historical functions of the doctrine of separation of powers, and went on to declare,

In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings.

The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.¹²³

The statement concluded by asserting that the judges had no objection to having Judge Goodman appear, or to the subcommittee having him “make any statement or to answer any proper inquiries on matters other than Judicial proceedings.”¹²⁴ The statement evidently was “sufficient” for the congressional subcommittee, and the matter quietly went away.

The issue of judicial privilege next reared its head in 1959 in a case involving then-Judge George C. Wallace of the Third Judicial Circuit of Alabama.¹²⁵ The Commission on Civil Rights sought to inspect voting and registration records of three counties in Alabama, but was refused access to the documents. Some of the records were impounded by Judge Wallace, who refused to relinquish them to the Commission. The Commission issued subpoenas duces tecum and the state officials filed suit to prevent their enforcement.¹²⁶

The district court did not decide the judicial privilege issue concerning Judge Wallace testifying regarding the impounded records. Instead, it held that “judicial status does not confer a privilege upon Judge Wallace to disregard the positive commands

¹²² 14 F.R.D. 335 (N.D. Cal. 1953).

¹²³ *Id.* at 335-36.

¹²⁴ *Id.* at 336.

¹²⁵ *See Zn re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959).

¹²⁶ *Id.* at 65-67.

of the law."¹²⁷ While indicating that Judge Wallace need not deliver the records to the Commission in person, or be required to testify under a mere subpoena duces tecum,¹²⁸ the court stated in dicta,

This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts; he is. For example, this Commission, nor indeed the Congress of the United States, could not inquire of Judge Wallace as to why he impounded these records or what factors he took into consideration when he impounded these records.¹²⁹

State officials produced the records and, again, the issue of judicial privilege escaped undecided.¹³⁰

3. The Federal *Common Law's* "Deliberative Process" Privilege.—While the courts continued to address judicial privilege only in dicta, they also avoided addressing the issue of a constitutional executive privilege directly. Instead, the courts recognized a federal common law privilege for the executive decision-making process. This "deliberative process" privilege, as it became known, protects the internal deliberations of government officials.¹³¹ Sweeping much broader than its close relatives, the executive privilege and the quasi-judicial privilege for deliberations of high executive officials,¹³² the "deliberative process" privilege protects the advice, opinions, and recommendations that are communicated during deliberations leading to the making of a decision within the executive branch.¹³³

The underlying rationale for the deliberative process privilege is that "disclosure of deliberative communications will chill future communications, thus diminishing the effectiveness of

¹²⁷*Id.* at 67-68.

¹²⁸*Id.* at 68-69.

¹²⁹*Id.* at 69.

¹³⁰While the order directing release of the records may appear to the reader to be a decision on the documentary evidence portion of judicial privilege, that was not the case. The records were not "judicial" records, but merely the *res* of the suit. The court decided the disposition of the records based upon the *Heyman* principle. *Id.* (citing *Covell v. Heyman*, 111 U.S. 176 (1984)).

¹³¹*See* Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 *Mo. L. REV.* 279, 279 (1989); Wetlaufer, *supra* note 2, at 846-47. Both of the cited articles provide an exhaustive list of cases demonstrating the development of the privilege.

¹³²Wetlaufer, *supra* note 2, at 847. The quasi-judicial privilege is not well known. Its existence, however, has been acknowledged within the administrative law field—its basis having derived from a 1938 Supreme Court decision. *Id.* at 846 n.4 (citing *Morgan v. United States*, 304 U.S. 1 (1938)).

¹³³*Id.* at 846-47.

executive decisionmaking and injuring the public interest.”¹³⁴ Though its historical roots trace back to England,¹³⁵ it really took hold in the federal courts following the decision in *Kaiser Aluminum & Chemical Corp. v. United States*,¹³⁶ a 1958 Court of Claims case.¹³⁷ Not clearly a constitutionally based privilege,¹³⁸ its bases are said to be built upon a combination of sovereign immunity, the separation of powers, the rule known in administrative law as the Morgan doctrine, the Freedom of Information Act, and proposed (but rejected) Rule 509 of the Federal Rules of Evidence.¹³⁹ While the exact underpinnings of the privilege may be characterized as “murky at best,” its widespread adoption by the federal courts makes it an accepted federal common law privilege.¹⁴⁰ Moreover, the constitutional underpinnings of this “deliberative process” privilege indirectly have been affirmed by the courts.¹⁴¹

Not surprisingly, the scope of the privilege is similar to the scope of Military Rule of Evidence 506, whose drafters took from proposed Federal Rule of Evidence 509.¹⁴² It covers both oral and written communications, but only when offered in the course of the decision-making process. It does not cover communications of fact, the actual “final” decision, or communications of a postdecisional nature.¹⁴³ The burden of proving that the privilege applies is on the Government, and the procedural requirements—which, among others, demand that the head of the executive agency assert the privilege—ensure it is not invoked recklessly.¹⁴⁴ If the

¹³⁴*Id.* at 847. As a court of appeals recently noted, the deliberative process privilege

[P]rotects the deliberative and decisionmaking processes of the executive branch, [and] rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, ... the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.

Weaver & Jones, *supra* note 131, at 279 n.1 (quoting *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)).

¹³⁵See Weaver & Jones, *supra* note 131, at 283-85 & nn.24-36; Wetlaufer, *supra* note 2, at 856-60 & nn.39-45.

¹³⁶157 F. Supp. 939 (Ct. Cl. 1958).

¹³⁷Weaver & Jones, *supra* note 131, at 287-88; Wetlaufer, *supra* note 2, at 848.

¹³⁸See Weaver & Jones, *supra* note 131, at 288-89 & nn.43-48 (discussing the controversy regarding the constitutional basis, if any, of the privilege).

¹³⁹Wetlaufer, *supra* note 2, at 850-51.

¹⁴⁰*Id.* at 848; Weaver & Jones, *supra* note 131, at 289.

¹⁴¹See *infra* notes 172, 180, and accompanying text.

¹⁴²See *supra* note 65 and accompanying text.

¹⁴³See Weaver & Jones, *supra* note 131, at 290-98; Wetlaufer, *supra* note 2, at 851-52.

¹⁴⁴See Weaver & Jones, *supra* note 131, at 300-12; Wetlaufer, *supra* note 2, at 852-53.

documents in question contain facts or unprivileged communications that are commingled with privileged communications, the facts and unprivileged communications still must be released.¹⁴⁵ When the privilege does apply, it is qualified. The courts will engage in a balancing test to see whether, on the particular facts of the case, disclosure is required.¹⁴⁶

While the "deliberative process" privilege clearly exists in federal common law for the executive, its extension to the judiciary to create a similar privilege is not so clear. If the privilege actually arises from the constitutional doctrine of separation of powers, as some courts have indicated,¹⁴⁷ then it also should apply to the judiciary's decision-making processes. Such an application would go beyond the scope of the deliberations privilege under Military Rule of Evidence 509.

If viewed as a "judicial privilege," the scope of the privilege would not be tied to the deliberations of a specific case, as the deliberations privilege is. Furthermore, it could be used to protect the advice, opinions, and recommendations between judges when offered on mere administrative decisions of a judicial policy nature. As an example, the privilege would protect the input of subordinate judges on proposed changes to the rules of court, and even the Federal Rules of Evidence, Federal Rules of Criminal Procedure, or Federal Rules of Civil Procedure.

The important issue, however, is whether recognizing such a privilege is wise. Predictably, the contemplated decision-making input would be of a more frank and nonpolitical nature if the judge offering it knew it never could be disclosed. Few cases have addressed the application of the deliberative process privilege to the judiciary.¹⁴⁸ Nevertheless, the rationales supporting the privilege for the executive apparently would support the

¹⁴⁵See Weaver & Jones, *supra* note 131, at 298.

¹⁴⁶*Id.* at 312-20. Today, most courts will grant the party seeking the communications an *in camera* review, which aids the court in determining the validity of the claim under the balancing test. *Id.* at 313.

¹⁴⁷See *infra* notes 167, 180, and accompanying text.

¹⁴⁸A federal appellate court recently upheld a claim of privilege involving a judiciary's use of the "deliberative process" privilege. See *Centifanti v. Nix*, 865 F.2d 1422, 1432 (3d Cir. 1989) (upholding a district court's decision that letters from the Chairman of the Pennsylvania Disciplinary Board to the Chief Justice of the Pennsylvania Supreme Court were privileged). In *Nix*, the disciplined attorney sought discovery of documents "concerning the decision to provide for the right of oral argument and briefing before the Pennsylvania Supreme Court in reinstatement proceedings." *Id.* Because the letter from the Chairman of the Disciplinary Board contained "recommendations and deliberations regarding the development of rules and policy governing regulation of attorneys ... it reflects the deliberative process of government policymakers, [and] it is protected by the predecisional governmental privilege." *Id.*

judiciary's having the same privilege. While the judicial branch engages in far less "policy-making" than the executive branch, recognition of a federal common law decision-making process privilege for the judiciary, within the overall term of "judicial privilege," is appropriate.

4. *Transition: Judicial Independence.*—Two additional cases merit discussion before beginning an analysis of the executive privilege announced in the Nixon Administration cases arising in 1973 and 1974. In 1970, the Supreme Court restated the "imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."¹⁴⁹ In *Chandler v. Judicial Council of the Tenth Circuit of the United States*,¹⁵⁰ the Supreme Court considered a petition for a writ of mandamus. A district court judge sought relief from administrative controls imposed on his cases by the judicial council of his court of appeals.¹⁵¹

The Court declined to issue the writ, while stating that the need for enforcement of reasonable, proper, and necessary rules within the federal courts cannot reasonably be doubted.¹⁵² The majority viewed favorably the exercise of administrative oversight of the district court judge by the court of appeals,¹⁵³ rejecting the proposition that each federal judge is the "absolute ruler of his manner of conducting judicial business."¹⁵⁴ The dissent, however, strenuously objected to the majority's dicta—dicta which implied that judicial independence is not absolute.¹⁵⁵ Justice Douglas, reaffirming that each judge is independent of every other judge, stated in his dissent, "There is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge."¹⁵⁶

On the one hand, the *Chandler* opinion reaffirmed the inviolate nature of the independence of the judiciary. With the other hand, it sanctioned the imposition of reasonable administrative controls on federal judges by other federal judges.

Finally, a case in the early 1970s hinted at the existence of an inherent judicial privilege, doing so in a footnote. In *New York*

¹⁴⁹ *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74, 84 (1970).

¹⁵⁰ 398 U.S. 74 (1970).

¹⁵¹ *Id.* at 74-82.

¹⁵² *Id.* at 85.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 84.

¹⁵⁵ *See id.* at 136 (Douglas, J., dissenting); *id.* at 141 (Black, J., dissenting).

¹⁵⁶ *Id.* at 136-37 (Douglas, J., dissenting).

Times Co. v. United States,¹⁵⁷ the Government sought to enjoin newspapers from publishing the contents of a classified study on Vietnam, commonly known as "The Pentagon Papers."¹⁵⁸ Addressing the power of the executive branch to classify documents and keep their contents confidential, Chief Justice Burger made an analogy to the Supreme Court, stating in his dissent,

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.¹⁵⁹

At the end of 1971, the controversy over the existence of a constitutionally based executive or judicial privilege persisted. In dicta, the courts had reaffirmed the separation of powers doctrine and stressed the necessity for an independent judiciary. Nevertheless, beyond the federal common law "deliberative process" privilege, no specific privilege for either the executive or judicial branches existed. The stage now was set for Watergate and the recognition of a constitutionally based executive privilege.

5. President Nixon and Executive Privilege.—In 1973, *Nixon v. Sirica*¹⁶⁰ offered a federal court of appeals the opportunity to rule on the existence and scope of a constitutionally based executive privilege. Arising from a dispute over a subpoena duces tecum directing the President to surrender certain tape recordings,¹⁶¹ the court held that presidential communications are presumptively privileged.¹⁶² The court, however, rejected the executive branch's claim that the privilege was absolute. The court announced a balancing test for determining whether such presumptively privileged communications, nevertheless, must be disclosed.¹⁶³

The majority opinion in *Nixon v. Sirica* discussed the constitutional underpinnings of the privilege, citing the need "to

¹⁵⁷ 403 U.S. 713 (1971) (per curiam).

¹⁵⁸ *Id.* at 714.

¹⁵⁹ *Id.* at 752 n.3 (Burger, C.J., dissenting).

¹⁶⁰ 487 F.2d 700 (D.C. Cir. 1973) (per curiam).

¹⁶¹ *Id.* at 704-05. Both President Nixon and the Watergate Special Prosecutor, Archibald Cox, challenged the enforcement order issued by Chief Judge John Sirica of the District Court for the District of Columbia. *Id.* at 704. Judge Sirica had ordered the tapes produced for his *in camera* review so he could see what evidence he would order disclosed to an empaneled grand jury. *Id.*

¹⁶² *Id.* at 717.

¹⁶³ *Id.* at 712-17. The test required "a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." *Id.* at 716.

protect the effectiveness of the executive decision-making process.”¹⁶⁴ In so doing, it analogized the privilege to “that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to that contained in the fifth exemption to the Freedom of Information Act.”¹⁶⁵ While discussing the doctrine of separation of powers in the context of whether or not the privilege was absolute, the majority did not state explicitly that its new, qualified executive privilege arose out of that doctrine. Instead, the opinion cited to the long line of cases supporting the federal common law’s “deliberative process” privilege.¹⁶⁶ The court found that this privilege was constitutionally based, arising from the inherent power of a branch of government to carry out its expressed duties under the Constitution.¹⁶⁷

The court held that the presumption in favor of maintaining the confidentiality of the communications failed in this case, “in the face of the uniquely powerful showing made by the Special Prosecutor.”¹⁶⁸ The dissenting judges, in lengthy opinions, argued in favor of an absolute executive privilege.¹⁶⁹ They stated that such a privilege was based not only on inherent powers, but also—and more specifically—on the doctrine of separation of powers. Accordingly, the dissent concluded, any balancing test would be an unconstitutional infringement of the executive branch’s authority.¹⁷⁰ Pointing out that both the legislative and judicial branches claimed an absolute privilege, the dissenting judges analyzed the historical invocation of privilege by each branch of government. They found that an implied executive privilege arose from custom and from the use of privileges by the different branches.¹⁷¹

Nixon v. Sirica is significant in that a federal appellate court recognized a constitutionally based executive privilege. At a minimum, the majority opinion affirmed the constitutional basis of the federal common law’s “deliberative process” privilege. The

¹⁶⁴*Id.* at 717.

¹⁶⁵*Id.* (citations omitted).

¹⁶⁶*Id.* at 713-17.

¹⁶⁷*Id.* at 717; *cf. id.* at 750 (MacKinnon, J., concurring in part, dissenting in part).

¹⁶⁸*Id.* at 717.

¹⁶⁹*Id.* at 730 (MacKinnon, J., concurring in part, dissenting in part); *id.* at 773-74, 799 (Wilkey, J., dissenting). As noted at the beginning of Judge Wilkey’s dissent, he and Judge MacKinnon concurred in the results reached in each other’s written dissent. *Id.* at 762,

¹⁷⁰*Id.* at 750 (MacKinnon, J., concurring in part, dissenting in part); *id.* at 763 (Wilkey, J., dissenting).

¹⁷¹*Id.* at 729-37 (MacKinnon, J., concurring in part, dissenting in part); *cf. id.* at 768-74 (Wilkey, J., dissenting).

court's recognition of that basis makes the argument for application of the "deliberative process" privilege to the judicial branch, discussed previously, all the more compelling.¹⁷² The Supreme Court soon resolved the issue of whether the constitutional basis was broader, strengthened by the support arising from the doctrine of separation of powers.

United States *v. Nixon*,¹⁷³ decided in 1974, was the Supreme Court's first opportunity to decide the issue of executive privilege directly. As in *Nixon v. Sirica*, the case involved a subpoena duces tecum directing President Nixon to surrender tape recordings. In this case, however, the evidence was to be used in a criminal trial of former Nixon Administration officials, and not for a grand jury.¹⁷⁴ Before the Court, the President's counsel asserted two grounds for executive privilege. The first was a valid need to protect communications between high government officials and those who advise and assist them in the performance of their official duties. The second was the doctrine of separation of powers.¹⁷⁵

The Court began its analysis by declaring that, without more,

[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications ... can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.... [W]hen the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.¹⁷⁶

The "more" that would be required for such an absolute privilege would be "a claim of need to protect military, diplomatic, or sensitive national security secrets."¹⁷⁷ Because the President had made only a generalized claim of privilege, the Court found that it was in conflict with and overridden by the constitutional duty of the judicial branch to do justice in criminal prosecutions.¹⁷⁸

¹⁷² See *supra* notes 147-48 and accompanying text.

¹⁷³ 418 U.S. 683 (1974).

¹⁷⁴ *Id.* at 686-88.

¹⁷⁵ *Id.* at 705-06.

¹⁷⁶ *Id.* at 706.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 707, 713. The Court went on to observe that in "allocating the sovereign power among the three co-equal branches, the Framers ... sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Id.* at 707.

Addressing the constitutional basis of the privilege, the Court acknowledged that no provision in the Constitution expressly addresses it. Using the rules of constitutional interpretation, however, the Court noted, “that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant.”¹⁷⁹ The Court then held that the executive privilege was grounded constitutionally in both the “deliberative process” privilege, as applied at the presidential level, and the separation of powers doctrine.¹⁸⁰

The Supreme Court had recognized an executive privilege arising from two separate constitutional bases. The privilege was qualified—not absolute—and the Court adopted the balancing test from *Nixon v. Sirica* to determine if the privilege is overridden.¹⁸¹ The holding in *United States v. Nixon* also affirmed the strength of “the fundamental demands of due process of law in the fair administration of criminal justice.”¹⁸² The importance of fundamental due process, relative to claims of privilege, is a principle that will be discussed later when balancing the interests served by the *voir dire* process against the interests served by a claim of judicial privilege.¹⁸³

The Court’s opinion in *United States v. Nixon* also clarified the constitutional parameters of the federal common law’s “deliberative process” privilege. By confining the constitutional basis of the privilege to presidential-level communications, it arguably created two separate “deliberative process” privileges. Executive branch officials below the presidential level—that is, those not directly advising or assisting the President in the performance of his duties—have a nonconstitutional, federal common law privilege. Executive officials at the presidential level, however, have a stronger, constitutionally based privilege.

With the issue of executive privilege resolved, the existence and scope of judicial privilege remained uncertain. The Court in *United States v. Nixon* gave us a preview when it analogized the expectations of a President in the confidentiality of his conversations and correspondence to “the claim of confidentiality of judicial deliberations.”¹⁸⁴ This dicta would appear to support a

¹⁷⁹*Id.* at 705 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)).

¹⁸⁰*Id.* at 708.

¹⁸¹*Sirica*, 487 F.2d at 716; see *Nixon*, 418 U.S. at 711-12 (“we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”).

¹⁸²*Nixon*, 418 U.S. at 713.

¹⁸³See *infra* notes 373-87 and accompanying text.

¹⁸⁴*Nixon*, 418 U.S. at 708.

constitutionally based, qualified privilege for the judicial branch—a privilege rooted both in the federal common law's "deliberative process" privilege, as it was interpreted by the majority opinion in *Nixon v. Sirica*, and in the doctrine of separation of powers.

111. Judicial Privilege

A. *Transition from Executive to Judicial Privilege*

After the Supreme Court's 1974 decision in *United States v. Nixon*, twelve years would pass before a federal appellate court was to rule on the existence and scope of judicial privilege. In the meantime, during the late 1970s and the first half of the 1980s, investigations into judicial misconduct gave rise to several invocations of judicial privilege. Each incident, however, evaded reported judicial decision for one reason or another.

In 1979, the California Commission on Judicial Performance held unprecedented public hearings into allegations that the California Supreme Court, headed by Chief Justice Rose Bird, delayed key court decisions.¹⁸⁵ Allegedly, some of the court's decisions were delayed improperly because the chief justice and two other justices on the court were facing reelection that term.¹⁸⁶ During the course of the hearings, Justice Newman, "refused to answer under oath most of the substantive questions ... citing 'judicial privilege not to disclose confidential information.'"¹⁸⁷ The commission rejected Justice Newman's assertion of the privilege, citing *United States v. Nixon* for the proposition that full disclosure was required to enable the commission to carry out its investigation.¹⁸⁸ Apparently, the commission took no further action to compel Justice Newman to answer the questions on which he claimed the privilege.¹⁸⁹

That same year, a claim of judicial privilege arose during an evidentiary hearing in a district court in Georgia.¹⁹⁰ The petitioner in the habeas proceeding was contesting a magistrate's ruling. The magistrate earlier had declined to compel the

¹⁸⁵See Lou Cannon, *California Justice Saw No Stalling; Witness Says He Doesn't Think Politics Held Up Court Opinions*, WASH. POST, June 20, 1979, at A13; *California Hearings Open In Probe of State High Court*, *id.* June 11, 1979, at A7 [hereinafter *California Hearings*].

¹⁸⁶"*California Hearings*, *supra* note 185, at A7.

¹⁸⁷*Id.* (quoting the background report of the Commission Special Counsel, Seth M. Hufstedler, presented to the Commission on 11 June 1979).

¹⁸⁸Cannon, *supra* note 185, at A13.

¹⁸⁹See *id.*; *California Hearings*, *supra* note 185, at A7.

¹⁹⁰*McCorquodale v. Balkcom*, 525 F. Supp. 431, 432-33 (N.D. Ga. 1981).

deposition or testimony of the Assistant to the Supreme Court of Georgia concerning that court's sentence review procedures.¹⁹¹ The magistrate deemed the matters to be subject to judicial privilege.¹⁹² The district court held that it was "unnecessary to rule on whether or not the Magistrate correctly analyzed [Mr.] York's claim of judicial and/or attorney-client privilege, because ... the sought-for testimony would not in any way have furthered Petitioner's claim"¹⁹³

In 1984, a federal magistrate invoked judicial privilege in a challenge to more than twenty-five indictments from a grand jury in Connecticut.¹⁹⁴ A defense counsel claimed that the magistrate failed to appoint a woman or black as the foreman of the grand jury investigating large-scale drug trafficking in the state, and sought to examine the magistrate on this subject.¹⁹⁵ While claiming judicial privilege, the magistrate nevertheless provided a two-page affidavit, in which he denied his discriminating in the appointment of "grand jury forepersons."¹⁹⁶ Apparently, the affidavit was sufficient for the court, and the defense did not challenge the claim of privilege on appeal.¹⁹⁷

In 1986, a committee of the Texas legislature investigated allegations of judicial misconduct by members of the Texas Supreme Court. Allegations included illegal *ex parte* communications and leaks of information to private lawyers and parties to cases.¹⁹⁸ Two justices refused to honor subpoenas and to testify before the committee, citing the doctrine of separation of powers. They eventually were successful in winning a court order

¹⁹¹*Id.* at 432. Mr. York, the assistant, had been deposed in an earlier case and had stated one of his duties was to review transcripts of capital felony cases and to prepare for the supreme court a "card summary" on each case, which he kept on file for use by the justices. *Id.* at 432-33. Additionally, he would provide written reports on the cases when requested to do so. *Id.* at 433. Mr. York analogized his duties "to those of a law clerk or those of an attorney acting for a client" in his assertion of judicial privilege in the earlier case. *Id.*

¹⁹²*Id.* at 432.

¹⁹³*Id.* at 433. The court also upheld the magistrate's decision not to compel the testimony of the then-Chief Justice of the Georgia Supreme Court, H. E. Nichols. While the Chief Justice had not invoked judicial privilege, the magistrate had accepted his statements made at a press conference as true for purposes of deciding petitioner's claim. *Id.* at 433-34.

¹⁹⁴*Federal Judge May Testify in Drug Case*, UPI, May 3, 1984 (LEXIS, Nexis Library, UPI file).

¹⁹⁵*Id.*

¹⁹⁶*Id.* (quoting the affidavit of United States Magistrate Thomas P. Smith (date unknown)).

¹⁹⁷*See id.*

¹⁹⁸*Supreme Court Justice Implicated in Improper Communication*, UPI, June 18, 1986, (LEXIS, Nexis Library, UPI file).

temporarily quashing the subpoenas.¹⁹⁹ Three of the employees of the justices, however, were not so fortunate—they testified under threat of contempt of the legislature following their invocations of judicial privilege.²⁰⁰ Evidently, the committee and the justices worked out a suitable arrangement because no reported court decision ensued.

The first half of the 1980s also saw Supreme Court nominees invoking a hybrid of judicial privilege in Senate confirmation hearings. Both Chief Justice William H. Rehnquist and Justice Antonin Scalia declined to answer questions from the senators “concerning cases in which they have already participated or concerning issues that might come before them in the future.”²⁰¹ This practice frustrated senators and some observers, who perceived it as inhibiting the Senate’s ability to evaluate nominees’ qualifications to sit on the Supreme Court.²⁰² Nevertheless, the practice has continued through the most recent confirmation involving Justice Clarence Thomas.²⁰³

The cases discussed above demonstrate that the recognized bases for a judicial privilege expanded tremendously in recent history. The Supreme Court announced a constitutionally based executive privilege to cover the confidential communications of the executive branch. At the same time, judicial misconduct investigations were occurring with much greater frequency, leading to an increased invocation of “judicial privilege.”²⁰⁴ These expansions of privilege inevitably brought the controversy into a federal appellate court, compelling that court to address directly the issue of the existence and scope of judicial privilege.

B. *The Case of Hastings II*

Between 1981 and 1983, federal prosecutors pursued the indictment and trial of Judge Alcee L. Hastings, a federal district

¹⁹⁹ *Id.* The article does not indicate which court issued the order or the ultimate result concerning the testimony of the justices.

²⁰⁰ *Id.*

“Austin Sarat, *Court Nominees Cannot Plead Judicial Privilege*, N.Y. TIMES, Aug. 24, 1986, § 4, at 20 (editorial).

²⁰² *See, e.g., id.*

²⁰³ *See* David A. Kaplan & Bob Cohn, *Court Charade*, NEWSWEEK, Sept. 23, 1991, at 18, 19 (discussing Justice Thomas’s evasiveness in answering certain questions asked during his confirmation hearings held by the Senate).

²⁰⁴ *See supra* note 8 (detailing the federal judges who were investigated, tried, and ultimately impeached in the 1980s); *infra* notes 209-13 and accompanying text (discussing the claims of judicial privilege raised by Judge Hastings and his staff).

court judge of the United States District Court for the Southern District of Florida. Judge Hastings' trial ended with his acquittal on charges of conspiracy to solicit and accept a bribe in return for performing certain official actions in his capacity as a federal judge.²⁰⁵ Following the trial, two district court judges filed a complaint with the Judicial Council of the Eleventh Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the Act).²⁰⁶ They alleged that Judge Hastings "had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges."²⁰⁷

Following the appointment of an investigating committee by the chief judge of the Eleventh Circuit, Judge Hastings mounted several of his many challenges to the investigation.²⁰⁸ Finally, in 1986, in response to the issuance of subpoenas by the investigating committee, Judge Hastings and members of his staff raised the issue of judicial privilege for an appellate court's consideration.²⁰⁹

In *Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit (Hastings II)*,²¹⁰ Judge Hastings; his secretary, Betty Ann

²⁰⁵ *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987) (*Hustings III*), cert. denied, 485 U.S. 1014 (1988).

²⁰⁶ Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035, (codified as amended at 28 U.S.C. §§ 331, 332, 372 (1988)).

²⁰⁷ *Hastings III*, 829 F.2d at 95.

²⁰⁸ *Id.* The investigating committee appointed by Chief Judge John C. Godbold consisted of himself, two circuit judges, and two district judges. Judge Hastings' first attempt to derail the investigation occurred when he objected to the release of the files of the grand jury that had indicted him to the investigating committee. *Id.* Judge Hastings lost that challenge and the files were released. *Id.* at 93 n.4, 95 (citing *In re* Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir.), cert. denied *sub nom.* Hastings v. Investigating Comm. for the Judicial Council of the Eleventh Circuit, 469 U.S. 884 (1984)). Judge Hastings also filed a challenge to the constitutionality of the Act in the District Court for the District of Columbia. *Id.* at 93 n.4, 96 (citing Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984) (*Hastings I*), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986)). The Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of Judge Hastings' challenge, but for different reasons. *Id.* at 96. Judge Hastings renewed his constitutional attack on the Act following the filing of the investigating committee's report with the Judicial Council of the United States in 1986. That attack was also unsuccessful. *See id.*

²⁰⁹ *See* *Matter of Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1492 (11th Cir.) (*Hustings II*), cert. denied *sub nom.* Hastings v. Godbold, 477 U.S. 904 (1986).

²¹⁰ *Id.* Because all the judges of the Eleventh Circuit recused themselves, a three-judge panel was designated to sit and hear this case. The panel consisted of Chief Judge Levin H. Campbell (Chief Judge, U.S. Court of Appeals for the First Circuit and author of the court's opinion), Circuit Judge Amalya Lyle Kearse

Williams; and three present and former law clerks, Alan Ehrlich, Daniel Simons, and Jeffrey Miller, sought to have subpoenas issued by the investigating committee quashed, while the investigating committee was seeking their enforcement.²¹¹ The court analyzed the claims of judicial privilege in the following two parts: (1) the claim of judicial privilege as it applied to the documents sought by a subpoena duces tecum and (2) the claims of testimonial privilege by Simons and Miller, the two clerks who actually testified and claimed the privilege.²¹² The court did not decide the claims of testimonial privilege by Williams and Ehrlich, ruling that those two claims of privilege were not ripe.²¹³ On the justiciable claims, however, the court issued the following ruling:

We conclude, therefore, that there exists a privilege (albeit a qualified one, *infra*) protecting confidential communications among judges and their staffs in the performance of their judicial duties. But we do not think that this qualified privilege suffices to justify either Williams' noncompliance with the Committee's subpoena duces tecum, or Simon's [sic] and Miller's refusals to answer the questions directed to them by the Committee.²¹⁴

In reaching its holding, the court acknowledged that it had "found no case in which a judicial privilege protecting the confidentiality of judicial communications has been applied."²¹⁵

(Judge for the Second Circuit), and Senior Judge Wilbur F. Pell (Senior Judge for the Seventh Circuit). *Id.* at 1491.

²¹¹*Id.* at 1491-92. The committee had issued a subpoena duces tecum to Williams, requiring her to produce documents such as appointment diaries, daily schedules, sign-in sheets, and telephone message books. Additionally, she was subpoenaed to testify, as were the three law clerks. *Id.* at 1492-93. Williams neither produced the required documents, nor appeared to testify; Ehrlich likewise did not appear to testify. Both filed notices of objection to the subpoenas with the Eleventh Circuit. *Id.* at 1493. Simons and Miller both appeared and testified, with Simons also filing a notice of objection with the court. Simons and Miller "both refused to testify, on grounds of privilege, about communications among Judge Hastings and his staff." *Id.* Judge Hastings ultimately was removed from office when the United States Senate voted to impeach him in 1989. *See* Pines, *supra* note 8, at 1.

²¹²*Hastings II*, 783 F.2d at 1518-25. The court began its opinion by addressing its jurisdiction to hear the case, challenges to the subpoena power of the investigating committee, and several constitutional attacks on the Act itself. *Id.* at 1493-1517. The court decided all issues against Judge Hastings' position, with the exception of several issues that the court simply decided not to consider on the merits. *Id.*

²¹³*Id.* at 1518. The court stated, "It is well settled that a witness cannot simply refuse to appear altogether on grounds of privilege, but rather must appear, testify, and invoke the privilege in response to particular questions." *Id.*

²¹⁴*Id.* at 1520.

²¹⁵*Id.* at 1518.

The court, however, then proceeded to cite cases in which “the probable existence of such a privilege was noted.”²¹⁶

Citing the Supreme Court’s reasoning for finding an executive privilege in *United States v. Nixon*,²¹⁷ the court quoted the passage concerning its constitutional foundation arising from the separation of powers and the nature of the President’s constitutional duties.²¹⁸ The court found, by analogy, that the cited constitutional underpinnings apply equally to the judiciary.²¹⁹ The court observed, “Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties.”²²⁰ The analysis concluded with the court noting, “Confidentiality helps protect judges’ independent reasoning from improper outside influences.”²²¹

Having found that judicial privilege exists, the court discussed its scope and the procedures to use when a party seeks to invoke it. As to scope of judicial privilege, the court stated, “In the main, the privilege can extend only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings.”²²²

²¹⁶ *Id.* at 1518-20. The court began by discussing *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974). *Hastings ZZ*, 783 F.2d at 1518 (citations omitted). The court quoted the following statement by Judge MacKinnon concerning the lack of authority on judicial privilege: “Express authorities sustaining this position are minimal, undoubtedly because its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government.” *Id.* at 1519 (quoting *Senate Select Committee on Presidential Campaign Activities*, 498 F.2d at 740 (MacKinnon, J., dissenting)). The court then discussed the tripartite decisionmaking process privilege from *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), followed by cites to *Statement of the Judges*, 14 F.R.D. 335 (N.D. Cal. 1953), and a law review comment on the law clerks duty of confidentiality. *Hastings ZZ*, 783 F.2d at 1519 (citations omitted). The court concluded its review of cases by citing Justice Burger’s quote from *New York Times v. United States*, 403 U.S. 713 (1971), and by discussing *United States v. Nixon*, 418 U.S. 683 (1974). *Hastings ZZ*, 783 F.2d at 1519 (citations omitted).

²¹⁷ 418 U.S. 683 (1974).

²¹⁸ *Hastings ZZ*, 783 F.2d at 1519. The quote reads as follows: “[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.” *Id.* (quoting *Nixon*, 418 U.S. at 705-06).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 1520.

²²² *Id.*

The burden of demonstrating that matters fall within the scope of the privilege is on the party seeking to claim it.²²³ If the party asserting the privilege meets the threshold “scope” requirement, the matters then become “presumptively privileged and need not be disclosed unless the ... party ... [seeking access to the information] can demonstrate that its need for the materials is sufficiently great to overcome the privilege.”²²⁴ Finally, a court will weigh the seeking “party’s demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need.”²²⁵

Applying the above procedures, the court first held that the descriptions of the documents sought from Williams under the subpoena duces tecum were insufficient to permit it to determine whether they fell within the privilege.²²⁶ The judges then assumed that the documents were within the privilege, and held that the privilege was defeated by the committee’s need for them.²²⁷ The court then ruled that the committee’s need for testimony to further its investigation overrode the claims of judicial privilege asserted by Simons and Miller.²²⁸ The judges analogized Judge Hastings’ generalized interest in the confidentiality of his communications with his judicial staff to the interests posited by President Nixon in *United States v. Nixon*.²²⁹ The court further compared the committee’s particular need for the testimony in an investigation of improper conduct within a judge’s chamber to the need for relevant evidence in a criminal proceeding—the need that the Government asserted in the Nixon case.²³⁰ When balanced, the committee had met its burden of showing that its need for testimony was sufficient to overcome the presumption of privilege.²³¹

²²³*Id.*

²²⁴*Id.* at 1522. The court offered three methods by which the party seeking the information could demonstrate its need for it. “[T]he investigating party can attempt to show the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means.” *Id.*

²²⁵*Id.*

²²⁶*Id.* at 1520.

²²⁷*Id.* The court drew an analogy between the documents held by Williams and the limits on the scope of the attorney-client privilege, noting that the privilege applies only to the content of communications—not to dates, places, or times of meetings. *Id.* (citing *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982)).

²²⁸*Id.*

²²⁹*Id.* at 1524 (quoting *Nixon*, 418 U.S. at 712-13).

²³⁰*Id.* at 1523-24.

²³¹*Id.* at 1524-25. The court added that it would have enforced “the

The court in *Hustings II* had managed to do what no other federal appellate court could do in the first two hundred years of this nation—that is, it acknowledged the existence of judicial privilege and defined a standard for invoking it. *Hustings II*, however, was indeterminate on the issue of whether the interests that support judicial privilege in Article III courts could be extended to apply to non-Article III courts. Specifically, whether the judicial privilege recognized in *Hustings II* applies to military trial and appellate courts is a question that remains to be answered.

C. Judicial Privilege in the Military Courts

Scholars and courts have raised the issue of the independence of the military courts—both at the trial and appellate levels—throughout the history of courts-martial in this country.²³² The greatest threat to this independence arises from all types of unlawful outside influences on court members and military judges.²³³ The Uniform Code of Military Justice addresses this threat, which the military services refer to as

subpoenas upon a lesser showing of relevance so long as a reasonable degree of materiality could be discerned.” *Id.* at 1525. It then went on to state,

Where, as here, a judicial council investigation concerns allegations of unquestionable seriousness, we believe that, given the make-up of judicial councils and the secrecy surrounding their investigations under the Act, any subpoena for material protected only by an asserted generalized need for confidentiality should be enforceable so long as the information sought does not on its face seem irrelevant to the investigation. The issuance of such a subpoena means that Article III judges already have satisfied themselves of the relevance of, and need for, the information sought and the existence of probable cause for the investigation itself.

Id. Such a broad, sweeping assertion, though only dicta in this case, would appear to make any claim of generalized interest in confidential judicial communications automatically overridden by the needs of a judicial misconduct investigating body composed of Article III judges.

²³² See, e.g., *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (asserting the independence of the military judiciary); *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990) (unsuccessful motion to disqualify appellate court panel because military appellate court judges lack institutional independence); Walter T. Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (discussing the evolution of military justice and the independence of courts-martial); Eugene R. Fidell, *Military Judges and Military Justice: The Path to Judicial Independence*, 37 FED. B. NEWS & J. 346 (1990) (challenging whether military judges are really independent in the present system of military justice); FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE §§ 1-40.00 to 1-47.00, 14-10.00 (1991) (discussing the evolution of military justice and the history of military judges); see also *infra* note 334 (discussing judicial independence and the civilianization of the military judiciaries).

²³³ See *supra* note 75.

“unlawful command influence.”²³⁴ Congress, through Articles 26²³⁵ and 37²³⁶ of the Code, has sought to prevent it. At the same time, Congress has attempted to reinforce the independence of the judiciary and ensure a fair and impartial military justice system.²³⁷

²³⁴ See UCMJ art. 37. While the title of the article is, “Unlawfully influencing action of court,” the actions proscribed have come to be known in the military community by the term of art, “unlawful command influence.” See, e.g., *United States v. Ledbetter*, 2 M.J. 37, 42 (C.M.A. 1976); see also *supra* note 75 (discussing unlawful command influence).

²³⁵ UCMJ art. 26. Article 26 is divided into five subparts. The first subpart mandates the detailing of a military judge to general courts-martial—the level of court used for the most serious offenses (and analogous to federal felony courts). It permits the detailing of a military judge to special courts-martial (a court analogous to federal magistrate courts). *Id.* at 26(a). The second and fourth subparts set forth qualifications of the military judge. *Id.* at 26(b), (d). The third subpart is the basis for the creation of the independent trial judiciaries within the services. It states,

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.

Id. at 26(c). The remainder of that subpart prohibits an officer from performing duties as a military judge unless detailed pursuant to service regulations. It also mandates that duty as a military judge is to be that officer’s primary duty when so detailed. *Id.* The last subpart prohibits the military judge from consulting with court members *ex parte*, or from voting with the members. *Id.* at 26(e).

²³⁶ UCMJ art. 37. Article 37 has two subparts. The first subpart provides,

No authority convening a ... court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Id. at 37(a). The remainder of that subpart provides two exceptions to the above rule—one for general courses in military justice and the other for statements and instructions given in open court by participants in the trial. *Id.* The second subpart deals with the preparation of effectiveness, fitness, or efficiency reports on military participants in trials. It insulates the military participant from all evaluations of duties as members, and from adverse evaluations resulting from duties as a defense counsel. *Id.* at 37(b).

²³⁷ See *United States v. Mabe*, 33 M.J. 200, 204 n.3 (C.M.A. 1991) (quoting legislative history regarding the implementation of independent trial judiciaries within the services); GILLIGAN & LEDERER, *supra* note 232, § 1-47.00 (discussing Congress’s post-1951 amendments to the Code).

The Court of Military Appeals, an appellate court in the military justice system,²³⁸ also has been very proactive in protecting the integrity and independence of the military justice system and in preventing the exercise of unlawful command influence.²³⁹ In 1976, the court decided *United States v. Ledbetter*,²⁴⁰ in which it announced its views on the independence of the military judiciary. Responding to allegations that an Air Force military trial judge had been “questioned” by military superiors concerning his lenient sentences in three cases,²⁴¹ the court recognized that “Congress, in adopting Articles 26(c) and 37(a) of the Uniform Code, sought to insulate judges, as well as others involved in the court-martial process, from command interference with the deliberative process.”²⁴² The court went on to address the importance of protecting military trial judges from unlawful command influence exerted by military superiors, including superiors in the military trial judiciaries. It noted,

The trial judge, as an integral part of the court-martial, falls within the mandate of Article 37. If anything is clear in the Uniform Code of Military

²³⁸The military justice system is divided into six levels as it applies to courts-martial. The first and third levels are composed of the convening authorities—that is, officers in command authorized by the Code to create a court-martial. Convening authorities may refer charges to a court-martial and take final action on the charges after the trial is complete. See UCMJ arts. 22-24, 60. The second level, or trial level, consists of the various forms of courts-martial. The three types are general, special, and summary, in decreasing order of their power to punish accused and the seriousness of the charges they may hear. See *id.* arts. 16-20. The fourth level consists of the first echelon of review of the convening authority’s action. The review is done by either the appropriate court of military review, *id.* art. 66, the office of the Judge Advocate General of the appropriate service, *id.* art. 69, or locally by a judge advocate, *id.* art. 64. The level at which this review occurs depends on the nature of the court-martial, the charges and punishment involved, and whether the accused waives appellate review. The fifth level consists of review by the Court of Military Appeals (COMA) under specific conditions. *Id.* art. 67. The final level of review is by the Supreme Court of the United States, which is limited to direct review of decisions of the COMA through a writ of certiorari. The direct appeal to the Supreme Court is not available if the COMA refuses to grant a petition for review. *Id.* at art. 67a.

²³⁹See, e.g., *United States v. Mabe*, 28 M.J. 326 (C.M.A. 1989), decision reaffirmed on remand, 30 M.J. 1254 (N.M.C.M.R. 1990), *affd.*, 33 M.J. 200 (C.M.A. 1991) (unlawful command influence exercised by the Chief Judge, Navy-Marine Corps Trial Judiciary); *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991) (command influence exercised to alter the assignment of a military judge to a national security court-martial); *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (questioning of a military judge regarding lenient sentences by his military superiors); *United States v. Littrice*, 13 C.M.R. 43 (C.M.A. 1953) (reading “retention of thieves” policy letter to members immediately before they convened to hear court-martial involving charges of larceny); see also *supra* note 75 and accompanying text (discussing unlawful command influence).

²⁴⁰2 M.J. 37 (C.M.A. 1976).

²⁴¹*Id.* at 41, app.

²⁴²*Id.* at 42.

Justice, it is the congressional resolve that both actual and perceived unlawful command influence be eliminated from the military justice system. Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, the Judge Advocate General and his representatives should not function as a commander's alter ego but instead are obliged to assure that *all* judicial officers remain insulated from command influence before, during, and after trial.²⁴³

The court next noted that Congress had not prescribed a procedure for inquiring into the deliberative processes of military judges. It then stated,

[W]e deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision, unless such inquiries are made by an independent judicial commission established in strict accordance with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge.²⁴⁴

The *Ledbetter* decision provided formal recognition of the independence of the military trial judge. Arguably, it also recognized a qualified judicial "deliberations" privilege for all military judges—similar in scope to the deliberations privilege of Military Rule of Evidence 509—which was adopted four years later. These deliberations now were protected from inquiry by all but established independent judicial commissions.

In 1986, at the time the Eleventh Circuit issued its *Hustings II* decision, military judges were without an established constitutionally based judicial privilege. Arguably, the holding in *Hustings I*, if not its rationale, could apply to military courts as well. The resolution to that argument, however, was not necessarily forthcoming—especially because military tribunals are Article I courts established by Congress,²⁴⁵ rather than Article III courts, which were the focus of *Hustings II*.²⁴⁶

²⁴³ *Id.* (footnote omitted).

²⁴⁴ *Id.* at 43.

²⁴⁵ U.S. CONST. art. I, § 8, cl. 14, provides that "Congress shall have the Power ... To make Rules for the Government and Regulation of the land and naval Forces."

²⁴⁶ See *supra* note 209-22 and accompanying text.

United States Navy-Marine Corps Court of Military Review v. *Carlucci*,²⁴⁷ decided in 1988, provided an opportunity to address the existence of judicial privilege in the military justice system. Arising in the form of a petition for extraordinary relief, the judges of the Navy-Marine Corps Court of Military Review (NMCMR) asked the Court of Military Appeals to enjoin the Inspector General of the Department of Defense from interviewing the judges and their commissioners²⁴⁸ concerning their deliberations in the case of United States v. *Billig*.²⁴⁹

Before reaching the merits of the case, the court had to deal with issues of ripeness; its power to enforce compliance with orders by civilians, such as the Inspector General, in the executive branch; and, most importantly, its jurisdiction to hear the petition.²⁵⁰ In the latter of these three areas the court discerned Congress's delegation of responsibility to the military courts to maintain "the independence, integrity, and fairness of the military justice system."²⁵¹ Reviewing legislative acts and history, the court found that Congress had granted "an Article I court, ... [and, specifically, the Court of Military Appeals], the

²⁴⁷ 26 M.J. 328 (C.M.A. 1988). *Carlucci* was described by former Chief Justice Robinson O. Everett as, "perhaps the most unique case that has ever reached the court." Robinson O. Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 FED. B. NEWS & J. 182, 182 (1989). For all of the facts leading up to and following *Carlucci*, including many not detailed in the reported opinion, see Joseph H. Baum & Kevin J. Barry, United States Navy-Marine Corps Court of Military Review v. *Carlucci*: A Question of Judicial Independence, 36 FED. B. NEWS & J. 242 (1989).

²⁴⁸ *Carlucci*, 26 M.J. at 329. The request by the NMCMR judges was urgent because their commissioners had been scheduled for interviews the next morning and the Judge Advocate General of the Navy personally had ordered Chief Judge Byrne of NMCMR to make them available. Baum & Barry, *supra* note 247, at 244. The NMCMR judges actually had sought a protective order from the court five days earlier after meetings with representatives of the Inspector General failed to arrive at a solution that would have avoided questions concerning the NMCMRs deliberations. That sealed petition had been denied by the court. *Id.* at 243.

²⁴⁹ 26 M.J. 744 (N.M.C.M.R. 1988) (en banc). Commander Billig, a Navy surgeon, had been convicted for involuntary manslaughter, negligent homicide, and dereliction of duty. He was sentenced to dismissal from the Navy, four years of confinement, and total forfeitures of all pay and allowances. The NMCMR decision reversed his conviction and dismissed the charges, precluding any retrial. *See id.* at 761; *Carlucci*, 26 M.J. at 329 & n.1.

²⁵⁰ *See Carlucci*, 26 M.J. at 330-36. The court found two distinct evils, either of which justified a finding of jurisdiction to resolve the matter before it. The first was the evil of having the judges placed in the position of choosing between the duty to keep their deliberations protected from outside scrutiny (judicial integrity and independence) and having to obey an order from a superior officer that would cause them to violate that duty. *Id.* at 333-36. The second evil was the threat to future judicial deliberations and decision-making, should the investigation defeat judicial independence. *Id.* at 333-34; *see also* Baum & Barry, *supra* note 247, at 244.

²⁵¹ *Carlucci*, 26 M.J. at 330.

power to prevent officials of the Executive Branch from interfering with the administration of military justice.”²⁵² This language, and the analysis upon which the court found it to be based,²⁵³ invoked the separation of powers doctrine and corresponding constitutional foundations.

The court next addressed the merits of the petition from the judges and, citing to *Hustings II*, held, “Investigation of a court’s deliberative process, ... is limited by a judicial privilege protecting the confidentiality of judicial communications.”²⁵⁴ It then explained that the “rationale for the privilege is the same as that which was articulated for executive privilege—namely, that confidentiality is important for the effective discharge of the duties of a judge.”²⁵⁵

The court had found a judicial privilege for the military appellate courts by analogy to executive privilege and by using the same analysis performed by the courts in *United States v. Nixon* and *Hastings II*. While not expressly stating the ultimate source from which the privilege derived, the court’s discussion of the basis for the privilege, its reliance on *Hustings II*, its reference to the powers of an Article I court to prohibit acts by the executive branch, and its analogy to executive privilege, strongly implied that the privilege is constitutionally based.

Interestingly, the court did not rely on Military Rule of Evidence 509 to establish a partial basis for the judicial privilege involving the confidentiality of communications between judges.²⁵⁶ Similarly, it chose not to rely on the federal common law “deliberative process” privilege, or its corollary found in

²⁵²*Id.* at 330. See generally *id.* at 330-36 (the court’s analysis of the jurisdiction issue and its interpretation of past congressional action).

²⁵³*Id.* at 330-36. In discussing the 1968 amendments to the Code, then-Chief Judge Quinn testified before Congress as follows:

[T]his bill ... establishes the U.S. Court of Military Appeals as a judicial tribunal in every sense of the word.... This bill removes any doubt about its full stature as a U.S. court. It increases its standing and prestige in the judicial hierarchy and, by implication, gives it the full powers of a U.S. court.

Id. at 331 (quoting H.R. Rep. 1480, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S.C.C.A.N. 2053, 2055 (emphasis omitted) (statement of Chief Judge Robert E. Quinn)). The House of Representatives report further stated, “The bill makes it clear that the Court of Military Appeals is a court and does have the power to question ... any executive regulation or action as freely as though it were a court constituted under article III of the Constitution.” *Id.* (quoting H.R. Rep. 1480, 90th Cong., 2d Sess. 2 (1968), reprinted in 1968 U.S.C.C.A.N. 2053, 2054 (emphasis omitted) (statement of Judge Kilday)).

²⁵⁴*Id.* at 337 (citing to *Hastings II*, 783 F.2d at 1518-22).

²⁵⁵*Id.*

²⁵⁶See *supra* notes 70-86 and accompanying text (discussing Military Rule of Evidence 509).

Military Rule of Evidence 506. Instead, it relegated its mention of a “deliberations” privilege to a footnote, stating, “A privilege has also been recognized with respect to the deliberative processes of a jury.”²⁵⁷ It then cited to Federal Rule of Evidence 606(b), Military Rule of Evidence 606(b), and *Tanner v. United States*,²⁵⁸ omitting any reference to Rules 506 or 509.²⁵⁹

In applying judicial privilege to the facts before it, the court stated that it was only a qualified privilege—like an executive privilege²⁶⁰—that “sometimes must yield to other considerations.”²⁶¹ The court then engaged in a balancing test, as proposed by the *Hustings II* decision, and found that a mere anonymous tip was not a sufficient quantum of evidence necessary to overcome the privilege.²⁶² The remainder of the opinion then set forth the remedy. Citing its earlier language in *Ledbetter* and the procedures for investigating judges in the federal courts through the judicial councils, the court designated itself, *qua* court, to be the independent judicial commission that would investigate any aspect of the deliberative processes of the NCMCMR judges.²⁶³ It further appointed one of its three judges, Judge Walter T. Cox III, as its special master initially to “function in the capacity of protecting the ... [NMCMMR], its judges, and staff from unlawful intrusions into the deliberative processes.”²⁶⁴ Judge Cox acquired sweeping powers as the special master. These powers, however, were to be triggered by the filing of a complaint with him that was accompanied by “information giving rise to a belief that judicial misconduct had occurred.”²⁶⁵ The court then issued a

²⁵⁷ *Carlucci*, 26 M.J. at 337 n.12.

²⁵⁸ 483 U.S. 107 (1987). *Tanner* involved an attempt by jurors and counsel to impeach a verdict through evidence submitted after trial concerning alcohol and drug use by the jurors during the course of the trial. The Court affirmed the inadmissibility of the evidence under Federal Rule of Evidence 606(b)'s prohibition against impeachment of a verdict, determining that the use would be an “internal” influence, and not the required “external influence” on the jury necessary to permit an attack on the verdict rendered. *Id.* at 113-27.

²⁵⁹ *Carlucci*, 26 M.J. at 337 n.12.

²⁶⁰ *Id.* at 337 (citing *Nixon*, 418 U.S. at 706-07).

²⁶¹ *Id.* (citing *Hustings II*, 783 F.2d at 1518-22).

²⁶² *Id.* at 338. The court balanced the authority of the Inspector General to investigate against the qualified judicial privilege of the NCMCMR, recognizing that the Inspector General had only an anonymous tip, and no other substantive evidence indicating judicial misconduct. *Id.*; see *Baum & Barry*, *supra* note 247, at 245.

²⁶³ *Carlucci*, 26 M.J. at 338-40.

²⁶⁴ *Id.* at 342. Judge Cox was a state trial judge prior to being appointed to the Court of Military Appeals and had worked with various judicial commissions inquiring into allegations of judicial misconduct at the state level. *Id.* at 341.

²⁶⁵ *Id.* at 342.

protective order that prohibited the Inspector General from conducting the planned interviews with the NCMCMR judges.²⁶⁶

The *Carlucci* court had found a constitutional judicial privilege. That privilege was coextensive with, and invoked the same implementing procedures as, the privilege for the federal judiciary that the Eleventh Circuit found in *Hustings II*. Nevertheless, whether that privilege was limited to military appellate court judges or could be claimed by military trial judges was still uncertain. A military trial-level court, however, arguably is just as much an Article I court as is a court of military review;²⁶⁷ therefore, the privilege should apply equally to both courts.

These last issues were raised in 1990 by the facts in *Clarke v. Breckenridge*.²⁶⁸ In *Clarke*, a new and inexperienced Marine Corps trial judge made an injudicious remark following an earlier, unrelated trial. The remark "could be reasonably interpreted to mean that he may have somehow considered the race of the accused in determining the sentence."²⁶⁹ The judiciary conducted an investigation, resulting in a decision that the judge

²⁶⁶As an interesting epilogue, Judge Cox, as the special master, wrote to the Inspector General, requesting a brief concerning her investigation so that he independently could determine if further investigation into the deliberations of the NCMCMR was warranted. The Inspector General not only failed to respond to the letter, but also failed to acknowledge her receipt of it. Judge Cox eventually reported back to the court that he could find no "information that causes me to believe judicial misconduct occurred." *Baum & Barry*, *supra* note 247, at 245 (quoting Interim Report of Special Master, *NCMCMR v. Carlucci*, 27 M.J. 407, 408 (C.M.A. 1988)). As late as 1989, no further evidence had come to light that would have justified any further investigation into the NCMCMR judges or their commissioners. *See* Walter T. Cox, *Professional Conduct and the Trial of a Case*, 36 *FED. B. NEWS & J.* 187, 187 (1989).

²⁶⁷*See supra* note 238 (discussing the types of courts-martial and the levels of the military justice system, all arising from the Code and enacted by Congress pursuant to its powers under United States Constitution art. I, § 8, cl. 14.).

²⁶⁸No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). This author concedes an interest in this case, having been the individual military counsel who conducted the *voir dire* of the judge at the trial level. The unanswered questions on judicial privilege, arising from *Clarke*, provided the author with some of the impetus to write this article. *Clarke* was an unpublished opinion by a three-member panel of the NCMCMR. The panel consisted of Senior Judge Albertson, Judge Landen, and Judge Lawrence. The panel initially issued an opinion granting the writ on 6 December 1990; the Government, however, sought reconsideration by the court *en banc*. Following the court's denying the reconsideration motion on 4 January 1991, the panel *sua sponte* reconsidered its earlier decision and issued the 10 January 1991 opinion. This latter, final opinion—while still granting the writ—addressed the issues raised in the Government's motion for reconsideration. *See id.* slip op. at 1, 6, 8; Government's Motion for Reconsideration *En Banc*, *Clarke* (No. 893618C).

²⁶⁹*Clarke*, No. 893618C, slip op. at 1. The military judge had been assigned to the trial judiciary for only two months before he made the injudicious remark following his eleventh trial as a special courts-martial judge. *Id.* Record of Trial, app. ex. VI, at 1-4 (Colonel Ouellette's investigation into, "Allegations of Impropriety Against a Military Judge," 22 Aug. 1990).

would remain on the bench.²⁷⁰ *Clarke* was the first case in which the judge sat as a military judge following the investigation. At the court-martial's initial session, counsel conducted extensive *voir dire* and challenged the military judge for cause.²⁷¹ Upon the judge's denial of the challenge, NCMCMR heard the case pursuant to a petition for extraordinary relief in the nature of a writ of mandamus.²⁷²

During the course of the *voir dire* of the military judge, the issue of judicial privilege arose on several occasions. The military judge first invoked the privilege in the form of "work product," when he read his answer to a question from counsel, and then later refused to show the document to counsel or attach it to the record of trial.²⁷³ He also invoked judicial privilege to protect the case reports from his prior trials.²⁷⁴ The judge further cited judicial privilege as protecting his discussions with the Chief Judge, Navy-Marine Corps Trial Judiciary, during breaks in the *voir dire*. Counsel had argued that these discussions were especially relevant because the Chief Judge was a "defense" subpoenaed witness, had sat in the courtroom throughout the *voir dire* process over defense counsel's objection, and had testified before and after these discussions took place.²⁷⁵ Finally, the military judge raised judicial privilege after he admitted showing his essential findings on the challenge to the Chief Judge prior to announcing them in open court, but would admit only that the Chief Judge had reviewed them for style purposes and that he (the trial judge) was proceeding "in accordance with the law."²⁷⁶

The NCMCMR panel ultimately concluded that the military judge had abused his discretion in failing to grant the challenge

²⁷⁰*Id.* slip op. at 2-3. The initial investigation was conducted by the circuit military judge. His report was sent to the Chief Judge, Navy-Marine Corps Trial Judiciary, for action. The chief judge made the decision that the military judge could continue to sit as a military judge, issuing him a nonpunitive letter of caution for making an injudicious remark that created an appearance of impropriety. *Id.*; *id.* Record of Trial, app. ex. VII (letter of caution). The court compared the investigation to the independent judicial commission contemplated by the Court of Military Appeals in *Ledbetter*, stating, "The investigations that took place under the circumstances of this case, however, do not constitute such an independent judicial inquiry board or commission." *Id.* slip op. at 3 n.2 (citations omitted).

²⁷¹*Id.* slip op. at 4-5; *id.* Record of Trial, at 14-123.

²⁷²*Id.* slip op. at 1. The extraordinary writ initially was filed with the Court of Military Appeals, which granted the petition and remanded the case to the NCMCMR for resolution of factual and legal issues. *Id.*

²⁷³*Id.* Record of Trial, at 22-23, 135-36.

²⁷⁴*Id.* Record of Trial, at 6-15, 17-18.

²⁷⁵*Id.* Record of Trial, at 90-92.

²⁷⁶*Id.* Record of Trial, at 136-37; *id.* slip op. at 5 & n.6.

for cause based on the appearance of impropriety.²⁷⁷ In addressing the issue of judicial privilege, the court did not hold explicitly that it applied. Instead, it stated, "Even if, under these circumstances, a judicial privilege existed, the privilege is a qualified one, and if its proper exercise effectively restricts the defense in fully developing pertinent facts regarding the challenge, the restriction is a factor militating in favor of granting the challenge."²⁷⁸ The court essentially assumed for the purposes of deciding the issue that the privilege did apply, but then failed to engage in the required balancing test to determine if the privilege must yield or be sustained. One interpretation of the court's opinion is that it lends support to the position that the privilege must yield to the due process interests of the accused in developing his or her facts for an intelligent exercise of his right to challenge the military judge. On the other hand, the opinion could be interpreted as merely indicating that the invocation of judicial privilege was one of many factors—albeit a factor in favor of the privilege yielding—to be considered in the balancing test. The court's opinion never resolved this conflict or explained why it chose not to balance the privilege against the interests of the accused. Perhaps it did not need to because the basis for finding an abuse of discretion was evident in the record without having to resolve the judicial privilege issue.²⁷⁹ Arguably, that the Clarke court "presumed the existence of judicial privilege in its opinion supports the proposition that this privilege does apply to a military trial judge.

The most recent discussion of judicial privilege in the military courts also comes from a three-member panel of the NCMCMR. In *Wilson v. Ouellette*,²⁸⁰ the court was faced with another petition for extraordinary relief in the nature of a writ of mandamus, which it ultimately denied.²⁸¹ At issue in the case was a claim of judicial privilege by a military judge who had declined to be interviewed by a defense counsel seeking to corroborate information provided to the defense counsel by a former military judge from the same circuit.²⁸² Noting that it was

²⁷⁷*Id.* slip op. at 8.

²⁷⁸*Id.* slip op. at 5 n.6 (citations omitted).

²⁷⁹*See id.* slip op. at 2-8.

²⁸⁰No. 913025M (N.M.C.M.R. 9 Dec. 1991), *petition denied*, No. 92-07/MC (C.M.A. 17 Jan. 1992). The panel of the NCMCMR that decided this case consisted of Senior Judge Fryer, Judge Mollison (author of the opinion), and Judge Holder. *Id.* slip op. at 1.

²⁸¹*Id.* slip op. at 5.

²⁸²*Id.* slip op. at 4. The former judge had alleged that the circuit judge who was presiding over Wilson's trial previously had indicated to him, in so many words, that his sentences should exceed the terms of the pretrial agreements. *See id.* slip op. at 3; *id.* Record of Trial, at 380.

“mindful of the potential existence of judicial privilege,”²⁸³ the court further stated in a footnote,

The law recognizes a qualified judicial privilege. Recognition of the judicial privilege is relatively recent. Thus far, the privilege extends to a court’s deliberative processes and to communications relating to official business, such as the framing and researching of opinions, orders and rulings. We need not decide whether the privilege extends to general academic discussions between trial judges or whether it applies in this case. Nor do we intimate that all communications concerning judicial business between one judge and another are always beyond discovery.²⁸⁴

This dicta appears to apply the judicial privilege to the military trial court judges to the same extent as it has been applied by the *Carlucci* court to military appellate judges, and by the *Hustings II* court to the federal judiciary.

Evaluating the language of the two NCMR opinions—the only military cases since *Carlucci* to address the issue of judicial privilege—the single reasonable conclusion that can be drawn is that military trial judges hold the privilege to the same extent and in the same situations as the judges sitting on the military appellate courts. Before analyzing the effect that a claim of judicial privilege has in certain courts-martial situations, summarizing the bases and scope of the various types of judicial privilege would be helpful.

D. The Bases and Scope of Judicial Privilege

1. *The Constitutional Privilege.*—*Hustings II* was the first federal appellate court decision to find that a constitutional judicial privilege existed. That court’s holding, and the subsequent interpretations of it by the military courts, define the scope of the constitutional privilege and the procedures for evaluating it when invoked.²⁸⁵

The constitutional privilege applies to all Article III judges, as well as to the military’s Article I judges, from the trial level through the military appellate courts. That interpretation arises

²⁸³ *Wilson*, No. 913025M, slip op. at 4.

²⁸⁴ *Id.* slip op. at 6 n.5 (citations omitted) (the footnote cites principally to *Carlucci* and *Hustings II* for the nature of judicial privilege; it also cites to *Clarke*, along with several other cases, for the point on the discovery of communications concerning judicial business between judges).

²⁸⁵ *See supra* notes 205-84 and accompanying text.

from the common interests they share, their similar duties and purposes, and express congressional intent.²⁸⁶ The constitutional underpinnings for the privilege are found in the doctrine of separation of powers and from the nature of their constitutional duties.²⁸⁷

The key constitutional theme arising from the separation of powers basis is the independence of the judiciary, which is secured by a fair and impartial court system that is free from interference by the other two branches of government.²⁸⁸ The key constitutional point arising from the nature of judicial duties is the supremacy of each branch of government within its own assigned areas of constitutional power and duties.²⁸⁹ To that end, a privilege protecting the confidentiality of communications between judges and others who assist them in the performance of their duties promotes the efficiency of the judiciary and collaterally protects their decisions from unwarranted and improper outside influences. The separation of powers and constitutional duties bases are mutually supporting and intertwined.²⁹⁰

As to the scope of this judicial privilege, it ((extendsonly to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings.”²⁹¹ It therefore covers discussions between judges and their law clerks or commissioners concerning the conduct of deciding issues before the judge or court.²⁹² This privilege is analogous to the federal common law’s “deliberative process” privilege. The differences are that the constitutional privilege is applied down to the lowest level of the individual judge and it is not limited to predecisional, nonfactual opinions and recommendations. The constitutional privilege is also analogous to the “deliberations” privilege of Military Rule of Evidence 509. It is more expansive, however, in that it includes preliminary discussions and postdecisional reflections, and because it is not limited to the precise deliberations leading up to a verdict or sentence in a particular case.

²⁸⁶ See *supra* notes 214-84 and accompanying text.

²⁸⁷ See *supra* notes 217-21, 251-55, and accompanying text.

²⁸⁸ See *supra* notes 167, 179-80, 218, 252, and accompanying text.

²⁸⁹ See *supra* notes 220-21, 251-53, and accompanying text.

²⁹⁰ See *supra* notes 217-21, 251-55 and, accompanying text.

²⁹¹ *Hastings II*, 783 F.2d at 1520.

²⁹² See *supra* notes 222, 254-55, and accompanying text; see also Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230 (1981) (arguing for a rule of confidentiality and containing a survey of federal judges that supports such a rule).

Whether the scope of the privilege includes day-to-day administration-oriented communications between judges, or general academic discussions, is unresolved. To the extent these communications promote the fairness and integrity of specific judicial duties, they are arguably privileged. On the other hand, communications relating to judicial misconduct, such as the acceptance of a bribe, clearly depart from this analysis. Because these communications would not be in furtherance of a judge's constitutional duties, they should not fall within the privilege.²⁹³

The burden of proving that the matters fall within the scope of judicial privilege is on the party claiming it. Once the party claiming the privilege meets the threshold "scope" requirement, the matters are "presumptively privileged."²⁹⁴ The burden then shifts to the party seeking access to the matters to "demonstrate that its need for the materials is sufficiently great to overcome the privilege."²⁹⁵ A court faced with deciding a claim of judicial privilege will balance the interests of the party seeking the information against the interests to be served by the claim of judicial privilege. If the scales tip in favor of the party seeking the information, the privilege must yield, for it is only a qualified privilege—not an absolute one.²⁹⁶

The privilege, of course, must yield in certain situations. From the holding in *Hustings II*, an investigation into alleged judicial misconduct by a judicial council likely will possess a need that is sufficiently great to overcome the privilege.²⁹⁷ Further, *Carlucci* indicates that a mere anonymous tip probably is not a sufficient quantum of evidence to support the required "great need."²⁹⁸ The needs of criminal trials certainly can be sufficiently great, especially when the interest to be served by disclosure is the promotion of due process of law, as it was in *United States v.*

²⁹³ Arguably, judicial privilege should give way in the presence of judicial misconduct, just as the attorney-client privilege yields when the client attempts to perpetrate a fraud on the court or commit other similar misconduct. See DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICE: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.3(a)(2), (4) & comment, at 26-27 (31 Dec. 1987). Additionally, the concept of "waiver" of judicial privilege may be raised when a judge discusses otherwise privileged communications or deliberations with someone not contemplated by the purpose of the privilege—for example, an acquaintance during a game of golf. See MCM, *supra* note 42, MIL. R. EVID. 510(a) ("Waiver of privilege by voluntary disclosure").

²⁹⁴ *Hastings II*, 783 F.2d at 1522; see *supra* notes 223-24 and accompanying text.

²⁹⁵ *Hastings II*, 783 F.2d at 1522; see *supra* notes 224, 260-61, and accompanying text.

²⁹⁶ See *supra* notes 225-31, 260-62, and accompanying text.

²⁹⁷ See *supra* notes 226-31 and accompanying text.

²⁹⁸ See *supra* notes 260-62 and accompanying text.

Nixon.²⁹⁹ The issue persists, however, over whether the needs of an accused at a court-martial, who seeks to *voir dire* the military judge to lay a foundation for an adequate challenge for cause, can be sufficiently great to tip the scales. That issue will be addressed in the next two sections of this article.

2. *The Federal Common Law Judicial Privilege.*—The law is clear that a “deliberative process” privilege exists for the executive branch.³⁰⁰ For the reasons discussed earlier, that same privilege should be recognized as another form of judicial privilege and made applicable to the judiciary.³⁰¹

As another form of judicial privilege, this “deliberative process” privilege protects the advice, opinions, and recommendations made by subordinates. It covers these communications only when made during the deliberations stage that leads to the making of a major decision or policy within the judicial branch.³⁰² It would not, therefore, cover decisions on local court rules in a single court, but would cover decisions made by more senior judges and administrators in the judicial branch. Because it does not protect facts used in making the decision, or any postdecisional communications, this privilege is narrower in scope than the constitutional privilege discussed above.³⁰³

Like the constitutional privilege, the common law privilege is not absolute, but qualified. The burden is on the party seeking to protect the communications to show they fall within the privilege. The courts will employ a balancing test to see whether, on the particular facts of the case, disclosure is required. As opposed to both the constitutional privilege and the deliberations privilege of Military Rule of Evidence 509, courts frequently will engage in an *in camera* review of the communications that are the subject of a claim of this privilege.³⁰⁴

3. *The “Deliberations” Privilege of Military Rule of Evidence 509.*—Applicable only to military judges and court members, this judicial privilege—when applied to the military judges sitting as courts-martial composed of a military judge alone—protects the actual deliberations, impressions, emotional feelings, or mental processes used in resolving an issue before the court.³⁰⁵ Its scope

²⁹⁹ See *supra* notes 174-82 and accompanying text.

³⁰⁰ See *supra* notes 131-41 and accompanying text (describing the numerous bases for this privilege).

³⁰¹ See *supra* notes 147-48 and accompanying text.

³⁰² See *supra* notes 142-45 and accompanying text.

³⁰³ See *supra* notes 222, 254, and accompanying text.

³⁰⁴ See *supra* note 146 and accompanying text.

³⁰⁵ See *supra* note 86 and accompanying text.

is much narrower than the constitutional privilege because it is directed to the deliberations of a specific case or issue, and would not protect more generalized communications.

Because the privilege arises from an executive order promulgated by the President, it is subject to modification at the pleasure of the executive branch. The first purpose served by the privilege is to insulate judges sitting as triers of fact from harassment or improper outside influences, including unlawful command influence. This insulation promotes the independence of the military judiciary.³⁰⁶ The second purpose is the interest in the finality of verdicts, which the rule promotes by preventing judges from impeaching their prior verdicts.³⁰⁷ As with the other two privileges above, this judicial privilege is also qualified. It may be forced to yield when the party seeking to disclose the privileged matters can show the existence of extraneous prejudicial information, improper outside influence, or unlawful command influence.³⁰⁸

Before practitioners and judges can appreciate fully the scope and interaction of the three qualified judicial privileges, they need to understand the effect that claiming one of these privileges has on the conduct of a court-martial. Most claims of judicial privilege in a court-martial will arise during *voir dire* of, or a challenge for cause against, the military judge. A party faced with a claim of judicial privilege that limits or prevents *voir dire* of the military judge, or which prevents development of a basis for a challenge for cause, must know the interests served by *voir dire* and the challenge process. Accordingly, by knowing the values that underlie the *voir dire* and challenge process, a court can balance the interests promoted by that process against the interests served by the protections of judicial privilege. Consequently, an examination of the historical and legal underpinnings of *voir dire* and challenges for cause is necessary to determine those interests.

IV. *Voir Dire* and Challenges of the Military Judge

A. *Historical Development of Voir Dire*

Voir dire is defined by one legal dictionary as “to speak the truth,” and denoting the examination “the court may make of one presented as a witness or juror, where his competency, interest,

³⁰⁶ See *supra* notes 73-75 and accompanying text.

³⁰⁷ See *supra* notes 72-73, 85, and accompanying text.

³⁰⁸ See *supra* notes 70, 73, 85, and accompanying text

etc., is objected to."³⁰⁹ While the origins of the voir dire examination of prospective jurors has been described as "rather obscure,"³¹⁰ it developed under the common law "as the natural concomitant of the right to an impartial jury."³¹¹ The development of the law on voir dire in the federal and state courts has focused almost exclusively on jurors. Only in the military does a litigant have the right to voir dire the judge in a particular case.³¹²

Cases and authors have offered numerous justifications for conducting voir *dire*.³¹³ The only universally recognized purpose for the inquiry, however, is to disclose a basis for disqualification or actual bias of the juror.³¹⁴ Justice Harlan's comments in a 1895 Supreme Court case best explain this purpose as follows:

It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury; that is, by jurors who had no bias or prejudice that could

³⁰⁹BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

³¹⁰Ronald M. Holdaway, *Voir Dire—A Neglected Tool of Advocacy*, 40 MIL. L. REV. 1, 2 (1968).

³¹¹*Id.* at 2. Originally, under the common law, *voir dire* took place only after a challenge for cause against a juror had been made. Today, it occurs before the challenge. Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 66 (1962). For a history of the various *voir dire* practices used by federal courts, see Romualdo P. Eclavea, Annotation, *Voir Dire Examination of Prospective Jurors Under Rule 24(a) of Federal Rules of Criminal Procedure*, 28 A.L.R. Fed. 26 (1976 & Supp. 1990) (federal cases discussing *voir dire* of prospective jurors); The Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 465-67 (1960); Orfield, *supra*, at 66-75.

³¹²In an attempt to determine whether any federal or state jurisdictions permitted *voir dire* of a trial or appellate judge, the author contacted numerous organizations involved with judges and courts nationwide. None of the organizations were aware of the existence of such a procedure. Telephone Interview with William Eldridge, Director of Research, Federal Judicial Center, Washington, D.C. (22 Oct. 1991); Telephone Interview with Dixie Knoebel, Staff Associate, The National Center for State Courts, Williamsburg, Va. (22 Oct. 1991); Telephone Interview with V. Robert Payant, Dean, The National Judicial College, Reno, Nev. (22 Oct. 1991); Telephone Interview with Wantland L. Sandel, Jr., Director, Division of Judicial Services, American Bar Association, Chicago, Ill. (10 Oct. 1991). The author's search for a case involving *voir dire* of a federal or state trial judge revealed only one reported case, and it involved only a motion entitled, "Demand for Special Hearing to Voir Dire Judge Korner," which the court denied. See *Paulson v. Commissioner*, 48 T.C.M. (CCH) 869 (1984) (mem.).

³¹³See, e.g., Holdaway, *supra* note 310, at 2 (suggesting the additional purposes of aiding in the exercise of peremptory challenges and as a tactical device to indoctrinate the jury). *But see* STANDARDS FOR CRIMINAL JUSTICE § 3, Standard 3-5.3(c), at 76 (1979) (The Prosecution Function) (questioning jurors "should be used solely to obtain information for the intelligent exercise of challenges," and not to argue prosecution's case); *id.* § 4, Standard 4-7.2 commentary, at 83 (1979) (The Defense Function) (the defense must limit its questions to those needed "to lay a basis for the lawyer's challenges," and rejecting the view that they may be used to influence the jury's view of the case—an "improper use of the right of reasonable inquiry to ensure a fair and impartial jury").

³¹⁴Holdaway, *supra* note 310, at 2.

prevent them from returning a verdict according to the law and evidence. It is equally true that suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.³¹⁵

The language in the opinion clearly shows the link between the purposes of *voir dire* to disclose bias, opinions, and prejudice on the one hand, and the right to be tried by a fair and impartial jury on the other. The Judicial Conference of the United States stated in 1960, "The constitutional purpose of the *voir dire* examination is thus to make sure that the jury is 'impartial.'"³¹⁶

More recently, an additional purpose has been recognized—that is, to question jurors so that a party may intelligently form a basis for the exercise of its peremptory challenges.³¹⁷ Because the peremptory challenge may be exercised for almost any reason³¹⁸—including matters discovered on *voir dire* concerning the juror's personal background and beliefs—"the scope of inquiry is naturally rather broad."³¹⁹

³¹⁵*Connors v. United States*, 158 U.S. 408, 413 (1895).

³¹⁶Judicial Conference of the United States, *supra* note 311, at 465 (emphasis added). The Conference noted that *voir dire* examination in federal criminal cases was governed by Federal Rule of Criminal Procedure 24(a), and that the constitutional basis for the rule rests both in the Sixth Amendment's provision for an impartial jury in all criminal prosecutions, and in the Fifth Amendment's due process of law requirement. *Id.* The Supreme Court further has held this particular right applicable to state court criminal proceedings through the Fourteenth Amendment. *See Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

³¹⁷*Holdaway*, *supra* note 310, at 2; *Orfield*, *supra* note 311, at 69; STANDARDS FOR CRIMINAL JUSTICE § 15, Standard 15-2.4 at 51 (1978) (Trial by Jury) ("Voiur dire examination should disclose grounds for challenge for cause and facilitate intelligent exercise of peremptory challenges."). As noted by one author, historically, "it was held that there could be no questioning for the purposes of peremptory challenges." *Orfield*, *supra*, at 69 (citing *Browne v. United States*, 145 F. 1, 7 (2d Cir. 1905)). Subsequent cases allowed the use of *voir dire* concerning peremptory challenges. *Id.* (citing *Murphy v. United States*, 7 F.2d 85 (1st Cir. 1925); *Kurczak v. United States*, 14 F.2d 109, 110 (6th Cir. 1926); *Beatty v. United States*, 27 F.2d 323, 324 (6th Cir. 1928)); *see also United States v. Barnes*, 604 F.2d 121, 138 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (noting that the Supreme Court, in *Swain v. Alabama*, 380 U.S. 202 (1965), "recognized the importance of the peremptory challenge, and approved questioning of potential jurors to form the basis for such challenges").

³¹⁸This is subject, of course, to the unique requirements imposed by the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

³¹⁹*Holdaway*, *supra* note 310, at 2, 17 ("[T]he rule has evolved to a point that the wide discretion vested in the law officer has largely been dissipated by emphasizing the accused's right to an impartial court."); *see Barnes*, 604 F.2d at 138 n.9 (citing *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (approving broad, but not limitless *voir dire*); *Orfield*, *supra* note 311, at 69 (quoting *United States v. Daily*, 139 F.2d 7, 9 (7th Cir. 1943), for the proposition that the range of jury *voir dire* "should be liberal").

B. Development of Voir Dire in Courts-Martial

The development of *voir dire* in courts-martial roughly has paralleled its development in the common law and federal courts—at least to the extent it involves court members. As early as 1806, a court member could be challenged for cause by an accused.³²⁰ Eventually, the right to exercise peremptory challenges against members also was recognized in courts-martial.³²¹ Today, Rule for Courts-Martial 912 regulates the *voir dire* and challenges—both peremptory and “for cause”—of court members.³²² The rule provides,

Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.³²³

The discussion to this section of the rule states the purpose of *voir dire* of the members as follows: “The opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use *voir dire* to present factual matter which will not be admissible or to argue the case.”³²⁴

The rule is based on Federal Rule of Criminal Procedure 24(a).³²⁵ Accordingly, it recognizes the same constitutional purpose for *voir dire* relied on for federal criminal trials—that is, to ensure the members are impartial.³²⁶ In addition to *voir dire* of the members, a party also is permitted to present evidence

³²⁰WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 205 (2d ed. 1920) (citing to Articles of War art. 71).

³²¹See 1951 MANUAL, *supra* note 64, ¶ 62e. Peremptory challenges against members still are permitted today, with each party in the court-martial having one such challenge. MCM, *supra* note 42, R.C.M. 912(g).

³²²See MCM, *supra* note 42, R.C.M. 912.

³²³*Id.* R.C.M. 912(d).

³²⁴*Id.* R.C.M. 912(d) discussion.

³²⁵*Id.* R.C.M. 912(d) analysis, at A21-54. The military courts have held that the procedures of Rule 24(a) are applicable to the military. *Id.* (citing *United States v. Slubowski*, 7 M.J. 461 (C.M.A.), *reconsideration not granted by equally divided court*, 9 M.J. 264 (C.M.A. 1980)).

³²⁶See *supra* note 316 and accompanying text.

relating to whether grounds exist for a challenge for cause against a member.³²⁷ A military judge shall excuse a member if any of fourteen specific grounds under the rule are shown to exist.³²⁸ The last ground is a so-called “catch-all,” providing for removal if the member, “[s]hould not sit ... in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”³²⁹

The interest served by permitting *voir dire* in courts-martial is, as in civilian trials, to ensure the selection of fair and impartial jurors, thereby permitting the accused to receive a fair and impartial trial. This fulfills the constitutional mandates of the Sixth Amendment right to an impartial criminal jury trial and the Fifth Amendment right to due process of law.³³⁰ This same interest has been carried over to the *voir dire* of the military judge. That transition results, in part, from the military judge’s frequent role as trier of fact—a role that he or she fills when sitting as a court-martial composed of a military judge alone.

Courts-martial have had a “military judge” only since 1968.³³¹ Prior to that time, the military judges were known as “law officers,”³³² or, even earlier, as “law members.”³³³ The

³²⁷ MCM, *supra* note 42, R.C.M. 912(e).

³²⁸ *Id.* R.C.M. 912(f).

³²⁹ *Id.* R.C.M. 912(f)(1)(N). Examples of bases for challenge under the last ground include “a direct personal interest in the result,” participation in “a closely related case; ... a decidedly friendly or hostile attitude toward a party,” or “an inelastic opinion concerning an appropriate sentence for the offense charged.” *Id.* R.C.M. 912(f) discussion.

³³⁰ *See supra* notes 315-16 and accompanying text.

³³¹ *See* Military Justice Act of 1968, Pub. L. No. 90-632, §§ 2(9), 3(a), 82 Stat. 1335, 1336-37, 1343 (codified as amended at 10 U.S.C. §§ 801-940 (1988)). “Whenever the term law officer is used, ... such term shall be deemed to mean military judge.” *Id.* § 3(a), 82 Stat. at 1343; *see* George B. Powell, Standards of Conduct and the Military Trial Judge 30-31 (1971) (unpub. written thesis dissertation, The Judge Advocate General’s School, U.S. Army).

³³² Powell, *supra* note 331, at 17-19. Under the Uniform Code of Military Justice Act of 1950, Pub. L. No. 506, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801-940 (1988)), Congress established the position of “law officer” in courts-martial—a position that has evolved into the “military judge” of today. *Id.* art. 26, 64 Stat. at 117.

³³³ Prior to the Uniform Code of Military Justice Act of 1950, the closest thing to a trial judge in courts-martial was the “law member,” who was a combination of juror (court member) and legal advisor. Powell, *supra* note 331, at 19. While the law member was a part of Army courts-martial under the Articles of War beginning in the 1920s, no such member existed in Navy courts-martial. *Id.* (citing Army Reorganization Act § 1, ch. 2, 41 Stat. 787 (1920), *as amended* by the Act of 24 June 1948, Pub. L. 759, 80th Cong., art. 8). These law members would retire to the deliberations room with the other members and vote as an equal member on verdicts and sentences. The law member, however, could not be challenged for cause. *See* War Dep’t, Doc. No. 1053, Courts-Martial Procedure 147 (U.S. Infantry Ass’n 1921) (citing to Articles of War art. 18).

change in status from law member, to law officer, to military judge, reflected the evolution toward a more independent military judiciary. This evolution envisaged a judiciary built around a military judge who not only was removed from the influences of commanders, but also served in a capacity more analogous to a civilian trial judge.³³⁴ While Congress was renaming the law officer a "military judge" to enhance this person's status, it also was providing an accused with the "right" to select to be tried by military judge alone.³³⁵

Placing military judges in the role of trier of fact gave *voir dire* of the military judges added significance. Whereas the *Manual for Courts-Martial* earlier had limited the military judge's role to ruling on questions of law and interlocutory issues,³³⁶ the modern *Manual* allowed them to decide not only the ultimate issues of guilt or innocence, but also—if necessary—an appropriate sentence.³³⁷ This change increased the significance of the military judge's role in a fair and impartial trial, and ultimately mandated new rules concerning the basis upon which a military judge could be challenged for cause.³³⁸

³³⁴ See UCMJ arts. 26(c), 37(a) (providing for independent trial judiciaries in each service and insulating military judges from unlawful command influence); S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4503-04 (one purpose of the 1968 amendments to the Code was "to redesignate the law officer ... as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges."). See generally GILLIGAN & LEDERER, *supra* note 232, §§ 1-30.00, 14-10.00 (discussing the civilianization of military law and the evolution of the military judge into "a true judge"). But see Fidell, *supra* note 232, at 346-51 (criticizing the level of judicial independence in military courts).

³³⁵ UCMJ art. 16(1)(B). An accused does not have an absolute right to be tried by military judge alone; the military judge must approve a request for this type of court-martial. *Id.* While the military judge has discretion to approve or disapprove the request for trial by military judge alone, "[a] timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder." MCM, *supra* note 42, R.C.M. 903(c)(2)(B) & discussion. A trial judge may not withhold the opportunity for trial by military judge alone arbitrarily. "[W]hile trial by military judge alone may not be an absolute right, it is a right nevertheless." *United States v. Sherrod*, 26 M.J. 30, 32 (C.M.A. 1988).

³³⁶ 1951 MANUAL, *supra* note 64, ¶ 39b(1). The law officer's rulings on interlocutory questions were final, except for rulings on motions for findings of not guilty or the question of the accused's sanity. The law officer also did not rule on any challenges, which were decided by the court members. *Id.*; GILLIGAN & LEDERER, *supra* note 232, § 14-10.00, at 515 (discussing the role of law officer).

³³⁷ 1969 MANUAL, *supra* note 47, ¶ 39b(5).

³³⁸ See, e.g., MCM, *supra* note 42, R.C.M. 902(a). The 1984 *Manual* added the appearance of impropriety language—specifically, "proceedings in which the military judge's impartiality might reasonably be questioned"—to the rules governing disqualification of the military judge. Under the prior rules, the general language of paragraph 62f(13) provided the only grounds for addressing a generalized appearance of impropriety. Compare MCM, *supra*, R.C.M. 902(a), (b) with 1969 MANUAL, *supra* note 47, ¶ 62f. The language of R.C.M. 902(a),

Rule for Courts-Martial 902 governs the disqualification of military judges and it provides as follows: "(a) *In general*. Except as ... [to waiver], a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."³³⁹ It then goes on in the next section to describe the five "specific grounds" upon which the military judge shall disqualify himself or herself.³⁴⁰

specifically, and R.C.M. 902, generally, results from a combination of the old rules, under paragraph 62 of the 1969 *Manual*, and the federal statutes covering the disqualification of Article III judges, now found in 28 U.S.C. § 455 (1988). MCM, *supra*, R.C.M. 902 analysis, at A21-45. Arguably, the integration of the rules governing federal judges further emphasizes the move to make military judges more like civilian judges. See *supra* note 334 and accompanying text.

³³⁹MCM, *supra* note 42, R.C.M. 902(a). The quoted language also is known by the term of art, "appearance of impropriety." See *Clarke*, No. 893618C, slip op. at 5. The statutes governing federal judges, as well as the American Bar Association's trial standards for judges, have similar provisions. See 28 U.S.C. § 455(a) (1988) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); STANDARDS FOR CRIMINAL JUSTICE § 6, Standard 6-1.7, at 19 (1978) (Special Functions of the Trial Judge) ("The trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned."). The purpose of R.C.M. 902(a), as well as 28 U.S.C. § 455(a), is to protect "the integrity and dignity of the judicial process from any hint or appearance of bias." *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991) (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)). "The test a military judge must apply in determining whether to recuse himself [or herself] is 'whether the objective, reasonable man with knowledge of all the circumstances would conclude that the trial judge's impartiality might reasonably be questioned.'" *Id.* at 605 (citing MCM, *supra* note 42, R.C.M. 902(a); *Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983); *Markus v. United States*, 545 F. Supp. 998 (S.D.N.Y. 1982)). The test is "an objective test that assumes the facts as alleged are true and then looks into the mind of a reasonable man rather than the mind of the judge or the parties." *Id.* (citing *United States v. Sherrod*, 22 M.J. 917, 920 (A.C.M.R. 1986), *rev'd on other grounds*, 26 M.J. 30 (C.M.A. 1988) (citations omitted)). An in-depth review of the cases addressing recusal of judges is beyond the scope of this article. For additional material in this area, see *Allen*, 31 M.J. at 600-10 (an exhaustive list of relevant cases); Marcia G. Robeson, Annotation, *Construction and Application of 28 U.S.C. § 455(a) Providing for Disqualification of Justice, Judge, Magistrate, or Referee in Bankruptcy in Any Proceeding in Which His Impartiality Might Reasonably Be Questioned*, 40 A.L.R. Fed. 954 (1978 & Supp. 1990) (analysis of federal cases construing 28 U.S.C. § 455(a)); Paul Tyrrell, *Piercing the Judicial Veil: Judicial Disqualification in the Federal and Military Systems*, ARMY LAW., Apr. 1989, at 46 (discussing disqualification of judges under 28 U.S.C. §§ 144, 455(a), and under R.C.M. 902).

³⁴⁰MCM, *supra* note 42, R.C.M. 902(b):

(b) *Specific grounds*. A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening

Because a military judge is not subject to a peremptory challenge,³⁴¹ the grounds for challenge under Rule 902(a) and (b) help to define the scope of permissible *voir dire* of the military judge.

C. Scope of Voir Dire of the Military Judge

An in-depth discussion of the case law on *voir dire* and the possible grounds for disqualification of a military judge is beyond the scope of this thesis. A brief review of the rules governing *voir dire*, however, will help in understanding the interests to be served by permitting the *voir dire* of military judges. Those interests then can be balanced against the interests to be served by a claim of judicial privilege.

Voir dire of the military judge may occur at any stage of the court-martial and be conducted by either the prosecution or defense.³⁴² The military judge decides the issue of disqualification, and he or she is under a duty to raise the issue *sua sponte* should the facts warrant him or her to do so.³⁴³ Prior to the ruling on a challenge, each party is entitled to *voir dire* the military judge and to present evidence regarding a possible ground for disqualification.³⁴⁴ Accordingly, a threshold requirement for any *voir dire* question, or for the admissibility of any

authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as a military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

³⁴¹*Id.* R.C.M. 902(d)(1) discussion; *see also infra* note 390 (discussing peremptory challenges of judges).

³⁴²MCM, *supra* note 42, R.C.M. 902(d)(1) discussion (the rule encourages raising any possible grounds for disqualification "at the earliest reasonable opportunity").

³⁴³*Id.* R.C.M. 902(d)(1).

³⁴⁴*Id.* R.C.M. 902(d)(2).

evidence during the *voir dire* and challenge phase of the court-martial, is that it be relevant to proving or disproving a ground for challenge of the military judge. Appellate courts will review the military judge's decision on the challenge using an abuse of discretion standard.³⁴⁵ Rule 902 states, "The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily."³⁴⁶

Addressing *voir dire* of the military judge, the Court of Military Appeals stated, in *United States v. Small*,³⁴⁷ that counsel may question the military judge as to his or her ability to be fair and impartial, but they may not extract "commitments from the judge as to what he [or she] will ultimately decide."³⁴⁸ The court based this rule on the fact that "fairness and impartiality ... have long been recognized as critical ingredients of military justice."³⁴⁹ Again, the court referred to the underlying purpose of *voir dire*—that is, to ensure a fair and impartial trial for an accused.

In *United States v. Smith*,³⁵⁰ the NCMCMR stated, "At the trial level, *voir dire* should expose a ground for challenge of a military judge, if one exists, and result either in assignment of a different military judge ... or ... create a record, which an appellate court may review to determine if an abuse of discretion has occurred."³⁵¹ To that end, a military judge can abuse his or her discretion by effectively limiting a counsel's development of a basis for a proper challenge.³⁵²

The military judge may not refuse to submit to any questions from counsel.³⁵³ As one court noted,

While some jurisdictions may not permit *voir dire* of the judge, our system under the UCMJ does. It is a right granted by executive order. An out of hand or arbitrary denial of that right is error.... [While the nature and scope of *voir dire* remains within the control of the military judge, with the caveat that he should be

³⁴⁵ *United States v. Smith*, 30 M.J. 631, 634 (N.M.C.M.R. 1990) (per curiam).

³⁴⁶ *MCM*, *supra* note 42, R.C.M. 902(d)(1) discussion.

³⁴⁷ 21 M.J. 218 (C.M.A. 1986).

³⁴⁸ *Id.* at 219.

³⁴⁹ *Id.*

³⁵⁰ 30 M.J. 631 (N.M.C.M.R. 1990) (per curiam).

³⁵¹ *Id.* at 633-34 (citing *United States v. Jarvis*, 46 C.M.R. 260 (C.M.A. 1973)).

³⁵² *See, e.g., Smith*, 30 M.J. at 634 (military judge abused discretion by "effectively limiting scope" through his misleading responses and failure to disclose information to counsel).

³⁵³ *United States v. Schauer*, No. NCM 76-2574 (N.C.M.R. 9 June 1976) (unpub.), *reprinted in* *United States v. Small*, 21 M.J. 218, 223 (C.M.A. 1986).

liberal in allowing an accused to develop possible grounds for challenge, the *right* of an accused to conduct *voir dire* is not discretionary with the judge.³⁵⁴

Under the military's system of justice, a trial judge "is presumed to be qualified."³⁵⁵ Because the "party moving for disqualification bears the burden of establishing a reasonable factual basis"³⁵⁶ for disqualification, the invocation of a privilege impairs a party's ability to meet that burden. It does so by effectively denying that party access to evidence to place before the court or to place in the record for review by appellate courts.

This impairment of a party's ability to meet its burden leads to disenchantment with the military justice system and to perceptions that the system is not fair.³⁵⁷ More importantly, the denial of an opportunity to establish a basis for a challenge against the military judge may amount to a denial of the accused's constitutional right to a fair and impartial trial.³⁵⁸ Presuming that the evidence sought—either communications or documents—is relevant to establishing a basis for a challenge, the invocation of judicial privilege to prevent the disclosure of the evidence gives rise to conflict. To resolve that conflict, a court must balance the interests in maintaining the confidentiality of the communications or evidence against a party's right to a fair and impartial trial, which are the interests served by the *voir dire* process.³⁵⁹

V. Resolving the Conflict: Balancing Interests

A. *Balancing the Interests Between Judicial Privilege and Voir Dire of the Military Judge*

The conflict arising from the competing interests served by judicial privilege and *voir dire* of the military judge cannot be resolved without taking into consideration the unique facts of

³⁵⁴ *Schauer*, No. NCM 76-2574, reprinted in Small, 21 M.J. at 221.

³⁵⁵ *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R.1990), *affd.*, 33 M.J. 209 (C.M.A. 1991) (citing *State of Idaho v. Freeman*, 478 F. Supp. 33 (D.C. Idaho 1979); *United States v. Baker*, 441 F. Supp. 612 (M.D. Tenn. 1977)).

³⁵⁶ *Id.* at 605 (citing *United States v. Cepeda Penes*, 577 F.2d 754 (1st Cir. 1978)).

³⁵⁷ The military justice system is "[a] justice-based system [that] seeks accurate determination of individual responsibility and proportional punishment. It is based upon fairness and to be functional, must be so perceived by the personnel operating under it." GILLIGAN & LEDERER, *supra* note 232, § 1-30.00, at 7.

³⁵⁸ See *supra* notes 314-16 and accompanying text.

³⁵⁹ See *supra* notes 223-31, 260-62, and accompanying text.

each particular case in which the conflict arises.³⁶⁰ Accordingly, no single, standard answer applies to all cases.

In each case, the resolution of the conflict will depend on several factors. The first factor will be the nature of the interest to be served by the invocation of judicial privilege. The more generalized the interest is in maintaining the confidentiality of the judicial matter concerned, the less likely the privilege is to prevail over the countervailing interests of *voir dire*.³⁶¹ For example, the distinction between a generalized interest versus a specific interest appears when a military judge not only refuses to answer questions concerning discussions he has had with other judges regarding any matters, but also refuses to disclose a specific aspect of his deliberations to explain why he gave an accused a particular sentence at trial.

The first situation is an invocation of the constitutionally based judicial privilege analogous to the situations faced by the courts in *United States v. Nixon*, *Hustings II*, and *Carlucci*.³⁶² In *Nixon* and *Hustings II*, the courts found that the privilege must yield to the greater interests served by a criminal trial and a judicial misconduct investigation.³⁶³ In *Carlucci*, the court held the privilege would prevail because of an absence of reliable evidence to justify the intrusion that was sought into the deliberative process of a court.³⁶⁴

In the second situation, the judge is invoking both the constitutionally based judicial privilege and the judicial privilege arising from Military Rule of Evidence 509.³⁶⁵ The judge's decision to invoke the privilege is directed at protecting the more sacred deliberations of a court in a particular case, absent an allegation of judicial misconduct. Therefore, the privilege must yield, if at all, only when posed against the most compelling of competing interests.³⁶⁶

The second factor is the nature of the judicial privilege being claimed. The courts will balance the competing interests whenever the judicial privilege is based upon either the federal common law's "deliberative process" privilege or the

³⁶⁰ See, e.g., *supra* notes 223-31 and accompanying text.

³⁶¹ See *supra* notes 229-31 and accompanying text.

³⁶² See *supra* notes 176-78, 214-31, 260-62, and accompanying text.

³⁶³ See *Nixon*, 418 U.S. at 707, 713; *Hustings II*, 783 F.2d at 1520-25; see also *supra* notes 176-78, 226-31, and accompanying text.

³⁶⁴ *Carlucci*, 26 M.J. at 338; see also *supra* notes 247-62 and accompanying text.

³⁶⁵ See *supra* notes 70-85 and accompanying text.

³⁶⁶ See *supra* notes 70, 73, 86, and accompanying text.

constitutionally based judicial privilege.³⁶⁷ This is not necessarily the case when the claim of judicial privilege is based upon Military Rule of Evidence 509.³⁶⁸

All three variations of judicial privilege are qualified; no absolute judicial privilege exists.³⁶⁹ Nevertheless, under Military Rule of Evidence 509, the qualified nature of the privilege is important only when the party seeking access to the information can prove that it meets one of the three exceptions arising from Military Rule of Evidence 606(b).³⁷⁰ A court may not engage in a balancing of competing interests, no matter how great the moving party's need is for the information, until after that party meets this requirement.³⁷¹ Therefore, a party could be prevented from having its interests balanced against the privilege because it is unable to meet its burden in proving an exception.

The final factor is the nature of the competing interest. On the low end of the scale, militating against the claim of judicial privilege yielding, is the mere hunch, the "fishing expedition," and the anonymous tip without substantive evidence.³⁷² On the other, higher end of the spectrum are the compelling interests, militating in favor of the privilege yielding, represented by the interests of an accused in receiving a fair and impartial trial, as guaranteed by the Constitution.³⁷³ Somewhere in between—but closer to the higher end—lies the allegation of judicial misconduct based upon substantial, credible evidence.³⁷⁴

A court must look at the three factors and resolve the issue based upon the facts in the case. To help understand how a court should resolve the conflict that arises when judicial privilege is claimed in a court-martial during *voir dire*, consider these examples of situations that have arisen in the past:

1. Problem 1.—A military judge has had a complaint filed against him alleging that he made a comment from the bench that gave the listeners the perception that he may have used the race of the accused as a factor in arriving at the sentence imposed. During *voir dire*, the defense counsel requests a copy of the statements made by the military judge as part of the investigation that followed the allegation and preceded the trial.

³⁶⁷ See *supra* notes 296, 304, and accompanying text.

³⁶⁸ See *supra* text accompanying note 308.

³⁶⁹ See *supra* text accompanying notes 296, 304, 308.

³⁷⁰ See *supra* note 86 and accompanying text.

³⁷¹ See *supra* notes 70, 73, and accompanying text.

³⁷² See *supra* notes 260-62 and accompanying text.

³⁷³ See *supra* notes 178, 316, and accompanying text.

³⁷⁴ See *supra* notes 226-31 and accompanying text.

The investigation had found some improper conduct by the judge. The military judge denies the request on the basis that the investigation is covered by judicial privilege.³⁷⁵

To analyze this claim of judicial privilege, a court must look to the three balancing factors. The claim certainly involves the constitutionally based judicial privilege. It also may involve the common law “deliberative process” judicial privilege to the extent the investigation was a part of the decision-making process of that service’s chief judge, who used it in determining what action to take against the military trial judge.³⁷⁶ The claim further is “generalized” in so far as it seeks to prevent disclosure of the entire investigation. Finally, the interest of the accused, against which the claim is to be balanced, involves the constitutional right to a fair and impartial trial—a compelling countervailing interest.³⁷⁷

A court must balance the generalized interest in maintaining the confidentiality of an investigation concerning judicial misconduct against the constitutional interests of an accused in having a fair and impartial criminal trial. By denying the accused access to the investigation, and specifically the requested statements, the military judge is impeding the accused’s ability to develop a possible basis for a challenge for cause. Relying on the holdings in *Nixon* and *Hustings II*, the interests of the criminal accused will prevail and the claim of judicial privilege must yield.³⁷⁸ Certainly, if the President’s privilege for maintaining the confidentiality of executive communications must yield to the overriding constitutional interests arising from a criminal trial, a military judge’s interest must yield in a similar setting.³⁷⁹ Likewise, if the material sought is not available from any source other than the judiciary and the judge, the claim of privilege by the judge will have to yield, as it did in *Hastings II*.³⁸⁰

2. Problem 2.—A subordinate military trial judge alleges that his circuit military judge improperly influenced him to sentence certain accused to terms of confinement greater than the

³⁷⁵This problem is based on the facts arising in *Clarke v. Breckenridge*, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). Ultimately, the military judge in *Clarke* released a copy of the investigation, including his two statements—but not including the opinions, recommendations, and the trial report summaries submitted by the investigating officer—to the parties during *voir dire*. *Id.* Record of Trial, at 6-14.

³⁷⁶See *supra* notes 291-93, 302, and accompanying text.

³⁷⁷See *supra* notes 314-16 and accompanying text.

³⁷⁸See *supra* notes 178, 226-31, and accompanying text.

³⁷⁹See *supra* notes 176-78 and accompanying text.

³⁸⁰See *supra* notes 228-31 and accompanying text.

term limitations that likely would appear in their pretrial agreements. In a subsequent trial, the circuit judge refuses to answer any questions from counsel regarding personal conflicts he had with the subordinate judge, including the adverse fitness report he prepared on that judge. The circuit judge also refuses a defense request to call present and former subordinate judges as witnesses, stating the following:

I am simply not going to create a precedent within this circuit whereby witnesses would be called saying whether they liked my performance or whether they interpreted or misinterpreted my comments. I answered the questions [asked so far] on voir dire. The witnesses will not be called. That is my final ruling.³⁸¹

Assume that the testimony of the other military judges and the questions concerning possible adverse retaliatory acts against the complaining subordinate judge would be legally "relevant" to a possible challenge against the circuit judge. This problem highlights the situation in which a military judge effectively has prevented the defense counsel from either establishing a basis for a challenge or from creating a record for review by the appellate courts. Further, even though the judge has not invoked "judicial privilege" expressly, the privilege has been implicated by his denying disclosure of the relevant information.

The interests protected by the claim of judicial privilege under these facts are two-fold. First, the circuit judge has a generalized interest in denying counsel the opportunity to call witnesses to corroborate what the complaining judge has alleged. Second, the circuit judge has a specific interest in avoiding a discussion on the record that details his relationship with, and action taken against, that complaining judge. The competing interest, against which a court must balance the interests of the claim of privilege, is the same as in *Problem I* above—that is, the accused's constitutional right to receive a fair and impartial trial.³⁸²

The type of judicial privilege implied in the ruling of the military judge is the constitutionally based version of the privilege. That an identifiable subordinate judge has made the

³⁸¹This problem is based on the facts arising during the *voir dire* phase of *Wilson v. Ouellette*, No. 913025M (N.M.C.M.R. 9 Dec. 1991), *petition denied*, No. 92-07/MC (C.M.A. 17 Jan. 1992). The circuit military judge persisted in his denial of the defense counsel's request to cover certain matters on *voir dire* or to call subordinate judges as witnesses. *Id.* Record of Trial, at 357-89. The NCMCR upheld the military judge's ruling on the basis of "relevance" in denying a petition for a writ of mandamus. *Id.* slip op. at 4-5.

³⁸²See *supra* text accompanying note 377.

allegation avoids the “anonymous tip” situation in *Carlucci*.³⁸³ If the defense counsel merely desired to call the subordinate judges to find out if the circuit judge ever had made such a remark, but had no credible basis for making this inquiry, he would be engaging in a “fishing expedition.” Under those circumstances, as in *Carlucci*, the judicial privilege almost certainly would prevail.³⁸⁴ As in *Problem 1*, however, the presence of a credible allegation of judicial impropriety, coupled with the compelling interests of a criminal accused in developing a basis for a challenge to vindicate his fair and impartial trial rights, should result in the claim of privilege yielding to the competing interests.³⁸⁵

These two problems highlight only a couple of the possible factual scenarios that can, and do, occur in courts-martial and criminal trials.³⁸⁶ Several common threads emerge from an analysis of factual scenarios involving the invocation of judicial privilege to curtail *voir dire*. The first is that the competing interest always will involve a party’s constitutional right to a fair and impartial trial. That right is assured, in part, through the opportunity—granted by executive order to parties in a court-martial—to subject the military judge to *voir dire*.³⁸⁷ The other is that, so long as the *voir dire* is based on some credible evidence, such that the material sought is “relevant” to a ground for challenge of the military judge, a generalized claim of judicial privilege almost certainly will have to yield to the competing interests of the party seeking disclosure of information under the holdings of *Nixon*, *Hustings II*, and *Carlucci*.³⁸⁸

B. Solution: A Bright-Line Rule

Resolving the conflict between the interests served by a claim of judicial privilege and the interests served by disclosure of the privileged matters is only half the battle. The remaining issue is what to do at trial when a claim of privilege is made. As the analysis above shows, a party in a court-martial seeking access to material covered by a generalized claim of judicial privilege should, in the majority of cases, ultimately prevail. That, however, is little consolation to an accused whom a judge or panel of members ultimately convicts and sentences to confinement—an

³⁸³See *supra* note 262 and accompanying text.

³⁸⁴See *supra* notes 260-62 and accompanying text.

³⁸⁵See *supra* text accompanying notes 378-79.

³⁸⁶See *supra* notes 273-76 and accompanying text.

³⁸⁷See *supra* note 354 and accompanying text.

³⁸⁸See *supra* notes 176-78, 228-31, 260-62, and accompanying text.

accused who then must wait the many months for final resolution of his or her appellate claims by a higher court.

Military judges and parties in courts-martial deserve a readily discernible rule to guide them in situations in which a claim of judicial privilege arises over the challenging of a military judge. That the above scenarios can be remedied by deleting *voir dire* as to the military judge is unacceptable. Such a change in courts-martial procedure needlessly would subject the military justice system to more criticism and the potential for undiscoverable unlawful command influence.³⁸⁹ Further, in as much as some mechanism must be in place to provide a criminal accused with a means of assuring his or her constitutional right to a fair and impartial trial, the courts would have to fashion an alternative to *voir dire* of the military judge to enable the accused to exercise those rights. Additionally, a test would be necessary to determine whether the accused has met the burden of establishing a basis for any challenges made against a military judge.

Implementation of peremptory challenges against military judges also is an unacceptable solution to this issue. Because of the nature of courts-martial and the limited numbers of judges available for any geographical area, a rule permitting the routine opportunity to excuse a military judge in any court-martial would work an undue hardship on the military justice system and prevent the delivery of timely justice to the service members and their commands.³⁹⁰

If the military services do nothing to change the system, then the parties to a court-martial are left with the normal appellate review procedures now in place, augmented by the potential for early resolution of a limited number of claims of

³⁸⁹ See *supra* notes 75, 232-37, and accompanying text.

³⁹⁰ As previously discussed, no civilian jurisdictions routinely permit the *voir dire* of a judge by counsel. See *supra* note 312. Numerous jurisdictions, however, have implemented procedures permitting peremptory challenges of judges in civil and criminal trials. See Alan J. Chaset, *Disqualification of Federal Judges by Peremptory Challenge* (Federal Judicial Center 1981); Larry Berkson & Sally Dorfmann, *Judicial Peremptory Challenges: The Controversy*, *ST. CT. J.*, Summer 1985, at 12, 12 & n.1 (noting that, as of 1985, 16 states permitted challenges of trial judges). Congress also has considered several bills proposing the adoption of a rule that would permit peremptory challenges against federal judges; none of the bills have been passed into law. Berkson & Dorfmann, *supra*, at 12 & n.7. The military services never have permitted peremptory challenges of military judges, and the Code and the *Manual* specifically reject the procedure. See UCMJ art. 41 ("the military judge may not be challenged except for cause"); MCM, *supra* note 42, R.C.M. 902(d)(1) discussion ("There is no peremptory challenge against a military judge."); 1969 MANUAL, *supra* note 47, ¶ 62a ("Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause (Art. 41)."); 1951 MANUAL, *supra* note 64, ¶ 62e ("[peremptory challenges] cannot be used against the law officer").

judicial privilege via extraordinary writ to the appellate courts.³⁹¹ As pointed out earlier, the prejudice to an accused caused by having to wait months or years to be vindicated on appeal is too great. Furthermore, that prejudice is not too speculative given the great weight in favor of the accused's interests prevailing under the current balancing process.³⁹² Additionally, should the invocation of judicial privilege prevent the full development of the underlying facts to support a challenge during the court-martial, an appellate court, months down the road, is ill-suited—even with its fact-finding powers—to resolve the conflict.

The extraordinary writ is also an unacceptable means to dispose of claims of judicial privilege. The facts in *Wilson v. Ouellette* are representative of the dilemma facing an accused.³⁹³ When the military judge cuts short the *voir dire* and challenge process, he or she deprives a party not only of the opportunity to establish a ground for challenge, but also of the opportunity to create a suitable record that will prevail on review by the appellate courts—even a contemporaneous review under an extraordinary writ.

This author proposes a change to Rule for Courts-Martial 902 as the best solution to the dilemma of handling claims of judicial privilege in courts-martial. The author's proposal appears in an appendix at the end of this article. The substance of the proposed change is the adoption of a bright-line rule, which a party and the military judge invoke by the occurrence of two events. First, a military judge must decline to answer a question on *voir dire* or to produce evidence sought by a party that relates to a ground for challenge for cause against the military judge. The basis for the military judge's action must rest upon a claim, either expressed or *de facto*, of judicial privilege. Second, the party seeking the evidence or asking the question must demonstrate to the court, in writing or orally on the record, the "relevance" of the answer or evidence sought. To meet this burden, the party must articulate a reasonable factual basis or allegation that, if true, could give rise to a challenge for cause against the military

³⁹¹See *supra* note 238 and accompanying text (discussing the various levels of appellate review). The Court of Military Appeals and the courts of military review have authority to grant relief under the All Writs Act, 28 U.S.C. § 1651(a) (1988), to ensure the integrity of the judicial process. See, e.g., *Carlucci*, 26 M.J. at 330-36; *United States v. Thomas*, 33 M.J. 768, 770-71 (N.M.C.M.R. 1991). For a review of the evolution of extraordinary writs in the military courts, see *Carlucci*, 26 M.J. at 330-36 (extensive case citations and a discussion of the purposes served by the writs); Gary F. Thorne, *Extraordinary Writs in the Military*, *ARMY LAW.*, Aug. 1977, at 8 (discussing the development of writs in the military courts from the first case to grant a writ, in 1966, through cases in 1977).

³⁹²See *supra* text accompanying note 387-88.

³⁹³See *supra* notes 281-82 and accompanying text.

judge,³⁹⁴ and the party must show that the proposed question or request for evidence is “relevant”—under the liberal definition of that term found in Military Rule of Evidence 401—to resolving the basis or allegation.³⁹⁵

If both of these requirements are met, the bright-line rule applies and the military judge must make one of three choices:

(1) If the matters sought by a party to the court-martial fall within the deliberations privilege of Military Rule of Evidence 509, the military judge must refuse to disclose the evidence (unless one of the three exceptions of Military Rule of Evidence 606(b) are met). In that case, the judge need not recuse himself or herself under the bright-line rule. The scope of Rule 509 is sufficiently narrow—limited to specific deliberations as to guilt or innocence and an appropriate sentence in specific trials—so as to avoid an unconstitutional infringement of a party’s right to a fair and impartial trial. Should disclosure be permissive, because one of the three exceptions to Rule 606(b) exists, then the military judge must make a decision based on the remaining options below.

(2) If the matters sought by a party to the court-martial are covered by the deliberations privilege but

³⁹⁴ Obviously, a party must act in good faith in articulating the reasonable factual basis or allegation. The court, in turn, must accept this factual basis or allegation *as true*. Accordingly, the court would not be permitted to deny the allegation summarily, thereby dismissing the question asked or evidence sought as not being legally relevant. The author specifically adopts this procedure from the requirements in place in the federal courts for alleging the bias or prejudice of judges. See 28 U.S.C. § 144 (1988) (requiring a party to file a sufficient affidavit that sets forth the bias or prejudice of the judge). As to what is a “reasonable factual basis or allegation,” the NCMCMRs exhaustive and comprehensive discussion of that subject in *United States v. Allen*, 31 M.J. 572, 604-07 & n.14 (N.M.C.M.R. 1990), *affd*, 33 M.J. 209 (C.M.A. 1991), should be the guide used by military judges and practitioners. Adoption of this requirement enables the appellate courts properly to judge the relevance of the question asked or evidence sought. Presuming the factual basis or allegation is true, the court fulfills the role of the neutral judge who would rule on the affidavit in the federal courts. See 28 U.S.C. § 144 (1988) (“another judge shall be assigned to hear such proceeding”); *Allen*, 31 M.J. at 606-07 (“Another judge is assigned to hear the motion for disqualification. The judge ruling on the motion must take the facts as provided in the affidavit as true”). For more information concerning bases for disqualification of a judge under 28 U.S.C. § 144, see Romualdo P. Eclavea, Annotation, *Pretrial Comments Indicating Fixed View as to Proper Punishment for Particular Type of Crime as Basis for Judge’s Disqualification Under 28 U.S.C. § 144*, 29 A.L.R. Fed. 588 (1976 & Supp. 1990).

³⁹⁵ MCM, *supra* note 42, MIL. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

not prohibited from disclosure under Rule 509, or if they fall within either the constitutionally based judicial privilege or the federal common law “deliberative process” judicial privilege, then the military judge may either—

(a)—invoke judicial privilege and refuse to disclose the matters sought, followed by immediately recusing himself or herself from the particular case. This option will permit the military judge to preserve the interests served by maintaining the confidential nature of the implicated communications or evidence, at least as it concerns the particular court-martial, while at the same time preserving the rights of the parties to the court-martial in receiving a fair and impartial trial; or

(b)—disclose the matters sought and then make an appropriate ruling on any subsequent challenge for cause, if one is made.

The only way to avoid the bright-line rule’s procedures is for a military appellate court to rule specifically on a claim of judicial privilege as to the particular matters sought to be disclosed. This escape provision would represent a shift in the burden of pursuing extraordinary writs. The burden no longer would fall on the party seeking the information, but on the party—including a military judge—that seeks to protect the information from disclosure.³⁹⁶ Once either the Court of Military Appeals or a court

³⁹⁶As seen in *Carlucci*, the military courts have jurisdiction to hear extraordinary writs *filed by judges*, in addition to the more traditional writs filed by “parties.” See *supra* note 248 and accompanying text. The author rejects as unacceptable the proposition that an independent judicial investigation conducted by a service’s trial judiciary is sufficient to resolve the issue of whether the information covered by the privilege must be disclosed. The trial judiciaries—in actuality and in appearance—are not in a position to perform the actual *impartial* balancing of interests required for the qualified judicial privilege. That is a role more appropriately performed by the courts of military review and the Court of Military Appeals. See *Clarke*, No. 893618C, slip op. at 3 n.2 (investigation by trial judiciary in that case held not to constitute an “independent judicial inquiry board or commission”). Similarly, the adoption of the proposed changes to R.C.M. 109, which provide for the investigation of judges using a procedure similar to that employed by the federal courts under 28 U.S.C. § 372, would not be enough to transform the trial judiciaries into proper balancers of the competing interests. See Memorandum from Samuel T. Brick, Jr., Director, Legislative Reference Service, Office of General Counsel, Dep’t of Defense, to multiple addressees within the Dep’t of Defense (4 Oct. 1991) (on file with author) (containing proposed revisions to the *Manual for Courts-Martial* being staffed for comment). Actually, as it was in *Hustings II*, one of the investigating bodies from the trial judiciaries may be the party against whom a claim of judicial privilege is raised. See *supra* note 209 and accompanying text.

of military review has engaged in the balancing of interests and determined that a specific invocation of judicial privilege need not yield, then the matters covered by that ruling need not be disclosed *and* the military judge need not recuse himself or herself from a court-martial in which the privilege is invoked, at least as to those matters. This escape clause from the general bright-line rule is limited to only those matters *previously* determined to be privileged by the appellate courts. As to any additional matters sought, a military judge must apply the general rule.

This three-option, bright-line rule accommodates both the interests of the judiciary in maintaining the confidentiality of privileged matters and the interests of the parties to a court-martial in receiving a fair and impartial trial. To the extent the rule favors the interests of the parties to the trial and potentially burdens the judiciary through its recusal mechanism, the rule is in keeping with the Constitution and the overall structure of the court systems in this country and in the military.

The proposed bright-line rule is not without its faults. The potential exists for one defense counsel after another to ask the same question on *voir dire* or to request disclosure of the same privileged evidence, thereby placing a military judge in a position of having to repeatedly elect one of the options under the rule. Under such circumstances, the military judge arguably should have the opportunity to lay the issue to rest. The trial judge has that facility through the escape clause, which mandates that an appellate court make a specific ruling as to the claim of privilege for the particular matters sought. The escape clause, however, would be the only method of avoiding the bright-line rule.

The bright-line rule also could cause military judges to avoid explicit reference to the term, "judicial privilege," when denying a party access to evidence or in refusing to answer a question. Similarly, military judges may seek to avoid the coverage of the rule by claiming the matters sought are not "relevant." Whether or not the judge employs the words, "judicial privilege," however, normally would be unimportant. Notwithstanding the terms used, if the effect of the ruling or claim would be to prevent disclosure of relevant matters within either the judge's or the judiciary's possession—that is, an effectively *de facto* claim of the privilege—then a "claim of judicial privilege" will have been asserted. Further, the threshold requirement of relevance always will need to be met for any evidence sought or *voir dire* question asked.³⁹⁷ No rule can be devised to delineate more clearly the situations

³⁹⁷ See MCM, *supra* note 42, MIL. R. EVID. 401, 402.

when a matter is relevant than those in existence now. The proposed bright-line rule, therefore, does not attempt to define “relevance” further or to invade the sound exercise of discretion by the military judge.

The proposed bright-line rule would not end the use of extraordinary writs to resolve claims of judicial privilege. Cases well may arise in which either the military judge abuses his or her discretion in ruling on relevance or in which a counsel goes on an unwarranted “fishing expedition.” The rule, however, would provide a clearer procedure for disposing of these claims while seeking to accommodate—within the bounds dictated by the Constitution—the interests of both the judiciary and the parties to a court-martial.

VI. Conclusion

Through an examination of the historical development of privileges, and by analogy to both legislative and executive privileges, this article has examined the development of judicial privilege.³⁹⁸ The following three variations of judicial privilege available to the judiciary in the military justice system currently exist: (1) the constitutionally based judicial privilege, as recognized by *Hustings II* and *Carlucci*;³⁹⁹ (2) the federal common law “deliberative process” judicial privilege, arising by analogy from the same privilege held by the executive branch and based upon its constitutional underpinnings;⁴⁰⁰ and (3) the deliberations privilege that is found in Military Rule of Evidence 509.401

An invocation of judicial privilege requires the court to balance the interest to be protected by maintaining the confidentiality of the matters sought by a party against the interests served by disclosure of the communications or evidence.⁴⁰² When a claim of judicial privilege prevents or inhibits the ability of a party during voir dire to meet its burden of establishing a ground for challenge of the military judge, the court must factor into its balancing test the interests of that party in receiving a fair and impartial trial.⁴⁰³ The Fifth and Sixth Amendments to the United States Constitution guarantee the right to a fair and impartial

³⁹⁸ See *supra* notes 18-308 and accompanying text.

³⁹⁹ See *supra* notes 205-99 and accompanying text.

⁴⁰⁰ See *supra* notes 131-48, 172, 180, 300-04, and accompanying text.

⁴⁰¹ See *supra* notes 70-86, 305-08, and accompanying text.

⁴⁰² See *supra* notes 146, 225-31, and accompanying text.

⁴⁰³ See *supra* notes 146, 225, 358-59, and accompanying text.

trial. The interests served by *voir dire*, therefore, are compelling and usually will prevail over the interests served by the claim of judicial privilege.⁴⁰⁴

In recognition of the compelling interests served by *voir dire*, and in an attempt to provide both the military judge and parties to a court-martial with a clear rule for resolving claims of judicial privilege, this article has proposed the adoption of a bright-line rule.⁴⁰⁵ The proposed rule is the best alternative to the inadequate procedures currently in effect, and it will best serve both the interests of the judiciary in maintaining confidentiality and the interests of a party to a court-martial in enjoying the right to a fair and impartial trial.

APPENDIX

Proposed Changes to R.C.M. 902

The author submits the following proposed changes to Rule for Courts-Martial 902 of the *Manual for Courts-Martial*. The changes incorporate the author's proposed bright-line rule and other implementing modifications of the Rule as discussed in Section V of this article. An asterick preceding a paragraph or subparagraph indicates a change or addition to the present text of Rule 902:

Rule 902. Disqualification of military judge

(a) *In general*. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) *Specific grounds*. A military judge shall also disqualify himself or herself in the following circumstances:

...

(c) *Definitions*. For the purposes of this rule the following words or phrases shall have the meaning indicated—

....

* (4) "Judicial privilege" includes matters covered by confidential communications between judges and their staffs,

⁴⁰⁴ See *supra* text accompanying notes 358-59, 375-88.

⁴⁰⁵ See *supra* notes 389-97 and accompanying text.

deliberations of judges and courts, and other matters in the possession or control of a military judge or a military trial judiciary, all as determined by M.R.E. 509, and any constitutional or common-law judicial privileges made applicable to trials by courts-martial under M.R.E. 501(a). A military judge “invokes” judicial privilege:

*(A) When the military judge expressly claims the privilege;
or

*(B) When the military judge’s words or conduct amount to a *de facto* claim of the privilege under the totality of the circumstances.

(d) *Procedure.*

(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

*(A) When a military judge invokes judicial privilege to avoid answering a question or producing evidence sought under this rule, the following procedures apply. Either before or following the invocation of judicial privilege, the party asking the question or requesting the evidence must state for the record, orally or in writing, a reasonable factual basis or allegation that, if true, could give rise to a challenge for cause under subsections (a) or (b) of this rule. Once the party meets this requirement and proffers the relevance of the matters sought, the military judge shall:

*(i) If the claim of privilege is based in whole or part on the protections of M.R.E. 509 and disclosure is not permissive under M.R.E. 606(b), decline to answer the question or produce the evidence. The military judge need not recuse himself or herself in this situation.

*(ii) If the claim of privilege rests upon any other basis, or if disclosure of matters protected by M.R.E. 509 is permissive under M.R.E. 606(b), either:

*(a) Decline to answer the question or produce the evidence, thereby maintaining the confidentiality of the matters sought, in which case the military judge shall recuse himself or herself; or

*(b) Answer the question or produce, or order produced, the evidence, in which case the military judge need not recuse himself or herself solely based upon this election.

*(B) None of the procedures contained in paragraph (A) of this subsection shall apply when an appellate court previously has adjudged the matters sought by a party to be privileged and protected from disclosure in a military proceeding.

DAVIS V. MICHIGAN DEPARTMENT OF TREASURY: THE RETROACTIVE MORASS IN REFUNDS OF STATE TAXES

MAJOR LINDA K. WEBSTER*

“It was as true,” said Mr. Barkas, “... as taxes is. And nothing’s truer than them.”

Charles Dickens, *David Copperfield*

I. Introduction

In an early opinion by the United States Supreme Court, Chief Justice John Marshall wrote, “The power to tax involves the power to destroy.”¹ That opinion, *McCulloch v. Maryland*, is the foundation of the doctrine of intergovernmental tax immunity. The doctrine provides some restraints upon actions by the federal and local governments to impose taxes that affect each other.² Despite vigorous early litigation involving the doctrine,³ intergovernmental tax immunity appeared to be on the decline by the time of World War II.

The Court rejected the reciprocal nature of the doctrine in *Helvering v. Gerhardt*⁴ and began using the test of whether a tax was imposed even-handedly in a nondiscriminatory fashion.⁵ The Court recently applied the nondiscrimination prong of the intergovernmental tax immunity doctrine in *Davis v. Michigan Department of Treasury*.⁶ The Court reviewed the taxpayer’s argument that the Michigan state income tax violated the doctrine because the tax discriminated against federal retirees.

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¹*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

²For a general discussion of the doctrine, see David M. Richardson, *Federal Income Taxation of States*, 19 *STETSON L. REV.* 411 (1990).

³See, e.g., *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870); *Pollack v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

⁴304 U.S. 405 (1938).

⁵See, e.g., *Graves v. New York ex. rel. O’Keefe*, 306 U.S. 466 (1939); *South Carolina v. Baker*, 485 U.S. 505 (1988).

⁶489 U.S. 803 (1989).

The taxpayer also asserted that a federal statute⁷ authorized states to tax a federal employee's pay only if the taxation did not discriminate against the employee because of the source of the pay.

This article will examine the Supreme Court's decision in *Davis* and the impact of the decision throughout states that had taxed federal retirees differently than state and local government retirees. It will review the tests for the retroactive application of a United States Supreme Court decision. Finally, it will advance a theory for the resolution of *Davis*-related litigation in light of recent Court decisions regarding retroactivity and differential taxation of federal retirees and state and local government retirees.

The author's position is that *Davis v. Michigan Department of Treasury* applies retroactively based upon the United States Supreme Court's decisions in *Chevron Oil Co. v. Huson*,⁸ *American Trucking Associations, Inc. v. Smith*,⁹ *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,¹⁰ and *James B. Beam Distilling Co. v. Georgia*.¹¹ The question that is left open after these decisions is whether state procedural grounds—that is, a state's refund statute—will operate to prevent plaintiffs in *Davis*-related cases from obtaining refunds after they successfully have challenged discriminatory state taxing statutes.

11. The Supreme Court Speaks: *Davis v. Michigan Department of Treasury*

In *Davis v. Michigan Department of Treasury*,¹² the United States Supreme Court examined a Michigan statute that taxed the retirement benefits of federal government retirees differently

⁷ 4 U.S.C. § 111 (1988) (also known as the Public Salary Tax Act).

⁸ 404 U.S. 97 (1971).

⁹ 496 U.S. 167 (1990).

¹⁰ 496 U.S. 18 (1990).

¹¹ 111 S. Ct. 2439 (1991).

¹² 489 U.S. 803 (1989), *remanded*, 446 N.W.2d 531 (1989). *See generally*, Richardson, *supra* note 2, at 424-446; Robert J. Mueller, Note, *Rejection of the "Similarly Situated Taxpayer" Rationale: Davis v. Michigan Department of Treasury*, 43 TAX LAW. 431 (1990); Timothy B. Sherman, Note, *Davis v. Michigan and the Doctrine of Retroactivity: States' Refund Liability for Taxation of Federal Pension Income*, 4 B.Y.U. J. PUB. L. 507 (1990); Martin A. Weeks, Note, *Taxation: Remedies for Discriminatory State Taxation of Federal Pensioners after Davis v. Michigan Department of Treasury*, 43 OKLA. L. REV. 565 (1990).

than the retirement benefits of state government retirees.¹³ The Court held that the Michigan tax statute violated the principles of the intergovernmental tax immunity doctrine and the Public Salary Tax Act because of the discriminatory treatment of federal retirees based upon the source of their retirement incomes. The dissent disagreed with the majority conclusion and instead reasoned that when the tax burden under a state taxing scheme is shared equally by federal employees and most other state residents, no discrimination arises against the federal employees.

A. Facts and History

Appellant Paul S. Davis was a Michigan resident and a former federal employee. He received retirement benefits based on the Civil Service Retirement Act.¹⁴ For each year from 1979 through 1984, Davis paid Michigan state income tax on his federal retirement benefits as required by Michigan law.¹⁵ The statute exempted the retirement benefits of retired state employees while taxing the retirement benefits of federal employees.

Davis originally petitioned the state for a refund of the taxes he paid on his retirement benefits from 1979 through 1983. The state denied the refund, and Davis filed suit in the Michigan Court of Claims. Davis added the 1984 tax year's payments to his complaint. Davis alleged that Michigan's inconsistent tax treatment of retirement benefits discriminated against federal employees in violation of the Public Salary Tax Act, which preserved federal employees' immunities from discriminatory state taxation.¹⁶

¹³MICH. COMP. LAWS *A* 206.30(1)(f) (West Supp. 1988). In pertinent part, the statute provided:

(1) Taxable income ... means adjusted gross income as defined in the internal revenue code subject to the following adjustments:

....

(f) Deduct to the extent included in adjusted *gross* income:

(i) Retirement or pension benefits received from a public retirement system of or created by an act of this state or a political subdivision of this state.

(iv) Retirement or pension benefits from any other retirement or pension system as follows:

(A) For a single return, the sum of not more than \$7,500.00.

(B) For a joint return, the sum of not more than \$10,000.00.

¹⁴5 U.S.C. § 8331 (1988).

¹⁵See *supra* note 13.

¹⁶4 U.S.C. § 111 (1988), which provides:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States ... by a duly constituted taxing authority having jurisdiction, if the

The Michigan Court of Claims denied relief,¹⁷ and the Michigan Court of Appeals affirmed.¹⁸ The Court of Appeals determined that Davis was an “annuitant” under federal law instead of an “employee” within the meaning of the Public Salary Tax Act because Davis was a “former employee who meets all the requirements to receive an annuity.”¹⁹ Therefore, section 111 of the Public Salary Tax Act did not apply to Davis. The Court of Appeals also held that the doctrine of intergovernmental tax immunity did not render the Michigan taxing scheme unconstitutional because the discrimination was justified under a rational-basis test.²⁰ In this case, the state’s interest was to attract and retain qualified employees, which was a “legitimate state objective which is rationally achieved by a retirement plan offering economic inducements.”²¹

The Michigan Supreme Court denied Davis’ application for leave to appeal,²² and the United States Supreme Court noted probable jurisdiction.²³

B. The Majority Opinion

The Supreme Court held that the Michigan Income Tax Act violated the principles of intergovernmental tax immunity and section 111 of the Public Salary Tax Act by favoring state and local government retirees over federal government retirees. In arriving at this conclusion, the Court examined whether the statute applied to federal retirees; whether the statute was coextensive with the doctrine of intergovernmental tax immunity; and whether the provisions of the Michigan Income Tax Act violated the principles of intergovernmental tax immunity.

Justice Kennedy wrote the opinion for the majority. The State argued that section 111 applied only to current employees of the federal government and not to retirees. Justice Kennedy rejected this argument, stating that the plain language of section 111 applies to retirees also. Acknowledging that civil service retirement pay is based and computed upon an individual’s salary and years of service, Justice Kennedy concluded that civil service

taxation does not discriminate against the officer or employee because of the source of the pay or compensation.”

¹⁷Mich. Ct. Cl. No. 84-9451 (Oct. 30, 1985).

¹⁸Davis v. Department of Treasury, 408 N.W.2d 433 (Mich. App. 1987).

¹⁹*Id.* at 435 (citing 5 U.S.C. § 8331(9) (1988)).

²⁰*Id.* at 436.

²¹*Id.*

²²412 N.W.2d 220 (1987).

²³Davis v. Michigan Dep’t of Treasury, 487 U.S. 1217 (1988).

retirement benefits are deferred compensation representing previous years of service to the federal government. Therefore, because these benefits accrue to an employee based on his or her service to the federal government, they are compensation for services rendered as an officer or employee of the United States as required by section 111.²⁴

Justice Kennedy called the State's argument that the nondiscrimination clause applied only to current federal employees "hypertechnical" and "construed in a vacuum."²⁵ Relying on the doctrine of statutory construction, Justice Kennedy stated that the reference to "the pay or compensation" in the last clause of section 111 must mean the same "pay or compensation" defined in the first clause of the section. Arguing that nothing in the statute or its legislative history supported the State's interpretation of section 111, Justice Kennedy stated that section 111 "waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of the compensation."²⁶

Justice Kennedy also addressed the issue of intergovernmental tax immunity. Intergovernmental tax immunity is a doctrine that originated in *McCulloch v. Maryland*.²⁷ *McCulloch* held that the State of Maryland could not impose a discriminatory tax against the Bank of the United States because the Bank was an instrumentality of the United States government. Based on a broad reading of *McCulloch*, the Supreme Court applied a general rule that prevented most taxation by one sovereign of another sovereign's employees.²⁸ As the years passed, however, the Supreme Court rejected such an expansive reading of *McCulloch*. In cases such as *Helvering v. Gerhardt*²⁹ and *Graves v. New York ex. rel. O'Keefe*,³⁰ the Supreme Court overruled the line of cases that began with *Collector v. Day*³¹ and used the doctrine of

²⁴*Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 (1989).

²⁵*Id.* at 809.

²⁶*Id.* at 810.

²⁷17 U.S. (4 Wheat.) 316 (1819).

²⁸*See, e.g., Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (Court held a federal tax on a state judge's salary could not be imposed); *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) (Court held a state tax on a federal officer invalid), *overturned in part by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

²⁹304 U.S. 405 (1938).

³⁰306 U.S. 466 (1939).

³¹78 U.S. (11 Wall.) 113 (1871).

intergovernmental tax immunity to bar taxes imposed directly on one sovereign by the other, and to prohibit taxes that discriminated against a sovereign or those who dealt with it.

Section 111 is part of the Public Salary Tax Act of 1939, which was enacted after the decision in *Gerhardt*. Congress, however, passed the Act before the Supreme Court announced its decision in *Graves*. Accordingly, during the legislative process, the law was unclear as to whether the doctrine of intergovernmental tax immunity prohibited state taxation of federal employees. Because Congress did not wish to protect federal employees from state taxation while requiring state employees to pay federal income taxes, section 4 of the Act (now section 111) waived whatever immunity would have protected federal employees from nondiscriminatory state taxes. Nevertheless, by the time the Act actually became law, the Supreme Court already had announced its decision in *Graves*. The *Graves* Court found that “[t]he burden on government of a non-discriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned.”³² Accordingly, federal employees effectively had lost their immunities from nondiscriminatory state taxes even before the enactment of Public Salary Tax Act of 1939 went into effect.

The issue of intergovernmental tax immunity, however, did not completely vanish with the *Graves* decision and the Public Salary Tax Act. Section 111 contains an exception clause for state taxes that discriminate against federal employees because of the source of their salaries or compensations.³³ After considering the history of the intergovernmental tax immunity doctrine and the statute, Justice Kennedy concluded that the “retention of immunity in section 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity.”³⁴

After determining that the doctrine applied in this case, Justice Kennedy examined the State’s arguments favoring the Michigan taxing statute. The State argued that the purpose of the doctrine was to protect governments, not private individuals, and as long as the federal government could perform its governmental functions, the doctrine had not been violated. In rejecting this argument, Justice Kennedy wrote that private individuals can avail themselves of the protection of the constitutional doctrine when they are subjected to discriminatory taxation because of

³²*Graves*, 306 U.S. at 485.

³³See *supra* note 12.

³⁴*Davis*, 489 U.S. at 813.

their dealings with a sovereign, citing several Supreme Court cases as precedent for this proposition.³⁵

After this rather summary treatment of the State's first argument, Justice Kennedy then turned to the State's argument that the different tax treatment of federal retirees was justified by the following two factors: (1) its interest in hiring and retaining qualified employees; and (2) the difference in the value of federal retirement benefits as opposed to state retirement benefits. Citing *Phillips Chemical Co. v. Dumas Independent School District*,³⁶ Justice Kennedy stated that imposing a heavier tax burden on a taxpayer who deals with one sovereign than is imposed on a second taxpayer who deals with another must be justified by significant differences between the two classes.³⁷ He did not accept the State's "rational reason" for discriminating between state and federal employees as proof that significant differences between the two classes existed. In rejecting the idea that the financial difference between state and federal benefits justified the blanket exemption in the Michigan statute, the majority noted, "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees."³⁸

After determining that the Michigan Income Tax Act violated the doctrine of intergovernmental tax immunity by favoring state and local government employees over retired federal employees, the Supreme Court remanded the case to the Michigan Court of Appeals to determine how to comply with the invalidation of the discriminatory Michigan taxing scheme.³⁹ Michigan already had conceded that a refund was due to Davis if

³⁵*Id.* at 814-815. *See, e.g.*, *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).

³⁶361 U.S. 376 (1960).

³⁷*Davis*, 489 U.S. at 815-16 (citing *Phillips*, 361 U.S. at 383).

³⁸*Id.* at 817.

³⁹*Davis v. Department of Treasury*, 446 N.W.2d 531 (1989). On remand, the Court of Appeals held that the appropriate remedy for the violation of intergovernmental tax immunity as regards prospective taxation was to extend the Michigan tax statute's more favorable treatment of the retirement pay of state and local employees' (the "favored class") and the pension benefits to federal employees (the "disfavored class"). The Court of Appeals chose to extend the benefit to the disfavored class, rather than removing the benefit enjoyed by the favored class, and it invited the Michigan legislature to amend the statute in conformance with the United States Supreme Court's decision in *Davis* if the legislature disagreed with the resolution of the remand. The Michigan legislature eventually codified these results. *See* MICH. COMP. LAWS ANN. § 7.557 (130)(1)(e) and (f) (Callaghan Supp. 1990).

he prevailed in his case.⁴⁰ Because of this, the Supreme Court did not reach the issue of whether other federal retirees should receive tax refunds in states with statutes affected by the decision in *Davis*.

C. *The Dissenting Opinion*

The dissent disagreed with the majority's conclusion that the intergovernmental tax immunity doctrine required the invalidation of the Michigan Income Tax Act. Justice Stevens, the lone dissenter, argued that Michigan's tax scheme did not discriminate unconstitutionally against federal retirees.

Justice Stevens argued in the dissenting opinion that states can tax federal employees or private parties who do business with the United States as long as the tax does not discriminate against the United States.⁴¹ According to his view of the intergovernmental tax immunity doctrine, previous Court decisions did not support, nor did they compel, the majority's holding. Justice Stevens explained that the nondiscriminatory rule of the doctrine recognizes that the federal government has no part in the policy decisions made by the states and is protected from bearing special burdens in the state taxation area by the Supremacy Clause of the United States Constitution.⁴²

Justice Stevens further explained, "When the tax burden is shared equally by federal agents and the vast majority of a State's citizens, however, the nondiscrimination principle is not applicable and constitutional protection is not necessary."⁴³ In this case, according to Justice Stevens, the tax was not discriminatory because it treated federal retirees the same way it treated retirees from any other state besides Michigan and drew no distinction between the federal employees or retirees and the vast majority of voters in the state. Justice Stevens concluded that "[the] intergovernmental immunity doctrine simply does not constitute a most favored nation provision requiring the States to accord federal employees and federal contractors the greatest tax benefits that they give any other group subject to their jurisdiction."⁴⁴

⁴⁰*Davis*, 489 U.S. at 817.

⁴¹*Id.* at 818 (Stevens, J., dissenting) (citing *South Carolina v. Baker*, 485 U.S. 505 (1988); *United States v. County of Fresno*, 429 U.S. 452 (1977)).

⁴²*Id.* at 819 (Stevens, J., dissenting).

⁴³*Id.*

⁴⁴*Id.* at 823 (Stevens, J., dissenting).

Justice Stevens also addressed the position that the *Davis* holding was a logical outgrowth of the Supreme Court's decisions in *Phillips Chemical Co. v. Dumas Independent School District*⁴⁵ and *Memphis Bank & Trust Co. v. Garner*.⁴⁶ These cases held that the state taxes at issue violated the intergovernmental tax immunity doctrine.

In *Phillips Chemical*, the controversy was over a tax that applied only to lessees of federal property. The Supreme Court struck down the Texas statute, which taxed these lessees at a higher rate than lessees of state property, while lessees of privately owned property paid no tax at all.⁴⁷ Justice Stevens stated that because the tax at issue in *Phillips Chemical* applied only to public lands, the *Phillips Chemical* holding would have applied in the instant case if the Michigan statute applied only to public employees.⁴⁸

In *Memphis Bank & Trust*, the controversy focused on a tax on the net earnings of banks doing business in the state when "net earnings" included the interest on obligations of the United States and of other states besides Tennessee.⁴⁹ In that case, the tax not only discriminated against the federal members of the disfavored class, but also against all other members of the disfavored class, none of whom were represented in the Tennessee legislature. By discriminating against an entire class of nonresidents, including federal instrumentalities, the political check present in state taxing schemes that withstood judicial scrutiny did not exist.⁵⁰ In *Davis*, however, the Michigan legislature represented all members of the class taxed under the Michigan statute because the members were Michigan residents and could voice their concerns through the political process.

Justice Stevens found that the Michigan statute did not violate the intergovernmental tax immunity doctrine because it did not unduly burden federal retirees. His analysis of the nondiscrimination rule concentrated more on the effects of the taxation—such as how the federal retirees were treated in comparison to other groups—rather than on the identity of the group receiving different treatment—such as whether state employees received a better tax break than federal employees.

⁴⁵ 361 U.S. 376 (1960).

⁴⁶ 459 U.S. 392 (1983).

⁴⁷ 361 U.S. at 381-87.

⁴⁸ *Davis*, 489 U.S. at 825 (Stevens, J., dissenting).

⁴⁹ 459 U.S. 392, 393-94 (1983).

⁵⁰ *Id.* at 827 (Stevens, J., dissenting) (citing *United States v. County of Fresno*, 429 U.S. 452 (1977); *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958)).

D. The Unanswered Question of Retroactivity

As previously noted, the Supreme Court left open the question of whether other federal retirees may receive refunds in states that have tax statutes with provisions similar to those found in the Michigan statute. If the Davis decision is to be applied only to the parties in the case and to those whose actions accrued after the decision, the decision would be applied prospectively and federal employees would receive refunds only for taxes paid after the Court announced its decision in Davis. If the Davis decision also were applied retroactively, federal employees would be entitled to refunds for taxes paid before the Court announced Davis, thereby requiring state treasuries and budget offices to account for monies paid over numerous years.

III. The Doctrine of Retroactivity

The Supreme Court in Davis did not clearly address the retroactive effect, or lack thereof, of its decision. Therefore, state courts facing Davis-related litigation have had to determine whether to apply Davis prospectively or retroactively. Judicial decisions usually operate retroactively.⁵¹ The United States Supreme Court, however, has recognized the doctrine of prospective application, or nonretroactivity.⁵² To determine whether Davis should be applied retroactively, the courts generally rely on the three-pronged test announced by the United States Supreme Court in *Chevron Oil Co. v. Huson*.⁵³ Although this test applies directly to federal courts, many state courts have adopted the Chevron Oil test for use in resolving issues of state law.⁵⁴

A. The Chevron Analysis

The Chevron Oil test represents a synthesis of principles that courts previously had used in determining whether to apply a new rule of law prospectively. The first prong of the test

⁵¹See generally *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

⁵²See, e.g., *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

⁵³404 U.S. 97 (1971).

⁵⁴See, e.g., *National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash.), cert. denied, 486 U.S. 1040 (1988); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978); see also *American Truckers Ass'ns v. Smith*, 496 U.S. 167 (1990) (holding that the determination of whether a constitutional decision of the Supreme Court is retroactive is a matter of federal law and that the *Chevron Oil* test is what the courts must use to determine retroactivity).

demands that the “decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.⁵⁵ The second prong of the test requires the Court to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.”⁵⁶ The third prong of the test obligates the Court to weigh “the inequity imposed by retroactive application.”⁵⁷

The first prong of the test requires that a case of first impression establish a new principle of law if the result was not clearly foreshadowed.⁵⁸ In applying this prong to taxing schemes after the Court announced *Davis*, two different positions emerge. Prior to *Davis*, Michigan was not alone in granting special tax exemptions to state and local government employees that were not granted to federal employees.⁵⁹ *Davis* arguably was a case of

⁵⁵ *Chevron Oil*, 404 U.S. at 106 (citations omitted).

⁵⁶ *Id.* at 106-07 (citing Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

⁵⁷ *Id.* at 107 (citing Cipriano v. City of Houma, 395 U.S. 701 (1969)).

⁵⁸ *Id.* at 106.

⁵⁹ *See, e.g.*, ALA. CODE §§ 40-18-19(a)(1) & (2), 40-18-20 (1985) (Alabama teachers' and state employees' retirement compensations were totally exempt from taxation, while military retirement only received a limited exemption); ARIZ. REV. STAT. ANN. § 43-1022 (Supp. 1988) (Arizona state retirement systems benefits totally exempt from taxation; U.S. Civil Service retirement income exempt only up to \$2500; other federal retirement programs and military retirement pay not exempt in any amount); ARK. CODE ANN. § 26-51-307 (Michie 1987) (retirement benefits totally exempt from taxation if received from Arkansas state government, teachers, police, or highway employees retirement system; other retirement income exempt only up to \$6000); COLO. REV. STAT. §§ 39-22-104(4)(f), (g) (Supp. 1988) (Colorado state retirement compensation, private retirement income, and federal nonmilitary retirement pay for retirees under 55 years of age exempt up to \$20,000; federal military retirement for retirees under 55 years of age exempt up to \$2000, but retirees 55 years of age and older exempt up to \$20,000); GA. CODE ANN. § 48-7-27(a)(4)(A) (Michie Supp. 1988) (retirement income from Georgia employees' systems totally exempt from taxation); IOWA CODE ANN. §§ 97A.12 (West 1984), 411.13 (West 1976) (retirement income from Iowa public safety officers' system, policemen's system, and firemen's system totally exempt from taxation); KAN. STAT. ANN. § 12-5005(e) (1991) (exemption for retirement benefits paid to police officers and firefighters under municipal retirement plans); *id.* §§ 13-14a10, 14-10a10 (1982); KAN. STAT. ANN. § 20-2618 (Supp. 1991) (exemption for retirement benefits paid to state judges); KAN. STAT. ANN. § 72-1768a (1985) (exemption for retirement paid to school employees); KAN. STAT. ANN. § 74-4923(b) (Supp. 1990) (exemption for retirement paid to retirees of the Kansas Public Employees Retirement System and Kansas Police and Firemen's Retirement System); *id.* § 79-32,117(c)(vii) (exemption for annuities under the federal civil service retirement system); KAN. STAT. ANN. § 79-32,117(c)(viii) (Supp. 1991) (exemption for amounts received by retired railroad employees as a supplemental annuity under the Railroad Retirement Act of 1974); KY. REV. STAT. ANN. § 141.021 (Michie/Bobbs Merrill 1982) (federal military retirement exempt from taxation for retirees 50 years of age or older; federal retirement annuities exempt from taxation subject to certain limitations for retirees 50 years of age and older);

first impression on the issue of nondiscriminatory taxation of federal retirees because of the existence of these statutes. Therefore, because state provisions predated *Davis* and the courts

LA. REV. STAT. ANN. §§ 42:545, 47:44.1 (West Supp. 1989) (retirement benefits paid under Louisiana employee retirement system totally exempt from taxation; other retirement benefits exempt up to \$6000 for retirees 65 years of age or older); MD. TAX-GEN. CODE ANN. § 10-207(o) (Michie 1988) (length of service award payments for fire, rescue, or ambulance personnel funded by any county or municipal corporation of Maryland exempt from taxation); MINN. STAT. § 290.08(26) (1986) (retirees 65 years of age or older with incomes less than \$28,000 can exclude up to \$11,000 from taxation; if retiree were younger than 65 years of age, retirement income from state or local government for firefighters, law enforcement personnel, or corrections personnel exempt from taxation); MISS. CODE ANN. § 21-29-307 (Law. Coop. Supp. 1989) (retirement benefits under Mississippi General Municipal Employees' Retirement system exempt from taxation); MO. REV. STAT. § 70.735 (1986) (exemption for pensions of officers and employees of political subdivisions); *id.* §§ 86.190, 86.353, 86.493, 87.365 (exemption for pensions of police and firemen); *id.* § 104.250 (exemption for pensions of former employees of the Missouri Highway Patrol and Department of Highways and Transportation); *id.* § 104.540 (exemption for pensions of former elected state officials and state merit system employees); *id.* § 169.587 (exemption for pensions of former teachers and school employees); MONT. CODE ANN. § 15-30-111(2)(c) (1987) (total exemption for all retirement benefits paid by Montana; exemption up to \$3600 for retirement benefits paid by other employers, including the federal government); N.M. STAT. ANN. § 10-11-135 (Michie 1978) (retirement benefits under the Public Employees Retirement Act exempt from taxation); N.M. STAT. ANN. § (Michie Repl. Pam. 1989) (retirement benefits under the Educational Retirement Act exempt from taxation); N.Y. TAX LAW § 612(c)(3) (McKinney 1987) (retirement of New York officers and employees exempt from taxation); N.C. GEN. STAT. § 135-9 (Supp. 1985) (retirement benefits paid under North Carolina teachers retirement system exempt from taxation); N.C. GEN. STAT. §§ 105-141(b)(13), (14) (1985) (retirement benefits paid under North Carolina fire or law enforcement retirement system totally exempt from taxation; retirement benefits paid to federal retirees under a contributory plan exempt up to \$4000); OKLA. STAT. tit. 68, § 2358 (1988) (retirement benefits paid under certain Oklahoma retirement systems exempt from taxation; retirement benefits paid from federal civil service exempt up to \$4000); OR. REV. STAT. §§ 316.680(1)(c), (d) (1987) (Oregon government retirement benefits exempt from taxation; federal retirement benefits exempt only up to \$5000); R.I. GEN. LAWS §§ 36-10-32, 45-21-45 (1980) (retirement benefits for state and municipal employees exempt from taxation); S.C. CODE ANN. §§ 12-7-435(a), (b), (d), (e) (Law. Coop. Supp. 1988) (retirement benefits paid under federal civil service or military retirement exempt up to \$3000; retirement benefits paid under South Carolina Retirement Systems and a South Carolina municipality or county group retirement plan for policemen and firemen totally exempt); UTAH CODE ANN. § 49-1-608 (1989) (retirement benefits paid under a system administered by the retirement office exempt from taxation); VA. CODE § 58.1-322(C)(3) (Supp. 1988) (pensions or retirement incomes to officers or employees of the commonwealth, its subdivisions, and its agencies exempt from taxation); W.VA. CODE §§ 11-21-12(c)(5) (6) (Michie Supp. 1988) (retirement benefits paid under the public employees retirement system, teachers retirement system, and military retirement system exempt up to \$2000; retirement benefits paid under a police; firemen; department of public safety; and death, disability, and retirement funds exempt from taxation); WIS. STAT. § 71.03(2)(d) (West Supp. 1988) (retirement payments received from the employees' retirement system of Milwaukee, Milwaukee court employees' retirement system, sheriffs annuity and benefit fund of Milwaukee County, police officer's annuity and benefit fund of Milwaukee, firefighter's annuity and benefit fund of Milwaukee, the public employee trust fund, and the Wisconsin state teachers' retirement system exempt from taxation).

had not examined the specific issue of nondiscriminatory taxation of federal retirees before *Davis*, *Davis* apparently meets the first prong of the test.

On the other hand, one could argue that the doctrine of intergovernmental tax immunity had its origins in *McCulloch* in 1819.⁶⁰ In the more recent cases of *Phillips Chemical Co. v. Dumas Independent School District*⁶¹ and *Memphis Bank & Trust Co. v. Garner*,⁶² the Supreme Court struck down state statutes which it found discriminated against the United States. The taxation schemes in *Phillips Chemical* and *Memphis Bank & Trust* gave the state governments an advantage over the federal government in raising money. By analogy, the tax at issue in *Davis* raised money for the state by taxing federal retirees at a higher rate than the rate for state retirees. Because the state had the doctrine of intergovernmental tax immunity and its history available for examination, the states were on notice that taxing schemes, such as the one in *Davis*, were questionable. Therefore, the decision in *Davis* was clearly foreshadowed.⁶³

The second prong of the test requires a court to examine the prior history, purpose, and effect of the new rule of law.⁶⁴ The court then must determine whether retrospective operation of the new rule will advance or impede the rule's operation.⁶⁵ The *Davis* decision announced the rule of equal treatment for state and federal employees' retirement and pension taxes.⁶⁶ Therefore, the question under the second prong of *Chevron Oil* is whether the retroactive application of *Davis* would advance the policy of equal treatment for state and federal employees. The Supreme Court stated this equal treatment could be accomplished either by extending the tax exemption to retired federal employees or by eliminating the exemption for retired state and local government employees, but it left the choice of remedy for the Michigan courts to decide.⁶⁷

If courts apply *Davis* retroactively, each state would have to examine its taxing statutes to determine whether it discriminates against federal retirees and determine its liability, if any, for refunds. In Virginia alone the estimate of the potential refunds

⁶⁰ See *supra* notes 26-30 and accompanying text.

⁶¹ 361 U.S. 376 (1960).

⁶² 459 U.S. 392 (1983).

⁶³ A proposed answer to which of these positions is better will be discussed in Part VI. See *infra* text accompanying notes 406-14.

⁶⁴ *Chevron Oil*, 404 U.S. at 106-07.

⁶⁵ *Id.* at 107.

⁶⁶ *Davis*, 489 U.S. at 817.

⁶⁷ *Id.*

due based on *Davis* is approximately \$440,000,000, exclusive of interest.⁶⁸ Many states have taken legislative action to comply with *Davis*, thus preventing future discrimination against federal retirees.⁶⁹ If the focus of the second prong is to advance the policy

⁶⁸*Harper v. Virginia Dep't of Taxation*, 401 S.E.2d 868, 873 (Va. 1991).

⁶⁹*See, e.g.*, ALA. CODE § 40-18-20(d) (Supp. 1990) (military retirement exempt from taxation effective January 1, 1989); ARIZ. REV. STAT. ANN. § 43-1022(2) (1990) (no exemption from state taxation for benefits, annuities and pensions received from the state, county, or municipal retirement funds; all public pension income is allowed up to a \$2500 subtraction from gross income; military retirees receive a \$2500 credit); ARK. CODE ANN. § 26-51-307 (Michie Supp. 1991) (all public and private retirement pays exempt up to \$6000); COLO. REV. STAT. § 39-22-104(4)(f) (Supp. 1990) (retirement from any source received by retirees 55 years of age or older exempt from taxation up to \$20,000); GA. CODE ANN. § 48-7-27(a)(4), (5) (Supp. 1991) (total exemption for any public retirement income removed; retirement income for taxable years beginning with January 1, 1990, exempted up to \$10,000); IOWA CODE ANN. § 422.7 (18) (West 1990) (retirement of Iowa peace officers, public employees, police officers, firefighters, and judges, as well as federal retirees, exempt up to \$2500 for a separate return and \$5000 for a joint return); KY. REV. STAT. ANN. § 141.021 (Michie/Bobbs Merrill 1990) (federal retirement annuities and local government retirement annuities paid under certain Kentucky statutes exempt from taxation); LA. REV. STAT. ANN. § 47:44.2 (West Supp. 1990) (federal retirement income exempt from taxation); MD. TAX-GEN. CODE A". §§ 10-20-7(h), (r) (Michie Supp. 1991) (length of service award payments for fire, rescue, or ambulance personnel funded by any county or municipal corporation of Maryland exempt from taxation; military retirement exempt subject to certain limitations for retirees 55 years of age or older and who were enlisted members at the time of retirement); MICH. COMP. LAWS A". § 7.557 (130)(1)(e) and (f) (Callaghan Supp. 1990) (military retirement benefits exempt from taxation; retirement benefits from a Michigan public retirement system exempt from taxation; retirement benefits from a retirement system other than another state's exempt up to \$7500 for a single return and \$10,000 for a joint return); MINN. STAT. § 290.08 (1986) (repealed) (repeal effective for taxable years beginning after December 31, 1986; federal, state, and local government pensions treated equally); MISS. CODE A". § 21-29-307 (Law. Coop. 1990) (retirement benefits under Mississippi General Municipal Employees' Retirement system exempt up to \$6000); MISS. CODE A". §§ 27-7-15(4)(k), (l) (Law. Coop. 1991) (retirement benefits paid by any federal, state, or local retirement system exempt up to \$6000); MO. ANN. STAT. § 143.124 (Vernon Supp. 1991) (retirement benefits paid by any federal, state, or local retirement system exempt up to \$6000); MONT. CODE A". § 15-30-111(2)(c) (1991) (retirement income from any source exempt up to \$3600 subject to federal adjusted *gross* income limitations); N.M. STAT. ANN. § 10-11-135 (Michie Repl. Pam 1990) (tax exemption for retirement benefits under Public Employees' Retirement Act removed); N.M. STAT. A". § 22-11-42 (Michie Repl. Pam. 1991) (tax exemption for retirement benefits under the Educational Retirement Act removed); N.Y. TAX. LAW § 612(c)(3) (McKinney 1991) (federal retiree pension benefits exempt from taxation on or after January 1, 1989); N.C. GEN. STAT. § 105-134.6(b)(6) (Michie 1989) (retirement benefits of state and federal employees exempt up to \$4000); N.C. GEN. STAT. § 135-9 (Michie Supp. 1990) (tax exemption for retirement benefits under teachers' retirement system removed); OKLA. STAT. tit. 68, § 2358D (West Supp. 1992) (retirement benefits paid under federal civil service, military retirement, and certain Oklahoma public and teachers' retirement systems exempt from taxation up to \$5500); OR. REV. STAT. § 316.680(1)(c) (1990) (retirement income paid under a public retirement system of the United States, including military retirement, and of Oregon or its political subdivision exempt from taxation up to \$5000 with an offset for retirees with a household income of \$30,000 or more); R.I. GEN. LAWS § 44-30-12 (West Supp. 1991) (repealed

of the new rule, legislative changes have accomplished that objective to a certain degree. Some states, however, have not modified their taxing statutes that treat federal retirees differently than state and local government retirees.⁷⁰ Therefore, the second prong arguably will be satisfied only by a requirement for these states to pay refunds to the federal retirees.

The third prong of the test requires the court to weigh the hardship or injustice that would occur by the retroactive application of the new rule of law.⁷¹ This prong compels an examination of the particular facts for the state involved. State decisions considering this issue have reached different results on the requirement to refund past taxes paid on federal retirement.⁷²

In *Davis*, Justice Kennedy referred to *Iowa-Des Moines Bank v. Bennett*⁷³ when stating that, to the extent *Davis* paid taxes under the invalid Michigan tax statute, *Davis* was entitled to a

inconsistent portions of §§ 36-10-32 and 45-21-45, insofar as they otherwise would purport to exempt retirement benefits from Rhode Island income tax; *see also*, *Linnane v. Clark*, 557 A.2d 480 (R.I. 1989)); S.C. Code § 12-7-435 (Law. Coop. Supp. 1990) (retirement benefits paid under a federal or state retirement plan exempt up to \$3000); UTAH CODE ANN. § 59-10-114(2)(d), (3)(a) (Michie Supp. 1991) (retirement benefits paid to retirees 65 years of age or older exempt up to \$7500; retirement benefits paid to retirees under 65 years of age exempt up to \$4800); VA. CODE ANN. §§ 58.1-322(c)(3), (13) (Michie Supp. 1991) (repealed) (§ (C)(13) had permitted retirees 62 years of age or older to exclude \$3000 of retirement benefits, offset by amounts received from Social Security or another nontaxable pension plan); W.VA. CODE §§ 11-21-12(C)(5), (6) (Michie Supp. 1991) (retirement benefits paid under any federal retirement system to which 4 U.S.C. § 111 applies exempt from taxation); WIS. STAT. ANN. § 71.05(1)(a) (West Supp. 1990) (retirement payments from federal civil service and military retirement system exempt from taxation, as are other specified pensions from the state and the city of Milwaukee).

⁷⁰*See supra* notes 59, 69, and accompanying text.

⁷¹*Chevron Oil*, 404 U.S. at 107.

⁷²*See, e.g.*, *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991) (tax levied by state discriminated on ground of source of payor compensation to retirees and violated federal statute and constitutional doctrine of intergovernmental tax immunity; finding of violation was retroactively applicable and refunds of improperly collected tax were awarded); *Swanson v. North Carolina*, 407 S.E.2d 791 (N.C. 1991) (using the *Chevron Oil* test, the court found that *Davis* did not apply retroactively because none of the three prongs of *Chevron Oil* favored retroactivity; no refunds were due federal retirees); *Ragsdale v. Department of Revenue*, 11 Or. Tax 440 (1990), *affd in part*, 823 P.2d 971 (Or. 1992) (using the *Chevron Oil* test, the court found that *Davis* would be applied prospectively only; because *Davis* applied prospectively, the Oregon statute was not constitutionally deficient, and refunds were not due under the state statutes to federal retirees); *Harper v. Virginia Dep't of Taxation*, 410 S.E.2d 629 (Va. 1991) (court reconsidered its previous decision holding that *Davis* was prospective because of the United States Supreme Court's remand "in light of *James B. Beam Distilling Co. v. Georgia*"; court determined that *Beam Distilling* did not require a different result from the one that reached in the previous decision). For a more detailed discussion of these and other decisions, see, *infra* Part IV.

⁷³284 U.S. 239 (1931).

refund.⁷⁴ Arguably, by citing *Bennett*, the Court implied that the *Davis* decision should apply retroactively. *Bennett* involved a tax on a national bank's stock at greater rates than those applied to the stock of competing domestic corporations.⁷⁵ Although the tax itself was not discriminatory, the difference in the tax rates resulted from an administrative error by the county assessor, resulting in a lower rate assessed on the domestic corporations. In holding that the national bank had a right to equal treatment,⁷⁶ the Supreme Court stated that "it is well settled that a taxpayer who had been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."⁷⁷ The Court then determined that its decision would apply retroactively, but it did not state the remedy that the state should apply.⁷⁸

Although the different tax treatment in *Bennett* resulted in unequal tax treatment, the case differs from *Davis* in several regards. First, a clerical error caused the different tax treatment in *Bennett*, rather than a violation of a constitutional doctrine. Second, the parties injured by the different treatment were only two banks located in one state. In the *Davis* situation, the parties injured—that is, those who paid taxes on federal retirement while state or local employees paid no or little taxes on their retirement incomes—live throughout the United States in more than twenty states. Additionally, the number of potential parties involved is enormous. For example, in Virginia alone, the class-action suit in *Harper v. Department of Taxation*⁷⁹ includes about 200,000 affected retired military service members and federal civilians.⁸⁰ Based on *Bennett* these factors may cut against applying *Davis* retroactively.

B. Chevron Oil's Progeny

Since the Supreme Court decided *Davis*, it has announced three significant decisions affecting the usage of the *Chevron Oil* test.⁸¹

⁷⁴*Davis*, 489 U.S. at 817.

⁷⁵*Bennett*, 284 U.S. at 241.

⁷⁶*Id.* at 247.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹410 S.E.2d 629 (Va. 1991).

⁸⁰Grant Willis, *Court to revisit Davis decision in late 1992*, ARMY TIMES, Nov. 25, 1991, at 21.

⁸¹See generally, Walter Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, TAX NOTES, July 16, 1990, at 326; Jerome

I. Smith.—In *American Trucking Associations v. Smith*,⁸² the Court applied *Chevron Oil* to determine that no right to a refund existed if the decision establishing the tax's invalidity overruled prior decisions and the case's equities inured against finding such a right. In a plurality decision, the Court affirmed the decision of the Arkansas Supreme Court holding that the ruling in *American Trucking Associations v. Scheiner*⁸³ applied prospectively only.

In *Scheiner*, the Supreme Court held that two Pennsylvania tax statutes that imposed annual lump sum taxes on the operation of trucks and truck-tractors on Pennsylvania highways violated the Commerce Clause of the United States Constitution. The Court determined that the statutes discriminated against out-of-state businesses by imposing a tax that placed a heavier burden on them than it imposed on in-state businesses.⁸⁴ The Court in *Scheiner* remanded the case to the Pennsylvania Supreme Court without deciding whether its ruling applied retroactively.⁸⁵

In the aftermath of *Scheiner*, the Supreme Court faced the retroactivity issue in *Smith*. *Smith* dealt with an Arkansas statute that discriminated against interstate commerce by imposing a flat tax on out-of-state truckers through a greater per-mile cost than that paid by in-state truckers. The challenge to the statute began in 1983, and the Arkansas Supreme Court ruled that the statute was constitutional. After the Court decided

B. Libin and Richard A. Burton, *Retroactivity and "Internal Consistency" — How Far Extended*, TAX NOTES, Nov. 19, 1990, at 901; Albin C. Koch, *American Trucking's "Catch-22" Should Not Affect Most Taxpayer Claims In Current State Tax Disputes*, TAX NOTES, May 27, 1991, at 1043; Albin C. Koch, *The Prospectivity Morass: Beam Resolves Davis Claims And Brings ATA/Smith Back To The Future While Quill Presents A New Issue*, TAX NOTES, Dec. 16, 1991, at 1301.

⁸²496 U.S. 167 (1990).

⁸³483 U.S. 266 (1987).

⁸⁴The statute required an identification marker be affixed to every truck over a specified weight and imposed an annual flat fee for the marker. The annual fee was \$25 from 1980 through March 1983, but it was reduced to five dollars in 1982. The statute exempted trucks registered in Pennsylvania by deeming the marker fee to be part of the vehicle registration fee, which was increased when the marker fee was enacted. In 1982, Pennsylvania enacted the second statute, which imposed an annual axle tax on all trucks over a specified weight using Pennsylvania highways. The rate was \$36 per vehicle axle. The second statute also reduced the registration fee for pertinent vehicle-weight classes by the amount of the axle tax applicable to these vehicles. The interstate motor carriers with vehicles registered outside of Pennsylvania challenged the statutes, alleging that they discriminated because the entire economic burden of each tax fell on out-of-state vehicles. This was because the first statute "deemed" the marker fee for Pennsylvania vehicles to be part of the registration fee and the second statute granted Pennsylvania vehicles a reduction in registration fees that offset the axle tax. See *id.* at 270-75 (detailed discussion of the mechanics of these statutes).

⁸⁵*Id.* at 297-98.

Scheiner, it vacated the Arkansas Supreme Court's decision and remanded for further consideration in light of *Scheiner*.⁸⁶ On remand, the Arkansas Supreme Court held that the tax was unconstitutional, but denied refunds for the taxes paid because it did not apply *Scheiner* retroactively after using the Chevron Oil analysis.⁸⁷

The case came back to the Supreme Court on the issue of retroactivity. Justice O'Connor wrote in the plurality opinion that the "determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or event that occurred before the date of the decision—is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions."⁸⁸ She further noted that the only question presented in the case was the federal question of whether the Arkansas Supreme Court correctly applied the Chevron Oil test.⁸⁹ The plurality decision determined that the Arkansas Supreme Court misapplied Chevron Oil in certain respects and, therefore, *Scheiner* applied to part of the taxation issues under the Arkansas statute.⁹⁰ This decision required a remand to the Arkansas Supreme Court to determine the appropriate relief in light of another Supreme Court decision, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*.⁹¹

2. *McKesson*.—In *McKesson*, the court held that a refund or other appropriate retrospective relief was required when a tax was invalidated under settled law. The Court specifically addressed the question of what remedy is available to a taxpayer when he or she challenges the constitutionality of a state tax. *McKesson Corporation*, a wholesale liquor distributor, challenged a Florida liquor excise tax that favored in-state over out-of-state products. A previous Supreme Court decision invalidated a

⁸⁶*Smith*, 496 U.S. at 173.

⁸⁷*American Trucking Ass'ns, Inc., v. Gray*, 746 S.W.2d 377 (Ark. 1988).

⁸⁸*Smith* 496 U.S. at 177 (citations omitted).

⁸⁹*Id.* at 178.

⁹⁰*Id.* at 179-83. Applying the *Chevron Oil* test to determine the retroactivity of *Scheiner*, the Supreme Court found that *Scheiner* obviously met the first prong of *Chevron Oil* because it established a new principle of law and overruled portions of *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs of Mont.*, 332 U.S. 495 (1947), and its line of cases upholding flat taxes. The Court also found that the purpose of the Commerce Clause did not require retroactive application of *Scheiner* (*Chevron Oil's* second prong) and that if the invalidation of the Arkansas tax required refunds, the state's treasury could be depleted resulting in a harsh and oppressive burden on Arkansas taxpayers.

⁹¹496 U.S. 18 (1990).

preferential liquor tax as violative of the Commerce Clause.⁹² Therefore, because it resembled the invalidated tax, the Florida legislature rewrote its statute by deleting references to “Florida-grown” citrus and replacing them with references to specific citrus, grape, and sugarcane products, common to Florida, that were used in alcoholic beverages produced there.⁹³

McKesson Corporation paid the taxes due and then filed for a tax refund with the Florida Office of the Comptroller based on a claim that the tax statute was unlawful.⁹⁴ The Comptroller denied the petition, and McKesson filed suit in Florida State court, seeking declaratory and injunctive relief and a refund of the excess taxes paid resulting from the disfavored treatment of its products.⁹⁵ The trial court granted the requested relief, except for the refund.⁹⁶

McKesson challenged the denial of the tax refund under state and federal law.⁹⁷ The Florida Supreme Court, however, held that the denial of retroactive relief “was proper in light of the equitable considerations present in the case.”⁹⁸

The Supreme Court reversed the Florida Supreme Court’s decision. The question before the Court was “whether prospective relief, by itself, exhausts the requirements of federal law.”⁹⁹ The Court concluded that prospective relief was insufficient by reasoning that if a state only gives a taxpayer a postpayment remedy to challenge the legality of a tax paid under duress, “the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.”¹⁰⁰

The Court indicated that the nature of the remedy followed from the nature of the right violated. For example, if the tax were beyond the state’s power to impose, or if the taxpayer were absolutely immune from the tax, the state would have to refund

⁹²*Bacchus Imports, Ltd. v. Dias*, 468 U.S.263 (1984) (Hawaii’s liquor excise tax scheme allowed a tax preference for alcoholic beverages manufactured from certain products grown in Hawaii; statute violated the Commerce Clause because it discriminated against interstate commerce).

⁹³*McKesson*, 496 U.S. at 23. The Court described the changes as “only cosmetic.” *Id.* at 46.

⁹⁴*Id.* at 23-24.

⁹⁵*Id.* at 24.

⁹⁶*Id.* at 25.

⁹⁷*Id.*

⁹⁸*Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1010 (Fla. 1988).

⁹⁹*McKesson*, 496 U.S. at 31.

¹⁰⁰*Id.* at 39.

the tax unlawfully collected.¹⁰¹ On the other hand, if the tax were unlawful because, as in *McKesson*, it preferred in-state products over out-of-state products, the remedy would be to cure the discriminatory aspect of the tax.¹⁰²

The Court also examined the reasons the Florida Supreme Court gave to deny retroactive relief. The first reason was that the state implemented the tax scheme in good-faith reliance on a presumptively valid statute.¹⁰³ Although this reason reflected the state's concern for sound fiscal planning, the Court found that a state's ability to impose various procedural requirements on the claimants would protect that state's interest.¹⁰⁴

The second reason was that the Florida Supreme Court assumed that *McKesson* passed on the cost of the tax to its customers and would receive a windfall if given a refund.¹⁰⁵ The Court rejected the "pass-on" defense and reasoned that the disadvantage in the marketplace was the key to the injury suffered. Therefore, reimbursement of any taxes would not constitute a "windfall."¹⁰⁶

Finally, the Court considered the State's assertion that the remedy should be limited because to do otherwise "would plainly cause serious economic and administrative dislocation for the State."¹⁰⁷ The court noted that state interests may affect "the contours of the relief" that state must provide, but concluded that "the State's interest in financial stability does not justify a refusal to provide relief."¹⁰⁸ Because the Court found that a state could protect itself by using the procedural methods the Court previously had described,¹⁰⁹ the Court remanded the case to permit the Florida courts to choose between the possible remedies.¹¹⁰

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.* at 44

¹⁰⁴*Id.* at 44-45. The Court gave examples of methods that states could use to accomplish this. For example, a state could provide by statute that taxpayers would receive refunds if they pay under protest or provide some other timely notice of complaint.

¹⁰⁵*Id.* at 46.

¹⁰⁶*Id.* at 46-49.

¹⁰⁷*Id.* at 49-50 (citing Brief for Respondents on Reargument, at 20).

¹⁰⁸*Id.* at 50. The Court went so far as to emphasize that a state could not deny a refund simply because of the magnitude of the amount. "We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it.... Florida cannot object to a refund here just because it has other ideas about how to spend the funds." *Id.* at 50 n.35.

¹⁰⁹See note 104 and accompanying text.

¹¹⁰*McKesson*, 496 U.S. at 50. The Court also recognized that the state can consider administrative costs when selecting a remedy.

With the decisions in *Smith* and *McKesson*, the Supreme Court clarified that the “Due Process Clause requires the states to grant meaningful retroactive relief when they compel taxpayers to pay taxes that are later found to be unconstitutional under settled constitutional principles.”¹¹¹ The Court then faced the issue of retroactivity again in *James B. Beam Distilling Co. v. Georgia*.¹¹²

3. *James B. Beam Distilling*.—In *James B. Beam Distilling (Beam Distilling)*, the Supreme Court used a “choice of law” inquiry in holding that a previous decision by the Court applied retroactively. *Beam Distilling* involved the challenge of a Georgia excise tax by a liquor manufacturer. The Georgia excise tax applied at a higher rate to imported alcohol than it did to local alcoholic products¹¹³ and resembled the Hawaii statute declared unconstitutional by the Supreme Court in *Bacchus Imports, Ltd. v. Dias*.¹¹⁴ The taxpayer company sought a refund for taxes it had paid as an out-of-state manufacturer for the three years prior to the revision of the Georgia statute. The state court held that the statute had been unconstitutional, but denied the refund request. The state court relied upon *Chevron Oil* in determining that *Bacchus* did not apply retroactively.¹¹⁵ The Georgia Supreme Court affirmed the trial court’s ruling.¹¹⁶

The decision in *Beam Distilling* reflected a diversity of views by the Court. Justice Souter, joined by Justice Stevens, wrote that *Bacchus Imports* applied retroactively.¹¹⁷ Justice Souter explained that whether a new rule applied retroactively is a question of choice of law.¹¹⁸ The first and usual choice is to apply a decision fully retroactively.¹¹⁹ The second choice is to apply a decision purely prospectively, under which a new rule applies neither to those who came before, nor to those actually involved in, the particular law-making decision. The third choice is to apply a new

¹¹¹Walter Hellerstein, *Preliminary Reflections on McKesson and ATA*, TAX NOTES, July 16, 1990, at 338.

¹¹²111 S. Ct. 2439 (1991).

¹¹³GA. CODE ANN. § 3-4-60 (Michie 1982). The statute imposed an excise tax on “distilled spirits” manufactured outside the state at a rate double that imposed on locally produced alcoholic beverages.

¹¹⁴468 U.S. 263 (1984).

“*Beam Distilling*, 111 S. Ct. at 2442.

¹¹⁶*Id.*

¹¹⁷*Id.* at 2441.

¹¹⁸*Id.* at 2443.

¹¹⁹*Id.*

rule to the case whose holding announced the rule, but not to the preceding cases—that is, application by selective prospectivity.¹²⁰

Justice Souter held that the choice of law inquiry in *Bacchus Imports* required retroactivity because the opinion “did not reserve the question on whether its holding should be applied to the parties before it.”¹²¹ He decided that because the Court in *Bacchus Imports* remanded the case only for consideration of a defense, the Court did not intend for the decision to apply prospectively.¹²² Therefore, the Georgia court erred in refusing to apply *Bacchus Imports* retroactively.¹²³ The Court remanded the case for remedial action because no one considered remedial issues below or argued them before the Court.¹²⁴

Justices White, Blackmun, and Scalia concurred in the judgment with separate opinions. Justice White determined that under several different theories, the rule in *Bacchus Imports* applied retroactively.¹²⁵ He did not believe, however, that a new rule of law could always apply retroactively.¹²⁶ Justice Blackmun wrote a concurring opinion in which Justices Marshall and Scalia joined. Justice Blackmun wrote that retroactive application of “new decisional rules does not thwart the principle of *stare decisis*,” but instead, “retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.”¹²⁷ Justice Scalia wrote a concurring opinion in which Justices Marshall and Blackmun joined. Justice Scalia found selective prospectivity and pure prospectivity beyond the Court’s power because they are unconstitutional—not because they are inequitable.¹²⁸

Justice O’Connor wrote the dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined. Justice O’Connor asserted that the rule in *Chevron Oil* applied because *Bacchus Imports* announced a new rule.¹²⁹ Using the *Chevron Oil* analysis,

¹²⁰*Id.* at 2444. Justice Souter wrote that “selective prospectivity appears never to have been endorsed in the civil context,” and that *Beam Distilling* presents the issue for decision. *Id.* at 2445.

¹²¹*Id.* at 2445.

¹²²*Id.*

¹²³*Id.* at 2445-46. Justice Souter wrote, “Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.”

¹²⁴*Id.* at 2448.

¹²⁵*Id.* at 2448-49 (White, J., concurring).

¹²⁶*Id.* at 2449 (White, J., concurring).

¹²⁷*Id.* at 2450 (Blackmun, J., concurring).

¹²⁸*Id.* at 2450-51 (Scalia, J., concurring).

¹²⁹*Id.* at 2451 (O’Connor, J., dissenting).

Justice O'Connor found that "Bacchus [*Imports*] easily meets the first criterion"¹³⁰ because it established a new rule of law by rejecting arguments accepted in previous Supreme Court decisions.¹³¹ Using the "equitable analysis of *Chevron Oil*," Justice O'Connor found that, to require Georgia to refund an estimated \$30,000,000 in refunds based on the retroactive application of *Bacchus Imports* "is the height of unfairness."¹³²

C. Conclusion

After the Court's decisions in *Smith*, *McKesson*, and *Beam Distilling*, the question of whether a state can deny retroactive relief to those who paid unconstitutionally discriminatory taxes has provoked tremendous controversy in Davis-related litigation. As previously indicated,¹³³ these courts have decided the issue in several varying ways.

IV. States React to the Davis Decision

After the Supreme Court announced its decision in *Davis*, those states with statutes similar to the Michigan statute¹³⁴ struck down in *Davis* faced the following two choices: (1) revise the offending statutes; or (2) take the position that the statutes did not fall within the *Davis* proscription. Many states did revise the statutes,¹³⁵ but some did not.¹³⁶ Although efforts by the states to change their tax laws prevented future litigation, these same states often faced litigation over the earlier versions of these statutes.

The following two common issues occurred in litigation spawned by the Supreme Court's decision in *Davis*: (1) Did the statute violate the standard established in *Davis*?; and (2) Should the taxpayers who had paid taxes under such a statute receive a refund? State courts used a variety of approaches to decide these

¹³⁰ *Id.* at 2453 (O'Connor, J., dissenting).

¹³¹ *See, e.g., State Board of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59 (1936). Justice O'Connor wrote bluntly that the rule in *Bacchus Imports* regarding the Commerce Clause "came out of the blue." *Beam Distilling*, 111 S. Ct. at 2455.

¹³² *Beam Distilling*, 111 S. Ct. at 2455. Georgia estimated its total potential liability at \$30,000,000, based on *Beam Distilling* and at least two other identical refund actions pending in the Georgia courts.

¹³³ *See supra* note 72 and accompanying text.

¹³⁴ *See supra* note 59.

¹³⁵ *See supra* note 69.

¹³⁶ *See, e.g., KAN. STAT. A* " § 74-4923(b) (1985); *see also supra* note 59.

issues. These decisions fall into the following four categories: (1) pre-Beam Distilling state decisions; (2) post-Beam Distilling state decisions; (3) exhaustion of state remedies decisions; and (4) miscellaneous state decisions.

A. Pre-Beam Distilling State Decisions

The pre-Beam Distilling decisions relied upon the Chevron Oil analysis to determine whether Davis applied retroactively. State courts arrived at different results using the Chevron Oil test. Financial liability of a state for potential refunds played a prominent role in the third prong of the analysis.

1. Bass.—In *Bass v. South Carolina*,¹³⁷ the South Carolina Supreme Court reviewed a case initiated by federal retirees based on Davis for refunds of income taxes paid from 1985 through 1988.¹³⁸ The trial court found the plaintiffs entitled to refunds pursuant to a South Carolina refund statute.¹³⁹ Both parties appealed, and the South Carolina Supreme Court reviewed the following issues: (1) Whether Davis applied prospectively so as to deny the refunds; and (2) whether the enactment of section 12-47-445 of the South Carolina Code barred the refunds.¹⁴⁰

The court agreed with the State that the Chevron Oil test constituted the proper test to apply to evaluate if Davis operated retroactively or prospectively.¹⁴¹ After reviewing other state cases facing a similar question,¹⁴² the court proceeded to apply Chevron

¹³⁷395 S.E.2d 171 (S.C. 1990).

¹³⁸The South Carolina statute under attack was S.C. CODE §§ 12-7-435(a), (d), (e) (Supp. 1988). The statute granted retired federal employees a \$3000 exemption for retirement income from South Carolina income tax, while retired state employees received a total exemption of their retirement income from South Carolina income tax.

¹³⁹*Bass*, 395 S.E.2d at 172. The statute was S.C. CODE A". § 12-47-440 (1976).

¹⁴⁰*Bass*, 395 S.E.2d at 172.

¹⁴¹*Id.*

¹⁴²These cases included *American Trucking Ass'ns, Inc. v. Gray*, 746 S.W.2d 377 (Ark. 1988) (whether to apply the United States Supreme Court opinion in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) retrospectively or prospectively); *James B. Beam Distilling Co. v. State*, 382 S.E.2d 95 (Ga. 1989) (whether the pre-1985 Georgia statute once found unconstitutional would be applied prospectively to prevent a tax refund); and *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989) (whether *Davis* applied retrospectively or prospectively). The Georgia Supreme Court opinion that denied the refund by applying the ruling prospectively, and was relied upon by the South Carolina Supreme Court, was reversed and remanded in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). The United States Supreme Court denied certiorari in *Director of Revenue of Missouri v. Hackman*, 493 U.S. 1019 (1990). The Missouri Supreme Court had found that the Missouri refund statute required

Oil's first prong. Finding that *Davis* held for the first time that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee and that no federal retirees in South Carolina protested the payment of these taxes, the court determined that the first prong of *Chevron Oil* was met.¹⁴³

In looking at the second prong of *Chevron Oil*, the court found that once South Carolina was made "aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects."¹⁴⁴ Thus, the second *Chevron Oil* prong was met.

The court then turned to the third prong of *Chevron Oil*, by weighing the equities. The court stated:

If *Davis* is applied retroactively, the State faces liability for approximately \$200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.¹⁴⁵

After finding that the State satisfied the third prong of *Chevron Oil*, the court announced that it would not apply *Davis* retroactively and no refund would be required. The court did not rely on state law to deny the plaintiffs claims.¹⁴⁶ The court reversed the trial court's order that had granted the refunds for taxes collected from 1985 through 1988.¹⁴⁷

a refund; it did not address whether *Davis* applied retrospectively or prospectively.

¹⁴³ *Bass*, 395 S.E.2d at 174.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ The court did discuss briefly that the federal retirees would be barred from a refund even under state law because the applicable refund statutes required taxpayers to pay under protest before bringing a refund action. The court stated that the federal retirees should have proceeded under S.C. CODE ANN. §§ 12-47-210 and 12-47-220, instead of § 12-47-440. *Bass*, 395 S.E.2d at 175.

¹⁴⁷ The South Carolina Supreme Court decided *Bass* on July 31, 1990. On June 28, 1991, the United States Supreme Court granted certiorari in the case and vacated the judgment. The case was remanded to the Supreme Court of South Carolina for further consideration in light of the decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). *Bass v. South Carolina*, 111 S. Ct. 2881 (1991).

The Supreme Court granted certiorari in *Bass* and remanded the case in light of the decision in *Beam Distilling*.¹⁴⁸ On remand, the South Carolina Supreme Court announced that it affirmed the first *Bass* decision based “primarily on the adequate and independent state ground that the federal retirees are procedurally barred from recovery because they failed to proceed under the applicable state statute.”¹⁴⁹ The correct statutes permitted an injured taxpayer to file within thirty days after payment for recovery of taxes paid under protest.¹⁵⁰ The court found the statute used by the federal retirees inapplicable to contesting an alleged erroneous collection of income taxes.¹⁵¹

The court also held that *Beam Distilling* did not require the retroactive application of *Davis*.¹⁵² The court found that the Court in *Davis* did not apply the rule retroactively and that the case did not present the retroactivity issue to the Court because Michigan conceded that refunds were due *Davis* if the Court found the statute unconstitutional.¹⁵³ Based on these factors, the court then could rely upon the *Chevron Oil* analysis, as it had done in its previous *Bass* decision.¹⁵⁴

2. *Harper*. — In *Harper v. Virginia Department of Taxation*,¹⁵⁵ the Virginia Supreme Court examined the Virginia income tax scheme¹⁵⁶ in a case brought by retired federal employees, each who received either civil service retirement benefits or military retired pay. The plaintiffs sought refunds of Virginia State income taxes paid for tax years 1985 through 1988. The trial court determined that *Davis* applied prospectively and denied refunds to the taxpayers.¹⁵⁷

The Virginia Supreme Court determined that the principal issue was whether *Davis* applied prospectively.¹⁵⁸ The court

¹⁴⁸See *supra* note 147.

¹⁴⁹*Bass v. South Carolina*, 414 S.E.2d 110, 111 (S.C. 1992); see *supra* note 146 and accompanying text.

¹⁵⁰S.C. CODE ANN. § 12-47-210 (1976) (taxpayer must pay the tax under protest); *id.* § 12-47-220 (taxpayer paying taxes under protest may file an action for recovery at any time within 30 days after making payment).

¹⁵¹*Id.* § 12-47-440 (taxpayer has three years to seek refund of tax erroneously, improperly, or illegally assessed, collected, or otherwise paid).

¹⁵²*Bass*, 414 S.E.2d at 115.

¹⁵³*Id.* at 114.

¹⁵⁴*Id.* at 114-15.

¹⁵⁵401 S.E.2d 868 (Va. 1991).

¹⁵⁶The plaintiffs challenged the constitutionality of VA. CODE § 58.1-322(C)(3) (Supp. 1988). That section had granted a small exemption for certain federal retirees, while totally exempting the retirement of state employees.

¹⁵⁷*Harper*, 401 S.E.2d at 870.

¹⁵⁸*Id.*

relied on *American Trucking Associations v. Smith*¹⁵⁹ in deciding that it had to use federal law to determine if Davis applied prospectively. The court then applied the Chevron Oil test to the Davis decision.

In evaluating the first Chevron *Oil* prong, the court found that twenty-three other states had statutes similar to the Michigan statute in Davis and taxpayers had not previously protested when paying the tax required by the Virginia statute. Therefore, Davis “established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed”¹⁶⁰ and thus satisfied the first prong of Chevron Oil.

In evaluating the second Chevron Oil prong, the court examined whether the intergovernmental tax immunity doctrine would be retarded or furthered by the retroactive application of Davis. The court found the Virginia taxing scheme proper until the new rule announced in Davis and that the Virginia legislature corrected the statute once it was aware of the law’s deficiencies. Therefore, the purpose of the doctrine already had been served and, therefore, did not require the retroactive application of *Davis*.¹⁶¹ This satisfied the second prong of Chevron Oil.

In evaluating the third Chevron Oil prong, the court weighed the equities of applying Davis retroactively. One of the important equities it considered was the financial stability of the state. Because the record in this case revealed that the retroactive application of Davis could result in “a potential tax refund liability, inclusive of interest, of approximately \$440,000,000”¹⁶² at a time when the state already had serious financial problems, the court found that the equities satisfied the third prong of Chevron *Oil*.¹⁶³

The court also considered the plaintiffs’ claim that Virginia State law allowed them a refund.¹⁶⁴ The court determined that because Davis applied prospectively, the pre-Davis taxes were not erroneous or improper within the meaning of the Virginia refund statutes.¹⁶⁵ The court rejected the final argument of the plaintiffs that, even if Davis applied prospectively, a refund of the 1988 taxes was required. The court found that even though those taxes

¹⁵⁹ 496 U.S. 167 (1990).

“*Harper*, 401 S.E.2d at 872.

“*Id.*

¹⁶² *Id.* at 873.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

were not assessed and often not paid until after the Court announced *Davis*, the taxable year had ended almost three months before the decision in *Davis* and the taxpayers' liabilities were fixed at the end of the taxable year.¹⁶⁶

Consequently, the Virginia Supreme Court affirmed the trial court's judgment. The Supreme Court of the United States, however, granted certiorari and vacated the judgment of the Virginia Supreme Court on June 28, 1991.¹⁶⁷ The Supreme Court remanded the case to the Virginia Supreme Court for further consideration in light of the decision in *James B. Beam Distilling Co. v. Georgia*.¹⁶⁸

On November 8, 1991, the Virginia Supreme Court announced its decision on the remand proceeding.¹⁶⁹ The court reaffirmed its previous decision denying the tax refund. After examining *Beam Distilling*, the court distinguished that case by stating that the Supreme Court had not ruled that *Davis* applied retroactively to the litigants in the case. Rather, the Court did not consider the issue because Michigan already had conceded that a refund was due *Davis* if the Court found that the tax statute was unconstitutional. Because the court decided that *Davis* did not decide the issue of retroactivity, it reasoned that it still could use *Chevron Oil* to determine the retroactivity issue in the present case.¹⁷⁰

3. *Bohn*.—In *Bohn v. Waddell*,¹⁷¹ the Arizona Tax Court reviewed a case in which the taxpayers claimed that they were entitled to full refunds of taxes paid on their federal and military retirement pensions. The court previously had heard the case and decided that the Arizona statute at issue¹⁷² violated federal law and the doctrine of intergovernmental tax immunity, thereby requiring a remedy of a refund of the excess taxes paid by the plaintiffs.¹⁷³ The court applied the *Chevron Oil* analysis and found a clear break with previously established precedent, but it

¹⁶⁶ *Id.* at 874.

¹⁶⁷ *Harper v. Virginia Dept. of Taxation*, 111 S. Ct. 2883 (1991).

¹⁶⁸ 496 U.S. 18 (1991).

¹⁶⁹ *Harper v. Virginia Dept. of Taxation*, 410 S.E.2d 629 (Va. 1991).

¹⁷⁰ *Id.* at 630. After this decision, the plaintiffs filed a petition for certiorari on November 15, 1991 (No. 91-794). On May 18, 1992, the Supreme Court granted certiorari on the petition. 112 S. Ct. 1934 (1992); see *infra* Part VI (discussion of *Harper*).

¹⁷¹ 807 P.2d 1 (Ariz. Tax 1991).

¹⁷² ARIZ. REV. STAT. § 43-1022 (Supp. 1988). The statute exempted Arizona state retirement systems from taxation. Federal retirement benefits received no exemption except for a \$2500 exemption for civil service retirement income.

¹⁷³ *Bohn v. Waddell*, 790 P.2d 772 (Ariz. Tax 1990).

did not find any injustice or inequity in granting these partial refunds.¹⁷⁴

The court, however, decided to grant the plaintiffs' motion for reconsideration based on the United States Supreme Court's opinions in *McKesson Corp. v. Florida Division of Alcohol & Tobacco*,¹⁷⁵ *American Trucking Associations v. Smith*,¹⁷⁶ *Ashland Oil, Inc. v. Caryl*,¹⁷⁷ and *National Mines Corp. v. Caryl*.¹⁷⁸ The plaintiffs argued that these decisions supported the premise that they were entitled to a full refund of the taxes paid on their federal pensions.

The court denied the requested relief of full refunds, stating that the Supreme Court decisions did not support such relief and that federal law required a court to weigh the effect of the retroactive application of the invalidation of a law on constitutional grounds.¹⁷⁹ The court relied on *Chevron Oil* again in determining if the remedy already granted was proper.¹⁸⁰ The court further found that to "hold that the Taxpayers are entitled to the full refund they demand would be to create a retroactive tax benefit,"¹⁸¹ which was beyond the power of the court and which would "have a devastating effect on state finances."¹⁸² The only injury the plaintiffs had suffered, according to the court, was the excess tax paid, there by justifying the remedy of the partial refund of the difference between what they paid and what they would have paid.¹⁸³

4. Pledger. — In *Pledger v. Bosnick*,¹⁸⁴ the Arkansas Supreme Court reviewed a class action brought by Arkansas residents who had retired from employment with various federal agencies, the United States Armed Forces, and other states' agencies and political subdivisions. The plaintiffs challenged the Arkansas scheme, which provided a full exemption from state income tax for retired state civil service employees and exempted only the first \$6000 of all other retirees' retirement incomes.¹⁸⁵

¹⁷⁴ *Id.*

¹⁷⁵ 496 U.S. 18 (1990).

¹⁷⁶ 496 U.S. 167 (1990).

¹⁷⁷ 497 U.S. 916 (1990) (*per curiam*).

¹⁷⁸ 110 S. Ct. 3205 (1990) (*per curiam*).

¹⁷⁹ 807 P.2d at 2, 6.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 7.

¹⁸² *Id.*

¹⁸³ *Id.* at 8.

¹⁸⁴ 811 S.W.2d 286 (Ark. 1991).

¹⁸⁵ ARK. CODE ANN. §§ 26-51-306, 26-51-307 (1987).

The court affirmed the lower court's holding that the Arkansas income tax laws violated the principles of intergovernmental tax immunity and the Public Salary Tax Act.¹⁸⁶ The court then examined the issue of the retroactive application of Davis based on the Chevron Oil test.¹⁸⁷ The court found that Davis did not establish a new principle of law because "the Doctrine of Intergovernmental Tax Immunity has been applied for decades."¹⁸⁸ The court found that the retroactive application of Davis would advance this doctrine for the members of the class action.¹⁸⁹ Finally, the court found that either the state or the taxpayer-plaintiffs would suffer financially, whether Davis applied retroactively or not. Therefore, "since one of two inequitable results must occur, we are required to apply the ruling retroactively."¹⁹⁰ Accordingly, Chevron Oil required the retroactive application of Davis, and the plaintiffs were entitled to a refund of taxes collected on their retirement income since 1985.¹⁹¹

5. Conclusion.—The dispute in these cases over the retroactive application of Davis focused on the following two issues: (1) Was the decision in Davis clearly foreshadowed?; and (2) Did the equities in the case overcome the need to apply Davis retroactively? The courts split over whether previous Supreme Court decisions indicated that the intergovernmental tax immunity doctrine would invalidate a taxing scheme such as the one in Davis. Most courts which ruled that the decision was not clearly foreshadowed relied heavily upon the fact that many states had

¹⁸⁶*Pledger*, 811 S.W.2d at 288, 289. For the text of § 111 of the Public Salary Tax Act, see *supra* note 16.

¹⁸⁷The court noted the decision of the Virginia Supreme Court in *Harper v. Virginia Dep't of Taxation*, 401 S.E.2d 868 (Va. 1991), which held that *Chevron Oil* did not require retroactive application of *Davis*. The court disagreed with that decision and stated further that whether the *Chevron Oil* analysis was used or the analysis of the decisions in *McKesson Corp. v. Florida Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990); *National Mines Corp. v. Caryl*, 110 S. Ct. 3205 (1990), was used, *Davis* applied retroactively. 811 S.W.2d at 292.

¹⁸⁸*Pledger*, 811 S.W.2d at 292.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 293.

¹⁹¹The state filed a petition of certiorari with the United States Supreme Court on September 3, 1991. The following two questions were presented by the state for review: (1) "Does the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111 prohibit a state from taxing pensions of military retirees and retirees from employment with other states and their political subdivisions while exempting from taxation the pensions of its own retired employees?"; and (2) "Must this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) be applied retroactively to grant refunds of income taxes paid on retirement income by federal retirees and retirees from employment with other states and their political subdivisions?" Petition for Writ of Certiorari to the Supreme Court of Arkansas, (Sept. 3, 1991) (No. 91-375).

enacted similar statutes that had not been challenged since they originally were enacted by the legislature.

Many courts that found the decision in *Davis* to be clearly foreshadowed used the third *Chevron Oil* prong to apply *Davis* prospectively, basing their decisions on the equities of each case. The “equity” on which the courts primarily relied was the financial burden upon the state if it were forced to provide refunds to taxpayers for the years of overpayments on their taxes. The courts that used *Chevron Oil* before a remand from the Supreme Court still used that financial aspect of the equity analysis when affirming the previous decisions denying refunds.

B. Post-Beam Distilling State Decisions

The post-Beam Distilling decisions relied upon that case to determine whether *Davis* applied retroactively. Some state courts found Beam Distilling added little to resolving the issue and turned to the *Chevron Oil* analysis. Others found that Beam Distilling did not require the retroactive application of *Davis*.¹⁹²

1. *Swanson*.—In *Swanson v. North Carolina*,¹⁹³ the North Carolina Supreme Court reviewed the tax refund suit brought by federal retirees and federal military personnel challenging the North Carolina income tax scheme.¹⁹⁴ The lower court had determined that some relief was due the plaintiffs because of the different treatment between federal pensions and state pensions and ordered refunds for the plaintiffs.¹⁹⁵

The North Carolina Supreme Court initially addressed the issue of whether the *Davis* rule applied retroactively, noting that if it did not, the plaintiffs would not be entitled to refunds.¹⁹⁶ The court then turned to a *Chevron Oil* analysis of *Davis*. The court pointed to the decisions in *Harper v. Virginia Department of Taxation*¹⁹⁷ and *Bass v. South Carolina*¹⁹⁸ as guidance in evaluating whether *Davis* applied retroactively and noted that in

¹⁹² See *supra* notes 137-70 and accompanying text (discussion of the original decisions of the South Carolina and Virginia Supreme Courts and the decisions after the remand from the United States Supreme Court “in light of *James B. Beam Distilling Co. v. Georgia*”).

¹⁹³ 407 S.E.2d 791 (N.C. 1991).

¹⁹⁴ N.C. GEN. STAT. §§ 105-141(b)(13) & (14), 135-9 (Supp. 1988). North Carolina retired employees’ pensions were exempt from state income taxes, while federal retired employees were exempt only on the first \$4000 of their pensions.

¹⁹⁵ *Swanson*, 407 S.E.2d at 793.

¹⁹⁶ *Id.*

¹⁹⁷ 401 S.E.2d 868 (Va. 1991).

¹⁹⁸ 395 S.E.2d 171 (S.C. 1990).

“fact situations very similar to the facts of this case the highest courts of Virginia and South Carolina held that Davis should not be applied retroactively.”¹⁹⁹ The court also noted the decision in *Swanson v. Powers*,²⁰⁰ in which the Fourth Circuit Court of Appeals had dismissed a class action suit against Helen Powers, the Secretary of the North Carolina Department of Revenue.²⁰¹ The suit had sought to make Powers personally liable for the amount the plaintiffs had overpaid in taxes because she enforced collection of those taxes under the state revenue code.²⁰² The Court of Appeals dismissed the case on the ground that Powers reasonably could not have foreseen the decision in Davis and was immune from suit.

Using these cases and its own examination of the Davis circumstances, the court found that Davis was a case of first impression that was not clearly foreshadowed. The court stated, “If the decision of Davis had been clearly foreshadowed we do not believe so many states would have adopted such plans.”²⁰³ The court also found that because the legislature had amended the offending statute, it would not advance the purpose of the intergovernmental tax immunity doctrine to apply Davis retroactively.²⁰⁴ Finally, the court determined that it “can take judicial notice of the fact that this State is in dire financial straits”²⁰⁵ and that to grant the refunds the plaintiffs requested would “cost the State approximately \$140,000,000.00.”²⁰⁶

After determining that Chevron Oil did not require the retroactive application of Davis, the court scrutinized the plaintiffs’ argument that the decisions in *James B. Beam Distilling Co. v. Georgia*²⁰⁷ and *American Trucking Associations v. Smith*²⁰⁸ required the retroactive application of *Davis*.²⁰⁹ The court distinguished the present case from *Beam Distilling* by finding that the Court in Davis did not pass on the question of retroactivity.²¹⁰ Therefore, *Beam Distilling* did not require Davis

¹⁹⁹*Swanson*, 407 S.E.2d at 794.

²⁰⁰937 F.2d 965 (4th. Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).

²⁰¹*Id.*

²⁰²The plaintiffs brought their action under 42 U.S.C. § 1983, alleging that they had been deprived of their civil rights by having to pay illegal taxes that Secretary Powers collected as an agent of the State of North Carolina.

²⁰³*Swanson*, 407 S.E.2d at 794.

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷111 S. Ct. 2439 (1991).

²⁰⁸496 U.S. 167 (1990).

²⁰⁹*Swanson*, 407 S.E.2d at 794.

²¹⁰*Id.* at 795.

to apply retroactively.²¹¹ Because the court held that Davis did not apply retroactively, it did not consider what remedies would be available to the plaintiffs if Davis were held to have retroactive application.²¹² The court then reversed and remanded the case to the lower court for the entry of a judgment dismissing the action.²¹³

2. *Sheehy*.—In *Sheehy v. Montana Department of Revenue*,²¹⁴ the Montana Supreme Court evaluated the appeal of retired federal employees challenging the Montana tax statute governing the taxation of pensions and requesting refunds for taxes paid pursuant to that statute.²¹⁵ The parties had stipulated at trial that the tax scheme was invalid in light of *Davis*, and the lower court adopted this stipulation. The lower court used *Chevron Oil* to conclude that *Davis* applied prospectively and denied the refunds for tax years 1983 through 1988.²¹⁶

The Montana Supreme Court affirmed the lower court's decision. The court found that under the principles of retroactivity in *James B. Beam Distilling Co. v. Georgia*²¹⁷ and *Chevron Oil* that *Davis* did not apply retroactively. In examining *Beam Distilling*, the court noted that the United States Supreme Court had granted certiorari in two cases in which retired federal employees in South Carolina and Virginia sought refunds under circumstances similar to those in the case before it²¹⁸ and then vacated the state court decisions and remanded the cases for further consideration in light of *Beam Distilling*.²¹⁹ The Montana

²¹¹*Id.*

²¹²*Id.* at 796.

²¹³*Id.* This case made its way back to the North Carolina Supreme Court after the remand. The plaintiffs petitioned for a rehearing on the issue that the lower court only dealt with the claims under the United States Constitution and did not address claims alleged under the North Carolina Constitution. The North Carolina Supreme Court found that the lower court had passed on all claims, but included a brief discussion of issues raised under the North Carolina Constitution. The court then reaffirmed its prior opinion and again remanded the case to the lower court for the entry of a judgment dismissing the action. *Swanson v. North Carolina*, 410 S.E.2d 490 (N.C. 1991).

²¹⁴820 P.2d 1257 (Mont. 1991).

²¹⁵The statute in question was MONT. CODE ANN. § 15-30-111(2)(c) (1987). MONT. CODE ANN. § 19-3-105 totally exempted state retirement benefits from state and local taxation, but MONT. CODE ANN. § 15-30-111 allowed only a \$3600 exemption for federal retirement benefits.

²¹⁶*Sheehy*, 820 P.2d at 1258. The *Sheehy* opinion refers to *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978), which is the opinion in which the Montana Supreme Court adopted the *Chevron Oil* analysis.

²¹⁷111 S. ct. 2439 (1991).

²¹⁸See *supra* notes 137-70 (discussing *Bass v. South Carolina* and *Harper v. Virginia Dep't of Taxation*).

²¹⁹*Bass v. South Carolina*, 111 S. Ct. 2881 (1991); *Harper v. Virginia Dep't of Taxation*, 111 S. Ct. 2883 (1991).

Supreme Court asserted, "The fact that the Supreme Court remanded *Bass* and *Harper* rather than simply reversing them indicates the Court's uncertainty as to whether [] *Beam Distilling* applies to the issue of *Davis's* retroactivity"²²⁰ and concluded that *Beam Distilling* did not apply.²²¹

The court also determined that *Davis* itself was not authority for application of its rule retroactively because it did not decide the issue of retroactivity and prevented the doctrine of *stare decisis* from applying.²²² Because the court found that *Davis* and *Beam Distilling* did not establish a rule of retroactivity, the court turned to the *Chevron Oil* analysis.

In applying the first prong of *Chevron Oil*, the court found that *Davis* established a new legal principle not clearly foreshadowed because *Davis* required three extensions of prior law.²²³ In applying the second prong of *Chevron Oil*, the court found that awarding refunds based on the retroactive application of *Davis* would not promote the doctrine of intergovernmental tax immunity.²²⁴ In applying the third prong of *Chevron Oil*, the court found that because states used such tax plans for about fifty years prior to *Davis*, providing refunds to federal retirees when such refunds would come at the expense of all Montana taxpayers would be inequitable.²²⁵ The court, therefore, held that the lower court did not err in ruling that the plaintiffs were not entitled to tax refunds for the years 1983 through 1988.²²⁶

3. *Duffy*.—In *Duffy v. Wetzler*,²²⁷ the Appellate Division of the New York Supreme Court examined an appeal challenging the constitutionality of the New York tax law taxing federal retirees'

²²⁰ *Sheehy*, 820 P.2d at 1259.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 1260-62. The court discussed what it considered to be these "three extensions of prior law." The first extension occurred when the *Davis* court concluded that civil service retirement benefits were deferred compensation based on prior years of service and the individual's salary; therefore, it fell within the category of compensation for services rendered as an officer or employee of the United States. The Michigan Court of Appeals had treated *Davis* as an annuitant instead of an employee, and found that 4 U.S.C. § 111 did not apply to *Davis*. The second extension occurred when the Supreme Court established a connection between the doctrine of intergovernmental tax immunity and the protection against discriminatory taxation of individuals under 4 U.S.C. § 111. The third extension occurred when the Supreme Court used the "significant difference" standard instead of the "reasonableness of the classifications" standard in a taxation case involving equal protection.

²²⁴ *Id.* at 1262.

²²⁵ *Id.*

²²⁶ *Id.* at 1262-63. The plaintiffs filed a petition for certiorari on March 9, 1992.

²²⁷ 579 N.Y.S.2d 684 (N.Y. App. Div. 1992).

pensions.²²⁸ The trial court had held the challenged statute unconstitutional and enjoined state and local financial officers from refusing to grant the plaintiffs refunds for taxes paid on federal pension benefits from 1986 through 1988.²²⁹

The Appellate Division explored the issue of whether *Davis* applied retroactively pursuant to the decision in *James B. Beam Distilling Co. v. Georgia*.²³⁰ The lower court had held that it need not determine the retroactivity issue relying upon New York's tax laws to find that, because the plaintiffs had overpaid their taxes, they were due refunds.²³¹ The appellate court disagreed and determined that *Beam Distilling* provided three ways to resolve the choice of law problem—full retroactivity, the purely prospective method of overruling, and modified or selective prospectivity.²³² In concluding that *Beam Distilling* did not overrule *Chevron Oil*, the court reasoned that *Beam Distilling* was a very narrow decision which removed “the doctrine of modified or selective prospectivity from this area of precedent.”²³³

After this conclusion, the court turned to a *Chevron Oil* analysis of *Davis* and the instant case. The court found that *Davis* established a new principle of law not clearly foreshadowed and that retroactive application of *Davis* would not retard or further the doctrine of intergovernmental tax immunity.²³⁴ The court decided that “the equities weighed in the State's favor because the State should not be required to refund an estimated \$44,000,000, particularly in today's parlous fiscal circumstances, when neither the State nor the plaintiffs could reasonably have anticipated the invalidation of a longstanding tax provision.”²³⁵ The Appellate Division held that *Chevron Oil* mandated a prospective application of the *Davis* rule and deleted the provisions of the lower court's order that awarded refunds and similar relief to the plaintiffs.²³⁶

4. Rinehart.—In *Sizemore v. Rinehart*,²³⁷ the Court of Civil Appeals of Alabama reviewed a decision of the Montgomery

²²⁸The court examined N.Y. TAX LAW § 612(c)(3a) (McKinney 1987), which exempted from income tax the first \$20,000 in pension income received by retirees who attained the age of 59 1/2 years, but totally exempted the pensions of retired state and local government employees.

²²⁹*Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990).

²³⁰111 S. Ct. 2439 (1991).

²³¹*Duffy*, 555 N.Y.S.2d at 547-548.

²³²*Duffy*, 579 N.Y.S.2d at 688-689.

²³³*Id.* at 690.

²³⁴*Id.* at 691.

²³⁵*Id.*

²³⁶*Id.*

²³⁷No. 2900290, 1992 WL 18487 (Ala. Civ. App. Feb. 7, 1992).

County Circuit Court regarding the income tax treatment of federal noncivil service and military retirement and survivor benefits.²³⁸ The trial court held that the Alabama income tax statutes as applied to the retirement and survivor benefits of military and other federal noncivil service retirees violated the intergovernmental tax immunity doctrine and the Public Salary Tax Act.²³⁹ The trial court also ordered refunds for the plaintiffs.²⁴⁰

The Court of Civil Appeals examined three issues on appeal. The first issue was whether the Alabama income tax scheme covering military retirees violated the doctrine of intergovernmental tax immunity.²⁴¹ The court found no distinction between retired state employees and retired military employees and upheld the trial court's ruling including military retirees in the group discriminated against by the Alabama tax statutes.²⁴² The second issue was whether the class action certification was proper. The court found that a class action in a tax refund case was appropriate.²⁴³ The third issue was whether the ruling invalidating the tax scheme applied prospectively only. The defendants argued that *Chevron Oil* required the prospective application of the ruling. In turning to *James B. Beam Distilling Co. v. Georgia*²⁴⁴ to decide the question, the court stated, "The decision in *Beam* [Distilling] essentially limited the possible application of the criteria in *Chevron Oil* and now prohibits a prospective application in this case due to the Court's decision in *Davis*."²⁴⁵ The court found that because the Supreme Court applied the rule of law announced in *Davis* retroactively and *Beam Distilling* referred to and cited *Davis* as having been

²³⁸The plaintiffs challenged ALA. CODE § 40-18-20 (1975), which gave a limited exemption to recipients of military retirement and survivor benefits, while ALA. CODE §§ 40-18-19(a)(1) & (2)(1975), gave a total exemption from income tax to retirees from state employment.

²³⁹*Rinehart*, 1992 WL 18487 at *2.

²⁴⁰*Id.*

²⁴¹*Id.* at *2-3. The case was a class action including "all recipients of military or other federal non-civil service retirement or survivor benefits who have paid, or are subject to payment of, state income tax on such benefits." The Commissioner of the State Department of Revenue did not challenge the application of the doctrine to any group within the class except for the military retirees.

²⁴²*Id.* The Commissioner had argued that military retirement was not true retirement because it was not deferred compensation, but rather was "current compensation" for reduced services. The court found that the federal statutes that determined retirement for the military services indicated that "those persons are 'retired' in the same sense as non-military retirees."

²⁴³*Id.* at *3.

²⁴⁴111 S. Ct. 2439 (1991).

²⁴⁵*Rinehart*, 1992 WL 18487 at *5.

applied retroactively, then the taxpayers in the instant case were entitled to refunds as ordered by the trial court.²⁴⁶

C. Exhaustion of State Remedies Decisions

The decisions in this subpart primarily invoke state refund statutes to determine how the rule of *Davis* applies to the facts and circumstances in each case. These cases appear to use the procedural techniques suggested in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*²⁴⁷ as a way of fashioning a remedy for unconstitutionally collected taxes.

1. *Hackman*.—One of the first cases in this area was *Hackman v. Director of Revenue, State of Missouri*.²⁴⁸ The Missouri Supreme Court reviewed the claims of taxpayers who sought refunds of state income taxes paid on federal military retirement benefits. The court held that under the rule in *Davis*, the Missouri income tax scheme violated the principles of intergovernmental tax immunity.²⁴⁹ The court then turned to an examination of whether the taxpayers should receive refunds.

The defendant argued that *Chevron Oil* mandated the prospective application of *Davis* and would thereby deny refunds to the taxpayer-plaintiffs.²⁵⁰ The court, however, determined that it must decide if state law mandated a refund of taxes paid prior to *Davis* because if state law required a refund, it would not have to reach the issue of retroactive or prospective application.²⁵¹ In its analysis, the court examined the statutes providing taxpayers with a mechanism for a refund and found that Missouri law required a claim based on an overpayment and the filing within three years of the filing of the return or two years of the payment

²⁴⁶*Id.*

²⁴⁷See *supra* note 104 and accompanying text.

²⁴⁸771 S.W.2d 77 (Mo. 1989).

²⁴⁹*Id.* at 79-80. Various statutes provided for exemptions for state public retirement benefits from income taxation. See, e.g., Mo. REV. STAT. § 70.735 (1986) (pensions for officers and employees of political subdivisions); *id.* §§ 86.190, 86.353, 86.493, 87.365 (pensions of police and fire department employees); *id.* § 169.587 (pensions of former teachers and school employees). Another section exempted \$7500 in retirement benefits for a single return and \$10,000 for a joint return from any pension for purposes of income taxation. *Id.* 206.30(1)(f)(iv). No exemption existed for benefits received under non-state retirement plans.

²⁵⁰*Hackman*, 771 S.W.2d at 80.

²⁵¹*Id.*

of the tax.²⁵² Additionally, the applicable tax refund statute did not require a payment under protest as a condition of filing a claim for a refund.²⁵³ "Overpayment" included taxes illegally collected under Missouri case law; therefore, the statute applied in this case.²⁵⁴ "[W]e hold that by its adoption of Section 143.801, the State of Missouri has consented to a refund of any overpayment, erroneous payment or illegal payment of income tax."²⁵⁵

The court held that if the plaintiffs met the procedural requirements of this tax statute, they were entitled to a refund.²⁵⁶ In other words, the court did not have to reach the issue of the retroactive application of Davis. The court remanded the case because the record did not show when the plaintiffs filed their 1985 tax returns.²⁵⁷

2. *Hamacher*.—In another Missouri case, the Missouri Supreme Court scrutinized a claim by taxpayers who paid state income taxes on federal military benefits who filed claims for refunds. In *Hamacher v. Director of Revenue, State of Missouri*,²⁵⁸ the court held that for the purposes of taxpayer filing requirements, a return will be deemed to have been filed on the last day for filing tax returns as provided by statute.²⁵⁹ In *Hamacher*, the taxpayer had filed a 1985 Missouri tax return on April 4, 1986, but they did not file for a refund for the 1985 tax year until April 14, 1989.²⁶⁰ The Director argued that the taxpayer filed a claim more than three years after the date the return was received in the Director's office.²⁶¹

The court reviewed that applicable tax refund statute²⁶² and found that the terms of the statute should have the same

²⁵²*Id.* The court looked at Mo. REV. STAT. § 136.035.1 (1986) (refunds shall come from appropriated funds; refunds shall be paid for overpayments or erroneous payments of an tax which the state is authorized to collect); *id.* § 143.801.1 (claim must be based on an overpayment and filed within three years of the filing of the return or two years of the payment of the tax).

²⁵³*Id.* § 143.801 (1986).

²⁵⁴*Hackman*, 771 S.W.2d at 80-81.

²⁵⁵*Id.* at 81; *see supra* note 252 (explanation of Mo. REV. STAT. § 143.801).

²⁵⁶*Hackman*, 771 S.W.2d at 80-81.

²⁵⁷*Id.* The State petitioned the United States Supreme Court for review after the Missouri Supreme Court held that refunds were due the plaintiffs. The United States Supreme Court denied the petition. *Mo. v. Hackman*, 493 U.S. 1019 (1990).

²⁵⁸779 S.W.2d 565 (Mo. 1989).

²⁵⁹*Id.* at 567.

²⁶⁰*Id.* at 566.

²⁶¹*Id.*

²⁶²MO. REV. STAT. § 143.801.1 (1986) provides, in part:

A claim for credit or refund for overpayment of any tax imposed by sections 143.011 to 143.996 shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; ...

meaning as the terms used in the federal income tax statutes. Therefore, the due date for filing the return started the running of the statute of limitations period for a claim of refund, even though a return might have been received before that date in the Director's office.²⁶³

3. *Winstead*.—In *Winstead v. Marx*,²⁶⁴ the Chancery Court of the First Judicial District, Hinds County, Mississippi, examined the Mississippi income tax statute and found that it violated the Public Salary Tax Act²⁶⁵ and the intergovernmental tax immunity doctrine when the federal government provided the pay or compensation. The court next looked at the issue of whether its holding had prospective or retrospective application. The defendants argued that Davis applied prospectively only because of the *Chevron Oil* test.²⁶⁶ The court found that state law provided an adequate remedy without resorting to the federal remedy because, under *American Trucking Associations v. Smith*,²⁶⁷ federal law required that the relief under state law be consistent with federal due process principles.²⁶⁸

In determining the plaintiffs' entitlements to refunds, the court noted that the applicable Mississippi statute provided that a refund claim had to be made within three years from the due date of the return.²⁶⁹ When the plaintiffs filed for relief, the statute provided for a refund.²⁷⁰ After the plaintiffs filed for relief, the Mississippi legislature changed the statute to deprive taxpayers

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in this subsection for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

²⁶³ *Hamacher*, 779 S.W.2d at 567.

²⁶⁴ No. 91-1400, 1991 STN 42-43 LEXIS (No. 141,652 Feb. 6, 1991).

²⁶⁵ See *supra* note 16.

²⁶⁶ *Winstead*, 1991 STN 42-43 LEXIS.

²⁶⁷ 496 U.S. 167 (1990).

²⁶⁸ *Winstead*, 1991 STN 42-43, LEXIS.

²⁶⁹ MISS. CODE ANN. § 27-7-313 (Supp. 1989) provides, in part:

In the case of any overpayment of any tax, interest or penalty levied or provided for in article 1 of this chapter or in this article, whether by reason of excessive withholding, error on the part of the taxpayer, erroneous assessment of tax, or otherwise, the excess shall be refunded to the taxpayer...

No refund shall be granted under this article or under the provisions of article 1 of this chapter unless a claim for same is made within three (3) years from the date the return is due....

²⁷⁰ *Id.*

of the right to a refund.²⁷¹ The court concluded that “the amendment of the refund statute during the pendency of this action and post *Davis* does not accord with basic due process requirements,” thereby entitling the plaintiffs to a refund as provided by state law.²⁷²

4. *Nutbrown*.—In *Nutbrown v. Munn*,²⁷³ the Oregon Supreme Court reviewed the taxpayers’ claims for refunds based upon a challenge to the Oregon income tax statute under the rule in *Davis*.²⁷⁴ The plaintiffs contested the differential treatment of federal retirement benefits as a failure of the defendants to follow *Davis* and, therefore, actionable as a violation of their civil rights.²⁷⁵ The Oregon Tax Court did not reach the merits of the case because it dismissed the complaint on the basis that the plaintiffs did not exhaust their administrative remedies.²⁷⁶

The Oregon Supreme Court examined the issue of the Oregon Tax Court’s jurisdiction and found that cases generally reached that court on appeal from decisions of the Department of Revenue because the Oregon statute provides that appeals of actions of tax assessment and collection go through that

²⁷¹MISS. CODE ANN. § 27-7-313 (Supp. 1990) provided, in pertinent part: Nothing in this section shall be construed as authorizing a refund of taxes for claims pursuant to the United States Supreme Court decision of *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500 (1989). These taxes were not incorrectly and/or erroneously collected as contemplated by this chapter.

In the event a court of final jurisdiction determines the above provision to be void for any reason, it is hereby declared the intent of the Legislature that affected taxpayers shall be allowed a credit against future income tax liability as opposed to a tax refund.

²⁷²*Winstead*, 1991 STN 42-43, LEXIS.

²⁷³811 P.2d 131 (Or. 1991).

²⁷⁴ORE. REV. STAT. § 316.680(1)(c) (1987) governed the taxation of federal retirement benefits. It provided that the “maximum amount excludable from taxable income under this paragraph from such pensions or annuities shall be in the amount of \$5,000,” with a dollar-for-dollar offset for any “household income” amount received of \$30,000 or more. This resulted in the largest deductible amount of federal retirement income being \$5000 and no deductible amount if the total of the retiree’s household income exceeded \$35,000. Oregon public employee retirees were treated differently under the Public Employees’ Retirement Act of 1953, codified at ORE. REV. STAT. §§ 237.001-237.315 (1953). The Act exempted these retirement benefits from all state, county, and municipal taxes.

²⁷⁵The plaintiffs relied upon 42 U.S.C. § 1983 (1988), which provides, in part:

Every person who, under color of any state law ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

²⁷⁶*Nutbrown*, 811 P.2d at 133.

Department.²⁷⁷ Because the Oregon Tax Court has exclusive jurisdiction of all questions of law and fact arising under the tax laws of Oregon,²⁷⁸ the court had authority to dismiss the plaintiffs' complaint for failure to comply with the statutory requirements.

The plaintiffs, however, contended that the tax court erred in dismissing the complaint for three reasons. They first argued that requiring them to exhaust their administrative remedies pursuant to the Oregon statute was "inappropriate in cases brought under 42 U.S.C. section 1983 because states may not erect procedural barriers to vindication of rights under that federal statute."²⁷⁹ The appellate court found this general proposition of law inapplicable to the instant case because the general rule that section 1983 actions may be brought in state court without exhausting state administrative remedies does not apply to cases in which the alleged actionable behavior of the defendant implicates the state's method of assessing and collecting taxes.²⁸⁰

The plaintiffs next argued that requiring them to exhaust their administrative remedies was inappropriate because those remedies would be inadequate.²⁸¹ The appellate court examined the reasons given for the alleged inadequacies of the remedies and held that none of the plaintiffs' allegations created a basis for

"ORE. REV. STAT. § 305.275(4) (1989) provides:

Except as provided in ORS 118.350 and 305.410, no person shall appeal to the Oregon Tax Court or other court on any matter arising under the revenue and tax laws administered by the Department of Revenue unless the person first exhausts the administrative remedies provided before the Department and the director of the Department of Revenue.

²⁷⁸ ORE. REV. STAT. § 305.410 (1989) provides in pertinent part:

(1) Subject only to the provisions of ORS 305.445 relating to judicial review by the Supreme Court and to subsection (2) of this section, that tax court shall be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state....

(3) Except as permitted under section 2, amended Article VII, Oregon Constitution, this section and ORS 305.445, no person shall contest, in any action, suit or proceeding in the circuit court or any other court, any matter within the jurisdiction of the tax court.

²⁷⁹ *Nutbrown*, 811 P.2d at 136.

²⁸⁰ *Id.* at 137-40. The court relied primarily upon the decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), which involved a 42 U.S.C. § 1983 action brought by property owners and others against certain Missouri tax assessment officials in federal district court. The majority opinion held that the principles of comity prevented a federal court from entertaining this type of action challenging the validity of a state tax system. *McNary*, 454 U.S. at 116.

²⁸¹ *Nutbrown*, 811 P.2d at 140.

excusing them from the required exhaustion of their administrative remedies.²⁸²

The plaintiffs finally argued that they were excused from exhausting their administrative remedies because none of the objectives forwarded by the doctrine of exhaustion of administrative remedies would be served by applying the doctrine in this case.²⁸³ The appellate court disagreed, stating "If Taxpayers exhaust their administrative remedies and, in the process, obtain the relief under the Oregon personal income tax laws they seek, the need for this section 1983 litigation vanishes. That is sufficient reason to require exhaustion."²⁸⁴

Therefore, the Oregon Supreme Court held that the Oregon Tax Court correctly interpreted the Oregon statute requiring the exhaustion of administrative remedies and affirmed that court's decision.²⁸⁵ After this decision, the plaintiffs filed a petition for writ of certiorari with the United States Supreme Court, asserting that the Oregon Supreme Court's decision conflicted with prior United States Supreme Court decisions and that the state remedy they were required to exhaust was inadequate.²⁸⁶ The United States Supreme Court denied the petition and let stand the Oregon Supreme Court's decision requiring the plaintiffs to exhaust their state administrative remedies.²⁸⁷

5. Hogan.—In *Hogan v. Musolf*,²⁸⁸ the Wisconsin Supreme Court reviewed a case brought by federal retirees, claiming

²⁸²The plaintiffs argued that the Department did not have the jurisdiction to entertain an action brought under 42 U.S.C. § 1983. The court rejected this by saying that although the Department cannot award damages under 42 U.S.C. § 1983, the Department can award all the relief to which the plaintiffs claimed they were entitled under an appropriate interpretation of the Oregon tax system. If the plaintiffs obtained that relief, need for any further claim would arise. The plaintiffs argued that the Department could not declare a taxing scheme unconstitutional. The court found that under Oregon case law, Oregon administrative agencies have the power to declare statutes and rules unconstitutional. The plaintiffs argued that the Department lacked the authority to award them punitive damages sought in connection with the section 1983 action. The court found that punitive damages were not yet relevant because the plaintiffs had not yet suffered a harm that required relief under section 1983. The plaintiffs argued that the defendants had demonstrated a predisposition to disallow their claims, making exhaustion a futile gesture. The court reviewed the actions alleged to illustrate predisposition and found them merely to be part of the administrative process in pursuing a tax case. 811 P.2d at 140-42.

²⁸³*Id.* at 142.

²⁸⁴*Id.* at 142-43 (footnote omitted).

²⁸⁵*Id.* at 143.

²⁸⁶*Nutbrown v. Munn*, 811 P.2d 131 (Or.), *petition for cert. filed*, U.S. Sept. 16, 1991 (No. 91-457).

²⁸⁷*Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S. Ct. 867 (1992).

²⁸⁸471 N.W.2d 216 (Wis. 1991).

refunds for taxes paid pursuant to a scheme similar to the one declared unconstitutional in *Davis*. As in *Nutbrown*, the plaintiffs alleged a violation of their civil rights. The Wisconsin Supreme Court examined four issues on appeal, focusing on the issue of whether the plaintiffs were required to exhaust their state administrative remedies before filing a section 1983 action in state court.

The court agreed with the plaintiffs that a cause of action existed for violations of the Public Salary Tax Act.²⁸⁹ The court examined previous cases in the area and concluded that the defendant had not shown that Congress specifically foreclosed a remedy by providing an enforcement mechanism for protecting rights under the Public Salary Tax Act.²⁹⁰

The court considered whether federal law permitted the state to require the plaintiffs to exhaust state remedies in tax matters.²⁹¹ After reviewing the leading United States Supreme Court decisions in this area,²⁹² the court concluded that in the area of state tax matters, federal law permits Wisconsin to require the plaintiffs to exhaust state tax remedies if those remedies are “plain, adequate, and complete.”²⁹³

The court then scrutinized Wisconsin’s administrative remedies to determine if they were “plain, adequate, and complete.” The court reasoned that because Wisconsin provided an orderly procedure for reviewing claims for tax refunds through the Department of Revenue, the Tax Appeals Commission, and the court system, Wisconsin’s administrative remedies met the standard.²⁹⁴ The court rejected the plaintiffs’ argument that, because the state remedies could not grant the same relief as a section 1983 action, the state remedies were inadequate.²⁹⁵ The court concluded that the plaintiffs would have the opportunity to obtain relief through the Wisconsin system, and if the alleged violations of their rights were not remedied, the plaintiffs then could assert the section 1983 action.²⁹⁶

As the final issue, the court reviewed whether Wisconsin law required plaintiffs challenging the administration of state taxing

²⁸⁹ *Id.* at 219.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 219-23.

²⁹² *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100 (1981); *Patsy v. Florida Bd. of Regents*, 487 U.S. 496 (1982); *Felder v. Casey*, 487 U.S. 131 (1988).

²⁹³ *Hogan*, 471 N.W.2d at 223.

²⁹⁴ *Id.* at 224.

²⁹⁵ *Id.* at 223-24.

²⁹⁶ *Id.* at 224.

statutes to exhaust available state administrative remedies before initiating a section 1983 action in state court.²⁹⁷ The court noted that the Wisconsin statutes reflected "the legislature's intent that persons who wish to contest the administration of the Wisconsin tax statutes must first pursue relief through available administrative remedies."²⁹⁸ After reviewing cases and the statutes, the court reasoned, "On the basis of the policy reasons discussed above and the legislature's expressed intent to have the Commission initially review contested tax matters, we conclude that plaintiffs who challenge the administration of the state's taxing statutes must exhaust their administrative remedies before commencing their sec. 1983 claims in the courts of this state."²⁹⁹

Therefore, the court determined that the plaintiffs had adequate administrative remedies available through the state system that must be exhausted before commencing a section 1983 action in state court.³⁰⁰ The plaintiffs filed a petition for writ of certiorari to the United States Supreme Court after this decision, but the Supreme Court denied the petition.³⁰¹

6. Kuhn.—In *Kuhn v. Department of Revenue of Colorado*,³⁰² the Colorado Supreme Court reviewed an action brought by military retirees challenging the constitutionality of the Colorado income tax statute which exempted \$2000 of military retirement benefits for retirees younger than fifty-five but exempted \$20,000 of retirement benefits for state and private retirees younger than fifty-five.³⁰³ Because the plaintiffs had not complied with the

²⁹⁷ WIS. STAT. § 71.75 (1989) provides, in part:

Claims for refund. (1) Except as provided in §§ 46.255, 71.77(5) and (7)(b) and 71.93, the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section.

(2) With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and §§ 71.30(4) and 71.77(7)(b), refunds may be made if the claim therefor is filed within 4 years of the unextended date under this section on which the tax return was due.

(6) Every claim for refund or credit of income or surtaxes shall be filed with the department of revenue.

²⁹⁸ *Hogan*, 471 N.W.2d at 224-25.

²⁹⁹ *Id.* at 225.

³⁰⁰ *Id.* at 225-26.

³⁰¹ *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 1992 WL 2958 (U.S. Jan. 13, 1992) (No. 91-380).

³⁰² 817 P.2d 101 (Colo. 1991).

³⁰³ Colorado's taxing scheme, as it existed at the time the case was initiated provided state and private retirees under the age of 55 a \$20,000 income tax

administrative procedures for requesting a tax refund, the court reviewed whether the lower court had subject-matter jurisdiction to hear the case.³⁰⁴

After reviewing the applicable state statute³⁰⁵ and case law,³⁰⁶ the court found that a party challenging the constitutionality of a statute does not have to exhaust administrative remedies provided in the statute before seeking a judicial remedy.³⁰⁷ The court also noted that requiring the plaintiffs to wait six months or until the denial of their claims would be futile because the Department of Revenue already had stated publicly its position that it would not rule on any claims filed until a court decided the issue.³⁰⁸

The court then turned to an examination of whether the Colorado scheme was unconstitutional and, if so, whether the state owed refunds to the plaintiffs. The defendant argued that the statute did not discriminate, and even if it did, it was justified by the differences between military retirement pay and other types of retirement benefits.³⁰⁹ The court concluded that military retirement pay was a pension and that the Colorado statute discriminated between taxpayers based on the source of their incomes.³¹⁰ Because the state was discriminating, the court evaluated whether the differences between military pensions and other retirement benefits justified this discrimination.³¹¹ The defendant argued that the differences that justified discrimination were that military retirement was not a pension and that military retirees were statistically different from other retirees

exemption for retirement benefits. COLO. REV. STAT. § 39-22-104(4)(f) (Supp. 1988). This exemption also was applied to federal nonmilitary retirement benefits. A different exemption applied to federal military benefits, however, and under COLO. REV. STAT. § 39-22-104(4)(g) (Supp. 1988), military retirees could subtract only a maximum of \$2000 from taxable income.

³⁰⁴*Kuhn*, 817 P.2d at 104.

³⁰⁵COLO. REV. STAT. § 39-21-108(1)(a) (Supp. 1982), provides that a taxpayer first must file a claim for a refund and then must wait six months before a suit for that refund can be brought.

³⁰⁶*Fred Schmid Appliance & Television Co. v. City & County of Denver*, 811 P.2d 31 (Colo. 1991); *Hamilton v. City & County of Denver*, 490 P.2d 1289 (Colo. 1971).

³⁰⁷*Kuhn*, 817 P.2d at 104.

³⁰⁸*Id.*

³⁰⁹*Id.* at 107. The State characterized military retirement pay as current pay at reduced compensation for prior services, rather than as a pension. It also asserted that the statute discriminated based on the type of income, not the source. The court rejected these arguments after noting, "Military retirement pay must be viewed realistically as compensation for past, not present services." 817 P.2d at 108.

³¹⁰*Id.*

³¹¹*Id.* at 108-09.

under fifty-five years of age.³¹² The court already had rejected the first "difference," and it also rejected the second one, which was based primarily on the idea that military retirees were in a better socioeconomic position than other retirees under the age of fifty-five.³¹³

After finding that the Colorado statute was unconstitutional,³¹⁴ the court examined the plaintiffs' claims for refunds of all taxes collected under the statute. The defendant argued that Chevron Oil mandated the prospective application of the decision.³¹⁵ The plaintiffs argued that because the state statutes required a refund, the Chevron *Oil* analysis was unnecessary.³¹⁶ The court found that "[t]he plain reading, and only reasonable interpretation, of sections 39-22-1201 and 39-21-108 is that the General Assembly intended to refund any tax illegally collected under section 39-22-104(4)(g) to the affected taxpayers."³¹⁷ Therefore, the court affirmed the lower court's ruling regarding the unconstitutionality of the Colorado tax statute and the right to refunds for the taxpayers.³¹⁸

7. Ragsdale.—In *Ragsdale v. Oregon Department of Revenue*,³¹⁹ the Oregon Supreme Court reviewed the Oregon Tax Court's decision denying the plaintiffs claim for tax refunds paid on her federal retirement income. The parties agreed that the Oregon income tax scheme impermissibly discriminated against federal retirees under the rule of *Davis*.³²⁰ Therefore, the court examined Oregon's refund statutes and relief available to the taxpayer.

The plaintiff claimed she was entitled to refunds for tax years 1970 through 1988 because *Davis* applied retroactively.³²¹ The court agreed with the defendant that the applicable Oregon

³¹²*Id.* at 108.

³¹³*Id.* at 108-09.

³¹⁴*Id.* at 109.

³¹⁵*Id.*

³¹⁶COLO. REV. STAT. § 39-22-1201 (Supp. 1990), provides for a revenue fund to pay claims based upon potential invalidity of treatment of military retirement income, COLO. REV. STAT. § 39-22-108(2) (1982), provides that if the executive director of the Department of Revenue finds, upon a claim filed by a taxpayer or upon final judgment of a court, that the tax paid by any taxpayer is in excess of the amount due or has been illegally or erroneously collected, then the executive director shall issue a refund to the taxpayer.

³¹⁷*Kuhn*, 817 P.2d at 110.

³¹⁸*Id.* The State filed a petition for writ of certiorari to the United States Supreme Court. *Kuhn v. Colorado Dep't of Revenue*, 817 P.2d 101 (Colo.), *petition for cert. filed*, U.S. Dec. 13, 1991 (No. 91-980). The petition was dismissed by agreement of the parties after the decision in *Barker v. Kansas*, 112 S. Ct. 1619 (1992).

³¹⁹823 P.2d 971 (Or. 1992).

³²⁰*Id.* at 973.

³²¹*Id.*

statutes created a remedy consistent with federal due process, but it disagreed with the defendant over the application of the statutes to the taxpayer's claims.³²² The court found that the Oregon Legislature "required the Department of Revenue to refund only taxes that were collected and paid, and that became due, in or after the year in which the action resulting in the invalidation of the exemption limitation for federal retirement payments in [Oregon Revised Statutes sections] 316.680(1)(c) and (d) (1987) was instituted."³²³ Therefore, the court permitted refunds only for tax years 1988 and forward.³²⁴

8. *Fonger*.—In *Fonger v. Michigan Department of Treasury*,³²⁵ the Michigan Court of Appeals considered the question of what was the appropriate remedy for federal retirees who had paid taxes under the unconstitutional Michigan tax statute. The Michigan Tax Tribunal had ruled that the plaintiff was entitled to a refund of taxes limited by the four-year statute of limitations in the Michigan Income Tax Act.³²⁶ It did not determine the retroactivity of *Davis* based on the reasoning that the United States Supreme Court had stated in other opinions that remedial issues were purely questions of state law.³²⁷

The Michigan Court of Appeals first examined whether *Davis* applied retroactively, notwithstanding the tax tribunal's determination. The court asserted that even though the State had conceded a refund was due if the statute were found unconstitutional, the United States Supreme Court nevertheless remanded

³²² *Id.* at 973-77. The Oregon statutes applicable to the case were ORE. REV. STAT. §§ 305-765 to 305.785. ORE. REV. STAT. § 305.765 provides that when a court of last resort holds a tax law invalid, and no other statute authorizes a refund thereof of taxes collected pursuant to that law, all taxes collected and paid in or after the year in which the action attacking the validity of that law shall be refunded. ORE. REV. STAT. § 305.780 provides that nothing in sections 305-770 to 305.785 authorized the refund of any tax paid and collected under an invalidated law when the tax was due and payable in any year prior to the year in which action was taken to seek invalidation of the law. In this case, because no other statute authorized refunds for taxes collected pursuant to an invalidated law, ORE. REV. STAT. § 305-765 applied. Because the plaintiff had sought a tax refund for taxes assessed for 1988 by filing her refund claim in 1989, she was entitled to a refund for that year and any years subsequent to 1988. Her refund claims for years prior to 1988, however, were barred by the statutes.

³²³ *Ragsdale*, 823 P.2d at 979.

³²⁴ The court stated in footnote 2 of its opinion that, because of its interpretation of ORE. REV. STAT. § 305.765 as requiring a refund for the 1988 tax year once it determined the Oregon income tax statute was invalid, a decision by the court that *Davis* did not apply retroactively would not change that result. The court used this footnote to explain why it did not have to decide the federal retroactivity question. *Id.* at 974.

³²⁵ No. 130294, 1992 WL 17891 (Mich. Ct. App. Feb. 4, 1992).

³²⁶ 1990 WL 96942 (Mich. Tax Tribunal June 11, 1990).

³²⁷ *Id.*

Davis for "consideration of a separate remedy issue, thereby necessarily implying that the decision was to be given retroactive effect."³²⁸ It also noted that two state supreme court decisions applying Davis prospectively were vacated and remanded for further consideration³²⁹ in light of the decision in *James B. Beam Distilling Co. v. Georgia*.³³⁰ The court then concluded that the United States Supreme Court intended for Davis to be applied retroactively.

Because Davis applied retroactively, the court then had to determine the proper remedy for the plaintiff. The plaintiff filed amended tax returns after the Davis decision, requesting refunds for taxes paid from 1982 through 1987. The Department of Treasury denied the request, saying it was not timely under the Michigan Revenue Act.³³¹ The Michigan Tax Tribunal had found that the ninety-day period of limitations in the Michigan Revenue Act conflicted with the four-year period of limitations in the Michigan Income Tax Act, which resulted in the four-year period prevailing.³³² The Michigan Legislature had enacted a new subsection to the Michigan Revenue Act since the date of the tax tribunal's decision, which became effective on December 21, 1990.³³³ The provision repealed the four-year limitations period and allowed for refund claims for taxes paid on income received as retirement or pension benefits from a federal retirement system for 1984 and later years.³³⁴ The appellate court gave this new provision retroactive effect in replacing the four-year limitations period.³³⁵ Therefore, the appellate court reversed the tax tribunal and remanded the case for further proceedings consistent with its opinion.³³⁶

³²⁸ *Fonger*, 1992 WL 17891, at *5 (Mich. Ct. App. Feb. 4, 1992).

³²⁹ See *Bass v. South Carolina*, 395 S.E.2d 171 (S.C. 1990), *vacated and remanded*, 111 S. Ct. 2881 (1991); *Harper v. Virginia Dep't of Taxation*, 401 S.E.2d 868 (Va.), *vacated and remanded*, 111 S. Ct. 2883 (1991).

³³⁰ 111 S. Ct. 2439 (1991).

³³¹ MICH. COMP. LAWS § 205.27a(6) (1986), provided that a claim for a refund based upon the invalidity of a tax law founded on the laws or United States Constitution or on the Michigan Constitution, shall not be paid unless the claim is filed within 90 days after the date set for filing the return or when ordered pursuant to an appeal.

³³² *Fonger*, 1990 WL 96942 at *21-31 (Mich. Tax Trib. June 11, 1990).

³³³ 1990 MICH. PUB. ACTS 285 added subsection 7 to MICH. COMP. LAWS § 205.27a.

³³⁴ See MICH. COMP. LAWS § 205.27a(7) (1990).

³³⁵ *Fonger*, 1992 WL 17891, at *6-7 (Mich. Ct. App. Feb. 4, 1992).

³³⁶ *Id.* at *9.

D. Miscellaneous State Decisions

Other Davis-related litigation has occurred, some of which did not rely on the grounds discussed previously. Litigation in Georgia went through the federal and state courts. In Maryland and Rhode Island, state courts did not decide if Davis applied retroactively because they disposed of the cases on other grounds.³³⁷

1. Collins.—In Davis-related litigation in Georgia, the Supreme Court of Georgia reviewed an injunction, issued by the Richmond Superior Court, that directed the revenue commissioner to maintain an escrow fund for income taxes attributable to federal pensions pending the determination of the legality of taxing these pensions while exempting state pensions.³³⁸ In *Collins v. Waldron*,³³⁹ the Georgia Supreme Court dissolved the injunction for several reasons. First, because the Georgia General Assembly repealed the challenged portion of the Georgia income tax statute³⁴⁰ after the oral argument in the case, no difference existed between the treatment of federal and state pensions and, therefore, no need for an escrow fund arose. Second, the court's grant of supersedeas had stayed the injunction originally so that the fund was not established. Because no fund to supervise existed and no need arose for a fund in the future, an injunction would have been nugatory. In this opinion, the court did not consider the issue of whether Davis applied to the Georgia income tax statute.³⁴¹

2. Doneski.—In *Doneski v. Maryland Comptroller of the Treasury*,³⁴² the Maryland Tax Court reviewed a case involving

³³⁷For a summary of Dah-related litigation, see generally *Davis v. Michigan Department of Treasury: A Review of the Subsequent Litigation*, 1992 STN 121-23 LEXIS (June 23, 1992).

³³⁸*Collins v. Waldron*, 385 S.E.2d 74 (Ga. 1989).

³³⁹*Id.*

³⁴⁰GA. CODE ANN. § 48-7-27 (Supp. 1988), provided that the income for the state employees' retirement system was exempt from taxation.

³⁴¹For other Davis litigation in Georgia, see *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986) (federal retirees' suit challenging taxation of federal retirement benefits, while exempting state retirees' benefits, not properly in federal court under the Tax Injunction Act because the absence of provision for class action did not render Georgia's procedure for litigating state income tax questions inadequate); *Parrish v. Employee's Retirement Sys. of Ga.*, 398 S.E.2d 353 (Ga. 1990), cert. denied, 111 S. Ct. 2016 (1991) (state retirees' suit to challenge bill that repealed previous tax exemption from income tax unsuccessful; the General Assembly did not give an irrevocable tax exemption to these retirees by passing the Teachers Retirement Act and the Employees' Retirement Act; furthermore, the passage of the bill was not an impairment of contract).

³⁴²1990 Md. Tax LEXIS 11 (Md. Tax Aug. 15, 1990).

whether a Maryland tax statute³⁴³ was unconstitutional because of the rule in *Davis*. The court found that the Maryland tax statute at issue did not apply to pensions but to length of service awards which benefited any retiree, federal or state, who received such an award.³⁴⁴ Accordingly, “[t]here is no differential treatment in the taxation between federal or state retirees of these awards”³⁴⁵ and *Davis* was inapplicable. The court then affirmed the Comptroller’s action in denying refunds to the plaintiffs.³⁴⁶ The court also noted that the petitioner had presented no other Maryland laws giving preferential treatment to state retirees over federal retirees.³⁴⁷

The Court of Special Appeals heard the plaintiffs’ appeal of the trial court’s decision.³⁴⁸ That court upheld the ruling that the Maryland statute did not discriminate against federal retirees because the statute did not provide favorable treatment for retirement payments, but only dealt with length of service payments available to anyone who served in the status of a volunteer firefighter or rescue worker.³⁴⁹

3. *Bouchard*.—In *Bouchard v. Clark*,³⁵⁰ the Rhode Island Supreme Court examined a case in which the plaintiffs claimed a refund for state taxes paid on federal pensions from 1981 through 1984. Their claim was denied throughout the administrative tax process and the plaintiffs filed a complaint in district court in December, 1986.³⁵¹ The plaintiffs contended that the federal retirement pension income was exempt from taxation. During the time that the case was pending on appeal, another decision of the Rhode Island Supreme Court³⁵² ruled that the state income tax statutes in question repealed the statutory tax exemption of pension benefits from state income tax.³⁵³

The plaintiffs also alleged that the taxation of federal pensions was unconstitutional because it discriminated against

³⁴³MD. TAX-GEN. CODE ANN. § 10-207(o) (1988), provided for a subtraction modification from federal gross income of payments received under a fire, rescue, or ambulance personnel length-of-service award program that is funded by any county or municipal corporation of the state.

³⁴⁴*Doneski*, 1990 Md. Tax LEXIS 11, at *4 (Md. Tax, Aug. 15, 1990).

³⁴⁵*Id.* at *4-5.

³⁴⁶*Id.*

³⁴⁷*Id.*

³⁴⁸1992 Md. App. LEXIS 105 (Md. App. May 1, 1992).

³⁴⁹*Id.* at *22-23.

³⁵⁰581 A.2d 715 (R.I. 1990).

³⁵¹*Id.* at 716. This was before the Court announced the decision in *Davis*.

³⁵²*Linnane v. Clark*, 557 A.2d 477 (R.I. 1989).

³⁵³*Id.*

federal retirees.³⁵⁴ The court refused to consider this argument because the plaintiffs raised it for the first time on appeal.³⁵⁵ The court in *Bouchard* did not mention Davis at all for a basis for the plaintiffs' allegation and instead relied upon Rhode Island case law that "this court will not consider an issue raised for the first time on appeal that was not properly presented before the trial court" to deny relief.³⁵⁶

4. *Barker*. — Some of the litigation spawned by Davis involved states that have not changed their taxing statutes at all. One of the most hotly contested cases in this area was *Barker v. Kansas*,³⁵⁷ a decision by the Kansas Supreme Court regarding the applicability, or lack thereof, of Davis to the Kansas Income Tax Act. Under the Kansas Income Tax Act, Kansas taxes military retirement benefits while exempting virtually all state retirement benefits from taxation. This differential treatment on its face raised the Davis issue of discrimination against federal retirees.

V. Supreme Court Litigation After Davis

In the most recent case in which the United States Supreme Court has considered Davis-related litigation, the Court reviewed the Kansas Income Tax Act, which taxed federal military retirement benefits while exempting retirement benefits received by state and local retirees. In *Barker v. Kansas*,³⁵⁸ the Court examined the claim that the Kansas Income Tax Act³⁵⁹ violated the Public Salary Tax Act³⁶⁰ and the doctrine of intergovernmental tax immunity as discussed in *Davis*.³⁶¹

A. The State Court Decision

Upon review, the Kansas Supreme Court had upheld the Kansas taxing scheme.³⁶² The court accepted the state's

³⁵⁴ *Bouchard*, 581 A.2d at 716.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ 15 P.2d 46 (Kan.), *cert. granted*, 112 S. Ct. 576 (1991).

³⁵⁸ 112 S. Ct. 1619 (1992).

³⁵⁹ KAN. STAT. ANN. § 79-3201 (Supp. 1991). Under the act, federal adjusted gross income (AGI) is the beginning point to determine one's income tax liability. Federal AGI includes military, state, and local government retirement benefits. The act, however, excludes retirement benefits under the Kansas Public Employees Retirement System, as well as benefits for other state and local employees such as judges, policemen, firemen, and city employees. Federal civil service and railroad retirement are also exempt from taxation under the act.

³⁶⁰ *See supra* note 16 and accompanying text.

³⁶¹ 489 U.S. 803 (1989).

³⁶² *Barker v. Kansas*, 815 P.2d 46 (Kan. 1991).

justifications for differing treatment between military retirees, and state and local government retirees. The justifications were as follows: (1) military retirees remain members of the armed forces and are retired only from active duty; (2) military retirees are subject to the Uniform Code of Military Justice and may be court-martialed after retirement; (3) military retirees are subject to restrictions on civilian employment after retirement; and (4) military retirees are subject to involuntary recall.³⁶³ The court used these factors to decide that federal military retirement is not deferred compensation but is instead current pay for reduced services.

The Kansas Supreme Court also relied on *United States v. Tyler*,³⁶⁴ *McCarty v. McCarty*,³⁶⁵ and *Cornetta v. United States*³⁶⁶ in arriving at its conclusion. The court read these federal cases as demonstrating that military retirement pay, even when considered in circumstances varying from a divorce action to a wrongful discharge claim, has been treated as current compensation for reduced services.³⁶⁷

The Kansas Supreme Court also examined the plaintiffs' argument that the Kansas Income Tax Act treats military retirement pay as deferred compensation through its incorporation of the federal tax statute governing individual retirement accounts.³⁶⁸ Because the pay is not compensation for the purposes of making a deductible contribution to an individual retirement account, the plaintiffs asserted that the state could not treat military retirement pay as current compensation because it already treated it as deferred compensation.³⁶⁹ The court rejected

³⁶³ *Id.* at 53.

³⁶⁴ 105 U.S. 244 (1882) (Supreme Court held a retired military officer entitled to a pay raise based on a statute that increased the pay of commissioned officers for every five years of service; Supreme Court stated that military retirement pay was compensation continued at reduced rate).

³⁶⁵ 453 U.S. 210 (1981) (issue was whether military retirement pay could be characterized as quasi-community property and therefore subject to division in a divorce proceeding; Supreme Court noted several factors it used to conclude that "military retirement pay is reduced compensation for reduced current services").

³⁶⁶ 851 F.2d 1372 (Fed. Cir. 1988) the Court of Appeals reviewed a motion for summary judgment, alleging wrongful discharge by a retired Marine officer. The government presented an argument that the potential receipt of increased retired pay was prejudicial to the government and supported the laches defense. The Court of Appeals noted, "Retired pay is reduced pay for current services" and that the "receipt of retired pay by an officer means the government will pay for the reduced service it then receives." *Id.*

³⁶⁷ *Barker*, 815 P.2d at 53-56.

³⁶⁸ 26 U.S.C. § 219 (1988), governs the deductibility of taxpayer contributions to an individual retirement account (IRA). Under section 219(f)(1), "compensation" is defined to exclude any amount received as a pension or annuity and does not include any amount received as deferred compensation.

³⁶⁹ *Barker*, 815 P.2d at 56.

this argument by reading the definition of compensation under the federal tax section for individual retirement accounts as a “limited definition” of compensation applicable to only that particular section. Accordingly, the court found the “distinction is not so much the characterization as current income or deferred compensation, but rather active versus passive activities required to earn the income.”³⁷⁰

The Kansas Supreme Court next reviewed the funding differences between military and state retirement systems,³⁷¹ the differing treatments between state and federal retirees in Kansas,³⁷² and other state cases dealing with the rule in Davis.³⁷³ The court found that because military retirement is a noncontributory system, the state had no opportunity to tax these benefits before military retirees received them. Kansas state and local employees and employers, however, paid taxes on their contributions into state and local retirement systems.³⁷⁴ The court once again relied on the treatment of military retirement pay as current compensation in taxing these benefits differently than other federal retirement benefits.³⁷⁵ Finally, the court found that even though state court decisions had held that federal civil service and military retirement should be treated the same, the Kansas district court properly relied upon federal precedent³⁷⁶ in treating military retirement as current compensation.³⁷⁷

³⁷⁰*Id.* at 57.

³⁷¹*Id.* at 57-58. The court rejected the plaintiffs’ argument that the inconsistent treatment of military retirement pay and state and local retirement pay was not related to significant differences between the two classes. In doing so, the court again relied upon the characterization of military retirement pay as current compensation, and of state and local retirement pay as deferred compensation.

³⁷²*Id.* at 58-59. The plaintiffs argued that the inconsistent treatment between federal civil service retirees, railroad retirees, and other federal retirees proved no legitimate basis for the present tax treatment of military retirement. Federal civil service and railroad retirement were exempt from taxation. Other federal retirees, however, such as bankruptcy judges, United States magistrates, and members of the Central Intelligence Agency, were subject to taxation even though these retirement systems were contributory.

³⁷³*Id.* at 59-60. The court reviewed the following state cases: *Bohn v. Waddell*, 790 P.2d 772 (Ariz. Tax 1990), *affd on reconsideration*, 807 P.2d 1 (Ariz. Tax 1991); *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991); *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Ragsdale v. Dept. of Revenue*, No. 2958, 1990 WL 174474 (Or. Tax Nov. 7, 1990); *Bass v. South Carolina*, 395 S.E.2d 171 (1990); *vacated and remanded*, 111 S. Ct. 2881 (1991); *Hogan v. Musolf*, 459 N.W.2d 216 (Wis. Ct. App. 1990), *reu’d*, 471 N.W.2d 216 (Wis. 1991). These cases and any subsequent action on them after the Kansas Supreme Court decided *Barker* are discussed *infra* Part IV.

³⁷⁴*Barker*, 815 P.2d at 57.

³⁷⁵*Id.* at 58.

³⁷⁶*See supra* notes 364-66 and accompanying text.

³⁷⁷*Barker*, 815 P.2d at 59-60.

B. The Supreme Court Opinion

The United States Supreme Court reviewed the Kansas Supreme Court's decision³⁷⁸ and disagreed with the characterization of military retirement pay as current compensation for the purposes of the Public Salary Tax Act.³⁷⁹ The Court found that *Davis* controlled the analysis in deciding *Barker*³⁸⁰ and examined the state's tax treatment of military retirees. The Court did not agree that the State's "distinctions" between military retirees, and state and local government retirees, justified the differential tax treatments.³⁸¹

The Court also examined the federal precedents relied on by the Kansas Supreme Court in concluding that military retirement pay was current pay for reduced services.³⁸² It found the readings of *United States v. Tyler*³⁸³ and *McCurty v. McCarty*³⁸⁴ by the Kansas Supreme Court "unpersuasive"³⁸⁵ and announced its interpretation of these cases. The Court interpreted *Tyler* as governing retirement benefits for a certain class of military retirees in relation to active-duty officers. The Court concluded, "Tyler thus cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services."³⁸⁶

The Court analyzed *McCurty* and determined that *McCurty* did not hold that federal law forbade states from treating military retirement pay as deferred income. The Court stated that it had not accepted *Tyler*'s characterization of retirement pay as current compensation for all purposes; otherwise, the *McCurty* decision would not have had to use an alternative basis of state law to resolve the dispute.³⁸⁷

³⁷⁸ *Barker v. Kansas*, 112 S. Ct. 1619 (1991).

³⁷⁹ See *supra* note 16 (text of section 111 of the Public Salary Tax Act, 4 U.S.C. § 111 (1988)).

³⁸⁰ 112 S. Ct. at 1622.

³⁸¹ *Id.* at 1622-23.

³⁸² See *supra* notes 364-66 and accompanying text.

³⁸³ 105 U.S. 244 (1882).

³⁸⁴ 453 U.S. 210 (1981).

³⁸⁵ *Barker*, 112 S. Ct. at 1624.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 1625. The court stated in *Barker*:

Had we accepted as definitive for all purposes *Tyler*'s characterization of such pay as current income, our decision in *McCarty* would have been simple because we would have been foreclosed from treating military retired pay as deferred compensation. Such a holding would have been a much easier way of deciding *McCarty* than the alternative basis for decision — that the application of California's community property law conflicted with the federal military retirement scheme.

After the Court rejected the Kansas Supreme Court's holdings regarding the differences in calculating benefits and federal precedents, the Court examined congressional intent concerning military retirement pay as evidenced by federal statutes.³⁸⁸ The Court found that the Uniformed Services Former Spouses' Protection Act³⁸⁹ permits states to treat military retirement pay as deferred compensation for past services.³⁹⁰ Additionally, the Court reviewed the treatment of individual retirement accounts under federal and Kansas income tax law.³⁹¹ The Court noted that Kansas tax law followed the federal scheme and treated military retirement pay as it treated other types of retirement benefits and not like current compensation.³⁹² The Court found the Kansas Supreme Court's view that military retirement pay was not current income only for purposes of individual retirement accounts "unpersuasive."³⁹³ The Court, therefore, found that for the purposes of the Public Salary Tax Act, military retirement benefits are to be treated as deferred compensation for past services.³⁹⁴ The Court reversed the judgment and remanded the case.

Justice Stevens wrote a concurring opinion in which Justice Thomas joined. Justice Stevens agreed that Davis controlled the Barker facts, but continued to assert that Davis "misapplied the doctrine of intergovernmental tax immunity."³⁹⁵

The Court, however, left open the question of great concern to many state courts in *Davis*-related litigation—that is, does Davis apply retroactively?³⁹⁶ During oral argument in *Barker*, Justice O'Connor asked the petitioners' counsel whether the

³⁸⁸ *Id.*

³⁸⁹ 10 U.S.C. § 1408 (1983).

³⁹⁰ *Barker*, 112 S. Ct. at 1625.

³⁹¹ See *supra* note 367 and accompanying text.

³⁹² *Barker*, 112 S. Ct. at 1625.

³⁹³ *Id.*

³⁹⁴ *Id.* at 1626. Additionally, the Court disposed of the position of the Kansas Supreme Court regarding contributory state and local government retirement plans and noncontributory military retirement plans in footnote 5 of the decision. For a discussion of the Kansas Supreme Court's position, see *supra* note 370.

³⁹⁵ *Barker*, 112 S. Ct. at 1626.

³⁹⁶ Significantly, neither the petitioners nor the respondent raised or addressed the retroactivity issue in the documents they filed with the Supreme Court in *Barker*. The only brief to address the issue was an amicus curiae brief in support of respondent filed by the states of Arizona, Arkansas, Georgia, Iowa, Montana, Oklahoma, Utah, Virginia, and Wisconsin, which stated that "Should this Court not affirm the ruling of the court below, amici curiae urge this Court to expressly reserve the question of the retroactivity of its decision until the issue can be fully briefed and argued." Brief for Amicus Curiae in Support of Respondents at 1-2, *Barker v. Kansas*, 112 S. Ct. 1619 (1992) (No 91-611). See *id.* at 3-10 (argument on the retroactivity issue).

ruling in *Barker* would have retroactive effect.³⁹⁷ The counsel replied that the ruling would be retroactive for the parties before the Court in *Barker*, but that the issue of retroactivity was not before the Court in this case.³⁹⁸ Justice O'Connor then told the counsel that under the holding in *Beam Distilling*,³⁹⁹ the decision in *Barker* would be retroactive "even if the Court did not say so."⁴⁰⁰ During the argument by respondent's counsel, no justice questioned him about the retroactivity issue. The counsel stated during his argument, however, that the effect of an adverse ruling to Kansas, applied retroactively, would be a refund of \$91,000,000 in taxes and interest for tax year 1984 and all years after 1984.⁴⁰¹

The *Barker* opinion did not address the retroactivity issue specifically. Justice White wrote that the case "was controlled by *Davis*,"⁴⁰² but he did not explain explicitly the refund issue. After the Court announced the opinion, observers of litigation in this area varied in their reactions as to whether *Barker* and *Davis* operated retroactively. Most predicted continued controversy unless the Supreme Court specifically resolved the retroactivity issue.⁴⁰³

C. Conclusion

Barker clearly dealt with only the issue of whether Kansas could tax military retirement pay differently than state and local government retirement pay. The retroactivity issue, meanwhile, remained muddy. The Supreme Court apparently has decided to

³⁹⁷ 43 Daily Tax Rep. (BNA) (Mar. 4, 1992) para. G-7.

³⁹⁸ *Id.*

³⁹⁹ James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).

⁴⁰⁰ 43 Daily Tax Rep. (BNA) (Mar. 4, 1992) para. G-7.

⁴⁰¹ *Id.*

⁴⁰² *Barker*, 112 S. Ct. at 1622.

⁴⁰³ See, e.g., Christopher B. Jones, *Kansas Loses Tax Case*, KAN. CITY STAR, Apr. 22, 1992, at A1, A10 (Kansas Department of Revenue Secretary says, "The court did not tell us whether this decision applies retroactively," while the lead counsel for the petitioners says, "Any position that's taken by the State that this ruling is not retroactive has very little substance."); Paul M. Barrett, *Justices Say States Must Tax Equally Pensions of State and Military Retirees*, WALL ST. J., Apr. 22, 1992, at A8 (When Justice White wrote that *Barker* was controlled by *Davis*, he was "perhaps implying that the Michigan decision should be applied retroactively to require refunds by Kansas," but he "didn't explicitly order refunds, guaranteeing more litigation over the issue"); Paul W. Arcari et al, *Washington Scene: A Victory Plus for Retirees In Kansas*, THE RETIRED OFFICER MAG. June, 1992, at 12 ("Some attorneys interpret [Justice White's opinion] to mean that the Michigan decision should be applied retroactively to require refunds by Kansas. However, because Justice White didn't explicitly order refunds, there will undoubtedly be more litigation over the refund issue before it is finally resolved").

resolve the “retroactivity quagmire”⁴⁰⁴ because it granted the petition for certiorari in *Harper v. Virginia Department of Taxation*⁴⁰⁵ less than one month after it announced the opinion in *Barker*. The petitioner-retirees in *Harper* had filed the petition on November 15, 1991, even before the Court had agreed to hear *Barker*.

The key issue in *Harper* will be retroactivity. Both parties briefed the issue fully in the documents submitted to the Court. Observers reacted quickly, noting that *Harper* is expected finally to resolve the retroactivity issue never clearly handled in *Davis* itself.⁴⁰⁶

VI. The Answer in *Harper*

When the Court agreed to hear *Harper v. Virginia Department of Taxation*, it indicated that an answer would be forthcoming in the controversy over the application of *Davis*. As was discussed in Part IV, state courts have used a variety of analyses to resolve the issue regarding the refund of illegally collected taxes. Most state courts quickly declared taxing statutes unconstitutional after the Court announced *Davis*, but struggled with the retroactivity issue.

In determining which analysis to use, the following methodology apparently applies. First, the decisions in *Smith*, *McKesson*, and *Beam Distilling* provide a framework to interpret the Court’s intent in the retroactivity area. Second, after determining whether a decision applies retroactively, the court will evaluate whether an independent state ground exists that

⁴⁰⁴ Paul M. Barrett, *High Court Cases Hold Big Risks For State Finances*, WALL ST. J., Feb. 6, 1992, at B6. This article reviewed several tax cases pending before the Supreme Court, including *Barker v. Kansas*.

⁴⁰⁵ 60 U.S.L.W. 3406 (U.S. May, 18, 1992) (No. 91-794).

⁴⁰⁶ See, e.g., Paul M. Barrett, *Justices Will Rule on Whether States Must Refund Taxes Deemed Improper*, WALL ST. J., May 19, 1992, at A3 (“Lawyers have followed the Virginia case closely on the theory that the high court might use it to establish a general rule on when judicial rulings apply retroactively”); Ruth Marcus, *Va. Has \$440 Million Stake In High Tax Court Ruling*, WASH. POST, May 19, 1992, at D1 (“The court said it would consider an issue left open since its 1989 ruling that state may not tax the retirement benefits of federal employees while exempting state and local retirees, essentially to decide whether its decision in *Davis v. Michigan Department of Treasury* applies retroactively”); Mike Causey, *The Federal Diary: Virginia Tax Refunds*, WASH. POST, May 19, 1992, at D2 (Since the Supreme Court requested additional arguments, the “final solution is many months away” because the Court will not hear the case until the fall); *Strapped States Wait Anxiously For A Supreme Court Ruling On Refunds*, WALL ST. J., May 27, 1992, at A1 (“Last week, the Supreme Court agreed to decide if its 1989 ruling requires refunds”).

affects the remedy available to the taxpayers even though the taxpayers paid illegally collected taxes.

In using the framework of *Smith*, *McKesson*, and *Beam Distilling* to analyze whether *Davis* applies retroactively, as well as prior Supreme Court precedents, the result is that *Davis* applies retroactively. *Beam Distilling*, although a decision with a plurality opinion—indicates that the normal choice of law is to apply a decision fully retroactively. Although Justice O'Connor's dissent strongly suggests that the *Chevron Oil* analysis should be applied, her questioning of counsel during the oral arguments on *Barker* reflected the Court's position that the usual rule is retroactive application of a decision.

The next part of the framework to examine is the remedy required from the failure to apply *Davis* retroactively. The Court in *Davis* indicated that the Michigan statute violated the intergovernmental tax immunity doctrine, as well as the Public Salary Tax Act. *McKesson* therefore requires the states to refund the taxes unlawfully collected because the taxes were beyond the states' power to impose. Moreover, because the remedy must be "meaningful backward-looking relief to rectify an unconstitutional deprivation,"⁴⁰⁷ fiscal problems experienced by states in refunding the taxes previously collected are not a sufficient reason to deny the refunds.⁴⁰⁸ This leaves states with various procedural requirements to invoke if they desire protection from potential refund liability.

Some states had refund statutes in place before the Court announced *Davis* and relied upon those statutes to deny refunds, even though the courts had declared that tax statute invalid.⁴⁰⁹ The statutes, often called "pay under protest" statutes, prescribed certain rules a taxpayer had to follow to claim a refund under a statute alleged to be unconstitutional. Under a somewhat different application of state law, one state court found refunds due taxpayers because applicable state law did not require a "pay under protest" condition to file a claim for a refund.⁴¹⁰ Therefore, taxpayers may find that the retroactive application of *Davis* does not mean that they are going to receive a refund automatically, even though they paid "illegal" taxes for tax years preceding the *Davis* decision.

⁴⁰⁷ *McKesson*, 496 U.S. at 39.

⁴⁰⁸ See *supra* notes 104-11 and accompanying text.

⁴⁰⁹ See *supra* notes 246-336 and accompanying text.

⁴¹⁰ *Director of Revenue of Missouri v. Hackman*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990).

The additional question that could spawn litigation, therefore, is whether a state statute governing the filing of a refund claim meets the requirements of *McKesson*. After the decisions in *McKesson* and *Beam Distilling*, some state courts found *Davis* applied retroactively but denied refunds based on the state refund statutes. For example, in *Bass v. South Carolina*,⁴¹¹ the South Carolina Supreme Court determined that the plaintiffs used the incorrect refund statute—one that permitted filing a claim up to three years after payment of the tax—and should have used the statute that allowed only thirty days to file for a refund after payment of the tax. Plaintiffs in some cases may have to challenge these statutes as a subterfuge used by the state to avoid payment of previously illegally collected taxes.

In *Harper v. Virginia Department of Taxation*,⁴¹² the Supreme Court will have to determine whether the “adequate and independent state ground” that the State relies upon in its brief is sufficient to deny refunds of approximately \$440,000,000.⁴¹³ According to the respondent’s brief, the Virginia Supreme Court on remand from the United States Supreme Court applied “established precedent that had anticipated the issue, and that had resolved the matter under Virginia law in 1973” in announcing an opinion that “was entirely consistent with *Beam [Distilling]*.”⁴¹⁴ Petitioners contend, on the other hand, that to deny the refunds would be inconsistent with *McKesson* because the state unlawfully collected taxes in violation of the inter-governmental immunity doctrine.

The Supreme Court likely will find that *Davis* applies retroactively and then closely will examine whether a sufficient procedure under state law denies the plaintiffs refunds for the illegally collected taxes. Because Virginia apparently is the state with the largest potential refund liability, the Court’s comments in *McKesson*, that financial hardship alone is not enough to deny refunds, will be put to the test.

⁴¹¹414 S.E.2d 110 (S.C. 1992).

⁴¹²410 S.E.2 629 (Va. 1991), *petition* granted, 112 S. Ct. 1934 (1992).

⁴¹³*Harper*, 401 S.E.2d at 239.

⁴¹⁴Brief In Opposition to Petition for a Writ of Certiorari, *Harper v. Virginia Dep’t of Taxation*, No. 91-794 (U.S. 1992).

THE UNITED NATIONS SECURITY COUNCIL VETO IN THE NEW WORLD ORDER

KEITH L. SELLEN*

A new world order is not a fact; it is an aspiration—and an opportunity. We have within our grasp an extraordinary possibility that few generations have enjoyed—to build a new international system in accordance with our own values and ideals, as old patterns and certainties crumble around us.¹

The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.²

I. Introduction

World events over the past two years—such as the fall of the Berlin wall, the demise of communism, the victory against Saddam Hussein, and the withering away of the Soviet state—have provided the international community with an unprecedented opportunity to structure a new world order. The Cold War and the era of the bipolar international security system are over. The international political climate has changed, as the 1991 coalition victory against Iraq illustrated.³ The orchestration of diplomacy leading up to the coalition victory, in particular, clearly demonstrated that nations involved in planning the new world order must consider the role of the United Nations Security Council.⁴ Although Cold War politics hindered the effectiveness of

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¹The White House, National Security Strategy of the United States V (Aug. 1991) [hereinafter *Natsec Strategy*].

²*Ecclesiastes* 1:9 (King James).

³See *Natsec Strategy*, *supra* note 1, at 2; see also Carl E. Vuono, *National Strategy and the Army of the 1990's*, PARAMETERS, Summer 1991, at 2.

⁴See Richard Holbrooke, *Japan and the United States: Ending the Unequal Partnership*, Council on Foreign Relations, Winter 1991, available in LEXIS, INTLAW Library, FORAFR File; Trevor Rowe, *Bush Said to Sign on for Proposed Security Council Summit*, WASH. POST, Jan. 8, 1992, at A16.

the Security Council, that body now has a mandate to become involved in the maintenance of international peace and security. Accordingly, the member states of the United Nations should seize this opportunity to make the Security Council an even more effective body for international deliberation and legitimate decision-making. In particular, one of the most important changes that the members could make is to eliminate the veto power wielded by each permanent member of the Security Council.

Improving the effectiveness of the Security Council now not only is important, but also is essential. The Cold War victory celebration has passed, but security problems persist.⁵ The common enemy, against whom the free world's alliances were united, is gone.⁶ The tremendous threats to security that once dominated international affairs have diminished. Ironically, the disappearance of these threats to stability, which for years had compelled the nations of the West to align in the interests of assuring the very survival of the free world, now may lead United Nations member states to become complacent about the opportunity to build peace in this new era.

History, however, should be enough to admonish the world community that, in time, new conflicts inevitably will develop and will hinder efforts to improve the Security Council—just as they did after World War II.⁷ Additionally, diminishing United States influence will change the international security system.⁸ These

⁵See e.g., Burrus M. Carnahan, *Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Issues*, 25 INT'L LAW. 167, 168 (Spring 1991) (arguing that chemical arms control is a global problem); The Honorable H. Lawrence Garrett III et al., *The Way Ahead*, PROCEEDINGS, Apr. 1991, at 37 (arguing that conflict will come from nationalism, religious rivalries, drug trafficking, terrorism, and growing gaps between rich and poor); Holbrooke, *supra* note 4 (arguing that strained relations between Japan and the United States is a significant security concern); Vuono, *supra* note 3, at 2 (Iraq invaded Kuwait even as the Cold War was waning); Secretary of State James Baker, Address at the UN General Assembly Special Session on Narcotics (Feb. 20, 1990) available in LEXIS, INTLAW library, DSTATE file (arguing that the drug trade is a security threat requiring cooperation through the United Nations).

⁶See YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 231 (1988); Natsec Strategy, *supra* note 1, at 1.

⁷See INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES—THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 48-9 (4th ed. 1971).

⁸See Yoichi Funabashi, *Japan and the New World Order*, FOREIGN AFFAIRS, Winter 1991, at 58 available in LEXIS, INTLAW library, FORAFR file (arguing that the United States will be under financial limitations that will render it unable to meet international security challenges alone); Eduardo Lachica, *U.S. Should Alter Its Policies on Trade to Halt Competitive Decline*, Study Says, WALL ST. J., Nov. 14, 1991, at A16 (citing a report indicating that the United States is falling behind international competitors in manufacturing); Mark Alan Stamaty, *An Active Europe, a Passive United States*, WASH. POST, Nov. 25, 1991, at A21 (arguing that United States power is less than assumed and that the American role in defining the new world order is being challenged).

factors make the old international security structure obsolete and a new structure necessary.⁹ While the Security Council can be an effective security organization today,¹⁰ its effectiveness in the future depends upon its facility to reflect political realities and engender respect.

While we must seek to improve the Security Council, the task will not be easy. Improving the effectiveness of the body will require permanent members to commit themselves to future Security Council decisions. This presents a classic prisoners' dilemma.¹¹ Specifically, each member nation not only recognizes that collective security requires a commitment to abide by the collective will, but also faces the need to protect its own sovereignty.¹² Because these interests may conflict, the members of the organization naturally will remain wary.¹³

This dilemma arises whenever states consider a collective security organization. For example, the Hague Conference of 1899 tried to reduce armaments but, after meeting for over ten weeks, the members refused to commit to any reductions.¹⁴ The Hague Conference did establish the Permanent Court of Arbitration, but excepted from its jurisdiction all significant cases.¹⁵ Similarly, in 1918, Nicaragua would not renew the Central American Court of Justice Treaty "because two decisions ... were adverse to her."¹⁶ Decisions in the League of Nations required unanimity,¹⁷ which protected each member from the collective will. Likewise, the United Nations Charter obligates all states to follow Security Council decisions, but the veto power effectively excuses permanent members from that obligation.¹⁸

Eliminating the veto, of course, would reintroduce this classic dilemma. The permanent members—that is, the United States, Great Britain, China, France, and the Soviet Union—

⁹Wilson A. Shoffner, *SASO to FMSO: Assessing the New World Order*, MIL. REV., Dec. 1991, preface.

¹⁰Natsec Strategy, *supra* note 1, at 3.

¹¹See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 640 (1991).

¹²See CLAUDE, *supra* note 7, at 253 (discussing the need for commitment to the collective interest); *id.* at 5, 39 (discussing the need to protect individual independence and sovereignty).

¹³MYRES S. McDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 356 (1961).

¹⁴SYLVESTER JOHN HEMLEBEN, *PLANS FOR WORLD PEACE THROUGH SIX CENTURIES* 128 (1943).

¹⁵*Id.* ("Not a single power ... was willing to bind itself by a hard and fast rule to submit all questions to arbitration, and least of all the United States").

¹⁶*Id.* at 137.

¹⁷LEAGUE OF NATIONS COVENANT art. 5, para. 1.

¹⁸U.N. CHARTER art. 24, 25, 27.

reserved the veto to preserve their own interests.¹⁹ The United States government, for instance, feared that the Senate would not consent to membership without the veto.²⁰ The Soviets, on the other hand, insisted on the veto because they feared that the Western powers would outvote them.²¹ At the United Nations conference in San Francisco, delegates strongly criticized the veto.²² Nevertheless, the permanent members defended it, and demanded its acceptance.²³

Because self-interest persists, the veto will be both difficult to live with and difficult to change. Despite recent international cooperation, “[t]here is no reason to suppose that the present period of global harmony will continue indefinitely; when the harmony ceases, the political machinery, unchanged, will prove to be just as inadequate as during the Cold War.”²⁴ Because the veto protects their self-interests, the permanent members will be reluctant to give it up.

Consequently, today the community of nations faces new and old—new opportunities arising from the Cold War’s end, as well as old, familiar choices between self-interest and collective interest. The members of that community should take this opportunity to consider critically whether the world has entered an era in which each nation comfortably can sacrifice considerable self-interest to promote collective interest. The world certainly will “miss the boat” if it does not use the end of the Cold War to create a global system for the new millennium—one that preserves peace, fosters economic growth, and prevents the deterioration of the human physical and environmental condition.²⁵ If the world truly has entered an era marked by a new international order, nations should consider, in particular,

¹⁹*Id.* art. 27, para. 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the *concurring votes of the permanent members.*” (emphasis added)). The phrase “all other matters” means nonprocedural matters, a clause subject to varied interpretation. See *id.* art. 27, para. 2; LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS 221-3 (2d ed. 1949).

²⁰CLAUDE, *supra* note 7, at 61-62.

²¹*Id.* at 155.

²²GOODRICH & HAMBRO, *supra* note 19, at 215.

²³*Id.* at 219. The permanent members “suggested that the proposed text and statement of interpretation were as far as their Governments were prepared to go, and called attention to the serious consequences that would follow so far as the work of the Conference was concerned from any rejection of the proposed text.” *Id.*; see also CLAUDE, *supra* note 7, at 143 (quoting Secretary of State Cordell Hull as saying that the United States supported the permanent member veto and would not have participated in the United Nations without it).

²⁴Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 INT’L L. & POL. 601, 614-5.

²⁵*Id.* at 601.

whether the ultimate protection of international self-interest—that is, the veto power retained by the permanent members of the Security Council—must be eschewed.

To improve the Security Council, the United Nations should replace the permanent-member veto with a “double-majority” voting method. This voting method would require the concurrence of a majority of all members, as well as an independent concurrence by a majority of the permanent members, before a Security Council resolution passes. Realistically, resolutions considered under this voting system will pass only if member states respect the Security Council’s effectiveness and fairness.

Accordingly, the double-majority voting scheme not only elevates collective interests above often-selfish domestic interests, but also promotes respect for the Security Council itself. A heightened recognition of collective interests and a heightened respect for the Security Council are both essential if law is to rule the international community. Because the United States benefits from improved international security, it should agree to replace the veto. This is especially important now because the United States likely will be less dominant in international politics in the future.

Several factors support a proposal to replace the permanent-member veto with a double-majority voting scheme. First, United States security improves as international security improves. Second, international security improves as the Security Council acts more effectively. Third, the Security Council acts more effectively as it becomes more authoritative—that is, as it operates without the veto. Fourth, eliminating the veto is in the United States’ best interests. Fifth, a double-majority voting method is the best way to make the Security Council more authoritative, considering its purpose and the international community’s needs.

II. UNITED STATES NATIONAL SECURITY IMPROVES AS INTERNATIONAL SECURITY IMPROVES.

A. Peace and Security Are Indivisible

To say that United States national security improves as international security improves is to say that security is indivisible. Indivisibility means a security threat anywhere is a security threat everywhere—that is, one cannot classify any threat as purely national or international. This is true because our world is ever-shrinking.

Kant stated, "The intercourse ... which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it."²⁶ In 1939, Neville Chamberlain acknowledged this principle of indivisibility by noting that states share a common objective in seeking "peace and security for the peoples of the world."²⁷ In 1945, the United Nations' founders believed security was indivisible. The international community had no interest in collective security unless security was indivisible.²⁸ Nevertheless, the founders established a collective security structure.²⁹

The international community continually grows closer through improved communications, increased economic interdependence, increased reliance on collective security, integration of ideas, and growing membership in international organizations.³⁰ This integration removes "the insulation from the rest of the world that geographical distance used to provide, making isolationism impractical."³¹

The United States recognizes that its security depends on international security. "In the 1920's ... the Nation turned inward. That course had near disastrous consequences then and it would be even more dangerous now. At a time when the world is far more interdependent—economically, technologically, environmentally—any attempt to isolate ourselves militarily and politically would be folly."³²

Just as it would be folly to ignore security threats abroad, it would be folly not to lead the world toward improved security. Therefore, the National Security Strategy states, "As we move

²⁶CLAUDE, *supra* note 7, at 251 (quoting Kant).

²⁷*Id.* (quoting Neville Chamberlain, Prime Minister of Great Britain, to acknowledge the indivisibility of peace and security).

²⁸*Id.* at 250-1.

²⁹U.N. CHARTER preamble (stating the determination "to unite our strength to maintain international peace and security"); *id.* art. 1, para. 1 (stating the purpose of the organization is "[t]o maintain international peace and security, and to that end: to take effective collective measures"); *id.* art. 24, para. 1 (establishing the Security Council with responsibility to maintain international peace and security); *id.* art. 52-54 (providing for regional security subject to Security Council authority).

³⁰*See* John Lewis Gaddis, *Toward the Post-Cold War World*, Council on Foreign Relations, Spring 1991, available in LEXIS, INTLAW Library, FORAFR File (describing the ways in which the world is becoming integrated); Miles Kahler, *The International Political Economy*, Council on Foreign Relations, Fall 1990, available in LEXIS, INTLAW Library, FORAFR File; Anant K. Sundaram, *National Sovereignty to Blame for BCCI Scandal*, WALL ST. J., Oct. 24, 1991, at A17.

³¹Gaddis, *supra* note 30.

³²Natsec Strategy, *supra* note 1, at 2.

toward the 21st century, this interdependence of peoples will grow and will continue to demand responsible American leadership. Guided by the values that have inspired and nurtured our democracy at home, we will work for a new world...."³³

B. Current Security Threats Are Indivisible

Indivisibility is a fact. Security threats are never purely national or international but are always both, and to a greater extent every day. Today's security threats—fragmentation, regional competition, drug trafficking, terrorism, arms proliferation, and economic competition—manifest their inherently mixed characters.

1. Fragmentation.—Today, “[t]here are ... forces of fragmentation at work that are resurrecting old barriers between nations and peoples—and creating new ones.”³⁴ They appear as nationalism, protectionism, racial tension, and religious tension.³⁵ Fragmentation, as we see in the former Soviet Union, Yugoslavia, and South Africa, creates security risks for the United States and the international community.

The first risk involves competition among fragmenting factions. During Gorbachev's attempt to keep the Soviet Union together, he warned, “Without the union, there will be an eternal erosion of our society as a whole.... The disintegration will even be fraught with wars.”³⁶ Russia and Ukraine have argued over ownership of the Black Sea Fleet, raising fears of an ethnic war.³⁷ The former republics have significant border disputes with each other.³⁸ Russia and Ukraine even began to erect trade barriers,³⁹ and fought over the control of nuclear weapons.⁴⁰

This competition is indivisible for three reasons. First, the potential that nuclear weapons might be used in conflicts among

³³*Id.* at 33.

³⁴Gaddis, *supra* note 30.

³⁵*Id.*

³⁶Carl Mollins, *Highlight: Three Summer Days Turned History Upside Down*, MACLEAN HUNTER LIMITED, Dec. 23, 1991, available in LEXIS, INTLAW Library, ASIL File.

³⁷Adi Ignatius, *Black Sea Fleet Stranded in Tug-of-war*, WALL ST. J., Jan. 17, 1992, at A8; Eleanor Randolph, *Yeltsin Says Black Sea Naval Fleet Must Belong to Russia, Not Ukraine*, WASH. POST, Jan. 10, 1992, at A14.

³⁸Graham Allison & Robert Blackwill, *America's Stake in the Soviet Future*, Council on Foreign Relations, Summer 1991, available in LEXIS, INTLAW Library, FORAFR File.

³⁹Randolph, *supra* note 37, at A14.

⁴⁰John J. Fialka, *Ukrainians Resist U.S. Efforts to Beat Their Nuclear Swords Into Plowshares*, WALL ST. J., Dec. 6, 1991, at A16.

former republics threatens the whole world.⁴¹ For instance, damage from misfirings and harm from fallout, as well as the mere threat of deploying nuclear weapons, impact well beyond the old Soviet borders. Second, the related risk of "brain drain" is a real threat. The sell-off of nuclear technology could "enable Third World countries to expand their military capabilities in coming years."⁴² Libya, for example, already has attempted to recruit Russian nuclear scientists.⁴³ Third, competition among factions can spill over into other states. Most notably, the fragmentation in currently being witnessed in Yugoslavia has threatened Greece.⁴⁴

The second risk involves the power vacuum that fragmentation creates. Neighboring states compete for the influence that the central authority held. Such a vacuum exists in the former Soviet Union, where Turkey and Iran are competing for influence among the Islamic republics.⁴⁵

The third risk involves human rights violations. Democratic self-determination "does not guarantee human rights."⁴⁶ The civil war in Yugoslavia has seen over ten thousand people die.⁴⁷ Serbians are fighting to create an autonomous enclave for Serbs living in Croatia, and are repressing Albanians who seek to create a similar enclave in Kosovo.⁴⁸ Senator Robert Dole reported that "the Serbian government is systematically destroying the human rights of the Albanians."⁴⁹ Moreover, in 1990 alone, over 250 people died in South Africa from factional fighting between Inkatha and the African National Congress.⁵⁰

⁴¹Keith Bradsher, *Noting Soviet Eclipse, Baker Sees Arms Risks*, N.Y. TIMES, Dec. 9, 1991, at A8 (quoting Secretary Baker as saying that this is "an extraordinarily dangerous situation for Europe and for the rest of the world—indeed for the United States").

⁴²Jeffrey Smith, *Gates Fears Soviet 'Brain Drain,'* WASH. POST, Jan. 16, 1992, at A22 (quoting CIA Director Gates).

⁴³Jeffrey Smith, *Nuclear Experts Going to Russia*, WASH. POST, Jan. 10, 1992, at A14.

⁴⁴*Greece President Fears Balkan Disturbans [sic] May Threaten Greece*, XINHUA, Oct. 27, 1991, available in LEXIS, Nexis Library, XINHUA File [hereinafter *Greece President Fears*].

⁴⁵William Drozdiak, *Iran and Turkey Vie for Political, Economic Influence in Soviet Muslim States*, WASH. POST, Nov. 24, 1991, at A27.

⁴⁶*The Political Scene: Nationalism, Tension in the Republics*, Economist Publications Ltd., Oct. 2, 1990, available in LEXIS, INTLAW Library, ASIL File [hereinafter *The Political Scene*].

⁴⁷Blaine Harden, *Unarmed U.N. Officers Begin Yugoslav Mission*, WASH. POST, Jan. 15, 1992, at A20.

⁴⁸*The Political Scene*, supra note 46.

⁴⁹*Id.*

⁵⁰*Chronology 1990: Africa*, Council on Foreign Relations, Peter Hayes ed. 1990, available in LEXIS, INTLAW Library, FORAFR File.

The international community's interest in preventing these abuses is clear.⁵¹ The human rights violations that accompany fragmentation sow seeds of future conflict.⁵² Ethnic Hungarians and Albanians are seeking autonomy in Yugoslavia,⁵³ raising ethnic tempers in Hungary and Albania. Similarly, racial tensions in South Africa drew considerable world-wide attention to that country's social policies.⁵⁴

The fourth risk, which clearly is the most indivisible risk posed by the forces of fragmentation, is fragmentation's propensity to proliferate. Once one group is able to exercise its rights of self-determination, other groups surely will follow.⁵⁵ These other groups may compose already fragmenting groups, as seen in Russia and Serbia.⁵⁶ Alternatively, these "follower" groups may be in other countries. In East Europe, for instance, "the achievement of liberty in one country" caused similar results in others.⁵⁷ In either case, the other three security risks compound.

Fragmentation, therefore, causes four distinct security risks—factional competition, power vacuums, human rights violations, and proliferation. Each of these risks threatens the entire community with potential nuclear confrontation, "brain drain," spillovers of violence, and fights to fill power vacuums.

2. Regionalism.—Regionalism promotes security and cooperation "only within limited segments of the globe" where common loyalties, problems, and interests exist.⁵⁸ Regionalism stands in contrast to globalism, which attempts to find commonality on a

⁵¹See *Genscher Calls for Security Council Move on Yugoslavia Crisis*, Agence France Presse, Nov. 22, 1991, available in LEXIS, ALERT Library, ALERT File [hereinafter *Genscher on Yugoslavia*].

⁵²See Sunstein, *supra* note 11, at 654.

⁵³Steven L. Burg, *Nationalism and Democratization in Yugoslavia*, Center for Strategic and International Studies, 1991, available in LEXIS, Nexis Library, WASHQR File.

⁵⁴G.A. Res. 34/93, U.N. GAOR, 34th Sess., Supp. No. 46, at 29-38, U.N. Doc. A/34/46 (1979); G.A. Res. 351206, U.N. GAOR, 35th Sess., Supp. No. 48, at 29-39, U.N. Doc. A/35/48 (1980).

⁵⁵Arthur Schlesinger, Jr., *Self-Determination: Yes, but ...*, WALL ST. J., Sept. 27, 1991, at A10. Schlesinger argues that "[i]f Armenia is independent, then why not Catalonia ... Slovakia? Corsica? Brittany? Wallonia? Jersey? Scotland? Quebec? Every minority contains minorities of its own. Where does self-determination stop?" *Id.* He also points out self-determination is not bad but it does involve security risks for the international community. *Id.* See generally Gaddis, *supra* note 30 (discussing the pros and cons of fragmentation).

⁵⁶See Robert S. Greensberger, *Economic, Ethnic, Nationalist Forces May Pull Stitches of Russia-Led Commonwealth Apart Soon*, WALL ST. J., Dec. 31, 1991, at A8 (reporting fragmentation within the Russian republic itself); *The Political Scene*, *supra* note 46.

⁵⁷Gaddis, *supra* note 30.

⁵⁸CLAUDE, *supra* note 7, at 103.

global scale.⁵⁹ Regionalism has an advantage in that it is easier to unite a limited area than the whole globe.⁶⁰ On the other hand, regionalism poses a risk that regional agencies will take on lives of their own and compete with other regional agencies.⁶¹ Regional conflicts are even more indivisible than other international conflicts. For example, the Cold War actually was a forty-five year regional competition that threatened security all over the world. No place was safe from potential nuclear conflict or low intensity conflict.

Despite current optimism over regional relationships, regional competition will continue to arise. The United States National Security Strategy states, 'We see regimes that have made themselves champions of regional radicalism, states that are all too vulnerable to such pressures, governments that refuse to recognize one another, and countries that have claims on one another's territory—some with significant military capabilities and a history of recurring war.'⁶² Regional competition will occur not only with radical regimes, but also with the European Community and Japan. With the demise of the Soviet threat, European and Japanese loyalty to the United States could fade dramatically.

Current United States support for the European Community is precarious for several reasons. First, the European Community may pursue its own economic interests through trade barriers. Significantly, European markets account for forty-six percent of world trade.⁶³ Second, though the European Community promises freer trade, American voters actually may not necessarily want freer trade.⁶⁴ Third, Europe may challenge the United States' political role. Specifically, French President Francois Mitterand has asserted, "eyeing the United States and Japan, ... Europe will be the top power by the next century."⁶⁵ Europe is planning a unified foreign and defense policy that certainly would affect the North Atlantic Treaty Organization (NATO).⁶⁶

⁵⁹*Id.* at 102-03.

⁶⁰*Id.* at 102-03, 113 (citing Churchill's support of regionalism).

⁶¹*Id.* at 113 (citing President Wilson's view that regionalism leads to "war-breeding competitive alliances").

⁶²Natsec Strategy, *supra* note 1, at 7.

⁶³Gerald F. Seib and Larry M. Greenburg, *Baker says U.S. Backs E.C. Unity as Long as Free Trade Prevails*, WALL ST. J., Dec. 6, 1991, at A11; Stamaty, *supra* note 8.

⁶⁴Kahler, *supra* note 30 (citing that the United States imposes trade controls and questioning whether the national interest in liberal markets is politically acceptable).

⁶⁵*New Union, New Upheavals For Europe*, U.S. NEWS & WORLD REPORT, Dec. 23, 1991, at 13 [hereinafter *New Union*].

⁶⁶Stamaty, *supra* note 8 (noting France's and Germany's suggestion of a European defense force); see Jeane Kirkpatrick, *Slouching Toward European Unity*, WASH. POST, Dec. 2, 1991, at A17 (stating that a unified foreign and

Japan also is considering a regional strategy because of competitive pressures from aggressive United States trade policy, European Community integration, and prospects of a North American Free Trade Agreement.⁶⁷ Japan also wants to expand its political influence and reduce the American military presence in Asia.⁶⁸ Because of its economic power, Japan likely will become a challenging competitor. A recent poll reported that sixty percent of Americans believe Japan is a “‘critical threat’ to the vital interests of the United States.”⁶⁹

3. Drug Trafficking. — No security threat is as significant today as the drug trade. “[I]llicit [drug] traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels.”⁷⁰ Despite the commitment of increased resources in recent years (from \$6 billion to \$10 billion by the United States), the threat continues with no discernable end in sight.⁷¹ In the 1990s, the United States expects traffickers to continue their exploitations of American markets and to expand into the European Community and East Asian countries.⁷²

No security threat is as indivisible as the drug trade. “None of us—not one—is safe from the danger of drugs. Drugs pose a serious threat to global security.... There is no country ... so proud or so great as to be able to rid itself of drugs without the help of other nations.”⁷³ The United States attacks the problem both at home and abroad, recognizing that victory on both fronts is essential.⁷⁴

Waging the war on drugs is essential for several reasons. First, drug trafficking anywhere threatens countries everywhere because it overwhelms producer countries, rendering them unable to prevent harm to others. Colombia, for example, has completely

security policy are likely); *New Union*, *supra* note 65 (relating commitments to start joint diplomacy and joint defense compatible with NATO).

⁶⁷Funabashi, *supra* note 8.

⁶⁸*Id.*

⁶⁹Holbrooke, *supra* note 4.

⁷⁰United Nations Convention Against Illicit Traffic in Narcotic **Drugs** and Psychotropic Substances, Dec. 20, 1988, preamble, Senate Treaty Document No. 101-4, 28 I.L.M. 493, 498 [hereinafter *Narcotics Convention*].

⁷¹Baker, *supra* note 5; Charles Lane et al., *The Newest War*, **NEWSWEEK**, Jan. 6, 1992, at 18-19.

⁷²Natsec Strategy, *supra* note 1, at 17.

⁷³Baker, *supra* note 5.

⁷⁴Natsec Strategy, *supra* note 1, at 17.

succumbed to this illicit trade. Its economy not only depends, but also thrives, on cocaine. Profits from the drug trade corrupt the government, buy up valuable property, make trafficking more efficient, and provide social standing. Internal violence reigns with over 16,200 homicides in 1987 alone. Over 12,000 guerrilla combatants compose eight different guerrilla groups. The country is in an abyss, rendering it virtually powerless to prevent the production and export of drugs.⁷⁵

In addition to its overwhelmingly disruptive internal influence on drug-producing countries, drug trafficking anywhere threatens countries everywhere because it causes tensions between producing and consuming nations.⁷⁶ These tensions are manifest in the relationship between Colombia and the United States. For instance, from 1979 to 1981, the Medellin traffickers literally attacked the Miami drug market, killing over 100 persons in 1981 alone. They capitalized on anti-American sentiment in Colombia to oppose the 1979 extradition treaty. The United States often has frustrated the Colombian government by doubting its resolve in fighting the Medellin cartel.⁷⁷

In addition, the United States has conflicts with countries other than Colombia. Heroin production and export continue in Burma with apparent government support.⁷⁸ Because China supports Burma, the United States and the United Nations have little influence there. United States drug intervention assistance in Bolivia reluctantly is received and largely ineffective. Rather than fight drug traffickers, Bolivia uses the aid for counter-insurgency operations "in which hundreds of civilians have ... been executed by

⁷⁵See Bruce M. Bagley, *Colombia and the War on Drugs*, Council on Foreign Relations, Fall 1988, available in LEXIS, INTLAW Library, FORAFR File. The Medellin cartel earns over \$2 billion each year. Cocaine tops coffee as a foreign exchange earner. Over 80,000 people depend on cocaine traffic for their livelihoods. The only real positive factor is that Colombia has not fallen behind in debt payments in over ten years. "In the last three years alone, Colombia's drug bosses have been responsible for the assassination of one minister of justice ... one attorney general, more than 50 judges, at least a dozen journalists, and more than 400 police and military personnel." *Id.*

⁷⁶*Convening of ministerial-level world meeting on drug problems approved by Assembly*, OPI, Feb. 1986, available in LEXIS, INTLAW Library, UNCHR File (quoting Under-Secretary-General for Political and General Assembly Affairs William B. Buffum) [hereinafter *Convening of Meeting*].

⁷⁷Bagley, *supra* note 75. The United States ordered sanctions against Colombia for its refusal to extradite traffickers, to include detailed customs checks of Colombians. *Id.* "These actions fueled rising nationalism and anti-U.S. resentments, and led many Colombians to conclude that U.S. authorities did not understand the country's precarious situation." *Id.*

⁷⁸Fact Sheet: International Narcotics Control—1990, United States Department of State, June 10, 1991, available in LEXIS, INTLAW Library, DSTATE File [hereinafter Fact Sheet].

government forces.”⁷⁹ The same problem exists in Peru.⁸⁰ The United States’ policy of abducting drug traffickers from Mexico has strained American relations with that country as well.⁸¹

Combatting the threat that drug trafficking anywhere has on countries everywhere also is important because the violence incident to illicit drug trade crosses borders easily. The violence in Miami from 1979 to 1981 is not the only example. In 1986, for instance, the Medellin cartel attempted to assassinate the former Colombian Justice Minister in Hungary.⁸² Drug profits also pass from country to country, relatively free from governmental control.⁸³ In particular, United States’ efforts to police its borders have had little impact because traffickers continually find new ways to hide drugs coming into the country.⁸⁴

For these reasons, the United States will be secure from the drug threat only when the international community is secure. The inability of producer countries to control the problem, as well as the difficulties that consumer countries have in abating it, is an international problem. Moreover, tensions between producer and consumer countries present security problems beyond combatting the traffickers. Finally, because the drug trade crosses borders so easily, no one is safe until everyone is safe.

4. *Terrorism.* —

[T]errorism has generated unprecedented dangers to the national security of democratic nations.... Terrorists are capable ... of killing hundreds of innocents at a clip.... [T]he technology for building bombs that can escape detection has outstripped the technology for preventing the tragedies they cause. We have reason to fear, moreover, that if this form of warfare continues it will get even bloodier.⁸⁵

⁷⁹Lane, *supra* note 71, at 21-2. Bolivia is concerned about military assistance because they fear corruption in their military, “which last made headlines when the ‘cocaine colonels’ took power in a 1980 coup.” *Id.* Military assistance likely would benefit the traffickers more than the government. “Of the 900 soldiers now being trained, 85 percent are conscripts on one-year hitches ... Many have relatives working in the drug industry who may well hire the recruits as security guards, paying a premium for U.S. know-how.” *Id.*

⁸⁰*Id.*

⁸¹See Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 A.J.I.L. 712, 713-14 (1990).

⁸²Bagley, *supra* note 75.

⁸³See Sundaram, *supra* note 30.

⁸⁴Bagley, *supra* note 75; Lane, *supra* note 71, at 18.

⁸⁵Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 122 (1989).

Despite the significant political developments of the last few years, the danger of terrorism continues. Over 200 terrorist attacks occurred during Operation Desert Storm.⁸⁶ The United States will continue to be a terrorist target as long as it remains an active world power. Therefore, the United States will be safe from terrorism only when the international community is safe.⁸⁷

Terrorism anywhere affects the United States and the international community for three reasons—its causes are international, its effects are international, and it undermines cooperation among states. Terrorism stems from colonialism and alien occupation and, regardless of who is right, the conflicts clearly are international.⁸⁸ The world has witnessed examples of this in Northern Ireland and Palestine. Because of its international stature, the United States must confront the conditions that prompt terrorism, and often must decide which side to support.⁸⁹ As a result, the United States frequently becomes the terrorist's target.

Terrorism's effects also are international, impacting on a state even when the particular act is committed outside of its borders. During Desert Storm, for instance, terrorists killed an American and targeted the American embassy in Jakarta.⁹⁰ Likewise, since 1985, Americans in Rome, Vienna, Berlin, and on *Pan Am Flight 103* have been terrorist targets.⁹¹

Terrorism also undermines cooperation among states.⁹² States use terrorism to attack others and evade responsibility for their actions.⁹³ Libya tried to avoid responsibility for its terrorism

⁸⁶*International Cooperation Counters Iraqi Terrorist Threats*, U.S. Department of State, July 1, 1991, available in LEXIS, INTLAW Library, DSTATE File [hereinafter *Cooperation Counters Iraqi Terror*]. While no attacks occurred in the United States, terrorists killed one American and attempted to bomb the American Embassy in Jakarta. Iraqi diplomats connected with terrorist attempts in Asia were expelled. *Id.*

⁸⁷See Natsec Strategy, *supra* note 1, at 3.

⁸⁸G.A. Res. 34/145, U.N. GAOR, 34th Sess., Supp. No. 46, at 244, U.N. Doc. A/RES/34/145 (1980); 19 I.L.M. 533, 535 (1980) (United States abstaining).

⁸⁹See *British Rights*, Chicago Tribune, Nov. 18, 1988, at 26 (discussing United States support of Britain in the conflict in Northern Ireland); Linda Greenhouse, *Extradition is Proving a Touchy Subject for the Senate*, N.Y. TIMES, May 18, 1986, at 4-4 (discussing United States efforts to extradite Joseph Doherty to Britain).

⁹⁰*Cooperation Counters Iraqi Terror*, *supra* note 86.

⁹¹Sofaer, *supra* note 85, at 103-4; John M. Goshko, *Anti-Libyan Action in Airliner Bombings Eased*, WASH. POST, Jan. 3, 1992, at A15.

⁹²See S.C. Res. 579, U.N. SCOR, 40th Sess., Resolutions for 1985, at 24, U.N. Doc. S/RES/579 (1985); 25 I.L.M. 243 (1986).

⁹³Sofaer, *supra* note 85, at 94-5. Sofaer says these attacks have become a "substantial threat to the national security of the United States." *Id.* In 1988, 232 Americans were victims of terrorism. *Id.*

in 1985 and 1986. Finally, by turning to terrorism, a state covertly takes matters into its own hands, instead of using cooperative means to resolve disputes.

By offering an expedient alternative to resolving problems, terrorism diminishes cooperative dispute settlement. Accordingly, when cooperation breaks down, the potential for violence increases.⁹⁴ Target states may feel compelled to take extreme measures when they are unable to rely on normal legal procedures. For example, Israel performed a military hostage rescue when Uganda harbored a group of hijackers that held Israeli citizens at Entebbe. Likewise, President Reagan ordered the bombing of terrorist camps in and around Tripoli after Libyan leaders ignored warnings to stop its attacks. An additional problem arises when a state refuses to extradite a terrorist. Specifically, the target state may abduct the terrorist, causing "a severe strain on relations."⁹⁵

Terrorism remains a significant international security threat. The United States recognizes that its prominent role in international affairs makes American interests especially vulnerable. Terrorism's causes and effects are international because it undermines cooperation among states. Therefore, the United States will be safe from terrorism only when the international community is safe.

5. Arms Proliferation.—Arms control, to include nonproliferation and disarmament, is a recognized means to preserve international security.⁹⁶ Kant included disarmament as one of his conditions for perpetual peace. Czar Nicholas II made disarmament an objective of the first Hague Conference. President Wilson included disarmament in his Fourteen Points.

Despite the recognized value of arms control, proliferation remains a significant threat.⁹⁷ Military technology has led to the

⁹⁴See *id.* at 106 ("terrorists need bases ... to live and work, to train, to store their weapons, to make their bombs, and to hold hostages. The States ... are almost invariably unable or unwilling to extradite them ... The only possible remedies ... often would require infringement of the territorial integrity of the State").

⁹⁵*Id.* at 110; see also Memorandum from William P. Barr, Assistant Attorney General, to Dick Thornburgh, Attorney General, Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities, June 21, 1989.

⁹⁶CLAUDE, *supra* note 7, at 286-87.

⁹⁷John J. Fialka, *The Risk Now Posed By the Soviet 'Nukes' Is One of Management*, WALL ST. J., Nov. 20, 1991, at A1, 10. The United States and Soviet Union agreed to destroy these "Scud" warheads at an expected cost of over \$2 billion. *Id.* Because the United States fears that terrorists could steal them, some policy makers favor providing the funds for their destruction. *Id.*; see Bradsher, *supra* note 41, at AS; David Gergen, *The New Rules of Engagement*, U.S. NEWS & WORLD REPORT, Dec. 9, 1991, at 88.

advent of relatively small bombs that have incredible destructive power. They also are "easily hidden, easily transported—and susceptible to theft."⁹⁸ The specter of the proliferation of these bombs was manifest when Iraq threatened the Middle East with nuclear and chemical weapons during the Gulf War.

Efforts to prevent proliferation have been only marginally successful. Iraq was able to develop nuclear and chemical weapons despite international controls.⁹⁹ States have resisted verification because they fear outside interference with their national security plans.¹⁰⁰ Curtailing proliferation also is difficult because it creates tension between two legitimate needs: the need to prevent irresponsible parties from acquiring powerful weapons, and a nation's need to maintain its defense capabilities as an effective deterrent.¹⁰¹ Ironically, when an irresponsible actor actually attempts to acquire these weapons, it almost certainly causes a substantial diversion of resources away from those in need. The world community's recent experience with Iraq confirms this.

Arms proliferation will continue to be an indivisible threat. The Cold War's end has not eliminated the problem, but merely changed it from bipolar to global.¹⁰² Current risks from Soviet

⁹⁸Fialka, *supra* note 97, at A1.

⁹⁹See Natsec Strategy, *supra* note 1, at 15 (citing Iraq's receipt of technology and assistance from Western companies); John J. Fialka, *Ruined Iraqi Chemical-Weapons Site May Yield Identities of Foreigners Who Helped to Create It*, WALL ST. J., Oct. 29, 1991, at A24; Smith, *supra* note 42, at A22.

¹⁰⁰See, e.g., GOODRICH & HAMBRO, *supra* note 19, at 119-20 (explaining Soviet opposition to international control of atomic energy because it interfered in its internal affairs).

¹⁰¹See LELAND M. GOODRICH & ANNE P. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 526 (1955) (citing the United Nations' recognition that international regulation of armaments must "ensure national safety and ... effective collective measures to prevent and suppress threats to and breaches of the peace"); Assistant Secretary for Politico-Military Affairs Richard A. Clarke, Address before the Subcommittees on Europe and the Middle East and on Arms Control, International Security, and Science, House Foreign Affairs Committee (June 27, 1991) available in LEXIS, INTLAW Library, DSTATE File (describing United States policy in deciding who receives American arms, and highlighting conflicts between the United States' interests and the international community's interests).

¹⁰²Natsec Strategy, *supra* note 1, at 27 ("changes in our relationship with the Soviet Union and ... Eastern Europe have markedly reduced the danger of a war in Europe that could escalate to the strategic nuclear level. At the same time, the threat posed by global ballistic-missile proliferation ... has grown considerably"); Garrett, *supra* note 5, at 37 ("As major military powers reduce forces and pull back from forward positions, regional powers and emerging Third World nations will accelerate their acquisition of modern combat weapons and delivery platforms... [R]egional powers will continue to develop and acquire the technology to pose chemical, biological, and nuclear threats"); J.H. Binford Peay III & Jack A. LeCuyer, *Gearing the Force For Crisis Response*, ARMY MAG., Oct. 1991, at 152.

fragmentation, “brain drain,” and radical regimes such as Iraq, threaten countries all over the world.

Fragmentation of the former Soviet Union presents the United States with two security threats. First, the “preeminent U.S. interest ... continues to be to avoid a nuclear war between the two countries.”¹⁰³ While this threat is less likely to occur than in the past, ignoring it would be a mistake. Second, violence or chaos in the former Soviet Union could result in a loss of control over nuclear weapons. Four republic leaders—Russia, Ukraine, Belarus, and Kazakhstan—currently have some control over launching decisions. These two risks moved Congress to authorize the expenditure of \$400 million for destroying Soviet nuclear weapons.¹⁰⁴

“Brain drain” is a related risk. The United States fears other countries will hire Soviet nuclear experts—many of whom are now out of work. According to Central Intelligence Agency Director Gates, Third World countries could use Soviet expertise to “expand their military capabilities ... posing new challenges to U.S. interests.”¹⁰⁵ He expects that Cuba, Syria, Egypt, and Algeria would be interested in tapping into this technology. The 1000 to 2000 scientists who have no alternative opportunities for employment may agree to help these countries. Libya already has solicited two Russian nuclear scientists.¹⁰⁶

Finally, if the postwar Iraqi government teaches anything, it teaches that arms proliferation will continue to threaten the whole world. Iraq was integrated into the international arms market long before the invasion of Kuwait.¹⁰⁷ Nothing since the invasion has changed the international arms market. Although the United Nations has imposed strict sanctions against Iraq, it remains defiant in its public statements and actions.¹⁰⁸ In

¹⁰³ Allison & Blackwill, *supra* note 38.

¹⁰⁴ *Id.*; Bradsher, *supra* note 41, at A8 (citing Secretary Baker’s support); Gergen, *supra* note 97, at 88 (citing support of Senators Nunn, Lugar, and Boren); Margaret Shapiro, *Angry Russians Confront Yeltsin*, *WASH. POST*, Jan. 9, 1992, at A33 (noting that the four leaders have veto power through a telephone line, but not clarifying how the affirmative decision to launch is made or executed).

¹⁰⁵ Smith, *supra* note 42, at A22.

¹⁰⁶ “*Libyans Said to Woo Russian Atom Scientists*,” *WASH. POST*, Jan. 9, 1992, at A37 (stating that Libya offered each scientist a \$2000-per-month salary and that an unnamed foreign government offered a Russian Nuclear Ministry expert \$5000 per month); Smith, *supra* note 43, at A14.

¹⁰⁷ Gaddis, *supra* note 30.

¹⁰⁸ S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687, available in LEXIS, INTLAW Library, DSTATE File. Articles 8 and 9 require international supervision of the destruction or removal of all chemical and biological weapons. This includes disclosure of all chemical, biological, and nuclear materials and acceptance of a commission to inspect Iraq’s nuclear capabilities.

addition, many other countries with the resolve to use nuclear, chemical, and biological weapons will continue to seek them.¹⁰⁹ Accordingly, countries that produce these weapons naturally will have the economic incentive to make them available.¹¹⁰

The international community continues to face dangers from arms proliferation. The end of the Cold War has changed only the nature of the risk. Soviet fragmentation, "brain drain," and the aggressive desires of Third World dictators pose global problems. Consequently, no country is safe until the whole community is safe.

6. *Economic Competition*.—Cold War threats have occupied the world's thinking for so long that to look at economic competition as a legitimate security threat may be hard to believe. In the former United Nations Secretary General's view, however, economic competition always has been a security threat. "Throughout history, nations and peoples have been drawn into conflicts over natural resources. Wars have been fought for territorial expansion, for access to mineral wealth and for control of water."¹¹¹

Economic competition remains a serious concern. "Today, in a world of growing population and proliferating technologies, competition over limited resources can become more fierce . . ." ¹¹² Iraq's invasion and threat to control the oil in the Middle East proved this point.¹¹³

The Cold War's end will permit nations to take a greater interest in economic issues. Tensions are rising among allies whose cooperation was motivated by the fear of communism.¹¹⁴

Id. Ahmad Chalabi, *An Iraq Without Saddam Is Still Possible*, WALL ST. J., Nov. 13, 1991, at A16 (citing Iraqi recalcitrance); John M. Goshko, *Iraq May Get Inventory of Papers*, WASH. POST, Sept. 27, 1991, at A1, 22 (reporting that Iraqi soldiers seized 44 United Nations inspectors for three days.); *U.N. bans Iraqi nuclear operations*, THE DAILY PROGRESS (Charlottesville, Va.), Oct. 12, 1991, at A5 (quoting the Iraqi Ambassador as saying that the resolution violated Iraqi sovereignty).

¹⁰⁹See *supra* notes 105-06.

¹¹⁰See Natsec Strategy, *supra* note 1, at 15 (citing that Libya and Iraq received technology and assistance from Western companies); *id.* at 21 (citing the national interest in maintaining a military technology base); Fialka, *supra* note 99, at A24.

¹¹¹*The 38th Floor*, OPI, Aug. 1986, available in LEXIS, INTLAW Library, UNCHR File (quoting United Nations Secretary-General Javier Perez de Cuellar's comments on World Environment Day, June 5, 1986).

¹¹²*Id.*

¹¹³See Undersecretary of State for Political Affairs Robert M. Kimmitt, Address at the American Bar Association (Apr. 25, 1991), available in LEXIS, INTLAW Library, DSTATE File.

¹¹⁴See Natsec Strategy, *supra* note 1, at 6 (recognizing the need to preserve partnerships with Germany and Japan in the face of economic competition); Holbrooke, *supra* note 4 (noting how the Soviet threat tended to smooth over

President Bush recognized not only the possibility of conflict, but also the potential consequences. "We must guard against the danger that old Cold War allies will become new economic adversaries.... There are signs ... that this could happen.... That way lies economic ruin—a prescription for plunging us into the kind of impoverishing rivalry that ravaged our economies during the Great Depression."¹¹⁵

Economic competition will become more indivisible and intense as time passes. The economies of individual countries are becoming increasingly dependent upon each other; "no nation ... can maintain itself apart from the rest of the world for very long."¹¹⁶ The United States is no exception.¹¹⁷ Economic competition will raise at least three security threats—disputes over access to resources, competition for economic success, and arms proliferation.

Iraq's invasion of Kuwait illustrated how access to resources affects the whole world. One commentator asserted the following account of the situation, had Iraq maintained control:

Staunch allies in the region such as Saudi Arabia, Egypt, Turkey, and, of course, Israel would have faced a real and immediate threat to their stability. The developing countries of Asia, Africa, and Latin America would have been threatened with arbitrary and capricious economic devastation. The industrial democracies of the West and the fledgling democracies of the East would have been at the economic mercy of a man who had little inclination to show any mercy himself.¹¹⁸

Victory in the Gulf did not resolve the general problem. Middle East tensions are as likely to clash over water as oil because both are "fundamental keys to life in the region."¹¹⁹ Japan, which is extremely dependent on foreign natural resources, likely will seek greater influence in areas where they are available.¹²⁰ The United States, also dependent on foreign natural

economic disputes between the United States and Japan, and describing current tension in the relationship); Kahler, *supra* note 30 (questioning United States support for the European Community once the Soviet threat fades).

¹¹⁵ Laurence McQuillan, *U.S. to Apply Yugoslavia Sanctions, Bush Sees Democracy Threat*, Reuters, Nov. 9, 1991, available in LEXIS, NEXIS Library, REUTER File.

¹¹⁶ Gaddis, *supra* note 30.

¹¹⁷ See Natsec Strategy, *supra* note 1, at 6, 19-22.

¹¹⁸ Kimmitt, *supra* note 113.

¹¹⁹ J.H. Binford Peay III & Jack A. LeCuyer, *Gearing the Force For Crisis Response*, ARMY MAG., Oct. 1991, at 152.

¹²⁰ Holbrooke, *supra* note 4.

resources, recognizes the need to protect its access. "We did not send our young women and men into harm's way simply to defend the price of gasoline.... But if vital issues of principle were at stake so were vital economic interests."¹²¹

Competition among economic powers also creates security risks. In particular, the United States, Japan, and the European Community will compete in virtually every market. While no one seriously believes any form of military conflict is likely today, many believe that the competition will become more fierce.¹²² If intense economic competition develops, military confrontation is possible.

The political relationship between the United States and Japan has become strained. Though far from violent, the "relationship is increasingly filled with friction, resentment and mutual recrimination."¹²³ With the Soviet threat gone, Japan depends less on American security assistance and grows more independent in its economic and foreign policy.¹²⁴ Since the Cold War, Americans also have changed their views of Japan. In 1982, public opinion polls showed that Americans considered Japan "more important to U.S. interests' than any other country."¹²⁵ Nevertheless, by 1990, sixty percent of those questioned believed Japan's economic power was a "critical threat' to the vital interests of the United States."¹²⁶

While the relationship between the United States and the European Community is still cooperative, the parties exhibit some degree of apprehension over economic competition. Secretary of State Baker expressed his fears that the European Community would become protectionist.¹²⁷ As is the case with Japan, the

¹²¹ Kimmitt, *supra* note 113; *see also*, Natsec Strategy, *supra* note 1, at 21 ("Secure ... supplies of energy are essential to our national economic prosperity and security. For the foreseeable future, oil will remain a vital element in our energy mix.... We will also maintain our [military] capability to respond to requests to protect vital oil facilities, on land or at sea").

¹²² *See* Natsec Strategy, *supra* note 1, at 6 ("we find ourselves competitors—sometimes bitter competitors—in the economic arena. These frictions must be managed ..."); Funabashi, *supra* note 8; Holbrooke, *supra* note 4; Kahler, *supra* note 30; McQuillan, *supra* note 115 (quoting President Bush as stating, "We must guard against the danger that old Cold War Allies will become new economic adversaries—Cold Warriors turned trade warriors").

¹²³ Holbrooke, *supra* note 4.

¹²⁴ *Id.*; Funabashi, *supra* note 8.

¹²⁵ Holbrooke, *supra* note 4.

¹²⁶ *Id.* (Gallup conducted the polls, which found that American respondents believed more in a threat from the economic power of Japan than any other threat cited in the polls).

¹²⁷ Seib & Greenberg, *supra* note 63, at A11 (quoting Secretary Baker as saying, "we hope it is in fact a process that breaks down trade barriers, that liberalizes trade, and does not create any sort of bloc or protectionism").

need for cooperation among western powers that was essential to facing the Soviet threat no longer exists between the United States and Europe. Commentators continue to ponder whether the European Community break down trade barriers, or if it will take on a life of its own.¹²⁸

Additionally, economic competition presents a security threat from the struggle between rich and poor. "Within developing nations, dramatic increases in population and growing dissatisfaction with the perpetual gap between rich and poor will continue to be major causes of unrest and insurgency."¹²⁹ While many Third World countries progressed in the 1980s, many others still are floundering in debt.¹³⁰ Because "harsh economic conditions ... and political instability [are] natural allies," those countries that compete well will face threats from those that do not.¹³¹

Economic incentives to sell military technology and hardware threaten international security in two ways. First, profits from arms sales make producing states unwilling or unable to control what their businesses sell. For example, notwithstanding their apparent interests in moderating weapons and technology transfer, Iraq evidently still was able to obtain chemical weapons ingredients or technology from Singapore, India, Malaysia, Western Europe, and China.¹³² Second, a state's desire to protect the trade secrets of its domestic companies might cause it to oppose verification. Losing a trade secret could cost millions of dollars, crippling even a giant company.¹³³ These economic incentives undermine arms control, and increase proliferation's risks.

¹²⁸ See *New Union*, *supra* note 65 (quoting President Mitterand of France as saying, "Europe will be the top power by the next century"); *Stamaty*, *supra* note 8 (pointing out that the European Community is making decisions about its future in a forum that excludes United States participation).

¹²⁹ *Garrett*, *supra* note 5, at 37.

¹³⁰ *Kahler*, *supra* note 30; see, e.g., *The 38th Floor*, *supra* note 111 (quoting United Nations Secretary-General Javier Perez de Cuellar in his speech to the Congress of Bolivia: "Bolivia's experience in recent years could be said to epitomize the distressing struggle of many ... which are caught between the Scylla of the policies of adjustment which the prevailing economic conditions demand and the Charybdis of their ... commitment to satisfying their people's just hopes for a better life").

¹³¹ *Fewer weapons and more development in all regions': eminent panel recommends steps to link disarmament and development*, OPI, Aug. 1986, available in LEXIS, INTLAW Library, UNCHR File (quoting Inga Thorsson, Sweden's former Undersecretary of State for Foreign Affairs) [hereinafter *Future Weapons*].

¹³² *Gaddis*, *supra* note 30 (reporting that some companies are able to evade legal controls); *Fialka*, *supra* note 99, at A24 (reporting specifics on the Iraqi program).

¹³³ *Carnahan*, *supra* note 5, at 177.

Economic competition always has created security problems. Now that the Cold War is over, these problems will receive more attention. Neither the United States, nor its competitors, are immune; access to resources, international competition, and arms sales inextricably affect their economies. Additionally, future relations between the United States and its competitors will become more tense.

C. Summary

The world today is so integrated that a nation isolates itself at its own peril. Consequently, states are secure only when the international community is secure. Security risks from fragmentation, regional competition, drug trafficking, terrorism, arms proliferation, and economic competition affect every nation. This does not necessarily portend doom. It does mean, however, that all states must commit themselves to improving international security—if only for their own sakes.

111. INTERNATIONAL SECURITY IMPROVES AS THE UNITED NATIONS SECURITY COUNCIL FUNCTIONS EFFECTIVELY.

To improve international security, states must promote unity, coercion, and justice. States can promote unity, coercion, and justice only through a central international authority. Because the United Nations Security Council has more potential than any other authority in history, states should rely on it to promote international security and should seek methods of improving its effectiveness as an international organ.

A. Responding to Today's Security Threats Requires Unity

1. The Need for Unity. —

“NEIGHBORING NATIONS are naturally enemies of each other, unless their common weakness forces them to league in a CONFEDERATIVE REPUBLIC, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors.” This passage, at the same time, points out the EVIL and suggests the REMEDY.¹³⁴

¹³⁴THE FEDERALIST No. 6, at 113 (Alexander Hamilton) (Benjamin Fletcher Wright ed 1961) (quoting Vide, *Principes des Negociations*, par l'Abbe de Mably)

Unity is necessary because the evils of disunity are great, and the evils of disunity are great because security is indivisible.¹³⁵ The remedy, as the quotation suggests, is unity.

Unity is commitment to the common purpose, rather than an individual purpose.¹³⁶ Self-interest tends to make enemies of nations. To unite, they must determine their common weaknesses, and commit themselves to promoting the collective interest.¹³⁷ The inability to respond effectively to today's security threats is a weakness common to virtually every state. Reconciling all of these states' weaknesses in security, therefore, presumably would be a collective interest that called for unity.

In addition to promoting the collective interest, unity has many other practical benefits, including internal security, economic prosperity, individual freedom, and burden sharing.¹³⁸ Moreover, unity is necessary and beneficial on any scale.

The analogy between the state in a society of states and the individual in a society of individuals is complete... In short, the individual human being enriches his nature, strengthens his moral life and adds to his own worth by that form of social and political association and service which is found in close and intimate contact with his fellow men.

Precisely the same considerations apply to the life and activity of nations. When two or more sovereign

¹³⁵ CLAUDE, *supra* note 7, at 251 (arguing that indivisibility demands "loyalty to the world community," under a conviction that "what is good for world peace is necessarily good for the nation").

¹³⁶ *Id.*

¹³⁷ See MCDUGAL & FELICIANO, *supra* note 13, at 373-75 (noting the importance of creating legal structures to ensure unity, and arguing for the need to develop conditions that will force decision-makers to commit to the collective interest).

¹³⁸ THE FEDERALIST No. 3 (John Jay) (Benjamin Fletcher Wright ed., 1961) (regarding internal security and economic prosperity); *id.* No. 5 (same); *id.* No. 8 (Alexander Hamilton) (regarding economic prosperity); *id.* No. 10 (James Madison) (regarding internal security); *id.* No. 41 (James Madison). In *The Federalist No. 41*, James Madison argued that a standing military force is a threat to freedom, and stated,

The Union itself ... destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat... the want of this pretext had saved the liberties of one nation in Europe.

Id.; HEMLEBEN, *supra* note 14, at 118-9 (regarding internal security and economic prosperity); MCDUGAL & FELICIANO, *supra* note 13, at 95 (arguing, as to burden sharing, that from clarification of common values could come a movement toward "an inclusive public order of safety, freedom, and abundance and ... a wide sharing of responsibility for the maintenance of such order").

states agree together to promote some common and noble end, they do not limit their sovereignties; they rather enrich them. By this co-operation and association each sovereign state reveals the fact that it has a moral consciousness and a moral purpose. It makes it plain that it cannot, and will not, live for itself alone, but will do all that lies in its power to promote the common interest of mankind. This does not limit sovereignty; it increases the value of sovereignty by ennobling it.¹³⁹

When the international community has united, it has preserved security. The United Nations successfully restored peace and order after North Korea's aggression in 1950, and Iraq's aggression in 1990.¹⁴⁰ Europe is making tremendous changes peacefully, due in large part to unity among Western European countries.¹⁴¹

When the international community had not united, security threats continued. In 1946, the United States proposed the formation of the International Atomic Development Authority to manage atomic energy without interference from the permanent member veto. The Soviet Union, however, opposed the organization, thereby preventing unity on this issue.¹⁴² Although the United States expected resistance by the Soviets, a failure to unite on the issue contributed to the Cold War arms race. Disunity between Great Britain and the Soviet Union over Palestine prevented the Security Council from maintaining peace as the Jewish state formed.¹⁴³ Disunity over how to change South

¹³⁹HEMLEBEN, *supra* note 14, at 193 (quoting NICHOLAS MURRAY BUTLER, *THE PATH TO PEACE: ESSAYS AND ADDRESSES ON PEACE AND ITS MAKING* 49-50 (1930)).

¹⁴⁰See GOODRICH & SIMONS, *supra* note 101, at 454-57 (citing United Nations unity), at 494 (noting general agreement that United Nations intervention accomplished its objectives in Korea); John M. Goshko, *A World of Difference at the United Nations*, WASH. POST, Nov. 12, 1991, at A19 (noting Ambassador Pickering's commitment to United Nations unity against Saddam Hussein). Goshko also notes recent United Nations success in unifying to resolve problems in Cambodia and El Salvador, and United Nations efforts to resolve problems in Yugoslavia and Cyprus. *Id.*; see also Assistant Secretary of State for Near Eastern and South Asian Affairs Edward P. Djerejian, Statement before the Subcommittee on Europe and the Middle East of the House Foreign Affairs Committee (Nov. 20, 1991) available in LEXIS, INTLAW Library, DSTATE File ("the victory of the US-led coalition in Desert Storm reversed Saddam Hussein's aggression against his neighbors. Ever since, the international community has shown its determination to ensure that Iraq complies with all its UN-mandated obligations").

¹⁴¹See *Coming together, coming apart*, THE ECONOMIST (U.K. ed.), Dec. 7, 1991, at 51 (noting the peaceful integration of Western Europe and stating, "For the East, the lesson from Western Europe is that close co-operation with the neighbors is the way to prosperity, and the way to keep historical hatreds in check").

¹⁴²See GOODRICH & HAMBRO, *supra* note 19, at 211-13.

¹⁴³GOODRICH & SIMONS, *supra* note 101, at 439-40.

Africa's apartheid policy allowed that policy to continue.¹⁴⁴ Disunity over Lebanon—caused in part, by biased counter-proposals in the Security Council that received overwhelming support, but nevertheless were vetoed—allowed that conflict to continue.¹⁴⁵

Unity is more necessary today than ever before. Natural jealousies grow as nations grow more interdependent. Therefore, commitment to preserve peace and security becomes more important each day. When the international community unites, it succeeds. When it does not, it fails.

2. Today's Challenges Demand Unity.—Though all countries are interested in international security, none can be the world's police officer.¹⁴⁶ Nations must unite to defeat today's security threats or their efforts will be ineffective.

Preserving security during fragmentation requires unity. The civil war in Yugoslavia serves as one of the best modern examples of how disunity affects a country, as well as the rest of the world. The tensions in Yugoslavia have brought systematic violations of human rights.¹⁴⁷ Serbs have sought both to keep Yugoslavia together and to create an independent Serbian enclave in Croatia.

¹⁴⁴See *Text calling for comprehensive mandatory sanctions against South Africa vetoed after discussion in eight meetings*, OPI, Aug. 1987, available in LEXIS, INTLAW Library, UNCHR File. Several African states proposed mandatory sanctions against South Africa. The United States and United Kingdom vetoed the draft Security Resolution, S/18785, claiming that it would be counterproductive to their efforts to resolve the issue diplomatically. *Id.* Regardless of which approach was correct, the disagreement—and resulting disunity—provided South Africa with room to maneuver between opposing sides of the Security Council, thereby stalling efforts by the international community to change its apartheid policy. *Id.*; see also *Text calling for mandatory selective sanctions against South Africa vetoed in Security Council*, OPI, Jan. 1986, available in LEXIS, INTLAW Library, UNCHR File (noting a United States and United Kingdom veto of a similar earlier resolution).

¹⁴⁵See *Council session on southern Lebanon; United Nations Security Council*, OPI, June 1988, available in LEXIS, INTLAW Library, UNCHR File (noting the United States veto of a resolution condemning Israel for its invasion of Lebanon); *United States vetoes draft resolution condemning Israeli acts in Lebanon*, OPI, Mar. 1985, available in LEXIS, INTLAW Library, UNCHR File; *United States vetoes Security Council proposal concerning Israeli measures in Lebanon; Includes summaries of delegates' speeches*, OPI, July 1984, available in LEXIS, INTLAW Library, UNCHR File [hereinafter *U.S. Vetoes Proposal*]; *Proposed UN force for Lebanon rejected in Security Council; Soviet veto*, OPI, Mar. 1984, available in LEXIS, INTLAW Library, UNCHR File (reporting a Soviet veto to a United States proposal to send a United Nations peacekeeping force to Lebanon for fear of increased American power in the region) [hereinafter *Proposed UN Force*].

¹⁴⁶See Natsec Strategy, *supra* note 1, at 2.

¹⁴⁷*The Political Scene*, *supra* note 46 (quoting Senator Dole, after a visit to Yugoslavia, as saying, "the Serbian government is systematically destroying the human rights of the Albanians," and citing a government refusal to allow a human rights delegation to enter the country).

Nevertheless, while they have moved to establish a Croatian enclave, they have sought to suppress the creation of an Albanian enclave in Serbia. Consequently, the disunity in Yugoslavia has led to its demise. Most unfortunately, the events leading to the breakup of Yugoslavia have had enormous consequences, not only for those who live there, but also for neighboring states.¹⁴⁸

A unified international response to fragmentation, such as that witnessed in Yugoslavia, is required for three reasons. First, unity is necessary to keep the peace and protect human rights.¹⁴⁹ Second, unity is necessary to prevent fragmentation from spreading. In particular, German Foreign Minister Hans-Dietrich Genscher has called for a unified international response in Yugoslavia, fearing "the example of the Yugoslav People's Army will be emulated."¹⁵⁰ Finally, unity is necessary to ensure peaceful transition of power in fragmenting states. This is true not only in Yugoslavia, but also in the former Soviet Union.¹⁵¹

Preventing the threats from regional competition requires international unity. Otherwise, violent competition among regional powers and low intensity conflicts in their spheres are likely. Resurging "Cold War" disunity would bring "Cold War" security threats.

A similar call for unity is necessary to deal with the problems created by international trafficking in illicit drugs. Neither the United States, nor any other country, can defeat drug trafficking alone.¹⁵² First, international cooperation is necessary because drugs, drug profits, and drug violence cross borders so easily. In addition, effective solutions require producer and consumer states to stop blaming each other.¹⁵³ Moreover, because the drug trade overwhelms producer countries, cooperative

¹⁴⁸Jacob W. Kipp & Timothy L. Sanz, *The Yugoslav People's Army, Between Civil War and Disintegration*, MIL. REV., Dec. 1991, at 39; *Greece President Fears*, *supra* note 44; see Sunstein, *supra* note 11, at 654.

¹⁴⁹Douglas Hurd, *Averting a Balkan tragedy*, THE TIMES (London), Dec. 3, 1991, available in LEXIS, Nexis Library, TTIMES File.

¹⁵⁰Genscher on Yugoslavia, *supra* note 51.

¹⁵¹See Douglas Stanglin et al., *Now, the birth of a notion*, U.S. NEWS & WORLD REPORT, Dec. 23, 1991, at 35 (quoting Secretary Baker as saying, "Much as we will benefit if this revolution succeeds, we will pay if it fails").

¹⁵²Baker, *supra* note 5 ("There is no country here so proud or so great as to be able to rid itself of drugs without the help of other nations.... Together we can work more effectively than in isolation. We can accomplish more in concert than [sic] at odds with one another").

¹⁵³See *Convening of Meeting*, *supra* note 76 (stating the position of Undersecretary-General for Political and General Assembly Affairs William B. Buffon as follows: "[I]n the past there had been 'insufficient awareness' of the gravity of the drug abuse situation, and that perception of the size of the problem had too often been obscured by differences over who was most culpable—producer, consumer, or transit States").

international assistance is the only hope.¹⁵⁴ Not surprisingly, when states have united, they have been successful.¹⁵⁵

Like combatting fragmentation and drug trafficking, defeating terrorism also requires a unified international response. First, because terrorism's causes are international, its solutions must be international.¹⁵⁶ Similarly, because terrorists cross international borders easily, preventing them requires international cooperation. Furthermore, some states actually are willing to harbor suspected terrorists.¹⁵⁷ International unity therefore is necessary to punish terrorists and to prevent target states from escalating the violence.

The coalition victory in the Persian Gulf War exemplifies the need for unity in the world community's efforts at defeating terrorism. International unity during Desert Storm was integral in thwarting Saddam Hussein's call for terrorism against coalition members. The international community condemned Iraq's hostage-taking, warned Iraq through diplomatic channels, expelled Iraqi diplomats who assisted terrorists, and protected their airlines and embassies.¹⁵⁸ These measures were largely successful.¹⁵⁹ No terrorist incidents were reported in the United States. One bomb, placed near the American embassy in Jakarta, was safely disarmed. "Elsewhere ... plots to attack official and public facilities connected to coalition interests were discovered and thwarted."¹⁶⁰

¹⁵⁴ See, e.g., Bagley, *supra* note 75 (discussing how drug traffickers have taken control over all the power structures in Colombia).

¹⁵⁵ *Drug Abuse: a social and economic threat*, OPI, Feb. 1985, available in LEXIS, INTLAW Library, UNCHR File ("Increased bilateral, regional and interregional co-operation has led to record drug seizures, confiscation of traffickers' immense financial assets and destruction of many clandestine laboratories"); Fact Sheet, *supra* note 78. The State Department fact sheet points out the expanded cooperative efforts among the United States, Bolivia, and Colombia; the success in stemming increases in production of coca and opium; the increased numbers of arrests of traffickers and seizures of drugs; and the problems caused by Burma's and Laos's failures to cooperate. The fact sheet concludes with the statement, "If the international community continues the commitment and cooperation shown in 1990, it should be possible to weaken the international drug trade to a point where it would no longer pose a serious threat to the world community." *Id.* But cf. Lane, *supra* note 71 (noting that cocaine use in the United States has remained steady since 1989 and that tension arises, even when nations apparently are cooperating in their efforts to abate the drug trade).

¹⁵⁶ See *supra* note 88.

¹⁵⁷ See *supra* note 91.

¹⁵⁸ S.C. Res. 667, U.N. SCOR, 45th Sess., Resolutions for 1990, at 23, U.N. Doc. S/RES/667 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., Resolutions for 1990, at 25, U.N. Doc. S/RES/674 (1990); *Cooperation Counters Iraqi Terror*, *supra* note 86.

¹⁵⁹ *Cooperation Counters Iraqi Terror*, *supra* note 86.

¹⁶⁰ *Id.*

International unity also is required to prevent arms proliferation. First, unity is necessary to establish and enforce international controls. These controls are vital because tremendous profits otherwise would motivate producers to sell, regardless of the security risks that arms transactions create.¹⁶¹ Additionally, some countries remain intent on developing nuclear, biological, and chemical weapons capabilities despite international controls.¹⁶² For instance, should the international community forsake its commitment to purge Iraq of all its unconventional weapons, little doubt arises as to what Iraq will do. In addition to establishing and enforcing international controls in general, assuring responsible control over the former Soviet Union's vast nuclear arsenal presents a particular need for international unity. Unity among the former republics and among interested nations who would fill the power vacuum will be important as long as control is in doubt.¹⁶³

Like the plainly destructive threats posed by terrorism and weapons proliferation, preventing threats from economic competition requires unity as well. Abating the potential harms of economic competition requires not only unity among competitors, but also unity against those who deny access to vital resources. Unity among competitors must exist in two forms. First, competing countries must avoid protectionism.¹⁶⁴ Second, they must share the economic burden of maintaining security. For example, the unity demonstrated during Desert Storm was exceptional. Kuwait, Saudi Arabia, the United Arab Emirates, Japan, Germany, and South Korea contributed over \$54 billion in support of the United States' military efforts.¹⁶⁵ The need for unity to protect resources also became apparent in the Persian Gulf War. As Saddam Hussein attempted to control oil supplies in the Middle East, so may others attempt to control critical economic resources in the future.¹⁶⁶

4. Summary.—The need for unity is vital to all countries' efforts at improving international security because security is indivisible. States must choose to commit to the collective interest to achieve their self-interests. The risks of disunity—that is,

¹⁶¹ See Natsec Strategy, *supra* note 1, at 15 (citing that Libya and Iraq received technology and assistance from Western companies); Fialka, *supra* note 99, at A24; Sundaram, *supra* note 30.

¹⁶² See *supra* notes 103-08 and accompanying text.

¹⁶³ See *supra* note 45 (discussing Turkey's and Iran's interests in the southern republics); Margaret Shapiro, *Angry Russians Confront Yeltsin*, WASH. POST, Jan. 9, 1992, at A33 (noting in particular that Kazakhstan is one of four republics with nuclear weapons).

¹⁶⁴ McQuillan, *supra* note 115.

¹⁶⁵ Kimmitt, *supra* note 113.

¹⁶⁶ See *supra* notes 117-19 and accompanying text.

jealousies among states, unresolved civil conflicts having international effects, economic protectionism, regional conflicts, arms races, and thriving international crime—are greater today than ever before. The benefits of unity—particularly, economic prosperity, internal security, preservation of human rights, and burden sharing—are also great. Whether the risks or the benefits prevail in the new world order depends upon the extent to which states unite. Nevertheless, while unity is necessary, it is not sufficient. Unity must facilitate coercion to be truly effective.

B. Today's Security Threats Require Coercion

1. The Need for International Coercion.—As the previous section discussed, unity is beneficial to international security—particularly because it facilitates coercion against those who violate community values. Coercion is the employment of force, or the threat of force, to compel adherence to community values. Coercion is necessary because some parties invariably will choose to maximize their self-interests at the community's expense.¹⁶⁷ Coercion, however, can be a competent enforcement mechanism only if the community has prescribed norms, accommodates means for the peaceful resolution of disputes, and acknowledges a policy of deterring aggression.¹⁶⁸ The international community actually has recognized these parameters by vesting the power to set them with the United Nations Security Council.¹⁶⁹ The

¹⁶⁷ROBERT CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 28-29, 254 (1974) (describing the biblical account of the origins of government as necessary to preserve community interests against individual self-interest); see HEMLEBEN, *supra* note 14, at 193 (analogizing the problem of governing individuals with that of governing states).

¹⁶⁸See CLAUDE, *supra* note 7, at 218 (noting that a task of international organizations is to make peaceful means available "and to encourage-if not insist upon-their utilization"); *id.* at 228 (noting that voluntary participation is a "major limiting factor" in pacific settlement methods); MCDUGAL & FELICIANO, *supra* note 13, at 121-23 (arguing the need for international control over the processes of coercion between states); *id.* at 214 ("low expectations as to the effective competence of the general organization of states to protect individual members ... make indispensable the permission of some self-defense." If the international community is incapable of deterring aggression, aggression is more likely to occur); *id.* at 363 (criticizing the competence of the Security Council and International Court of Justice to prescribe norms).

¹⁶⁹U.N. CHARTER art. 24 (conferring responsibility for maintaining international security on the Security Council); *id.* art. 25 (obligating members to accept and carry out Security Council decisions); *id.* art. 33 (empowering the Security Council to call on parties to resolve conflicts through peaceful means); *id.* art. 34 (granting power to investigate conflicts that might threaten international security); *id.* art. 39 (granting power to decide whether a threat to international security exists and to determine appropriate corrective measures); *id.* art. 41 (granting power to employ measures other than armed force); *id.* art. 42 (granting power to employ armed force); see MCDUGAL & FELICIANO, *supra* note 13, at 143.

effectiveness of coercion in general—and the Security Council's competence to enforce community values, in particular—is necessary to defeat today's security threats.

2. International Coercion Is Necessary to Meet Current Security Threats.—Fragmenting countries often are unable to control internal violence and unwilling to allow international coercion.¹⁷⁰ Nevertheless, community values are at stake. Violence in Yugoslavia has degraded human rights and threatened neighboring countries such that some form of international coercion is necessary.¹⁷¹ Fragmentation in the former Soviet Union raises concerns over nuclear weapons control, “brain drain,” and conflicts over the power vacuum.¹⁷² World leaders rightly are concerned about these problems.¹⁷³

While the regional competition that existed during the Cold War has not returned, it is as likely to breed conflicts in the future as it had in the past.¹⁷⁴ Coercion is as necessary today as it was during the Cold War. Unfortunately, coercion's effectiveness often is diminished when nations seek to protect their regional powers to the exclusion of united international efforts. In particular, the regional interests of a single country can compel it to exercise its veto, thereby aborting the potential coercive power of the United Nations Security Council. Therefore, absent a change in the nature of regional competition and the Security Council's competence, “Cold War” could return.

Like dealing with the problems created by fragmentation and regional competition, fighting drug trafficking requires significant coercion. The drug war requires all nations to assist in international efforts at abating the use of illicit drugs, monitoring drug trafficking, and eliminating supplies at their sources.¹⁷⁵ Because drug trafficking is a community problem, it requires community coercion. Cooperative efforts have been successful, but not sufficient.¹⁷⁶ Drug money crosses borders free of international

¹⁷⁰Hurd, *supra* note 149.

¹⁷¹Kipp & Sanz, *supra* note 148, at 39; *Greece President Fears, supra* note 44; Blaine Harden, *Yugoslav Defense Minister Quits Serb-Led Government*, WASH. POST, Jan. 9, 1992; *The Political Scene, supra* note 46.

¹⁷²See *supra* notes 41-45.

¹⁷³Genscher on *Yugoslavia, supra* note 51 (calling for United Nations action to enforce international norms); Hurd, *supra* note 149 (calling for a United Nations peacekeeping force to stop killing and protect minorities); McQuillan, *supra* note 115 (citing President Bush's call for United Nations sanctions out of concern that racism and ethnic hatred threatened democracy in Yugoslavia and in the Soviet Union).

¹⁷⁴See CLAUDE, *supra* note 7, at 113.

¹⁷⁵See Natsec Strategy, *supra* note 1, at 17.

¹⁷⁶Fact Sheet, *supra* note 78.

controls, making the confiscation of dealers' massive profits difficult.¹⁷⁷ Producer countries are unable to cooperate in law enforcement because traffickers have terrorized or corrupted their governments.¹⁷⁸ Only international coercion can overcome these obstacles.

In addition to drug trafficking, terrorism is a community problem requiring community coercion. First, states that sponsor terrorism are not cooperating. Libya, for example, long has supported terrorism, despite warnings and sanctions.¹⁷⁹ Libya also resisted extradition of the *Pan Am Flight 103* suspects.¹⁸⁰ Second, the community must employ coercion because victim states raise tensions when they rescue hostages, attack terrorist bases, or abduct suspects from other states.¹⁸¹ Unlike individual action, community coercion is apparently disinterested and, therefore, more likely to promote peace.

International coercion also is necessary to prevent arms proliferation because arms controls are coercive by nature, and because state self-interest promotes proliferation. The arms control functions of regulation and verification are both coercive. Regulations prescribe community values for each member, but current standards arguably are ineffective or, at least, insufficient.¹⁸² Verification works only if the community can obtain information from uncooperative countries and is able to inspect for compliance.¹⁸³

Iraq demonstrated why coercion is necessary to prevent proliferation. It developed chemical and nuclear weapons despite obligations under the 1925 Geneva Protocol and 1968 Nuclear

¹⁷⁷Sundaram, *supra* note 30.

¹⁷⁸See Bagley, *supra* note 75; Lane, *supra* note 71.

¹⁷⁹See Sofaer, *supra* note 85, at 103-05 (describing Libyan sponsored terrorism in 1985 and 1986, and United States military response).

¹⁸⁰Goshko, *supra* note 91, at A15.

¹⁸¹See Sofaer, *supra* note 85, at 104-10.

¹⁸²See Natsec Strategy, *supra* note 1, at 15 (affirming support for controls on weapons transfers and export controls); Sundaram, *supra* note 30 ("there is a void at the intersection of between-country regulations that will continue to provide a fertile ground for many more BCCTs").

¹⁸³See GOODRICH & SIMONS, *supra* note 101, at 524 (noting criticism of a post-World War I arms agreement that included Japan, but did not provide for verification); *id.* at 539-40 (citing United States opposition to the Soviet proposal on atomic weapons in 1946, which would have left to each state the responsibility for developing atomic power for peaceful means). "The United States ... insisted on a system of detailed international control, including ownership, management, supervision, leasing, licensing, and inspection." *Id.*; see also McDUGAL & FELICIANO, *supra* note 13, at 364 (regarding obtaining information).

Non-Proliferation Treaties.¹⁸⁴ Iraq resisted United Nations efforts to enforce compliance and has manifested an intent to violate the agreements once the United Nations team leaves.¹⁸⁵ Iraq's motives are understandable because every state desires military power, technology, and profits from arms sales. Nevertheless, these motives are precisely why international coercion is imperative. The Iraqi military build-up is no aberration. The Japanese militarized during the 1930s under the umbrella of an Asian arms control pact.¹⁸⁶ Likewise, the Soviets were developing biological weapons in 1979, despite the 1972 Convention.¹⁸⁷ Without international coercion, arms proliferation never will stop.

The risk that economic competition will cause threats to vital resources, competition for success, and arms proliferation is real. Therefore, international coercion will be required to ensure peaceful settlement of disputes,¹⁸⁸ to prevent arms proliferation? and to maintain community access to vital resources.

3. Summary.— International coercion is necessary because states will seek self-interest at the expense of community values. On the other hand, the importance of community values has grown to the extent that acknowledging those values is critical to dealing with many of the world's problems such as fragmentation, regional competition, drug trafficking, terrorism, arms proliferation, and economic competition. The community? however, cannot solve these problems without unity and coercion. Nevertheless, even though unity and the use of coercion are necessary to maintain international security, they are not sufficient to ensure that security endures. To be truly effective, unity and coercion must be accompanied by justice.

¹⁸⁴ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; see Natsec Strategy, *supra* note 1, at 15 (citing Iraq's pursuit of nuclear arms and use of chemical weapons despite its being a party to these treaties).

¹⁸⁵ Chalabi, *supra* note 108, at A1, A22.

¹⁸⁶ See GOODRICH & SIMONS, *supra* note 101, at 524.

¹⁸⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (committing enforcement decisions to the Security Council, wherein the veto prevented any meaningful action); Carnahan, *supra* note 5, at 173.

¹⁸⁸ See CLAUDE, *supra* note 7, at 218.

C. Today's Security Threats Require Justice

"There is no real peace and security ... if these are achieved only at the sacrifice of justice."¹⁸⁹

1. *Justice Is Having an Honest Broker.*—Justice, as the world faces today's security challenges, requires a disinterested decision maker, or honest broker. The principle that no one should judge his or her own cause is firm.¹⁹⁰ The United Nations Charter recognizes the need for an international honest broker. Article I states that the United Nations will maintain peace and settle disputes "in conformity with ... justice and international law."¹⁹¹ The drafters recognized that the Security Council not only must "suppress the use of armed force," but also must "act as an organ of conciliation."¹⁹² To foster conciliation, one must be an honest broker; otherwise, the parties will lack trust, leading ultimately to their rejecting the dispute settlement process.

2. *Honest Brokers Are Necessary.*—Fostering conciliation is important because states are always in close contact, and therefore, in conflict.¹⁹³ "In ... this continuous process, contending participants make certain ... claims about the lawfulness and unlawfulness of ... coercion... Generally, one participant asserts that it is lawful to ... accelerate the intensity of coercion ... against the opposing participant; and the opposing participant then maintains that such is unlawful ... and justifies defensive coercion."¹⁹⁴ Honest brokers are able to decelerate the intensity of

¹⁸⁹ GOODRICH & HAMBRO, *supra* note 19, at 93 (noting the general position held by delegates at the San Francisco conference who drafted the United Nations Charter).

¹⁹⁰ See U.N. CHARTER art. 27, para. 3 ("in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting"). Interestingly, any party to a dispute is permitted to vote; and, if that party is a permanent member, it can cast a veto in cases under Chapter VII. *Id.* chap. VII (providing for decisions on binding sanctions); see CLAUDE, *supra* note 7, at 25 (quoting Hugo Grotius); *id.* at 217 (noting the practice in Greek city-states); CULVER, *supra* note 167, at 206 (commenting on *Leviticus* 19:17-18, which prohibits private revenge in deference to civil authority); THE FEDERALIST No. 10 (James Madison) (Benjamin Fletcher Wright ed. 1961); GOODRICH & HAMBRO, *supra* note 19, at 224 (quoting President Franklin Roosevelt); HEMLEBEN, *supra* note 14, at 48 (quoting William Penn).

¹⁹¹ U.N. CHARTER art. 1, para. 1; see GOODRICH & HAMBRO, *supra* note 19, at 93.

¹⁹² GOODRICH & HAMBRO, *supra* note 19, at 94 (discussing the drafters' intent). The authors immediately point out that "no state which has taken the law into its own hands should be allowed to stop the [Security] Council from acting." *Id.* This concern about states taking the law into their own hands implies that the Security Council should act as an honest broker.

¹⁹³ McDUGAL & FELICIANO, *supra* note 13, at 106.

¹⁹⁴ *Id.* at 123.

coercion.¹⁹⁵ That is why the United Nations Charter gives the Security Council power to perform this role.¹⁹⁶

Honest brokers have succeeded in the past. The League of Nations resolved twenty cases during its first ten years.¹⁹⁷ The United Nations secured the peaceful disposition of Italy's colonies when no other agreement could be reached.¹⁹⁸ Despite criticism of the United Nation's effectiveness, "[it] is still capable of performing its function of peaceful settlement ... In the opinion of many, this is its major responsibility and opportunity."¹⁹⁹ The opportunity to resolve international issues in the forum of the United Nations exists only because the parties that participate have confidence in the body's ability to address the issues with some degree of impartiality.

3. *Today's Threats Particularly Require Honest Brokers.*— Each of today's security threats requires an honest broker to reduce tensions. For instance, fragmentation in Yugoslavia is rampant with ethnic hatred that accelerates violence. The Serbs, however, are not honest brokers. They have violated human rights and prevented human rights delegations from working in the country.²⁰⁰ They have taken inconsistent positions on allowing independence, favoring it for fellow Serbs in Croatia, but opposing it for ethnic Albanians in Serbia.²⁰¹ Yugoslavia clearly will not be able to reduce tensions alone.²⁰²

Regional competition among the United States, European Community, and Asian powers will grow more intense in all spheres—economic, political, and military.²⁰³ No honest broker ever conciliated disputes among Cold War rivals. Having an

¹⁹⁵ See GOODRICH & SIMONS, *supra* note 101, at 367 ("A procedure of established value in dealing with international disputes and threatening situations is to get the interested parties to take measures that will prevent the further aggravation of the situation"). The authors note that the League of Nations, Permanent Court of International Justice, Security Council, and International Court of Justice were established with power to perform roles as honest brokers. See *id.*

¹⁹⁶ See U.N. CHARTER art. 33 (allowing the Security Council to call upon parties to use peaceful means to resolve disputes); *id.* art. 35 (encouraging parties to bring disputes to the Security Council); *id.* art. 36 (empowering the Security Council to recommend appropriate means to resolve disputes); *id.* art. 37 (empowering the Security Council to recommend appropriate terms of settlement).

¹⁹⁷ CLAUDE, *supra* note 7, at 228.

¹⁹⁸ GOODRICH & SIMONS, *supra* note 101, at 257.

¹⁹⁹ *Id.* at 514.

²⁰⁰ See *supra* notes 46-49 and accompanying text.

²⁰¹ *The Political Scene*, *supra* note 46.

²⁰² See Hurd, *supra* note 149 ("The Yugoslavs recognise [sic] that they need outside help. The involvement of the international community offers ... an impartial negotiating framework").

²⁰³ See *supra* notes 62-69 and accompanying text.

honest broker to foster conciliation in the future, however, would make the world safer than it was during the Cold War.

The drug war could benefit substantially from the intervention of such an honest broker to resolve conflicts over providing security assistance, facilitating extradition, and taking responsibility for the problem itself.²⁰⁴ These conflicts have created strong anti-American sentiment in Colombia, Peru, and Bolivia, engendering sympathy for the traffickers and hindering law enforcement.²⁰⁵ The United States is not an honest broker because it has law enforcement interests in these countries. An international agency, on the other hand, could transcend the interests of individual states, thereby reducing tensions and making law enforcement more effective.

The intervention of an honest broker also would improve the effectiveness of international efforts to combat terrorism. Terrorism presents a classic example of how conflicts accelerate into violence. For instance, colonialism and alien occupation typically raise competing interests between two states—one state is interested in its independence, while the other is interested in maintaining order. As the two states pursue these interests, the conflict between them often escalates into terrorist attacks.²⁰⁶ Subsequently, because the international community cannot intervene effectively, targeted states escalate the violence, claiming it to be necessary for self-defense.²⁰⁷ Later, targeted states seek to extradite the terrorists from harboring states, raising new conflicts, which can escalate into sanctions or abductions.²⁰⁸ Having an honest broker involved early could ease these tensions.

²⁰⁴ *Convening of Meeting*, *supra* note 76 (discussing the problem of infighting); see *supra* notes 76-81 and accompanying text (stressing the conflict between the United States, Bolivia, and Peru). The United States wants aid spent on the drug trade; Bolivia and Peru, however, want the aid for combatting insurgents. *Id.*; see also Bagley, *supra* note 75 (regarding extradition).

²⁰⁵ See Bagley, *supra* note 75 (noting traffickers' publicity campaign to arouse Colombian nationalist sentiment against the United States-Colombia extradition treaty); Lane, *supra* note 71, at 21-22 (noting Bolivian anti-American feelings and how the United States is training Bolivian soldiers who will work for the traffickers within a year); *id.* at 23 (quoting an American adviser as saying that the United States is losing the important war for the will of the people in Bolivia).

²⁰⁶ See G.A. Res. 34/145, U.N. GAOR, 34th Sess., Supp. No. 46, at 244, U.N. Doc. A/RES/34/145 (1980), 19 I.L.M. 533, 535 (1980); G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/RES/40/61 (1986), 25 I.L.M. 239 (1986).

²⁰⁷ See Sofaer, *supra* note 85, at 106-10 (explaining how targeted states intervene violently); *id.* at 93-105 (arguing that self-defense applies in terrorism cases, specifically to Libyan terrorism in 1985 and 1986).

²⁰⁸ See *id.* at 106; Goshko, *supra* note 91, at A15 (providing a current example of how extradition claims can escalate into sanctions).

Accordingly, the international community justifiably should seek an increased United Nations role as that honest broker.²⁰⁹

In addition to terrorism, arms proliferation causes tensions for many reasons. A state naturally creates tensions by building military strength for its own security because, by doing so, it concomitantly raises its neighbors' fears. Regional powers also can create tensions in their attempts to balance the need for regional security with the community's interest in preventing arms proliferation.²¹⁰ Similarly, states that produce arms create tensions by pitting manufacturers' and suppliers' desires for profits against the community's desire to prevent proliferation. Because no country can be an honest broker on this issue, an international authority is necessary.

Finally, economic competition generates tension over the need to protect resources, competition between economic powers, and the desire for profits from the arms industry.²¹¹ Reducing these tensions is as important as reducing any of the others. As with arms control disputes, each state has an unique agenda of individual interests it seeks to protect. On the other hand, every state shares one important interest—abating conflicts created by economic tensions. Consequently, nations that compete economically should be able to appeal to an international honest broker to manage these conflicts.²¹²

3. Summary.—Each of today's security challenges requires an honest broker. Tensions are more likely to escalate when interested parties are left to resolve conflicts themselves than when an honest broker exerts its conciliating influence. Therefore, honest brokers must intervene in today's security challenges. Moreover, because individual states are rarely disinterested, only an international authority can be an effective honest broker.

²⁰⁹ See Bagley, *supra* note 75.

²¹⁰ See Clarke, *supra* note 101. The author describes United States policy in deciding who receives American arms. Specifically, this decision-making policy highlights conflicts between American interests and the interests of other states and the international community. In particular, Mr. Clarke cites the United States goal of deterring aggression against "friendly" states, argues that United States transfers have not contributed to aggression—even in the case of Iran, and notes that the United States would not support any agreement "that would prohibit such sales that are necessary for the security of our friends." *Id.*

²¹¹ See *supra* notes 111-33 and accompanying text.

²¹² See Kahler, *supra* note 30 (stating that the question of creating an international economic order was avoided during the Cold War period, but must be answered in the 1990s). Kahler expresses particular concern about protectionism, trade deficits, burden-sharing in support of economic institutions, and incorporation of many new and diverse countries as members. *Id.*

D. Unity, Coercion, and Justice Coexist Only in a Central International Authority.

1. *The Need for International Authority.* — To this point, this article's analysis shows that international security requires unity, coercion, and justice. These values, however, also implicate some authority that recognizes and enforces them. Moreover, the only type of authority under which all three values successfully can coexist throughout the world is a central international authority. The other methods of legitimizing authority—that is, through moral consensus, individual state enforcement, or regional enforcement—lack at least one of them. When one of these requirements is lacking, however, international security inevitably will suffer.

The values of unity, coercion, and justice naturally implicate authority for several broad reasons. Because unity is commitment to a common purpose, it implies a need for authority, even if that authority's duty merely is to set common standards. Coercion also implies a need for authority because the legitimacy of standards depends upon the existence of an authority with the power to enforce them.²¹³ Justice implies authority because an impartial party must preside over decision-making if rulings are to be recognized as just.

In addition to the need for authority that derives from these values implicitly, the great thinkers of the past six centuries also believed that unity, coercion and justice require authority. Their peace plans actually relied on authority. In the early 1300s, Dubois advocated a federation of states. He proposed a council and panel of judges (honest brokers) to decide disputes between nations. He also "advocated concerted military action" (coercion) against aggressors.²¹⁴ Moreover, Dante proposed a system in which all people would fall under one world government (unity); that government would be led by one emperor who would have the authority to settle all disputes (honest broker) and would have the responsibility to suppress tyrannies (coercion).²¹⁵ Similarly, Cruce designed an international assembly in which delegates would judge disputes (honest broker) and members would enforce decisions (coercion).²¹⁶ Grotius proposed conferences between states in which disinterested parties (honest

²¹³ See CULVER, *supra* note 167, at 28-29 (arguing that coercive authority is necessary because individuals will seek self-interest at the expense of others).

²¹⁴ HEMLEBEN, *supra* note 14, at 1-3.

²¹⁵ *Id.* at 7-11.

²¹⁶ *Id.* at 25.

brokers) would decide disputes and enforce peace (coercion).²¹⁷ Likewise, Saint-Pierre proposed a union of Europe in which a senate (honest broker) would decide disputes and members would enforce decisions (coercion).²¹⁸ Rousseau argued for a federation of Europe with a parliament (honest broker) to decide disputes and a federal army to enforce decisions (coercion).²¹⁹ Finally, Kant, though he believed a world republic was impossible, still argued that a federation (honest broker) was necessary for peace. He also called upon states “to yield to the coercion of public laws.”²²⁰

Like these great thinkers, the founders of the League of Nations and United Nations agreed that authority is necessary to achieve unity, coercion, and justice. The League Covenant purposed to “promote international cooperation” (unity), and establish firmly international law as the “actual rule of conduct among Governments” (coercion).²²¹ It established a Council and Assembly (honest brokers), giving them authority to “deal with any matter ... affecting the peace of the world.”²²² The United Nations founders proposed to unite their strength to “ensure ... that armed force shall not be used, save in the common interest.”²²³ They provided for coercion, granting the Security Council power to intervene to maintain or restore security. They also established honest brokers—a General Assembly and a Security Council—to resolve disputes between nations.²²⁴

International authority not only promotes unity, coercion, and justice, but also is gaining acceptance as a recognized method of enhancing international security. World leaders actually have

²¹⁷*Id.* at 45 (quoting Grotius: “[I]t is almost necessary, that certain Congresses ... should be held, in which the controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms”).

²¹⁸*Id.* at 59-61

²¹⁹*Id.* at 74-75.

²²⁰*Id.* at 90.

²²¹LEAGUE OF NATIONS COVENANT preamble.

²²²*Id.* art. 3, para. 3; *id.* art. 4, para. 4.

²²³U.N. CHARTER preamble.

²²⁴*Id.* art. 10 (granting the General Assembly authority to discuss any matters within the United Nations Charter’s scope and make recommendations); *id.* art. 11 (granting the General Assembly authority to discuss security issues and make recommendations to individual members or the Security Council); *id.* art. 24 (assigning to the Security Council responsibility for maintaining international peace and security); *id.* arts. 41-42 (authorizing the Security Council to take appropriate measures to ensure peace and security); *see id.* art. 27, para. 3 (providing that interested parties may not vote on questions under Chapter VI). Interested members, however, also may vote on questions under Chapter VII, which involve Security Council sanctions. *Id.* chap. VII. This voting prerogative, in conjunction with the veto power, limits the extent to which the Security Council can act as an honest broker.

acknowledged on several occasions the need for international authority to resolve security threats. For instance, Secretary of State Baker urged all countries to make maximum use of the United Nations to fight drugs.²²⁵ Additionally, several world leaders have called for United Nations and European intervention in Yugoslavia.²²⁶ United Nations members long have called for ratification of terrorism conventions and better cooperation.²²⁷ Former Secretary General Javier Perez de Cuellar also has called for more United Nations involvement to promote economic development.²²⁸ Finally, the most recent United States arms control policy supports an international arms control authority.²²⁹

2. The Need for Central International Authority.—The values of unity, coercion, and justice not only require an authority that transcends state boundaries, but also require an authority that is centralized. Other possible alternatives that fail to incorporate formal centralization of authority lack at least one of these three necessary values. For instance, while moral consensus provides for unity, it lacks coercion. States that offend policies developed through moral consensus naturally feel little pressure to submit to community values. Furthermore, a state's desire and ability to pursue its self-interest often causes others to do likewise, destroying much of the unity they once may have shared.²³⁰ This phenomenon actually occurred during the dispute over creation of

²²⁵ Baker, *supra* note 5; see Narcotics Convention, *supra* note 70.

²²⁶ See Genscher on Yugoslavia, *supra* note 51 (noting the German Foreign Minister's appeal); Harden, *supra* note 47, at A20 (noting Yugoslav President Milosevic's support for United Nations intervention); Hurd, *supra* note 149 (noting his support for United Nations and European Community intervention).

²²⁷ See *supra* note 88.

²²⁸ Fewer Weapons, *supra* note 131 (calling for a strengthened United Nations role in promoting disarmament and development); *The 38th Floor*, *supra* note 111.

²²⁹ Natsec Strategy, *supra* note 1, at 13; Clarke, *supra* note 101 ("No international regime existed to note this [the Iraqi] build-up and address its threatening implications. No agreed standard existed to say that it was wrong. We want to fix that").

²³⁰ THE FEDERALIST No. 15 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961):

There was a time when we were told that breaches, by the States, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint.

the International Atomic Development Authority.²³¹ The United States and Soviet Union agreed morally on the policy that atomic power should be used only for peaceful purposes. Nevertheless, they established no coercive authority to enforce that policy. Predictably, their mutual mistrust degenerated into complete disunity over an issue on which they were actually in agreement.

Unlike authority derived from moral consensus, authority based on individual state enforcement can coerce effectively. A powerful state, however, often will use its coercive influence to promote its own interests. Accordingly, a system based on individual authority lacks the facility of an honest broker. In addition, when a state has no interest in a particular international conflict, it generally will be reluctant to expend its own resources to assist in resolving the problem. Interested states, on the other hand, desire to enforce the law but are not honest brokers. Therefore, their actions are more likely to escalate tensions than to reduce them, and are more likely to suppress conflicts than to resolve them.

In addition to moral consensus and individual state enforcement, regional agencies with coercive power also fail to accommodate the values precedent to international security. Regional agencies promote unity and coercion better than the former two alternatives. Furthermore, regional agencies often are effective in acting as honest brokers in settling internal conflicts, and actually serve as the central authority in many such conflicts. Nevertheless, a regional authority's effectiveness and legitimacy as an honest broker is bound by the region it serves. A regional agency naturally will attempt to externalize the effects of problems that its member nations are experiencing, and will attempt to maximize the interests shared by its member nations—often to the detriment of the interests shared by other members of the world community at large. Accordingly, the ability of regional agencies to promote international security essentially is limited to the regions that each individual agency serves.

Because other alternatives fail to accommodate all the values necessary to promote international security, a central international authority becomes the only practical solution. A central international authority provides unity, coercion, and justice. Unity exists because its structures are able to determine and promote consensus. Additionally, coercion is possible through the coalition of states under one power. Finally, because a world-wide organization obviously cannot externalize its problems, but instead must address each problem as an internal one, it

²³¹ See GOODRICH & SIMONS, *supra* note 101, at 534-41.

possesses the capacity to serve as the honest broker—to serve justice—in all conflicts involving international security.

Nations first considered whether to vest authority in regional agencies or to vest it in a central body during the San Francisco conference on the United Nations Charter. While delegates were acquainted with Churchill's preference for regional agencies, they also shared Wilson's concern that regionalism would bring "war-breeding" competition.²³² Therefore, they granted the central organization responsibility for international security.²³³ Although regional agencies have been valuable in maintaining peace, the Charter subjects them to the United Nations' authority.²³⁴

Maintaining international security today demands worldwide unity, coercion, and justice—all of which coexist only in a central international authority. Because the United Nations Security Council is such a central international authority, its potential and effectiveness are important issues. While the Security Council has been only marginally effective in the past, its potential makes it worthy of continued use and development.

E. The United Nations Security Council Is a Worthy Central International Authority

The world has seen only two central international authorities in its history—the League of Nations and the United Nations. Many peace plans had called for central international authority, but the world apparently was not ready to form one until after World War I.²³⁵ The League of Nations and United Nations had similar potential for coercion and justice. The League Covenant required all members to apply sanctions against aggressors.²³⁶ The United Nations Charter not only empowered the Security Council to decide enforcement measures, but also obligated its signatories to follow those measures.²³⁷ The League Covenant provided for an honest broker—an assembly and

²³² CLAUDE, *supra* note 7, at 113.

²³³ U.N. CHARTER art. 24.

²³⁴ *Id.* art. 52 (requiring regional agencies to act consistent with the purposes and principles of the United Nations Charter); *id.* art. 54 (requiring regional agencies to inform the Security Council of activities taken to maintain international security); *see* CLAUDE, *supra* note 7, at 114-16.

²³⁵ Hemleben, *supra* note 14, at 182-84.

²³⁶ LEAGUE OF NATIONS COVENANT art. 16; GOODRICH & SIMONS, *supra* note 101, at 490.

²³⁷ U.N. CHARTER arts. 24, 25, 41, 42; GOODRICH & SIMONS, *supra* note 101, at 491.

council—to decide questions about “the peace of the world.”²³⁸ The United Nations Charter also provided for an assembly and council to decide questions about international security.²³⁹

These two organizations differed, however, in that the United Nations promotes unity more effectively. The League of Nations tried to impose unity by legal decree. Article 16 of the League Covenant committed states in advance to impose sanctions automatically and unconditionally.²⁴⁰ This broad binding legal language actually caused disunity because nations would not commit themselves in advance to automatic sanctions.²⁴¹ The United Nations, on the other hand, recognized that unity cannot be legislated. The United Nations Charter, therefore, established a mechanism for pursuing unity, rather than a legal requirement to mandate it. States were more committed to the United Nations than to the League of Nations because of this distinction.²⁴² Although this mechanism has brought less unity than originally expected, at least it has provided the potential for developing unity.²⁴³

This potential is significant because it leaves room for the Security Council to become more united and more effective. Almost thirty years ago, Professor Claude noted, “If, indeed, we can safely assume the end of the Cold War, the voluntary elimination of major armaments, and the dependable performance of significant international responsibilities by states, there is every prospect that the United Nations will work quite well.”²⁴⁴ When he made that statement, the prospects he posited were

²³⁸ LEAGUE OF NATIONS COVENANT art. 3, para. 3; *id.* art. 4, para. 4.

²³⁹ U.N. CHARTER art. 9 (establishing the General Assembly); *id.* arts. 10-14 (granting the General Assembly authority to consider international security issues, subject to Security Council authority); *id.* arts. 23-24 (establishing the Security Council and granting it authority for maintaining international security).

²⁴⁰ LEAGUE OF NATIONS COVENANT art. 16, para. 1 (stating, that in the event a member resorted to war, members were immediately to apply sanctions); GOODRICH & SIMONS, *supra* note 101, at 424.

²⁴¹ See GOODRICH & SIMONS, *supra* note 101, at 425 (noting Article 16's absolute requirement to impose sanctions, and citing League of Nations O.J. Spec. Supp. 11, at 34 (1923), to show how the members had to reinterpret Article 16 to make it more universally acceptable).

²⁴² See CLAUDE, *supra* note 7, at 71-76 (stating that the major powers realized that no organization would work unless they were united, and that the United Nations “might help to promote the maintenance of their indispensable unity”).

²⁴³ See McDUGAL & FELICIANO, *supra* note 13, at 375 (arguing the importance of providing opportunity to develop unity: “The most immediately relevant tasks of scholars ... lie, not so much in the invention and evaluation of specific new legal techniques, as in the design and execution of appropriate alternatives in communication and collaboration for promoting the necessary changes in the perspectives of the effective decision-makers of the world”).

²⁴⁴ CLAUDE, *supra* note 7, at 432

laughable. Today, they are history. "The bitter struggle that divided the world for over two generations has come to an end.... the Cold War is over."²⁴⁵

Perhaps nothing exemplifies how the end of the Cold War has raised the potential for world unity than the rapprochement between the former Soviet Union and the United States. Within the past two years alone, the United States and Soviet Union agreed to cease production of chemical weapons and destroy existing stocks, to limit underground nuclear tests to only those necessary for peaceful purposes, to promote confidence-building measures through the Conference on Security and Cooperation in Europe, and to reduce conventional armaments between the Atlantic Ocean and the Ural Mountains.²⁴⁶ The potential for world unity also became apparent during the Gulf War. The United States received commitments of over \$54 billion to support its military operations in the Persian Gulf from Kuwait, Saudi Arabia, the United Arab Emirates, Japan, Germany, and South Korea. The coalition formed by these countries represented the greatest sharing of responsibility since World War II.²⁴⁷

These changes in circumstances have led to more unity in the Security Council. Moreover, this increased unity has made the Security Council more effective, as was demonstrated during the Persian Gulf War. "In the Gulf, we saw the United Nations playing the role dreamed of by its founders ..."²⁴⁸ The Security Council was a springboard for the community response to Iraq's aggression, passing twelve resolutions and cementing unity among its members.²⁴⁹ Furthermore, the body continues to promote security in the region by ridding Iraq of its chemical and nuclear weapons.²⁵⁰ While the Security Council best demonstrated its value in the Persian Gulf, it has been effective elsewhere.²⁵¹

²⁴⁵Natsec Strategy, *supra* note 1, at 1.

²⁴⁶*Id.* at 14.

²⁴⁷Kimmitt, *supra* note 113.

²⁴⁸Natsec Strategy, *supra* note 1, at V (preface by President Bush).

²⁴⁹Goshko, *supra* note 140, at A19.

²⁵⁰See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st Mtg., U.N. Doc. S/RES/687 (1991), available in LEXIS, INTLAW Library, DSTATE File (imposing obligations on Iraq to accept elimination of its chemical, biological, and nuclear weapons capability under international supervision and forming a special commission to carry out the task under Security Council supervision); Goshko, *supra* note 108, at A22 (describing the special commission's difficulties with the Iraqi government, and the Security Council's efforts to ensure the commission's success).

²⁵¹See Natsec Strategy, *supra* note 1, at 13 (noting United Nations distinction in "fostering democratic change in Namibia and Nicaragua"); Goshko, *supra* note 140, at A19 (noting United Nations assistance in resolving the

The Security Council has great potential and, therefore, great value as a central international authority. It promotes unity, coercion, and justice better than any other international authority in history. Therefore, the community should continue to support and develop the United Nations Security Council as the primary means of maintaining international security.

F. Summary

Abating today's security threats requires unity, coercion, and justice. International security improves as nations increasingly adopt these values. International security suffers, on the other hand, if nations ignore or flout them. In addition, unity, coercion, and justice will be most effective at improving international security when they have developed under the auspices of one central authority. Because the United Nations Security Council has demonstrated more potential to promote these values than any other authority, nations rightly support it. Nevertheless, the Security Council's existence alone does not guarantee international security; nations must make it more effective to improve international security. To make the Security Council more effective, nations must make it more authoritative.

IV. The Security Council Will Become More Effective as it Becomes More Authoritative

Given that today's security threats are indivisible and resolved best through the Security Council, the international community naturally should seek to increase the effectiveness of the Security Council. In particular, nations should consider improving the function of the Security Council to maximize its facility to promote unity, coercion, and justice. Nevertheless, because the efficacy of Security Council proceedings has depended on voluntary cooperation since the body's inception,²⁵² no state reasonably could be expected to surrender substantial authority to it, except to an extent consistent with that state's self-interest. Although even this level of commitment is necessary and worthy, the Security Council's functional limitations at enforcing such commitments—the most visible and substantial of which is the

Cambodian civil war, and Ambassador Pickering's influence in promoting United Nations involvement there and in other places).

²⁵²GOODRICH & HAMBRO, *supra* note 19, at 100-01 ("the principle of 'sovereign equality' has served to emphasize the fact that the United Nations is an international organization to facilitate voluntary cooperation among its Members").

permanent member veto provision—undermine the Security Council's ultimate objectives relating to international security.

Accordingly, changing the veto provision would improve the Security Council's effectiveness by compelling each of its members to confront and solve security problems, rather than to eschew them by exercising a veto. Although eliminating the veto is a difficult task²⁵³—a task that still will require acceptable conditions²⁵⁴—it is an important one. If no veto exists, permanent members must become problem-solvers. Rather than make futile gestures, they must find solutions that all of the members can support.²⁵⁵ Moreover, without a permanent member veto provision, the Security Council would be more authoritative, thereby improving its ability to promote unity, making it more effective at enforcing community values, and enhancing its legitimacy as an honest broker.

A. *The Veto Is at the Crux of the Security Issue*

Nation-states continue to reserve to themselves control, by unilateral and exclusive decision, over most of the important bases of effective power which can be employed to sustain general community authority.... It is no less true with respect to *authority* itself as a base value. States remain reluctant to delegate even their inclusive, shared competence — that competence which is authorized by the general community and exercised in the name of and on behalf of the general community — to international governmental organizations.²⁵⁶

States historically have not granted authority to an international organization until they commit themselves legally and accept obligations willingly. Legal commitments alone do not make international organizations authoritative; conditions making the commitment acceptable also must exist.²⁵⁷ On the other

²⁵³ See U.N. CHARTER art. 108 (requiring the concurrence of all permanent members for ratification of amendments to the United Nations Charter).

²⁵⁴ See McDUGAL & FELICIANO, *supra* note 13, at 374-75.

²⁵⁵ See Goshko, *supra* note 140, at A19 (noting Ambassador Pickering's efforts to mold the permanent members into a team, and quoting him as saying, "our goal was to convince them [the Soviets] that we could reach a new era where the pressure is on everyone to find negotiated solutions").

²⁵⁶ McDUGAL & FELICIANO, *supra* note 13, at 358-59.

²⁵⁷ *Id.* at 374 ("It is ... our very strong conviction that most of these proposals [changes in legal commitments] are partial, in ... that they place too much emphasis upon ... legal techniques, and too little emphasis upon the conditions which must affect the acceptance of any appropriate techniques"); see

hand, acceptable conditions are not sufficient either. The natural tendency of states is to seek self-interest at the expense of others.²⁵⁸ Therefore, even when a true common interest lies, “momentary passions, and immediate interests” will control states’ decisions.²⁵⁹ Without a transcendental legal authority to promote acceptable conditions, however, states ultimately will resort to conflict.²⁶⁰ On the other hand, if the definition of acceptable conditions is not based on consensus, a state likely will not agree to be bound by them. Professor Claude describes this circular problem as follows:

[I]s the real task that of persuading people to accept or initiate drastic institutional change, or is it rather that of preparing people, changing them, making them fit ... The latter formulation would seem to characterize the problem much better. What is required is the profound alteration of attitudes, loyalties, attachments, and values, which in turn involves an attack upon the basic conditions of human society that provide the context within which men are shaped.²⁶¹

When Professor Claude says making people fit for world government is a better formulation of the problem, he acknowledges that

also CLAUDE, *supra* note 7, at 418 (explaining that conditions in society must be ready for a world government prior to establishing such a government, but noting that United Nations agencies gradually are establishing these conditions); GOODRICH & HAMBRO, *supra* note 19, at 73 (“[international cooperation on arms control] is conditional on the existence of conditions of friendliness and mutual confidence among the great powers”); GOODRICH & SIMONS, *supra* note 101, at 11 (“The maintenance of international peace and security ... must be viewed in a broad perspective as requiring common action not only in dealing with threatening disputes ... but also in creating ... conditions favorable to peace throughout the world”).

²⁵⁸THE FEDERALIST No. 6 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961) (“A man must be far gone in Utopian speculations who can seriously doubt that, if these States [under the Articles of Confederation] should either be wholly disunited, or only united in partial confederacies, the subdivisions ... would have frequent and violent contests with each other”). Hamilton continued this analysis with a discussion of the causes of hostility and historical examples of how states have pursued self-interest foolishly to their detriments. *See id.*

²⁵⁹*Id.* at 111.

²⁶⁰*Id.* at 113 (“Neighboring Nations ... are naturally enemies ... unless their common weakness forces them to league ... and their constitution prevents the differences that neighborhood occasions”); *see* Sunstein, *supra* note 11, at 634:

[C]onstitutions ought not include a right to secede. To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.

²⁶¹CLAUDE, *supra* note 7, at 418.

acceptable conditions must precede legal commitments. Similarly, when he says the alteration of values involves an attack on the societal conditions, he acknowledges that some legal commitments must exist to facilitate the attack. Human society will not develop the necessary values unless some authority molds them.²⁶² Furthermore, because legal commitments and societal conditions affect each other, the important issue is not what commitments and conditions prevail now, but what commitments and conditions likely will exist in the future. Accordingly, the setting of acceptable conditions depends on the proper accommodation of legal and societal trends.

The historical trend in commitments and conditions is toward increased legal commitment and increased acceptance. Although numerous plans for world peace existed before this century, “[t]hey were ... born into the world before the world was ready to receive them.”²⁶³ States instead relied on a system of voluntary alliances, which were manipulated and dissolved easily.²⁶⁴ Unity and coercion were weak, and no honest broker existed. Ironically, such alliances often drew states into war.²⁶⁵

In the aftermath of World War I, nations finally came to some agreement on the development of acceptable conditions. The war produced “a fresh awareness of the horrors of war, a rather bewildered admission that modern European civilization was not immune from the destructive forces of military conflict, and a distressed feeling that ‘it must not happen again.’”²⁶⁶ Peace plans capitalized on these sentiments and called for a League of Nations—a stronger legal commitment than ever before.²⁶⁷ Nevertheless, while states had legal commitments to the League of Nations, they did not commit themselves to follow its decisions. The United States, in particular, was not even willing to commit to the organization.²⁶⁸ Furthermore, under the League of Nations,

²⁶² See *id.* (describing United Nations agency work as promoting the necessary values that will nurture the international community’s acceptance of its authority). To embark on much of this work, the United Nations must enjoy some degree of authority. As it successfully accomplishes its missions, however, it generates even more respect and acceptance of that authority. Professor Claude points out, “It is quite possible that an ounce of international organizational service and experience is worth a pound of world governmental sermons pointing out the inadequacy of international organization.” *Id.*

²⁶³ HEMLEBEN, *supra* note 14, at 184.

²⁶⁴ *Id.* at 185.

²⁶⁵ *Id.* at 192.

²⁶⁶ CLAUDE, *supra* note 7, at 45.

²⁶⁷ HEMLEBEN, *supra* note 14, at 192.

²⁶⁸ CLAUDE, *supra* note 7, at 66.

decisions on nonprocedural matters required unanimous agreement.²⁶⁹ Therefore, each member effectively had a veto.

World War II stimulated acceptance of even stronger international authority. The major powers realized that they must be involved in the United Nations to make it effective.²⁷⁰ As a result, they accepted a greater legal commitment than under the League of Nations' Covenant. All United Nations members obligated themselves to Security Council decisions, knowing that the Security Council had authority to prescribe sanctions.²⁷¹ Only the five permanent members—as opposed to all League of Nations members—retained the right to avoid adverse decisions by veto. This arrangement provided greater unity, coercion, and justice than existed under the League of Nations. Dissention among the permanent members of the Security Council, however, continues to be an obstacle to achieving genuine unity.

Throughout the Cold War, the international community watched the current veto arrangement prevent the Security Council from performing its role. Even President Bush believed that the Security Council was a failure.²⁷² Nevertheless, while the Gulf War gave the Security Council renewed legitimacy, the ending of the Cold War diminished the need for the veto. A new spirit of cooperation prevails throughout the world community.²⁷³ The international community is considerably more integrated now than just a few years ago.²⁷⁴ The international power structure is no longer bipolar, but regional. Accordingly, the pervasive international tensions that compelled the major powers to reserve their veto prerogatives no longer persist. Actually, nations such as France, Britain, and China now rarely use their vetoes.²⁷⁵

²⁶⁹LEAGUE OF NATIONS COVENANT art. 5, para. 1.

²⁷⁰CLAUDE, *supra* note 7, at 71-72 (“The United Nations was erected upon the fundamental assumption of the need for great power unity.... The notion ... prevailed without serious challenge throughout the war years”); *id.* at 66 (noting American abstention from the League of Nations and Soviet mistrust of the organization).

²⁷¹U.N. CHARTER arts. 25, 39-42.

²⁷²Goshko, *supra* note 140, at A19 (quoting President Bush's campaign autobiography: “Like most Americans who had idealistic hopes for the United Nations when it was created in 1945, I'd undergone a sea change in attitude by the early 1970's. As ‘the last best hope for peace,’ the U.N. was another light that failed”).

²⁷³See Franck, *supra* note 24, at 604-13; Goshko, *supra* note 140, at A19.

²⁷⁴See Gaddis, *supra* note 30.

²⁷⁵Franck, *supra* note 24, at 615 n.61 (noting that China has cast only one solitary veto, France has cast only one solitary veto since 1946, and Britain never has cast a solitary veto; the other vetoes exercised by these states were cast alongside the United States).

These conditions suggest that the international community is willing to accept a greater commitment to the Security Council. Because the veto is the mechanism by which permanent members avoid legal commitments, however, the permanent members presently are the only states that ultimately need not fear a proposal before the Security Council. Therefore, the veto mechanism is at the crux of the commitment issue, and determining the merits of the veto is important. The first step in analyzing the merits of the permanent veto is to examine the reasons for its adoption.

B. The Veto *Is* Less Necessary Today Than Ever Before

During the San Francisco conference, four justifications for the veto became clear. First, unanimity was considered indispensable for peace. Second, permanent members needed to protect their respective national interests. Third, they needed to protect minority blocs from overbearing majority coalitions. Fourth, they wanted to prevent rash Security Council decisions.²⁷⁶ Each of these justifications for the veto mechanism were understandable, given the world situation in 1945. The reasons are less valid today, however, because communism is dead, the world is more integrated, and the power structure is multipolar.

1. Unanimity *Is* Not Indispensable Today.—The need for great power unity, unquestioned in 1945,²⁷⁷ became a demand for permanent member unanimity during the San Francisco conference. The great powers demanded a veto because the conflict over communism already had caused them to distrust each other. Neither the United States nor the Soviet Union was willing to be governed by a majority of the other members. On the other hand, to form the United Nations without both of them would have been futile.²⁷⁸ Therefore, the founders were wise to save the organization from almost certain failure by conceding on the veto issue.²⁷⁹

²⁷⁶CLAUDE, *supra* note 7, at 61-62 (regarding permanent member self-interest); *id.* at 72 (regarding the need for unity); *id.* at 147 (regarding the need to prevent rash decisions); *id.* at 155 (regarding the need to protect a minority).

²⁷⁷*Id.* at 72; see GOODRICH & HAMBRO, *supra* note 19, at 219 (noting permanent member delegates' statements that unity among the great powers is a necessity).

²⁷⁸See CLAUDE, *supra* note 7, at 75 (quoting Secretary of State Cordell Hull to support the need to keep the great powers in the organization in an effort to pursue peace).

²⁷⁹See *id.* at 76:

The founding fathers of the United Nations were realistic enough to accept the necessity of operating within the confines of the existing power structure and to recognize the grave dangers of future conflict

The cost of including the veto, however, was the risk that the Security Council would become deadlocked—a risk that arguably became a reality for over forty years.²⁸⁰

Today, the political climate is different; the conflict over communism is over.²⁸¹ Former enemies now cooperate. Former Soviet President Gorbachev's new thinking included broad cooperation in international organizations.²⁸² The Soviet Union "not only voted for each U.N. resolution condemning Iraq and demanding its withdrawal, but also played an important role in persuading others to go along."²⁸³ Now, the United States is cooperating with the new former Soviet Union. Because the conflict over communism is over, Cold War enemies have less reason to mistrust each other, paling the original justifications for the permanent member veto.

2. Self-Interest **Now** Requires Pursuit of the Collective Interest.—All states that participated in the San Francisco conference attempted to secure their best interests out of the organization, rather than build an organization best suited to the collective interest.²⁸⁴ Even the United States, whose negotiators were concerned about receiving senatorial consent, would not have participated in the formation of the United Nations without the veto.²⁸⁵

Self-interest provides less justification for the veto today than in 1945 because the world is now more integrated and because security is now more indivisible.²⁸⁶ Accordingly, in the

among the superpowers; they were idealistic enough to make a supreme effort to promote great power unity and to capitalize upon the chance that the wartime alliance might prove cohesive enough to uphold world peace.

²⁸⁰GOODRICH & HAMBRO, *supra* note 19, at 219.

²⁸¹See Gaddis, *supra* note 30 ("Marxism-Leninism could hardly have suffered a more resounding defeat if World War III had been fought to the point of total victory for the West").

²⁸²Franck, *supra* note 24, at 604-13 (discussing Soviet policy since 1985 on international cooperation); *Charter committee drafts declaration on UN fact-finding*, OPI, June, 1991, available in LEXIS, INTLAW Library, UNCHR File (citing a Soviet proposal for enhancing cooperation between the United Nations and regional organizations, and stressing a need for Security Council authorization before regional agencies engage in enforcement actions).

²⁸³Allison & Blackwill, *supra* note 38.

²⁸⁴CLAUDE, *supra* note 7, at 61-62.

²⁸⁵*Id.* at 62 (noting concern about Senate consent); *id.* at 143 (quoting Secretary of State Hull as saying that the permanent member veto provision was incorporated "primarily on account of the United States," and that the United States "would not remain there [in the Security Council] a day without retaining its veto power").

²⁸⁶See generally Gaddis, *supra* note 30 (explaining how the world is integrated by the communications revolution, economic interdependence, collective

post-Cold War era, a veto has a substantially greater potential to hinder the interests shared by the world community than it had just a few years ago. Today, more than ever, isolation is folly.²⁸⁷ States cannot safely ignore collective interests without jeopardizing their own self-interests.

3. *The Need for a Veto to Protect the Interests of a Minority Bloc Continues to Diminish.*—The Soviet Union “constantly inveighed against ... the abusive exploitation of the West’s capacity to mobilize quantities of votes, and ... cherished the veto as an indispensable safeguard of their own position and interests.”²⁸⁸ As the only communist country with a veto until the admission of the People’s Republic of China, the Soviet Union’s concern was at least understandable, if not reasonable.

Because the bipolar international political climate that divided the communist bloc and the West no longer exists, this justification for the veto has less merit today. Several regional powers now exist, where only two existed during the Cold War.²⁸⁹ Powers loyal to the United States during the Cold War no longer have the common enemy to bind them together.²⁹⁰ For these reasons, national interests are much more diverse. This increased number of competing powers and issues reduces the likelihood that a consistent majority will oppress a minority.²⁹¹

4. *The Veto Is Not Necessary to Preclude Rash Decisions.*—At the San Francisco conference, the major powers argued that the veto was necessary to preclude decisions that did not have unanimous support.²⁹² If this justification preserved self-interest

security requirements, and the flow of ideas); Kahler, *supra* note 30 (describing how economies are increasingly interdependent and how economics affects security).

²⁸⁷ See Natsec Strategy, *supra* note 1, at 2; Gergen, *supra* note 97, at 88 (“Domestic and foreign affairs are not an either/or proposition: They are increasingly intertwined. We will not win at either unless we win at both”).

²⁸⁸ CLAUDE, *supra* note 7, at 155.

²⁸⁹ Funabashi, *supra* note 8 (noting Japan’s growth as a regional power, and arguing a need for Japan to assume a greater security role); Holbrooke, *supra* note 4 (noting increasing Japanese strength and its desire for a seat on the Security Council); *New Union*, *supra* note 65 (noting Europe’s increased power through unity); Stamaty, *supra* note 8 (noting that increased European power will impact on the NATO).

²⁹⁰ See, e.g., Funabashi, *supra* note 8 (noting how the decreasing Soviet threat to Japan is affecting American-Japanese relations); Holbrooke, *supra* note 4 (same).

²⁹¹ See THE FEDERALIST NO. 10 (James Madison) (Benjamin Fletcher Wright ed. 1961) (arguing that increased diversity of interests and citizens reduces the likelihood that majority factions will arise).

²⁹² GOODRICH & HAMBRO, *supra* note 19, at 218 (citing *Statement by the delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, UNCIO Doc. 852, Documents, XI, at 710-4).

or prevented majoritarian tyranny, it has less merit today than in 1945. If it calmed fears about rash decisions, it was without merit.²⁹³

First, discussion of the issues—not the veto—makes the folly of rash proposals apparent. To think the veto is the only method of avoiding rash decisions is to pretend that permanent members never communicate with each other, always ignore political reality, and never act outside the Security Council. Second, whether vetoes prevent or cause unwise proposals is not clear. When states foresee a veto, they care little about the merits of the proposal.²⁹⁴ On the other hand, when states expect that proposals will pass, they take them more seriously.

Consequently, the justifications for the permanent member veto in the Security Council have less merit today than in 1945. Changes in international politics and power bases have undercut them significantly. Nevertheless, eliminating the veto would be a substantial change, the proposal for which understandably must be founded on greater reason than the mere atrophy of its original purposes. Therefore, considering how the veto actually affects the Security Council's effectiveness is necessary.

C. *How* the Veto Undermines Council Effectiveness

The Security Council is effective when it promotes unity, coercion, and justice. It promotes these values more effectively than any other organization the world has known. Nevertheless, the permanent member veto mechanism does not contribute to these values. Instead, it promotes disunity, prevents enforcement, and undermines the body's image as an honest broker.

1. The veto promotes disunity.—Vetoes, to include the permanent member veto, “authorize a minority ... even of one, to determine sanctioning policy for the whole general community. Inaction is as fraught with policy consequences as action and the failure to achieve decision may be the most significant kind of decision.”²⁹⁵ Vetoes frustrate unity by substituting minority control for majority control. This has occurred in the maintenance of peace and in the admission of member states to the United Nations.

²⁹³ *Contra* CLAUDE, *supra* note 7, at 147 (quoting Philip Jessup as saying that the veto is “the safety-valve that prevents the United Nations from undertaking commitments in the political field which it presently lacks the power to fulfill”).

²⁹⁴ *See* GOODRICH & SIMONS, *supra* note 101, at 86 (noting that in cases in which clearly, no action would result, parties used the Security Council as a so-called “propaganda forum”).

²⁹⁵ McDUGAL & FELICIANO, *supra* note 13, at 362.

The veto substituted regional control for central control over the maintenance of peace. While the community interest in monopolizing force to promote order is legitimate,²⁹⁶ the veto's existence required that regional agencies also use force to promote order.²⁹⁷ These agencies, however, have achieved autonomy. They characterize their actions as prerogatives of self-defense and avoid the Security Council's scrutiny through the veto.²⁹⁸ As a result, regional enforcement frustrates the unity sought through community monopolization of force.

During the United Nation's first few years, the veto substituted the community's interest in universal membership with rejections of states based on the permanent members' political views. The Soviet Union, for instance, vetoed the membership applications of Eire, Transjordan, Portugal, Austria, Finland, and Italy.²⁹⁹ Although Mongolia and Albania did not receive a majority vote in the Security Council, the United States opposed their applications.³⁰⁰ The United States also prevented the membership of the People's Republic of China for many years by threatening a veto.³⁰¹ These actions frustrated the unity sought through universal membership.

2. The Veto Prevents Enforcement of Community Values.— The veto not only frustrates unity, but also prevents enforcement of community values.

The record of the Security Council is replete with cases in which it has been deadlocked, due to political cleavages splitting the five Permanent Members. When a breach of ... the peace directly affects one or more of the Big Powers, or even their 'client States,' the veto power can be counted on to ensure that only an anodyne resolution will be adopted.³⁰²

²⁹⁶*Id.* at 95.

²⁹⁷See GOODRICH & HAMBRO, *supra* note 19, at 297-99; McDUGAL & FELICIANO, *supra* note 13, at 48-49, 235.

²⁹⁸CLAUDE, *supra* note 7, at 116 (noting that regional agencies may base security arrangements on Article 51 of the United Nations Charter, which provides only for subsequent Security Council action). The permanent member veto allows the regional agency to block subsequent Security Council action. Accordingly, "regional agencies have been able to acquire plausible legal justification and, more importantly, strenuous political justification, for being what they are intended by their creators to be: independently operating coalitions, unhampered by external controls." *Id.*

²⁹⁹GOODRICH & HAMBRO, *supra* note 19, at 57.

³⁰⁰*Id.*

³⁰¹CLAUDE, *supra* note 7, at 149.

³⁰²DINSTEIN, *supra* note 6, at 268-69.

The Security Council's inability to act decisively often necessitates members' resorting to self-help.³⁰³ Self-help, however, promotes individual state values, not community values.³⁰⁴ Accordingly, when a permanent member exercises its veto, thereby inhibiting the Security Council from acting, the result is a failure to enforce community values.

Three significant community values, in particular, suffer tremendously at the behest of a permanent member veto. First, the veto prevents the Security Council from setting the legal standards of aggression and self-defense—standards that already are vague.³⁰⁵ Significantly, the Security Council can do little to define these standards more explicitly because the permanent members often have competing interests. They rarely agree on the outcome of a case; each member, therefore, will veto any proposal not completely in its favor. This deadlock leaves the problem to individual states or regional agencies, who naturally are compelled to enforce their own interests.

Second, the veto prevents the Security Council from enforcing responsibility for maintaining order. Because security is indivisible, each state not only benefits from, but also bears responsibility for, international security. When a security breach occurs, uninvolved states avoid the responsibility and cost. "Because of the veto, the Security Council may not be able to

³⁰³ See McDUGAL & FELICIANO, *supra* note 13, at 213-14:

[T]he fundamental community policy at stake is the common interest of all the worlds peoples in securing a minimum of public order. This most basic policy ... permits the unilateral use of force ... In the contemporary world, low expectations as to the effective competence of the general organization of states to protect individual members ... make indispensable the permission of some self-defense.

³⁰⁴ See DINSTEIN, *supra* note 6, at 192:

The excuse of self-defense has often been used by aggressors ... Brutal armed attacks have taken place while the attacking State sanctimoniously assured world public opinion that it was only responding with counterforce ... If every State were the final arbiter of the legality of its own acts ... the international legal endeavour to hold force in check would have been an exercise in futility.

GOODRICH & HAMBRO, *supra* note 19, at 301:

By the terms of Article 2(4), Members undertake to "refrain ... from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Does this mean that if the United Nations, in the opinion of one or more Members, fails to achieve the Purposes enumerated in Article 1, that Member or those Members may by individual or collective action under Article 51 involving the use of force, seek to implement these purposes? That would seem to open a rather large door for unilateral action with no adequate assurance that the alleged right would not be seriously abused.

³⁰⁵ GOODRICH & HAMBRO, *supra* note 19, at 300.

reach a decision.” Therefore, the decision on whether to contribute to efforts at abating a particular security problem frequently fall upon regional agencies and individual states.³⁰⁶

Third, and most significant, the veto prevents the Security Council from maintaining order. This has occurred most notably in Lebanon. Ever since Israel moved forces into southern Lebanon in 1982 in response to terrorist attacks, the Security Council has remained impotent. The Soviet Union vetoed a proposal to send a United Nations peacekeeping force into Lebanon out of concern that this would enhance United States power in the region.³⁰⁷ The United States vetoed a counter-proposal that merely condemned the Israeli action without providing a solution to the terrorist attacks.³⁰⁸ Both proposals commanded overwhelming support. Nevertheless, no solution was forthcoming because the Security Council acted more like a political grist mill than a problem-solver.

3. The Veto Undermines the Security Council's Image as an Honest Broker.—The permanent member veto undermines the Security Council's effectiveness, not only by frustrating unity and coercion, but also by undermining its image as an honest broker.

Article 27 lays down that, in certain matters, a party to a dispute must abstain from voting in the Council. But the obligation does not apply to decisions under Chapter VII [which contains all sanctioning authority]. Hence, a Permanent Member may cast the veto, in a vote on the application of Chapter VII measures, notwithstanding the fact that it is a party to the dispute.³⁰⁹

Permanent members often have used the veto to protect their interests without regard for the community interest. For example, in 1989, the United States vetoed a proposed resolution deploring its invasion of Panama.³¹⁰ During the Panama operation, American soldiers mistakenly entered the Nicaraguan Ambassador's home in Panama City. Although President Bush publicly apologized for the violation, the United States later vetoed a Council resolution “declaring that the search of the

³⁰⁶ McDOUGAL & FELICIANO, *supra* note 13, at 70.

³⁰⁷ *Proposed UN Force*, *supra* note 145.

³⁰⁸ *U.S. Vetoes Proposal*, *supra* note 145.

³⁰⁹ DINSTEIN, *supra* note 6, at 263.

³¹⁰ Ethan Schwartz, *U.N. Assembly Blasts Invasion of Panama*, WASH. POST, Dec. 30, 1989, at A17 (reporting a General Assembly resolution condemning the invasion that passed by a 75-to-20 margin, as well as the United States veto of the Security Council resolution).

Nicaraguan Ambassador's residence . . . violated international law."³¹¹ Given these clear conflicts of interest, doubts about whether the Security Council is an honest broker should be no surprise.³¹²

4. Summary.—The permanent member veto undermines the Security Council's effectiveness in maintaining the three values needed to ensure international security—unity, coercion, and justice. Although the Security Council promotes these values more effectively than any organization in history, the veto does not contribute to them. Accordingly, eliminating the veto would improve the Security Council's effectiveness.

D. How Eliminating the Veto Promotes Security Council Effectiveness

A Security Council without a permanent member veto mechanism would become less of a political grist mill and more of a problem-solver. This is precisely the effect that Ambassador Pickering has sought in his work at the United Nations.³¹³ Although the permanent members must forego their vetoes before this will happen,³¹⁴ acceptable conditions for the elimination of the mechanism are developing. The need for a veto has diminished. The world is multipolar, rather than bipolar, making political compromise more realistic.³¹⁵

Because the Security Council never has operated without the veto, one cannot compare the Security Council's effectiveness

³¹¹Debbie M. Price & Thomas W. Lippman, *President Apologizes For Troops' Blunder*, WASH. POST, Dec. 31, 1989, at A1, A17; *U.S. Vetoes U.N. Resolution*, N.Y. TIMES, Jan. 18, 1990, at A16.

³¹²*See, e.g., Security Council considers situation in southern Mediterranean*, OPI, 1986, available in LEXIS, INTLAW Library, UNCHRN File ("Libya also said that because of the United States veto [over American freedom of navigation exercises in the Gulf of Sidral, the Security Council was no longer able to assume its responsibilities or to play its role in maintaining international peace and security").

³¹³Goshko, *supra* note 140, at A19.

³¹⁴*See* Sunstein, *supra* note 11, at 648-49 (explaining how the possibility of secession undermines effective union). Sunstein recommends that no right of secession exist, because this will help the union become effective. *Id.* The same argument applies with regard to the veto.

³¹⁵*See* THE FEDERALIST No. 10 (James Madison) (Benjamin Fletcher Wright ed. 1961) (arguing that extending the sphere of interests reduces the chances of factions in the organization and tends to protect against oppression by a majority with distinct interests). During the Cold War, two distinct interests existed. Today, more interests are apparent. Accordingly, each permanent member should feel less threatened by an adverse majority of the other permanent members on the Security Council than during the Cold War. *See also* FRANCK, *supra* note 24, at 615 n.61 (noting that the veto has fallen into disuse among permanent members other than the United States and Soviet Union).

under both conditions.³¹⁶ Nevertheless, eliminating the veto should improve the Security Council. When a single member can no longer determine sanctioning policy for the whole community, unity will improve; therefore, the setting of sanctioning policy becomes more important to the community. When enforcement of community values becomes more certain, coercion improves; therefore, community compliance becomes more routine. When interested parties no longer can block adverse decisions, justice improves; therefore, community respect for the system grows.

Ambassador Pickering has demonstrated that a Security Council without a veto works.³¹⁷ His approach of seeking agreements that all members can support resulted in twelve resolutions covering the Persian Gulf crisis.³¹⁸ The consensus-building necessary to sustain these resolutions united the international community to reverse the aggression, prevent terrorist attacks, and share the burden of combatting aggression.³¹⁹ The Security Council was extremely successful in the Persian Gulf, rekindling hopes for its future.³²⁰ Ambassador Pickering's approach also has been successful in Cambodia and El Salvador.³²¹

E. Summary

The Security Council, as the organization best able to maintain international security, must act authoritatively to be

³¹⁶See CLAUDE, *supra* note 7, at 418-23 (criticizing world government as an option that cannot be evaluated until tried). Claude's argument raises the logical possibility that eliminating the veto will not work. He admits, however, that the authority affects the community, and that increased Security Council effectiveness should generate increased compliance with community norms. *Id.*

³¹⁷Goshko, *supra* note 140, at A19.

³¹⁸*Id.*

³¹⁹See *supra* notes 158-160 and accompanying text (on cooperation to prevent terrorism); *supra* note 247 (on burden-sharing); *supra* notes 248-250 and accompanying text (on efforts to defeat aggression and prevent future aggression).

³²⁰See Natsec Strategy, *supra* note 1, at V (President Bush writes, "In the Gulf, we saw the United Nations playing the role dreamed of by its founders"); Gaddis, *supra* note 30:

Woodrow Wilson's vision of collective international action to deter aggression failed to materialize after 1919 because of European appeasement and American isolationism, and after 1945 because of the great power rivalries that produced the Cold War. None of these difficulties exist today. The world has a third chance to give Wilson's plan the fair test it has never received, and fate has even provided an appropriate occasion: successful U.N. action to restore Kuwaiti independence sets a powerful example that could advance us some distance toward bringing the conduct of international relations within the framework of international law that has long existed alongside it, but too often apart from it.

³²¹Goshko, *supra* note 140, at A19; see Natsec Strategy, *supra* note 1, at 13.

effective. This requires not only legal authority, but also community acceptance of that authority. The historical trend has been toward increased authority and acceptance for the proceedings of the Security Council to the point at which only the permanent members essentially may avoid its decisions. Accordingly, attention focuses on the veto. When a permanent member uses the veto, it undermines the Security Council's effectiveness. On the other hand, recent cases show that when the permanent members forego the veto, the Security Council effectively promotes international community values. Consequently, the member states of the United Nations should eliminate the veto.

V. The United States Should Move to Eliminate the Veto

This article thus far has argued principally that eliminating the Security Council veto would promote the values shared by the international community and, in turn, would benefit each member of that community. Nevertheless, to say that the member states of the United Nations should eliminate the veto does not mean that the United States should agree. The United States naturally must weigh the costs and benefits to itself.

Among the factors the United States should consider are the extent to which a more authoritative Security Council would benefit United States national security; the historical experience of the American union, including its nationalism and sovereignty; and the degree of international influence the United States would have in the future. While these are difficult to quantify, they are important to consider.

This article's analysis of international security interests tends to answer the questions posed by the first factor with relative ease—that is, United States national security would benefit substantially from a more authoritative Security Council. Because security is indivisible, improving international security generally improves the security of every nation—including the United States. More specifically, because international security depends largely upon the effectiveness of the Security Council, and because the effectiveness of the Security Council is hampered considerably by the permanent member veto, eliminating the veto mechanism would have the proximate effect of improving United States national security. Nevertheless, while this argument has substantial weight, the United States naturally must consider other factors before it takes the initiative in seeking to eliminate the permanent member veto in the Security Council.

Analysis of the second factor—the historical experience of the American union, provides some additional support. The

American colonies' options regarding their committing to the Constitution were similar to the options that the United States now faces on the veto. Although they are not identical, both cases manifest many of the benefits of a sovereign's committing to the collective interest.³²² The colonies' commitments to the union, as well as the union's subsequent success, supports the worthwhile nature of endeavors by individual sovereigns to dedicate some degree of their autonomies to promote the values they share as a community. Speculating over whether the colonies would have prospered separately arguably is like speculating over whether the vitality of the international community can endure without every nation sacrificing at least a portion of its sovereign prerogatives in the name of world unity.³²³ Nevertheless, the adversities facing the American colonies in the seventeenth century are sufficiently analogous to the adversities facing the individual nations that compose the world community. Accordingly, to assert that seeking to eliminate the veto cannot be a worthwhile endeavor is to suggest that the colonies were wrong in their endeavor to form the United States.

In addition to promoting United States security interests and extrapolating the historical successes of the American union, an analysis of the third factor—increasing its influence in the world—strongly suggests that the United States should seek to eliminate the veto. The United States' influence in the world is declining. Other rivals are rising to supplant the influences of the former Soviet Union, and many Third World nations are rising to challenge industrialized powers. Accordingly, the United States faces the specter of a world in which its influence in the international community will continue to diminish. Therefore, it should seek to incorporate its values into international practice while it still has persuasive control. To do this, the United States

³²²THE FEDERALIST No. 2 (John Jay) (Benjamin Fletcher Wright ed. 1961) (noting that the common cultural values of the colonial people were not characteristic of the international community); *id.* No. 3 (John Jay) (arguing that commitment to the collective interest helps to protect each member from outside threats). Commitment to the international community does not enjoy this advantage, absent the proverbial attack from outer space. *See also id.* No. 5 (John Jay) (arguing that unity will promote liberty, civil rights, and economic progress); *id.* No. 6 (Alexander Hamilton) (arguing that unity will prevent internal violence); *id.* No. 15 (Alexander Hamilton) (arguing that unity will help maintain order); *see supra* note 135 and accompanying text (explaining that similar benefits come from unity in the international community); *supra* notes 248-51 and accompanying text (explaining how the Security Council has been effective in recent years by foregoing the permanent member veto).

³²³*See* CLAUDE, *supra* note 7, at 428. Claude asks rhetorically, "how can any man presume to say that world government would produce beneficent effects upon world society comparable to the effects produced upon American society by its central government?" *Id.* Because the commitment to the Security Council without a veto would be similar to a commitment to a world government, the analogy seems to apply.

not only must treat rising powers as equal partners, but also must seek to accommodate their interests in the Security Council. Without such treatment and accommodation, many of the states that emerge as dominant players in the international community may resolve to project their influences outside of the Security Council, where they can circumvent the franchise of the United States in influencing world affairs.³²⁴

American influence apparently is declining while Europe and Japan appear to be increasing their spheres of influence. The industrialized nations of Europe are attempting to unify, combining their economic and political powers.³²⁵ Concomitantly, Japan is expanding its predominance in the Asia region, becoming stronger economically, and searching for a prominent role in international security.³²⁶ Additionally, Germany and Japan seek permanent seats on the Security Council.³²⁷ Should the United States ignore the interests expressed by these two countries to participate in the Security Council on an equal basis, Germany and Japan could decide to project their powers outside the Security Council. Just as the United States acknowledged that the Soviet Union's cooperation was integral to American efforts at reducing the arms tensions of the Cold War era, the United States now should acknowledge that the growing influences of Germany and Japan will be fundamental to the maintenance of international security in the future.³²⁸

³²⁴ See Stamaty, *supra* note 8.

³²⁵ See *New Union*, *supra* note 65 (quoting President Mitterand as saying, "Europe will be the top power by the next century"); Stamaty, *supra* note 8 (explaining how unity will make Europe the world's largest market, leading to a security structure independent of NATO).

³²⁶ See Funabashi, *supra* note 8. Funabashi reports of increased Japanese interest in regional security, stemming from European Community integration and North American trade agreements. He notes that competition from other regions is stimulating a competitive response from the Japanese. *Id.*; see also Holbrooke, *supra* note 4. Holbrooke points out that the United States and Japan no longer can relate as unequal partners, that Japan's economy is growing stronger in comparison to the American economy, that Japan exported more to East Asia than to the United States in 1990. *Id.* He concludes that "Japan's relative importance to the United States may increase as Washington's relative importance to Tokyo decreases." *Id.*

³²⁷ Franck, *supra* note 24, at 615; Holbrooke, *supra* note 4; Rowe, *supra* note 4, at A16.

³²⁸ Natsec Strategy, *supra* note 1, at 6:

As these countries assume a greater political role, the health of American ties with them—political, military and economic—will remain crucial to regional and even global stability.... But we frequently find ourselves competitors ... These frictions must be managed ... In this sense, ongoing trade negotiations now share some of the strategic importance we have traditionally attached to arms talks with the Soviet Union.

See also Claude, *supra* note 7, at 76.

Europe and Japan, however, are not the only rising powers that will affect international security in the years to come. The United States also must be concerned about the emerging influences of Third World countries. Nicholas Eberstadt predicts that population growth in Third World countries will be much faster than in industrial countries, generating increased economic power and political instability.³²⁹ By the year 2025, "today's industrial democracies would account for less than one-fourteenth of the total population ... [y]et would rank among the top in the world's population of geriatrics."³³⁰ As these countries grow in population, so they grow in economic strength.³³¹ Most importantly, because they do not share western values of individual rights, adherence to the rule of law, and respect for private property, the increasing influences these countries wield threaten many of the values that the United States traditionally has defended world-wide.³³² Moreover, the increasing Third World power should prompt the United States, as well as the other permanent members of the Security Council, to unify and establish their values as legal norms while the opportunity exists. Eliminating the veto will improve unity in the United Nations by enabling these emerging nations to express their values in an orderly manner.

The idea that the United States should submit to international control to achieve its best interests is not new. The United States committed to the United Nations, not expecting Soviet cooperation, but needing contact with the Soviet Union to cultivate future cooperation.³³³ Soon after the atomic explosions at Hiroshima and Nagasaki, the United States proposed international control over atomic energy with no veto provision.³³⁴ The United States realized its nuclear advantage would be short-lived and recognized that once the Soviets developed an atomic bomb, only international control would be adequate.³³⁵ The United States' strategy apparently paid off, and that strategy is as good

³²⁹Nicholas Eberstadt, *Population Change and National Security*, Council on Foreign Relations, Inc., Summer 1991, available in LEXIS, INTLAW Library, UNCHR File.

³³⁰*Id.*

³³¹*Id.*

³³²*Id.*

³³³CLAUDE, *supra* note 7, at 75. Claude notes that Secretary Cordell Hull "was keenly aware of the fact that Soviet cooperation could not be assumed, but would have to be carefully and patiently sought after and cultivated." *Id.* He "clung to the determination to exploit every possibility of maintaining unity for the future." *Id.*

³³⁴GOODRICH & SIMONS, *supra* note 101, at 535-37.

³³⁵*Id.* at 527-28.

for dealing with Europe, Japan, and the Third World today as it was for dealing with the Soviet Union in the past.

Eliminating the veto is in the best interests of the United States. All of the factors—the benefits of an improved Security Council, the United States' historical experience, and future projections of United States power—support this position. Accordingly, the following two issues remain: (1) how the United States should pursue eliminating the veto; and (2) what voting mechanism should replace the veto.

VI. The United States Should Seek to Replace the Veto with a Double-Majority Requirement.

Eliminating the veto will improve the Security Council's ability to maintain international peace and security; therefore, it will improve United States national security. As the United States promotes an alternative, however, it must work through the United Nations.³³⁶ Seeking both community acceptance and the veto's elimination are important, because they go hand in hand.³³⁷ Though the task will not be easy,³³⁸ the United States should promote respect for the Security Council and a veto alternative.

A. Establishing Acceptable Conditions for a Veto Alternative

1. *Promoting Community Respect for Security Council Authority.*—Promoting respect for the Security Council's authority is most important; respect is a prerequisite to effectiveness.

³³⁶ See U.N. CHARTER art. 108 (requiring a two-thirds vote in the General Assembly and ratification of two-thirds of the members—including all the permanent members—before amendments take effect); CLAUDE, *supra* note 7, at 65-66 (explaining Secretary Hull's concern about the effects of war victors imposing a peace upon the community). The United States should be concerned about imposing peace as a Cold War victor. Therefore, working through the United Nations and through consent is necessary to generate community acceptance of United States positions.

³³⁷ See HEMLEBEN, *supra* note 14, at 182-84 (noting that acceptable community conditions must exist); MCDUGAL & FELICIANO, *supra* note 13, at 130-31 (noting that some legitimate authority is required to prescribe and apply community policy).

³³⁸ See *supra* notes 11-24 and accompanying text; CLAUDE, *supra* note 7, at 39 ("Men and nations want the benefits of international organization, but they also want to retain the privileges of sovereignty ... The development of international organization has been plagued by the failure of human beings to think logically ... about the inexorable relationship ... between the having and the eating of the cake"); HEMLEBEN, *supra* note 14, at 191 (noting that nationalism prevented states from benefitting from arbitration.); MCDUGAL & FELICIANO, *supra* note 13, at xx (recording in Professor Lasswell's introduction that seeking to achieve minimum world order involves risks to individual state interests).

Therefore, the United States should promote United Nations operations, and maintain its channels of communication.³³⁹

The best way to engender respect for the Security Council is to use it effectively. The United States can do this in several ways. First, it can solicit Security Council action to reconcile security breaches as it did in the Persian Gulf.³⁴⁰ Second, it can remove politics from the Security Council's investigative functions. Specifically, rather than vote on whether to investigate a case, the Security Council should investigate every case. This would take politics out of the decision and increase respect for Security Council authority.³⁴¹ Third, the United States can assist other United Nations agencies to improve economic and social conditions throughout the world. "The helping hand of ... service is a more impressive argument for ... allegiance than the long arm of ... justice."³⁴²

The United States also should maintain the Security Council's channels of communication. This was an important consideration during the formation of the United Nations.³⁴³ Open lines of communication are needed to mold world leaders' views on the appropriate use of force, generate awareness of community problems and interests, educate the community, and develop community values.³⁴⁴ If the Security Council is a forum

³³⁹ McDUGAL & FELICIANO, *supra* note 13, at 375; see Natsec Strategy, *supra* note 1, at 3, 13 (citing a United States commitment to strengthen the United Nations, making it more effective in maintaining peace); *id.* at 13 (citing United States desires to fund United Nations development programs); Goshko, *supra* note 140, at A19 (noting that Presidents Bush and Gorbachev suggested that the United Nations become the basis for the new world order); Baker, *supra* note 5 (calling on nations to make use of the United Nations in drug enforcement efforts).

³⁴⁰ See Goshko, *supra* note 140, at A19 (noting the Security Council's increased respect as a result of its work in the Persian Gulf war, as well as its work in El Salvador and Cambodia).

³⁴¹ See GOODRICH & SIMONS, *supra* note 101, at 202.

³⁴² CLAUDE, *supra* note 7, at 442. The quoted passage concerns the federal government; nevertheless, it applies equally to the international arena. Claude notes that "an ounce of international organizational service and experience is worth a pound of world governmental sermons pointing out the inadequacies of international organization." *Id.* at 418; see also GOODRICH & HAMBRO, *supra* note 19, at 96 (noting the need for international organizations to improve human conditions).

³⁴³ See CLAUDE, *supra* note 7, at 75 (quoting Secretary of State Cordell Hull as saying that the need to harmonize interests is "the solid foundation upon which all future policy and international organization must be built"); *id.* at 76 (quoting Senator Vandenberg as saying that the United Nations would minimize friction, stabilize friendships, and channel orderly contacts).

³⁴⁴ See *id.* at 28 (regarding community awareness of problems and interests); THE FEDERALIST No. 1 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961) (indicating Publius's purpose to educate the citizens about the merits of the Constitution); GOODRICH & SIMONS, *supra* note 101, at 616 (regarding developing

for molding community views and solving community problems, it will gain respect.

2. Promoting Community Support for an Alternative.—To establish acceptable conditions, the United States not only must promote respect for the Security Council, but also must propose a viable veto alternative.³⁴⁵ Procedurally—no matter what the United States offers as a veto alternative—it convincingly must communicate the merits of its proposal to the community, and it must build support for that proposal through persuasion, rather than coercion.³⁴⁶ Substantively, the United States proposal should protect against majoritarian tyranny in the Security Council,³⁴⁷ through a voting procedure, or an expansion of the Security Council's permanent membership.³⁴⁸ Furthermore, the United States should ensure its proposal adequately limits the Security Council's power.

Limiting the power of the Security Council, without sacrificing the benefits of providing it with greater authority, will require delicate balancing. James Madison correctly stated the problem. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."³⁴⁹ Third World states are already concerned about this.³⁵⁰ The United Nations Charter, however, already provides some protection. The General Assembly—in which Third World countries have greater influence—elects nonpermanent members to the Security Council. In addition, the nonpermanent members are a majority on the Security Council; Security Council responsibilities are limited to security matters;

community values); HEMLEBEN, *supra* note 14, at 78 (noting that Rousseau wrote to convince leaders that the costs of war outweighed the benefits); MCDUGAL & FELICIANO, *supra* note 13, at 289 n.58 (regarding molding community leaders' views on the use of force).

³⁴⁵ See Gaddis, *supra* note 30 ("the Cold War has already created in the practice of the great powers mechanisms for deterring aggression that have worked remarkably well: these did not exist prior to 1945. There could be real advantages now in codifying and extending this behavior as widely as possible"); see also THE FEDERALIST No. 1 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961) (noting Publius's purpose to generate support for the adoption of the Constitution).

³⁴⁶ See THE FEDERALIST No. 2 (John Jay) (Benjamin Fletcher Wright ed. 1961); GOODRICH & HAMBRO, *supra* note 19, at 17.

³⁴⁷ CLAUDE, *supra* note 7, at 149 (suggesting that the veto's use may be based upon a perception of majoritarian tyranny); *id.* at 155 (citing Soviet use of the veto as a necessary reaction to perceived exploitation by a majority of western states).

³⁴⁸ Franck, *supra* note 24, at 615.

³⁴⁹ THE FEDERALIST No. 51 (James Madison) (Benjamin Fletcher Wright ed. 1961).

³⁵⁰ Goshko, *supra* note 140, at A19; Goshko, *supra* note 91, at A15.

and the Security Council must submit reports to the General Assembly.³⁵¹ These provisions already make the Security Council responsible to the international community and thereby limit its power. Nevertheless, other potential limitations merit consideration. Two such limitations are the specification of the areas of domestic jurisdiction protected under article 2, paragraph 7, of the United Nations Charter, and the incorporation of civil rights protection into the Charter.³⁵²

B. The United States Should Recommend a Double Majority Voting Method as a Veto Alternative

Promoting respect for the Council and for a veto alternative creates acceptable conditions for making the legal change. In addition to this, however, the United States should recommend the alternative best suited to the Security Council's functions and the community's needs.

Possible alternatives to the permanent member veto mechanism include a simple majority, special majority (a requirement for a two-thirds concurrence), composite majority (a majority of permanent members and a majority of nonpermanent members), and double majority (a majority of the entire Security Council and a majority of the permanent members). Determining which alternative is best first requires identification and definition of the criteria that make an alternative well suited to the Security Council and the community. It then requires a careful evaluation of those criteria.

1. Defining Criteria. — Many considerations impact on voting schemes, but the fundamental consideration is that the form be well suited to the institution's purposes.³⁵³ The Security Council's purpose is to maintain international peace and security,³⁵⁴ which requires unity, coercion, and justice. Therefore, the voting form should promote these three attributes. Nevertheless, because any mechanism for legal decision-making is ineffective without community acceptance, accommodating those three considerations alone is insufficient to form a set of defining criteria. Instead, because the permanent members must consent to any amend-

³⁵¹ See U.N. CHARTER art. 23, para. 1 (regarding election by the General Assembly and delegation of security responsibility); *id.* art. 24 (regarding delegation of security responsibility and reports to the General Assembly); see also *id.* arts. 10, 62, 87 (granting other areas of responsibility to other United Nations organs).

³⁵² See Sunstein, *supra* note 11, at 637 (suggesting that civil rights protection may help create acceptable conditions).

³⁵³ CLAUDE, *supra* note 7, at 119.

³⁵⁴ U.N. CHARTER art. 24, para. 1.

ments to the United Nations Charter, they must be receptive to a change in the voting scheme, and must find the chosen alternative acceptable. Accordingly, a comprehensive analysis of potential alternatives to the permanent member veto mechanism must address the criteria of unity, coercion, justice, and acceptance.

Unity means commitment to a common purpose.³⁵⁵ Therefore, the value of an alternative depends on how well it tends to promote commitment to a common purpose. Two considerations are important in evaluating a voting scheme's facility for commitment. First, while special majority voting schemes protect the rights of minorities, such schemes often allow small voting blocs to dictate community policy; therefore, special majorities potentially can frustrate unity.³⁵⁶ Policy founded on the consensus of a majority of parties manifestly will promote better unity than an insubstantial policy that merely incorporates the denominators held by a minority faction.³⁵⁷ Therefore, an alternative that most often expresses a majority consensus is best. Second, voting should promote consensus, rather than merely parliamentary victory.³⁵⁸ When every party has a risk of losing, each participant in the process will feel pressure to seek consensus. The present permanent member veto mechanism removes this risk of losing. Accordingly, the Security Council often is confronted with multiple counter-proposals—each receiving majority support, yet none passing—leaving crises to continue.³⁵⁹ Ambassador Pickering's practice of seeking solutions that every participant can support clearly offers a better solution.³⁶⁰

Coercion is the ability to enforce community values.³⁶¹ Therefore, in addition to considering each alternative's potential for fostering unity, each alternative must be evaluated to determine which is best at enforcing community values.³⁶² First,

³⁵⁵ See CLAUDE, *supra* note 7, at 251

³⁵⁶ *Id.* at 120 (noting that unanimity requirements lead to paralysis and anarchy, which is the opposite of unity); *id.* at 124 (noting that one vote for each state does not express the will of the majority properly); THE FEDERALIST No. 22 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961) (arguing that, as to the colonies, a majority of states was not necessarily a majority of the country); MCDUGAL & FELICIANO, *supra* note 13, at 362 (noting that special majorities enable minorities to determine community policies).

³⁵⁷ CLAUDE, *supra* note 7, at 125.

³⁵⁸ *Id.* at 140.

³⁵⁹ See *supra* notes 307-308 and accompanying text.

³⁶⁰ See Goshko, *supra* note 140, at A19.

³⁶¹ See *supra* notes 167-168 and accompanying text.

³⁶² See MCDUGAL & FELICIANO, *supra* note 13, at 374 (noting that legal techniques can affect community behavior).

the voting procedure must allow the organization quickly to determine an appropriate response.³⁶³ Typically, a small number of states should be able to reach agreement with greater speed and urgency than a larger group whose manifold special interests may predominate. Second, the voting procedure must ensure that the organization musters sufficient power to enforce its decision.³⁶⁴ These two considerations tend to work against each other. Specifically, a procedure that allows for a quick decision may not muster enough enforcement power. Conversely, a procedure that depends upon the coalescing of enforcement power may be slow to reach consensus.

Justice, the third necessary criteria for evaluating alternatives to the permanent member veto mechanism, requires the facility of an honest broker.³⁶⁵ Accordingly, each alternative must be evaluated to determine which one will maximize the Security Council's capacity to act as an honest broker. Proposals first must correlate each state's power to influence decisions with its obligations to support the Security Council.³⁶⁶ A state's accumulation of influence may inure to its eschewing its obligations and eventually may tempt it to exploit its advantage over less influential states.³⁶⁷ This detracts from the Security Council's image as an honest broker. In addition, proposals must prevent a particular state's self-interest from being decisive. The veto allowed any permanent member to paralyze the majority for its own interests.³⁶⁸ To preserve impartiality, the voting method should force states' interests to compete with one another.

Finally, any alternative to the permanent member veto mechanism must be evaluated in terms of its acceptability—that is, the willingness of states to adopt the proposal. The degree of unity, coercion, and justice accommodated by each alternative affects its acceptability. Additionally, proposals that protect against majoritarian tyranny naturally are more acceptable than

³⁶³ See CLAUDE, *supra* note 7, at 120 (noting that a unanimity requirement often leads to paralysis); THE FEDERALIST No. 51 (James Madison) (Benjamin Fletcher Wright ed. 1961) (arguing that a government must be able to control the governed); GOODRICH & HAMBRO, *supra* note 19, at 219 (criticizing the permanent member veto as paralyzing the Security Council).

³⁶⁴ GOODRICH & HAMBRO, *supra* note 19, at 29. This is one reason the veto was necessary in 1945.

³⁶⁵ See *supra* notes 190-192 and accompanying text.

³⁶⁶ THE FEDERALIST No. 22 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961); GOODRICH & HAMBRO, *supra* note 19, at 199.

³⁶⁷ See CLAUDE, *supra* note 7, at 63 ("if great nations are inclined to abuse their strength by behaving dictatorially, small ones are often tempted to abuse their weakness by behaving irresponsibly").

³⁶⁸ See *supra* notes 307-308 and accompanying text.

those that do not.³⁶⁹ Finally, proposals that oblige the Security Council to control itself are more acceptable than those that could allow the Security Council to take arbitrary or capricious actions.³⁷⁰ In other words, proposals that harness the natural conflicts of interest between powerful groups are beneficial because they tend to moderate the Security Council's proceedings with an inherent structure of checks and balances.

Consequently, an acceptable alternative to the permanent member veto should serve the Security Council's purpose and the community's needs. These considerations suggest the following four criteria: (1) the extent to which each promotes commitment to a common purpose; (2) the extent to which each promotes enforcement of community values; (3) the extent to which each allows the Council to act as an honest broker; and (4) the extent to which the community accepts each.

2. Evaluating the *Alternatives*.—

(a) Applying the criteria.—

(i) *Unity*.—Choosing the voting alternative that best promotes unity requires an empirical analysis of the following two factors: (1) the total number of Security Council members that must agree to pass a resolution; and (2) the number of permanent members that must agree to sustain it. Based on these two factors, the alternative that most easily expresses a majority consensus is the simple majority, which requires agreement by any eight members. The next best alternative is the double majority, which not only requires agreement by eight members, but also requires that at least three of those eight be permanent members. The third best alternative is the composite majority, which requires a nine-member majority vote—at least six of the ten nonpermanent members and at least three of the five permanent members. Finally, a special majority requiring a two-thirds vote of the Security Council's membership apparently would reflect consensus. Nevertheless, like the composite majority, having to obtain full agreement among nine or ten members could hinder much of the relatively routine business of the Security Council. Accordingly, the composite majority and special majority voting schemes often would sacrifice Security Council action for apparently marginal indicia of

³⁶⁹ See GOODRICH & HAMBRO, *supra* note 19, at 224 (noting Soviet use of its veto as a means to prevent tyrannical treatment by the majority of western states on the Security Council).

³⁷⁰ See THE FEDERALIST No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed. 1961) ("the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself").

consensus. Therefore, the simple and double majority mechanisms strike the best balance between the beneficial attribute of promoting unity and the essential attribute of facilitating action.

(ii) Coercion.—Which alternative best empowers the Security Council to coerce depends upon how rapidly it permits the body to respond to crises and how readily it allows the body to muster its enforcement power. The voting mechanism that is most effective at moving states toward consensus also will hasten the Security Council's response. Accordingly, the analysis from the preceding paragraph—which supports the employment of simple or double majorities to promote unity—also tends to support them to reduce the Security Council's response time. On the other hand, the alternatives that muster the most enforcement power are the composite majority and double majority—both of which require support from at least three of the powerful permanent members. Finally, because the special majority and simple majority would allow resolutions to pass without the backing of any of the permanent members, these major players understandably may be dilatory in employing their powers to enforce such resolutions.

The voting mechanism's two major influences on coercion—that is, the speed and effectiveness of the organization's ultimate response—are inversely related, making comparisons difficult. For instance, although a decision supported by a composite majority typically would muster the most enforcement power, the relative difficulty in achieving such a composite majority may reduce the circumstances under which the Security Council actually would employ such power. On the other hand, while a simple majority facilitates quick responses, the bloc of states that comprises such a majority need not have great influence. Accordingly, without requiring the support of the more powerful permanent members, a resolution passed by simple majority may not necessarily muster the enforcement power needed to coerce compliance effectively.

Despite this difficulty, two conclusions are clear. First, because mustering the enforcement powers of the permanent members will be critical to the Security Council's ability to coerce in almost every circumstance, the voting mechanisms that require acquiescence from the permanent members are better than the others. Second, the difference between the composite majority and double majority is slight; only the vote and support of one nonpermanent member distinguishes the two. Nevertheless, because the double majority requires one less vote than the composite majority, a double majority can be achieved—and thereby can approve action—with greater speed.

(iii) Justice.—In considering the voting alternative under which the Security Council acts most like an honest broker, two factors are important. First, the voting mechanism must fairly correlate each state's capacity to influence decisions with its obligations to the Security Council. Second, the mechanism must prevent an individual member's self-interest from being decisive.

Because of the permanent members' economic, political, or military strengths, they come to the Security Council sharing most of the world's influence. Those strengths mean not only that the permanent members come to the Security Council with substantially greater resources than the nonpermanent members, but also that the permanent members attract a concomitant expectation to obligate their resources to promoting the success of the United Nations. The simple majority and special majority voting schemes, however, make no distinction between the votes of permanent members and nonpermanent members. Under both of these voting mechanisms, each state has equal capacity to influence decisions even though the permanent members have greater obligations. The composite majority is slightly better at accommodating the greater obligations of the permanent members because it—unlike the simple and special majorities—allows a majority of the permanent members to negate Security Council actions. Nevertheless, the composite majority scheme effectively grants to any majority formed by nonpermanent members—that is, only six states—the prerogative of negating actions supported by the other nine members, including actions having the full support all permanent members. Accordingly, notwithstanding the tremendous disparity in their obligations to the organization, the permanent members and the nonpermanent members essentially would enjoy equal capacities to influence Security Council decisions.

The double majority, on the other hand, grants special status to the permanent members—a special status that fairly provides them with voting influence that squares with their greater obligations. While the composite majority requires that at least six nonpermanent members agree on any resolution, a double majority never would require support from more than five nonpermanent members. In addition, the permanent members can negate Security Council actions as easily under the double majority as under the composite majority. Consequently, the double majority scheme tends to correlate voting influence with voter obligation better than the other options.

Nevertheless, if the Security Council is to act as an honest broker, it also must prevent the self-interest of a single member from paralyzing the whole community. The alternative that most

easily overcomes the obstacle of self-interest also will be the alternative that best promotes unity. Though no voting mechanism can assure that states regularly will elevate the common good above self-interest, the simple majority is the only scheme that prevents a state or bloc of states to dictate policy based on individual or factional self-interests. As noted above, however, the simple majority is the poorest voting alternative at compensating a state's obligation by granting it enhanced influence.

Consequently, reconciling both factors that affect justice in a voting scheme requires balancing the benefits of correlating obligation and influence against the benefits of attenuating the manifestations of self-interest. The double majority voting mechanism emerges as the best alternative because, while it is the second best option at preventing individual state self-interest from paralyzing the Security Council, it is the best option at correlating each state's capacity to influence decisions with its obligations to the organization. Accordingly, among the voting mechanisms examined, the double majority is best at promoting justice and at facilitating the Security Council's function as an honest broker.

(iv) Acceptance.—The acceptability of a voting scheme depends on its ability to prevent majoritarian tyranny and its facility to compel the Security Council to control itself. The alternative that best prevents majoritarian tyranny is the one that is least likely to develop a consistent voting majority that effectively controls the Security Council's proceedings at the peril of the other members. In particular, because the special and composite majority schemes require resolutions to be founded on some degree of consensus among members—rather than on sheer numbers—they are better able to prevent majoritarian tyranny than the simple and double majority mechanisms.

In addition to its capacity to prevent majoritarian tyranny, an acceptable voting scheme must force the Security Council to control itself by setting groups against each other. The simple majority and special majority do not tend to promote such deliberative tensions between groups. On the other hand, because they require agreement among the permanent members by separate ballot, the composite majority and double majority voting schemes naturally encourage some degree of adversity between the permanent members and the other states. The composite majority would be particularly effective at creating such adversity because it would require agreement by a majority of two exclusive voting blocs—permanent members and nonpermanent members. Accordingly, based on the two principle criteria that determine a proposal's acceptability—preventing major-

itarian tyranny and facilitating internal checks and balances—the composite majority is the most satisfactory voting alternative. It prevents majoritarian tyranny effectively and it compels the Security Council to control itself by creating a climate of deliberative adversity.

Finally, the other general criteria—unity, coercion, and justice—also affect a proposal's acceptability. Most notably, proposals that poorly correlate a state's capacity to influence decisions with its obligations to the Security Council likely will be unacceptable. The simple majority, special majority, and composite majority share this problem. Specifically, a powerful nation understandably would be apprehensive about obligating to a process in which it often must shed much of its influence—potentially to its own detriment—to satisfy the adverse interests of weaker states. Consequently, although a composite majority voting scheme appears to be the most functional alternative for promoting the normative criteria for acceptability, the double majority mechanism actually is more acceptable now because it would not obligate the most powerful nations on the Security Council to eschew their influences in total—an obligation that the international community still cannot reasonably expect the permanent members to make.

(b) Comparing the *alternatives*.—

(i) Simple majority.—The simple majority is best at promoting unity because it requires the fewest members to make a decision. That, however, is its only advantage. A simple majority musters the least enforcement power of all the alternatives. While it hastens decision-making, the resulting decisions often may not enjoy the broad support needed to credibly enforce them. In addition, the simple majority voting scheme poorly correlates a state's capacity to influence decisions with its obligations to the Security Council. Finally, the simple majority mechanism is the least acceptable alternative. It provides the least protection against majoritarian tyranny and no self-checking mechanism on Security Council power. Because of the simple majority's many disadvantages, it is a comparatively poor alternative.

(ii) Special majority.—The special majority, on the other hand, is reasonably acceptable because it protects against majoritarian tyranny. Nevertheless, it has many disadvantages. It is the least effective alternative for promoting coercion not only because resolutions could pass without mustering the powers of permanent members, but also because the time needed to amass the required votes often would make the Security Council dilatory

in responding to security threats. Finally, the special majority's principal drawback is its failure to correlate a state's capacity to influence Security Council proceedings with its obligations to the organization. Because these disadvantages greatly outweigh its advantage, the special majority also is a comparatively poor alternative.

(iii) Composite majority.—Unlike the special majority, the composite majority voting scheme effectively promotes coercion by mustering the most enforcement power. It also is the most acceptable proposal because it inherently imposes checks on majoritarian tyranny and Security Council capriciousness. It has only two comparative disadvantages to other proposals. First, it promotes unity less effectively than the simple and double majority mechanisms because it requires nine votes for a decision rather than eight. Second, it correlates a state's capacity to influence decisions with its obligations to the Security Council less effectively than the double majority. Accordingly, while the composite majority voting scheme suffers from some marginal disadvantages, its facility to promote coercion and its potential for acceptance make it a comparatively good voting mechanism.

(iv) Double majority.—The double majority voting scheme has only minor disadvantages. It is less acceptable than the composite majority. A double majority also could pass a resolution with one less nonpermanent member's acquiescence than a composite majority. Accordingly, the double majority voting scheme is less capable of mustering coercive power than the composite majority mechanism. The double majority alternative, however, best facilitates the Security Council's role as an honest broker by accommodating the closest correlation between a state's capacity to influence decisions and its obligations to the Security Council. It also promotes unity more effectively than all alternatives except the simple majority. Consequently, the double majority appears to be a comparatively good voting mechanism.

C. Summary

The composite majority and the double majority voting schemes emerge from the analysis as the best two balloting proposals to replace the current permanent member veto mechanism. Between these two proposals, however, the double majority is the better choice. It promotes unity slightly better than the composite majority, requiring eight votes rather than nine. In addition, while a composite majority would have to muster the support of one more nonpermanent member than a double majority, the coercive benefit derived from that additional

vote would be negligible. Specifically, a double majority—like the composite majority—still would have to muster support from a majority of the more powerful permanent members. Moreover, while the requirement for one less nonpermanent member vote could result in marginally less coercive power, the time saved by not having to elicit that vote often will permit the Security Council to respond more rapidly to a crisis.

The double majority also facilitates the Security Council's role as an honest broker. The justness of this voting mechanism is most apparent in that it is the only alternative that effectively compensates permanent members' obligations to the Security Council with enhanced influence in its formal decision-making process. Finally, even though the composite majority voting scheme is the proposal that most effectively prevents majoritarian tyranny and Security Council capriciousness, the double majority nevertheless provides adequate protection by preventing a permanent member's self-interest from paralyzing the organization. Consequently, although the composite majority voting scheme is a favorable alternative to the current permanent member veto mechanism, the double majority fares as the best alternative among the proposals examined.

Accordingly, the United States should continue its commitment to improve the Security Council by proposing a veto alternative. Such a proposal will continue the trend toward increased respect for international authority, which grows more important as the world grows more integrated. To facilitate the proposal's adoption, the United States should develop conditions in the international community that will make a veto substitute acceptable. In particular, the United States should work through the Security Council to resolve threats to international security, maintain constructive relationships among its members, and support its efforts to communicate community values.

The United States, therefore, should propose an alternative to the permanent member veto. It should offer that proposal before the United Nations so the international community can discuss and decide the issue. Most importantly, however, it specifically should propose a double majority voting method as the veto replacement that best suits the Security Council's purpose and best serves the international community.

VII. Conclusions and Recommendations

The Cold War's end provides a new opportunity to improve international security structures. The ideological struggle against

communism is over. A spirit of cooperation in international affairs has arisen. New regional powers are rising to assume their security roles.

Nevertheless, although times have changed, many obstacles remain on the road to achieving lasting international security. In particular, each state still struggles with choices between its self-interests and the community's common interests. Moreover, many of the typical post-World War II security threats persist today—namely, fragmentation, regional competition, drug trafficking, terrorism, arms proliferation, and economic competition. On the other hand, the world has become much more integrated since 1945. As a result, security threats anywhere affect states everywhere. Accordingly, every state that resolves to improve international security thereby enhances its own security as well.

To improve international security, states must unite under the Security Council. Preserving security today requires unity, coercion, and justice. These three coexist only in a central international authority. Of all the international authorities in history, the United Nations Security Council has been the most effective.

Assuring effective international authority, however, will require each state to make a commitment to that authority, and to accept the legitimacy of its decisions. The historical trend has been favorable, with many nations acknowledging the need for a more authoritative international structure, as well as the necessity for increased community acceptance of international authority. This trend has been manifest in the United Nations Security Council, which obligates its members states more than any previous international organization. Nevertheless, each permanent member of the Security Council continues to enjoy the prerogative of avoiding legal commitments by exercising its veto.

Recent Security Council successes have raised the issue of whether permanent members should retain the veto. The resolution of that issue is tremendously important because the body's voting structure immediately affects the community's acceptance of authority. Specifically, the veto has diminished respect for international authority in the past. It has frustrated unity in the Security Council, prevented enforcement of community values, and diminished the Security Council's image as an honest broker.

Eliminating the permanent member veto would force all Security Council members to seek acceptable solutions, rather than to block all proposals that are not entirely in their self-interests. Accordingly, states can expect the Security Council to

reach more decisions and to implement its decisions more deliberately. Likewise, member states could be expected to take greater interest in the Security Council's work because they would see not only the proceedings, but also results.

Consequently, the United States should propose the elimination of the Security Council's permanent member veto mechanism. Eliminating the veto would improve the Security Council's effectiveness as an international organization. More importantly, it would represent a development of international authority that would enhance not only international security, but also United States national security.

The United States specifically should propose a double majority voting scheme to replace the veto. The double majority voting scheme would require that a majority of the Security Council and a majority of the permanent members concur in any resolution. This voting procedure best suits the community's needs and the Security Council's purpose. Furthermore, to facilitate the international community's acceptance of its proposal, the United States should initiate discussion of the voting procedure in the United Nations.

Throughout history, mankind has hoped for a world order with peace and prosperity for all. Nevertheless, the windows of opportunity to bring about such a world order—if any ever were actually open—always were closed too quickly on the states that were devoted to attaining a durable peace. Accordingly, the issue nations now should confront is not whether the international climate is ripe to create a world of complete peace, but whether they will seize this opportunity to move toward that goal.

BOOK REVIEWS

ARMING MILITARY JUSTICE*

REVIEWED BY MAJOR FRED L. BORCH**

What is the purpose of the military criminal legal system? Do courts-martials convene to do justice or to enforce discipline? Who should control the system—commanders or civilians? Who should administer the system—lawyers or nonlawyers? What place does the “rule of law” have in military criminal law? *Arming Military Justice* examines these and related questions while it tells the story behind the creation of the United States Court of Military Appeals (COMA).

Arming Military Justice is meant to be a “comprehensive history of the development of appellate review of military justice.” It is, however, much broader in scope. Because the book looks at the reasons underlying the COMA’s origins, it necessarily examines the principles upon which military criminal jurisprudence is based. Consequently, *Arming Military Justice* is valuable not only as a highly readable history of the COMA, but also as a thought-provoking examination of the philosophical framework underlying military justice.

Arming Military Justice is the first volume in a two-volume project by Jonathan Lurie, a professor of history and law at Rutgers University. This first volume covers the period from 1775 to 1950; the second volume is to be a legal history of the COMA from 1951 to about 1980. In this first book, Lurie examines various historical incidents that “demonstrate [the] tension between civil and military justice.” He focuses primarily on the famous Ansell-Crowder controversy of 1917-1919, and the major post-World War II reforms that resulted in a “uniform” legal code for the Armed Forces.

Professor Lurie discusses the Ansell-Crowder controversy at considerable length. Major General Enoch Crowder was The Judge Advocate General (TJAG) from 1911 to 1923. He was a West Point graduate, a veteran of the final Indian campaigns, and an exemplary staff officer. During World War I, Crowder was in

*JONATHAN LURIE, *ARMING MILITARY JUSTICE* (Princeton University Press 1992); 274 pages.

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charge of the new Selective Service System. Although he retained his position as TJAG, he left the day-to-day running of the JAG Department to his senior assistant, Samuel Ansell. Like Crowder, Brigadier General Ansell also was a military academy graduate and career officer. He was smart and enthusiastic, and Crowder “facilitated his advance” in the Judge Advocate Generals Corps. In sum, loyalty, trust, and friendship prevailed between the two men.

By 1919, however, Crowder and Ansell were in a public war of words about the future of military justice. It began as a disagreement over the extent to which the Judge Advocate General’s Department could review courts-martial proceedings. Crowder insisted that the Articles of War did not provide for an appeal from the findings or sentence imposed by a court-martial. TJAG might *review* a particular case, but he could not *revise* any aspect of it. Total control remained with the convening authority and commander. Ansell, on the other hand, believed that TJAG had “a general revisionary power.” He argued that this power permitted TJAG “to make any correction of errors of law found to be necessary in the administration of justice.” As Lurie shows, the Ansell-Crowder controversy is important to understanding the COMA’s origins because it represents the “first time the Army, and to some extent the American polity, debated the issue of a military appellate procedure.” The argument between TJAG Crowder and his senior assistant, however, also “revealed a perceived incompatibility between the totality of command and civilian norms of ... jurisprudence.” Consequently, what began as a dispute over TJAG’s power to revise courts-martial results expanded into a comprehensive debate over reforming many aspects of military justice.

Arming Military Justice thoroughly examines these proposed reforms. Ansell advocated a number of then-revolutionary changes. He wanted a pretrial investigation into charges before they could be referred to courts-martial. He believed that a convening authority should not be permitted to act upon a case until that commander “shall have the views of his [judge advocate] in writing, and no convening authority shall approve any proceeding or sentence of courts-martial pronounced illegal or void by his judge advocate.” Ansell also advocated using the federal rules of procedure in military trials. Most importantly, he wanted appellate review of courts-martial. Significantly, he eventually proposed a *civilian* court of military appeals—one that would function independently of the President and the

War Department. Virtually all of Ansell's proposed reforms were fiercely resisted by Crowder and the War Department. Nevertheless, a few changes to the Articles of War, notably the creation of "appellate" boards of review, were enacted by Congress in 1920.

Ansell's ideas for reforming military justice, however, were not forgotten. The remainder of *Arming Military Justice* concentrates on how and why most of his proposals were resurrected when new calls for reform came during the period from 1943 to 1948. For instance, when Secretary of Defense James Forrestal decided that a uniform penal code should be drafted to complement the recently unified services in the new Department of Defense, he selected a distinguished Harvard Law School professor, Edmund Morgan, to head the drafting committee. Although he had been an academic for many years, Morgan had served as a judge advocate in 1919. He had worked for Ansell, and supported his reform proposals during the controversy with Major General Crowder. Accordingly, that many of Samuel Ansell's ideas were reflected in the new Uniform Code of Military Justice (UCMJ) drafted by Morgan and his committee is not surprising. Morgan's role, the legislative history of the UCMJ, and the political infighting all are detailed in the last chapters of the book.

The "central theme" of *Arming Military Justice* is that the tension between "discipline" and "justice" in military criminal law, and between commander and noncommander control over courts-martial, always have been present. In a real sense, the COMA represents the "triumph" of civilian concepts of the rule of law over absolute commander control of the system. *Arming Military Justice* not only details this tension, but also shows *why* it took some 200 years for this *civilian* oversight of courts-martial proceedings to occur.

Judge advocates should read *Arming Military Justice* for the insight it gives a reader about military justice generally, and the COMA in particular. Military and civilian practitioners cannot appreciate—nor fully understand—today's UCMJ and trial procedure under the Rules for Courts-Martial and Rules of Evidence without examining the pre-1951 military criminal legal system. Those who read *Arming Military Justice* will come away with a clearer understanding of *why* the military justice system exists in its present form. They also should gain new insight into how military justice should be structured as the Armed Forces enter the 21st century.

FATAL VOYAGE: THE SINKING OF THE *USS INDIANAPOLIS*"

REVIEWED BY CAPTAIN BRIAN T. PALMER**

In his book, *Fatal Voyage*, Dan Kurzman provides a vivid and authentic portrayal of a many faceted-tragedy. In a spellbinding account of the worst United States Navy sea disaster, it depicts the horrors of war and the agony of the lost at sea. It is the story of men, struggling to survive against overwhelming odds. It is a witness to strength and weakness, courage and fear, and selflessness and selfishness. It is also a story of an unforgivable moral failing of the World War II United States Navy leadership. It chronicles how that leadership destroyed an innocent man's career and honor to shift public blame away from the Navy.

The *USS Indianapolis* was a heavy cruiser that saw action throughout the Pacific Theater in World War II. She was skippered by Captain Charles Butler McVay III, the proud son of a Navy admiral. In the summer of 1945, the *Indianapolis*, recently repaired after a kamikaze attack, delivered parts of the Hiroshima atomic bomb to Tinian Island in the Northern Marianas. Then, during Sunday night, July 29, while sailing from Guam to the Philippines, a Japanese submarine attacked. Struck by three torpedoes, the *Indianapolis* rolled over and sank in less than fifteen minutes. The initial explosions destroyed all ship-board communications. Although Captain McVay had given the order to abandon ship, the order could be passed only by word-of-mouth amid great confusion. Still, by the time the ship was gone, 800 of the ship's 1196 crewmen had made it into the water. Few lifeboats were launched because of the rapid, unexpected sinking. Most survivors were treading water in life jackets.

Confident of rescue, the survivors had no way of knowing that the ship's sinking had gone completely unnoticed by the United States Navy. The route of the *Indianapolis* had crossed the boundary between two commands—the Marianas Command area operating out of Guam, and the Philippine Sea Frontier Command with its base at Leyte. The leaders of both commands assumed the other had responsibility for the vessel. Additionally,

*Dan Kurzman, *Fatal Voyage: The Sinking of the USS Indianapolis* (Pocket Books 1990); 336 pages; \$4.99.

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the Pacific Fleet Command had issued no standing orders that required the reporting of nonarrival of combat ships. When the *Indianapolis* did not arrive in port as scheduled on the morning of July 31st, no action was taken. As a consequence, the survivors of the wreck were not discovered until Thursday, 2 August. Even then, the discovery and subsequent rescue effort occurred only because of a chance sighting by an anti-submarine aircraft pilot on routine patrol.

Of the 800 men that entered the water, only 316 survived the ordeal. With almost no food or water, the men quickly succumbed to the sea. Most drowned, sharks killed others, and others died at the hands of their shipmates who had gone mad from drinking seawater. One of the survivors was Captain McVay. He soon learned that his rescue was only the beginning of another nightmare. In this nightmare, the enemy was not the Japanese, nor was it the sea. It was, instead, the Navy he loved.

A court of inquiry was conducted. Specifically, the allegations stated that Captain McVay was negligent for not ordering his vessel to take a zigzagging course on the night of the attack. Upon reviewing the inquiry results, Admiral Chester Nimitz, the Commander in Chief, United States Pacific Fleet, recommended that Captain McVay only receive a letter of reprimand.

Nevertheless, political and public pressure soon mounted in Washington. Families of the dead sailors pressed for sterner measures. The Navy leadership found itself under increasing scrutiny as the nation demanded an explanation. One man especially—Fleet Admiral Ernest J. King, Navy Chief of Operations—was determined to see Captain McVay fall. Anxious to shift attention away from the Navy, he strongly urged the Secretary of the Navy, James Forrestal, to have Captain McVay court-martialed.

Secretary Forrestal ultimately agreed, and Captain McVay was brought to trial on 3 December 1945. He was charged with the following two offenses: (1) for suffering his vessel to be hazarded through negligence by failing to zigzag; and (2) for culpable inefficiency in the performance of duty by failing to make sure the crew abandoned the ship on time. The prosecutor, a man who wore two silver stars and the Medal of Honor, had been unable to illicit damaging testimony from the *Indianapolis* crew members. He therefore had Mochitsura Hashimoto, the submarine commander who sank the *Indianapolis*, brought to Washington to testify. Commander Hashimoto gave ambiguous testimony as to whether zigzagging would have prevented the attack. Nevertheless, even though the court acquitted Captain

McVay on the abandoning ship charge, it convicted him of hazarding his vessel. With that conviction, he became the first man in the Navy history to be tried and convicted for losing his ship in battle.

The court-martial sentenced Captain McVay to lose lineal numbers in both his temporary rank of captain and his permanent rank as a commander. The practical effect of the sentence guaranteed that he would never advance in the Navy. Although Secretary Forrestal eventually remitted the sentence, he approved the conviction. That final act indelibly marked Captain McVay, and not the United States Navy—or even the Japanese navy—as the man responsible for the deaths of over 880 men. Captain McVay lived with that stigma for the rest of his life.

Following a shore command assignment, he retired from the Navy in 1949. He spent his remaining nineteen years trying to piece his life together. Although continually haunted by hate mail, he obtained a modicum of relief in 1960, when his shipmates from the *Indianapolis* gave him a hero's welcome at a reunion. Nonetheless, he was destined never to regain the joy and sense of purpose his life had before that fateful sinking. Death seemed to follow him. His father died in 1959; his wife Louise died of cancer in 1961; and then his eight-year-old grandson died of a brain tumor in 1965. Unable to carry on, Captain McVay took his own life on November 6, 1968.

Dan Kurzman had three objectives in telling this story in *Fatal Voyage*. First, he wanted to relay the tale of a horrific naval disaster. Secondly, and perhaps more importantly, he wanted to expose the actions of the Navy and the motivations that caused it to take the course it did. Finally, he publicized the issue, hoping to force the government to exonerate Captain McVay officially and to have his conviction set aside.

The book is finely written and highly detailed. Kurzman enjoys a well-established reputation as an expert literary historian and talented writer. A one-time foreign correspondent for *The Washington Post*, he previously has written ten books. Most have won impressive literary awards; all are intensely researched historical texts. *Fatal Voyage* is no exception. The book is the product of exhaustive research. He interviewed over 100 people in both the United States and Japan. His information sources included letters, diaries, memoirs, books, newspaper articles, magazine articles, and hundreds of official documents—some of which were released for the first time. The result is an extremely credible, well-supported, and comprehensively referenced scholarly work.

In large measure, Kurzman uses the actual thoughts and deeds of individuals, as recounted to him, to convey the action in the book. He relays the events that led up to the sinking, the attack, the rescue, and the trial by giving the reader a look through the eyes of those who lived the episodes. He carefully selected officers and enlisted men from the Japanese Navy and the United States Navy to tell the story for him. The result is a balanced, suspenseful thriller. The reader is aware of not only the thoughts and motivations of the submarine commander giving the order to fire, but also the emotions of those aboard the *Indianapolis* when the torpedoes exploded.

Dan Kurzman's description of the living nightmare of the survivors is extremely unsettling. The reader can only marvel that anyone survived at all. The descriptions of shipmates watching their friends die and being helpless to do anything about their plights are especially poignant. The ordeal, as the author depicts it, is so riveting that putting the book down before reading that the rescue planes finally fly overhead is almost impossible. Even then, the horror is evident as Kurzman describes the screams of a man whose leg was severed by a shark, amid the cheers of those watching the aircraft drop supplies. Without a doubt, Kurzman succeeded in writing a classic disaster tale.

Although the sea disaster is a gripping tale, *Fatal Voyage* focuses primarily on the investigations, the trial, and the Navy cover-up, as well as how all these events impacted on the life of Captain McVay. The events that occurred after the rescue are comprised by fully half of the book—the part of the book, in particular, in which the benefit of Kurzman's research actually begins to shine. His examination of the evidence and the circumstances in which it was presented, prove that Captain McVay indeed was the Navy's scapegoat. The Navy never made a public issue of any "top-brass" errors that allowed the sinking to go undetected. Eventually, the Navy issued letters of censure to four, mostly low-level, officers. The gravamens of their offenses were their failures to follow-up on the nonarrival of the *Indianapolis*. Although an official news release acknowledged that these men had no affirmative duty to act, their punishments stood, at least temporarily. Within a year however, Secretary Forrestal withdrew the letters, stating that the disciplinary action was "more severe than the circumstances warranted."

Nevertheless, Captain McVay's conviction remained unchanged. According to Kurzman, that a court-martial was convened was not surprising. One of the judges on the court of inquiry that recommended a trial was Vice Admiral George

Murray, the commander of the Marianas. His command was aware that four enemy submarines were operating in the waters along the *Indianapolis* route and that the destroyer *USS Underhill* was sunk in the region just a few days earlier. When Captain McVay attended a predeparture briefing, however, this information inexplicably was withheld. Moreover, Captain McVay's request for an escort ship was denied. Nevertheless, the Admiral deemed himself fit to preside over the inquiry as a supposedly "disinterested and neutral" officer.

The key issue at the trial centered on the weather conditions on the night the *Indianapolis* was sunk. A fleet rule required that, in fair weather, all ships sailing in possibly dangerous waters were to zigzag. Although many considered zigzagging futile, the rule was based on the theory that doing so would reduce the possibility of torpedo strikes. Captain McVay's instructions in Guam, however, specifically gave him discretion not to zigzag if he thought it would be futile. The testimony of all the witness confirmed that it was a cloudy, dark night with only intermittent moonlight. All the witness were unanimous that it was a typical night in which zigzagging would not be necessary. The witnesses agreed, and expert testimony confirmed, that zigzagging could not have prevented a torpedo hit. Even the testimony of the government's star witness, Commander Hashimoto, stated that the *Indianapolis's* zigzagging only would have required him to make some changes in maneuvering.

Notwithstanding the overwhelming exculpatory evidence, the court-martial voted to convict. After issuing their sentence, the court members made a recommendation for clemency to the reviewing authority. As Kurzman explained, they reached their verdict to "please the top command," but then requested clemency "to appease their conscience."

Fatal Voyage uncovers a long list of top Navy leaders, in addition to Admiral Murray, who benefited from Captain McVay's conviction. Having found a scapegoat, these men continued to prosper in their naval careers. The author provides the following summary:

— Captain E. T. Layton, the combat intelligence officer in Guam, intercepted a radio message from Commander Hashimoto's submarine that claimed to sink a ship. He knew the submarine was operating in the same region as the *Indianapolis*, yet he conducted no investigation.

— Captain William Smedberg, the combat intelligence officer in Washington, was privy to the same information. He too, chose to ignore the report.

— Rear Admiral Lynde McCormick, and Vice Admiral Jesse Oldendorf were senior and subordinate Task Force commanders. They were both aware the Indianapolis was due to join their command. When the ship failed to arrive, the Task Force made no inquiries as to its whereabouts.

Finally, Kurzman points out that “Admiral King, Admiral Nimitz and their Chiefs of Staff had approved the ambiguous ship arrival order and had not required that combatant ships be escorted.” Had any of the above officers acted responsibly, the disaster may have never occurred.

In *Fatal Voyage*, Kurzman exposes the truth behind the motivation in court-martialing Captain McVay. The formal investigation on the sinking was not completed until several days after the court-martial. Furthermore, it contained findings of facts specifically stating that Captain McVay never was informed of known submarine activity on the ship’s route. In addition, the Navy issued a prepared press release in February 1946. Incredibly, it completely omitted any mention of the submarine activity and instead stated that all “information of possible submarine activity” was discussed with the navigator. Moreover, the Secretary of the Navy, intentionally misled the American public at the expense of Captain McVay.

In addition to the results of the investigation, the report and legal opinions sent to Secretary Forrestal clarified that Captain McVay, at worst, was guilty of a highly technical charge, and perhaps not guilty at all. According to Kurzman, the report confirmed that Captain McVay’s action did not contribute to the sinking. Nevertheless, Secretary Forrestal followed his legal advisors, who warned against any admission that the charge against Captain McVay was “highly technical.” Specifically, they believed that making such an admission would be tantamount to an “apology for ever having tried McVay.”

Fatal Voyage suggests that Captain McVay was singled out for reasons other than convenience. In a testament to the depth of his research, Kurzman has discovered that a darker motivation may have been guiding Admiral King. A proud and vain man, Admiral King’s record only had one blemish on it: As a junior officer, he had been reprimanded by none other than Admiral McVay II, Captain McVay’s father. It was a fact he had never forgotten.

Captain McVay’s fierce loyalty to the Navy may have made him a target. Kurzman implies that the Navy’s top brass well knew that Captain McVay never would attempt to discredit the

Navy actively. Actually, at the close of his trial, McVay told the prosecutor, a one-time friend and Annapolis classmate, "Whatever the verdict, it was for the good of the service."

Kurzman easily guides the reader through the difficult maze of military justice and military politics. By creating a balance between military and civilian vocabulary, all readers can maintain a high level of interest and comprehension. The book creates an unavoidable impression that a great injustice was done to an innocent man.

Interestingly, *Fatal Voyage* was published one year after the turret explosion on the battleship, *USS Iowa*. Although the author never draws a specific analogy between the two disasters, the response of the Navy in 1989 was remarkably similar to its response to the *Indianapolis* incident in 1945. Naval investigators were unable to establish the cause of the *Iowa* explosion. Rather than leave the issue unresolved, the Navy released a report blaming Petty Officer Clayton Hartwig. They accused him of detonating a homemade bomb that killed himself and forty-six other sailors. He was depressed, the report said, because of a failed homosexual relationship. Petty Officer Hartwig's family knew the allegations were false and launched an all-out effort to clear his name. They challenged the Navy to support its findings with evidence. When the investigators could produce nothing more than baseless conclusions, the Navy was forced to retract its findings. Ultimately, Admiral Frank Kelso offered a veiled apology and acknowledged the Navy had no "clear and convincing proof" against Petty Officer Hartwig. Nonetheless, the end result of the two cases are the same; both McVay and Hartwig are now dead, with their memories forever tainted.

As Mr. Kurzman nears the end of his book, he takes great pains to update the central character's lives. He tells of their successes and failures and recounts how each survivor deals with their individual memories. In this part of *Fatal Voyage*, the author reveals an ironic twist. Commander Hashimoto ended his days on the sea in 1974, when a merchant ship under his command collided with a freighter, causing the freighter to sink. Twenty-four people were killed in the incident, and Hashimoto found himself on trial for negligence. Forced to resign, he left the sea forever.

This section of the book is invaluable because the reader finds himself wanting to know as much about these remarkable people as possible. In this regard, the book could have been improved by including a comprehensive photographic essay. Most notably absent was a picture of the *USS Indianapolis* as she

would have appeared when she was the flagship of the fleet. Including a map of the region where the ship sank also would have been helpful. Doing so would have helped the reader discern the various command boundaries, as well as the routes taken by the *Indianapolis* and the Japanese submarine.

Fatal Voyage ends with a sad and frustrating postscript, in which lies the third main point of Kurzman's book. He describes the tireless efforts of Captain McVay's family and the survivors of the *Indianapolis*, who have petitioned the Ford, Carter, and Reagan administrations to overturn the conviction or, at least, to obtain a presidential unit citation to honor Captain McVay's name. In each case, they have "met with total resistance from naval authorities." Apparently, after almost fifty years, the Navy still is unwilling to admit and rectify a terrible wrong. The last sentence of his book is a challenge to the United States Navy to find a way to exonerate Captain McVay, lest the Navy's honor forever be tarnished for making him a victim of its "worst moral disaster."

Although *Fatal Voyage* makes outstanding reading for anyone, it should become required reading for all naval officers. By understanding what the Navy's leadership is capable of doing, officers may be able to prevent the disastrous fates awaiting the Captain McVay's and Petty Officer Hartwig's of the future.

BAND OF BROTHERS*

REVIEWED BY MAJOR FRED L. BORCH**

This is a wonderful book. It tells the story of the men who came together to make Company E, 506th Regiment, 101st Airborne Division. They were "farmers, coal miners, mountain men and college graduates." They came from all parts of the country. Nevertheless, although they began with little in common, these men became soldiers and a "band of brothers."

Author Stephen E. Ambrose has drawn on the memories of the surviving members of E Company to describe the life of the airborne infantryman in World War II. The soldiers in "Easy"

*STEPHEN E. AMBROSE, **BAND OF BROTHERS** (Simon & Schuster 1992); 335 pages; \$25.00 (hardcover).

**Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army.

Company parachuted into Normandy on D-Day, fought in the Battle of the Bulge, and ended the war by capturing the Eagle's Nest in Berchtesgaden. This alone is exciting reading. *Band of Brothers*, however, is more than a collection of memories. The men who trained and fought together from 1942 to 1945 "learned selflessness and found the closest brotherhood they ever knew." *Band of Brothers* reveals *how* and *why* individuals from very different backgrounds had such an *esprit de corps* that they "went hungry, froze, and died for each other."

Judge advocates will enjoy *Band of Brothers* for at least two reasons. First, it is a superbly written book. Professor Ambrose's use of first-person narratives lets the story of fighting in Europe unfold with clarity and passion. Second, the book contains real examples of legal issues that arise during combat. For example, several members of Company E remember being instructed not to take any German prisoners of war on D-Day. A private remembers his lieutenant saying, "No prisoners. We are not taking any prisoners." Another soldier recalls that General Maxwell Taylor, the 101st Division Commander, told a platoon "to fight with knives until daylight, 'and don't take any prisoners.'" Judge advocates reading *Band Of Brothers* should ask themselves what they would do if they heard this or similar statements from a senior commander.

Similarly, a former lieutenant named Winters remembers that Company E took eleven German prisoners of war (POW) at one point in the fighting. He ordered a soldier named Liebgott, who was slightly wounded, but walking, to "take the prisoners back to the battalion C[ommand] P[ost]." Winters then "remembered that Liebgott, a good combat soldier, had a reputation of being rough on prisoners." He also heard this soldier reply to his order with the words, "Oh, Boy! I'll take care of them." What followed was unorthodox, but effective. Winters told Liebgott that eleven POWs were taken, and that he expected eleven POWs to be turned over to the battalion. "Liebgott began to throw a tantrum." Winters took the safety off his M-1 rifle, pointed it at Liebgott, and said: "Liebgott, drop all your ammunition and empty your rifle." Liebgott "swore and grumbled," but followed the order. Winters then told Liebgott that he could "put *one* round" back in his rifle and stated, "If you drop a prisoner, the rest will drop you." Winters remembers that a German officer who appeared nervous about Liebgott "relaxed" when he heard Winters' order to him. No doubt the officer understood English, and all eleven POWs arrived at the battalion headquarters.

Another passage from *Band of Brothers* gives a final example of how military lawyers may face legal issues that go to the very

core of discipline in a unit. The author tells of one rifle platoon leader named Speirs who was “tough, aggressive, brave, and resourceful.” He had won a silver star after leading a bayonet charge in Normandy. While in Normandy, however, a story circulated that Speirs “had a major problem” with alcohol in his platoon. Consequently, “he put out a blanket order. No more wine. None.” The next day, the story goes, he came across a drunk sergeant. Speirs “gave an order, the noncom back-talked him, and he took out his pistol and shot the man between the eyes.” The soldier telling the story concluded that Speirs “never had any trouble with drinking after that.” No member of Company E who told this story about Lieutenant Speirs actually had seen the incident, but they apparently believed it. Interestingly, they nevertheless did not condemn Speirs. Rather, they believed the story illustrated “what can happen in war.” The judge advocate should contemplate what he or she would do if confronted with a report of such a summary execution.

Band of Brothers is unlike other books about war because it does not look at the “big picture.” The author writes little of strategy or generals. Rather, the book focuses on the privates, sergeants, and lieutenants who were “in the fields where the blood flowed and the killing took place.” The narrative is crisp, clear, and never boring. Every reader who picks up this fine book will enjoy it.

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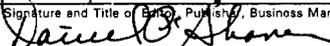
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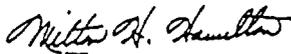
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