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Articles

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The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions

Major Charles L. Pritchard, Jr.¹

*It will be a desirous thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.*²

I. Introduction

In 1986, Timothy B. Hennis was convicted in a North Carolina state court of killing a woman and two of her daughters.³ Hennis spent three years on death row pending his appeals, which resulted in a new trial where he was acquitted of the murders.⁴ Seventeen years later, the Cumberland County, North Carolina District Attorney's Office opened Hennis's "cold case" and ran a DNA test which they believed implicated Hennis.⁵ The Double Jeopardy Clause of the Fifth Amendment prohibited North Carolina from prosecuting Hennis again.⁶ That constitutional protection did not stop the U.S. Army, however. The Army recalled Hennis to active duty—he was a sergeant at the time of the murders—to court-martial him for the same offenses.⁷

In 2002, David Tillery was acquitted by a North Carolina state court of a two year-old murder.⁸ Six months later, the Cumberland County, North Carolina Sheriff's Office convinced Staff Sergeant Tillery's Army commander at Fort Benning, Georgia⁹ to pursue the murder charge again.¹⁰ With the North Carolina record of trial in hand (literally)¹¹ and without any additional evidence,¹² the Army obtained the court-martial conviction.¹³ The difference? North Carolina has a unanimous jury verdict requirement; the military only has a two-thirds verdict requirement.¹⁴

In both cases, the Army was within the bounds of the law. The U.S. Supreme Court established the dual sovereignty doctrine in *United States v. Lanza*¹⁵ as an exception to the Double Jeopardy Clause, thereby permitting federal and state governments to prosecute successively for the same crime.¹⁶ The Hennis and Tillery cases are not aberrations either. The

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² CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONTINENTAL CONGRESS 152 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] (quoting *The Congressional Register* for James Madison's comments during the Committee of the Whole House on 8 June 1789).

³ Nancy Bartley, *Accusations Again Pursue Suspect in 1985 Killings, Despite Acquittal*, SEATTLE TIMES, Oct. 6, 2006, available at http://seattletimes.nwsource.com/html/localnews/2003291530_oldmurder06m.html.

⁴ *Id.*

⁵ *Id.*

⁶ U.S. CONST. amend V.

⁷ Bartley, *supra* note 3.

⁸ Transcript of Record at 103–04, *United States v. Tillery*, No. 20030538 (Army Ct. Crim. App. 2003).

⁹ *Id.* at 960. Tillery was alleged to have driven from Fort Benning to North Carolina to commit the murders. *Id.*

¹⁰ *Id.* at 33.

¹¹ Brief on Behalf of Appellant at 70–71, *Tillery*, No. 20030538.

¹² Transcript of Record at 97, *Tillery*, No. 20030538.

¹³ *Id.* at 1757.

¹⁴ Compare N.C. GEN. STAT. § 15A-1201, with UCMJ art. 52(a)(2) (2005).

¹⁵ 260 U.S. 377 (1922).

¹⁶ *Id.* at 385.

military has engaged in similar dual sovereign prosecutions many times. Eighteen published cases alone show the military's willingness to invoke the dual sovereignty doctrine.¹⁷ But is this the right answer?

The Framers of the Constitution did not intend a dual sovereignty doctrine to undermine the fundamental protection against double jeopardy.¹⁸ The Supreme Court erred to the significant detriment of generations of Americans when it created the doctrine based on faulty reasoning and no precedent, and it continued that error as it entrenched the doctrine in American jurisprudence. While the federal government and a majority of states have significantly limited the doctrine, the military has taken advantage of it. While each of the military services has instituted a policy governing successive state-military prosecutions, the policies are disparate and ineffective.

This article demonstrates that the military should change its practice with regard to successive prosecutions. The military's insistence on getting its pound of flesh has put servicemembers in the predicament of Edgar Allen Poe's protagonist in *The Pit and the Pendulum*¹⁹—surviving one fate only means being thrown into another, equally horrible one. The military should seek an amendment to the Uniform Code of Military Justice (UCMJ) that prohibits courts-martial after states have prosecuted servicemembers for the same act or transaction. At a minimum, the Department of Defense (DOD) should immediately consolidate the military services' disparate policies governing successive state-military prosecutions into one unified policy that makes those prosecutions the exception rather than the norm.

In this article, section II.A. analyzes the origins of the Double Jeopardy Clause, Section II.B. attempts to divine the intent of the Framers of the Constitution. Section II.C. analyzes the judicial precedent and reasoning that led to the dual sovereignty doctrine and reviews the doctrine's application and its limitations including the sham prosecution exception. Section II.D. discusses the military's treatment of dual sovereign prosecutions, and Section III compares that treatment to that of the states, the Department of Justice, and U.S. treaties. Finally, Section IV balances the competing needs of the military and its servicemembers to reach a conclusion about the military's policy regarding successive state-military prosecutions.

II. What We *Can* Do

This section of the article traces the origin and development of the Double Jeopardy Clause from its inception, through its permutations, including the dual sovereignty doctrine and the sham prosecution exception, to its present status in the military. This discussion will form the foundation to analyze what other jurisdictions are doing and, from this comparison, to discuss what the military should do.

A. Early References to Double Jeopardy

"No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."²⁰ So says the Bill of Rights. But how did the nation get there, and what did it do in the years between the ratification of the Constitution and the adoption of the Bill of Rights?²¹ The Framers of the Constitution did not include any form of double jeopardy protection in the original document. They were primarily concerned with the creation and preservation of the United States as a federal entity.²² The Declaration of Independence had indicted King George III for abuses of his citizen-subjects;²³ the Constitution

¹⁷ See *In re Stubbs*, 133 F. 1012 (D. Wash. 1905); *United States v. Knudson*, 16 C.M.R. 16 (C.M.A. 1954); *United States v. Sinigar*, 20 C.M.R. 46 (C.M.A. 1955); *United States v. Cadenhead*, 34 C.M.R. 51 (C.M.A. 1963); *United States v. Borys*, 40 C.M.R. 259 (C.M.A. 1969); *United States v. Petro*, 44 C.M.R. 511 (A.C.M.R. 1971); *United States v. Marks*, 45 C.M.R. 55 (C.M.A. 1972); *United States v. Sponseller*, 10 M.J. 775 (A.F.C.M.R. 1980); *United States v. Miller*, 12 M.J. 836 (A.C.M.R. 1982); *United States v. Green*, 14 M.J. 461 (C.M.A. 1983); *United States v. Clark*, 1990 C.M.R. LEXIS 147 (N.M.C.M.R. Feb. 23, 1990); *United States v. Duncan*, 38 M.J. 476 (C.M.A. 1993); *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993); *United States v. Kohut*, 41 M.J. 565 (N-M. Ct. Crim. App. 1994); *United States v. Bordelon*, 43 M.J. 531 (A. Ct. Crim. App. 1995); *United States v. Hutchison*, 56 M.J. 684 (C.G. Ct. Crim. App. 2001); *United States v. Ragard*, 56 M.J. 852 (Army Ct. Crim. App. 2002); *United States v. Owens*, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005).

¹⁸ See discussion *infra* pp. 4–6.

¹⁹ 4 Edgar Allen Poe, *The Pit and the Pendulum*, in *THE WORKS OF EDGAR ALLEN POE* 65 (Hovendon ed. n.d.).

²⁰ U.S. CONST. amend. V.

²¹ For ease of discussion, this article distinguishes between the Constitution (the base document) that was ratified in 1787 and the Bill of Rights (the first ten amendments) that was ratified in 1791.

²² John Jay, in arguing the importance of a federal government, said:

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to [the central government] some of their natural rights in order to vest it with requisite powers. It is

was the mechanism that replaced the tyrant with a system of democratic self-governance—the key that opened the door to individual rights.²⁴

Although the Framers' original focus was not on individual liberties,²⁵ they were cognizant of the need for a bill of rights.²⁶ James Madison and Governor Morris voiced concern about the evil of successive prosecutions during a debate regarding the federal government's power to proscribe and punish treason; a power later established in Article III, Section 3 of the Constitution.²⁷ In that context, they were concerned with the ability of both the federal government and state governments to prosecute a citizen for the same offense where both sovereigns were victimized.²⁸ They argued that, to avoid this, the federal government should be given sole jurisdiction over treason.²⁹ This was a bridge too far, however. Most debaters were wary of an all-powerful federal government and were reluctant to have the states cede too many rights to it.³⁰ This fear prevailed, and the states did not cede complete power to define and prosecute treason to the federal government.³¹

The Constitution brought with it few individual protections other than those derived from the collective protections it provided the citizenry in general, and the new U.S. citizens lingered for four years before the Bill of Rights sheltered them individually. Despite this significant gap in protections, citizens were not likely to have been subjected to double jeopardy (at least not the federal-state kind). Congress did not create federal courts inferior to the U.S. Supreme Court until it passed the Judiciary Act of 1789.³² Federal courthouses and federal prosecutors were few and far between.³³ Although federal prosecutors tried prosecuting federal crimes in state courts, they were largely unsuccessful.³⁴ Americans benefited from these problems of early federalism (they only had to worry about state prosecutions, because federal prosecutors were stymied by the foregoing problems). They were saved from this tentative reliance in 1791 when the Bill of Rights filled the gap the original Constitution had left open.

well worthy of consideration therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.

1 THE FEDERALIST NO. 2, at 14 (John Jay) (M. Walter Dunne 1901).

²³ For example, the Declaration states, "He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people." THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776).

²⁴ Alexander Hamilton made this point repeatedly in his arguments for a federal government. He said, "The vigor of government is essential to the security of liberty . . ." and "I am convinced that this [Constitution] is the safest course for your liberty, your dignity, and your happiness." 1 THE FEDERALIST NO. 1, at 11, 12 (Alexander Hamilton).

²⁵ There were a few individual liberties incorporated into the Constitution itself: the right to a trial by jury, habeas corpus, and privileges and immunities as well as prohibitions on ex post facto laws, bills of attainder, and religious tests. See 2 BERNARD SCHWARZ, THE ROOTS OF THE BILL OF RIGHTS 436 (Leon Friedman ed. 1980).

²⁶ Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 16 (1996). The ratification debates were rife with controversy about the propriety of the Constitution because of its lack of a national bill of rights. *Id.*

²⁷ *Id.* at 12.

²⁸ *Id.* Ironically, this is exactly what the U.S. Supreme Court permitted with the creation of the dual sovereignty doctrine. See discussion *infra* sec. II.C.

²⁹ Kurland, *supra* note 26, at 12.

³⁰ *Id.* See also STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 23 (2005) ("[M]uch post-revolutionary (pre-constitutional) American political thought was characterized by suspicion of government, hostility to the Executive Branch, and confidence in democracy as the best check upon government's oppressive tendencies.").

³¹ Kurland, *supra* note 26, at 12.

³² *Id.* at 16. "[T]he Framers were hesitant to establish a scheme whereby federal crimes could be prosecuted exclusively in federal court. This hesitance persisted even after Congress created inferior courts . . ." *Id.* This was due to a lingering fear of a powerful central government. The more the states allowed the federal government to do, the more that government would flex its muscles according to the Framers. *Id.* at 17.

³³ *Id.* at 16.

³⁴ *Id.* at 17. Although the Judiciary Act permitted this, state courts and the U.S. Supreme Court were reluctant to recognize such shared jurisdiction because of the vertical separation of powers requirement between state and federal courts. *Id.* See also *Jackson v. Rose*, 2 Va. Cas. 34 (1815); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *United States v. Lathrop*, 17 Johns. 4 (N.Y. 1819).

B. The Double Jeopardy Clause

In 1791, three-fourths of the states ratified the Fifth Amendment which, among other things, forbade multiple prosecutions for the same offense.³⁵ Based on the history of the Double Jeopardy Clause, however, its inclusion in the Bill of Rights was not a foregone conclusion. The rights contained in the Bill of Rights have been described as natural rights or “the true, ancient, and indubitable rights and liberties of the people.”³⁶ The Double Jeopardy Clause does not appear to have been one of these; it was not incorporated in the Magna Carta in 1215,³⁷ the English Petition of Right in 1628,³⁸ or the English Bill of Rights in 1689,³⁹ although these documents were the foundation of individual liberties in Great Britain. According to Blackstone’s Commentaries in the late eighteenth century, however, double jeopardy protections were provided by English common law, even to the extent of barring an English prosecution after a foreign prosecution for the same offense.⁴⁰

There was scant reference to double jeopardy protection in American colonial declarations and state constitutions. During the colonial period, only Massachusetts and Carolina included protections against double jeopardy. Article 42 of the Massachusetts Body of Liberties in 1641 stated, “No man shall be twice sentenced by Civill Justice for one and the same Crime, offense, or Trespasse.”⁴¹ Article 64 of the Fundamental Constitutions of Carolina in 1669 stated, “No cause shall be twice tried in any one court, upon any reason or pretense whatsoever.”⁴² Upon attaining unofficial statehood (a promotion from colonial status), nine of the former colonies adopted bills of rights. Only New Hampshire’s Bill of Rights of 1783 included a double jeopardy provision.⁴³ Article XVI stated, “No subject shall be liable to be tried after an acquittal, for the same crime or offence.”⁴⁴ This left twelve states without a constitutional prohibition on double jeopardy.⁴⁵

The first ten Amendments to the Constitution were primarily based on the states’ constitutions and bills of rights.⁴⁶ States were asked to propose changes to the Constitution after its ratification, and James Madison collected those submissions. Madison then culled the submissions and drafted a distinct set of articles that Congress could debate.⁴⁷ He believed the amendments that would go to the people should consist of an enumeration of “simple and acknowledged principles.”⁴⁸ The only state submission to contain a double jeopardy provision was New York’s. It proposed, “That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same offence, nor unless in case of impeachment, be punished more than once for the same Offence.”⁴⁹ There are two striking features in this: First, New York did not prohibit double jeopardy in its own constitution; and second, New York’s proposal must have struck a cord with James Madison, because the Double Jeopardy Clause made it into the articles he presented to the House of Representatives. This is despite the fact that only one state (New Hampshire) had included the provision in its constitution and only one state (New York) had

³⁵ U.S. CONST. amend V.

³⁶ 1 SCHWARZ, *supra* note 25, at 44.

³⁷ *Id.* at 8.

³⁸ *Id.* at 19.

³⁹ *Id.* at 40.

⁴⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1773). Blackstone stated,

[T]hat no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime.

Id. The same was true for a former conviction. *Id.* See also *Rex v. Hutchinson* (1775) (not directly reported, but discussed in *Roche’s* case); 1 Leach C.L. 34 (4th ed. 1815); *Beak v. Thyrrwhit*, 87 Eng. Rep. 124 (English court dismissed a murder indictment because Hutchinson had already been acquitted by a Portuguese court for the same act); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 (1956).

⁴¹ 1 SCHWARZ, *supra* note 25, at 76.

⁴² *Id.* at 117.

⁴³ 2 *id.* at 375.

⁴⁴ *Id.* at 377.

⁴⁵ RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 200 (2006).

⁴⁶ 2 SCHWARZ, *supra* note 25, at 435.

⁴⁷ CREATING THE BILL OF RIGHTS, *supra* note 2, at xiv, 11–14.

⁴⁸ *Id.* at 152 (quoting *The Daily Advertiser* for Madison’s comments during the Committee of the Whole House on 17 August 1789).

⁴⁹ *Id.* at 22.

recommended the provision as an amendment. Yet, the Double Jeopardy Clause piqued the interest of Congress and was ultimately presented to the states for ratification.

Congress altered the wording of the Clause several times. James Madison originally framed it as follows: “No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence.”⁵⁰ After the House passed it essentially unchanged,⁵¹ the Senate struck out the language, “except in case of impeachment, to more than one trial, or one punishment,” and substituted the phrase, “be twice put in jeopardy of life or limb.”⁵² More interesting is additional language proposed several times by Representative George Partridge (Massachusetts) in the debates of the Committee of the Whole House. He proposed adding after the words “same offence” the words “by any law of the United States.”⁵³ The House twice voted down the additional language.⁵⁴

Given this history, the question remains: What were the Framers concerned about? First, the Bill of Rights generally was seen as an attempt to limit the powers of the federal government. James Madison said that

the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode. They point these exceptions sometimes . . . against the majority in favor of the minority. The prescriptions in favor of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.⁵⁵

That is, the powers of the masses in governing themselves were to be sacrificed, to some extent, for the preservation of individual rights. In the words of Tench Coxe, a Philadelphia Federalist, the Amendments would “[heighten and strengthen] the barriers between necessary power and indispensable liberty.”⁵⁶ This focus on individual liberties at the expense of the government was apparent in the debates of the Committee of the Whole House regarding the Double Jeopardy Clause. Several of the Representatives were concerned that the Clause would divest individuals of their *right* to obtain a second trial if the first trial was proven to have been defective.⁵⁷ They therefore read the Clause consistent with its “human intention . . . to prevent more than one punishment.”⁵⁸ Representative Livermore summed up the sentiment of his brethren as follows:

The clause appears to me essential; if it is struck out, it will hold up the idea that a person may be tried more than once for the same offence. Some instances of this kind have taken place; but they have caused great uneasiness: It is contrary to the usages of law and practice among us; and so it is to those of that country from which we have adopted our laws.⁵⁹

Second, the Framers never raised the concern during the debates that the Clause would bind the federal government’s hands improperly. There was no discussion regarding the potential tension between the states and the federal government concerning the Clause. The tenor of the debates seems to indicate the representatives believed the Clause to be universal: If a person is tried once, that person may not be tried again (unless he wishes it) for the same offense regardless of the prosecuting entity. In fact, the response to Representative Partridge’s proposal for additional language supports this universal application of the Clause. Partridge sought to limit the applicability of the Clause by changing it to read “for the same offense by any law of the United States.”⁶⁰ This language indicated that the Clause would only apply to the federal

⁵⁰ *Id.* at 12.

⁵¹ *Id.* at 31. The House juxtaposed the phrases “one trial” and “one punishment” in the version it passed.

⁵² *Id.* at 39 n.14.

⁵³ *Id.* at 180, 187 (quoting *The Gazette of the United States*, 22 August 1789). See *infra* discussion pp. 5–6.

⁵⁴ *Id.*

⁵⁵ *Id.* at 81 (quoting *The Congressional Register* for statements made before the House of Representatives on 8 June 1789).

⁵⁶ LABUNSKI, *supra* note 45, at 211.

⁵⁷ CREATING THE BILL OF RIGHTS, *supra* note 2, at 186. Representatives Benson and Sherman believed that, “as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor” *Id.* If this reading of the Clause was accurate, Timothy Hennis would not have been able to challenge his original murder conviction and thereby obtain the new trial at which he was acquitted. See discussion *supra* p. 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 180 (quoting *The Gazette of the United States*, 22 August 1789).

⁶⁰ *Id.* at 180, 187.

sovereign's laws and prosecutions. Yet the proposal was voted down twice. A universal application of the Clause makes sense in the context of the state-federal dual sovereignty model. As stated above, the double jeopardy protection is not a "natural right," but one "resulting from the social compact which regulates the action of the community."⁶¹ The citizens of the several states comprise the society from which the compact is drawn. There are no citizens of the federal government distinct from the citizens of the states. If the benefit of the social compact belongs to the individual citizens, the limitation of power must be on both sovereigns because the individual belongs to both at the same time. To believe otherwise (that is, to reject the universal application of the Double Jeopardy Clause) would be to defeat the individual's sacred right through a combination of federal and state power—something the laws of each could not accomplish (and were not intended to accomplish) separately.⁶²

Yet, the U.S. Supreme Court believed otherwise and interpreted the Double Jeopardy Clause in just that manner.

C. The Dual Sovereignty Doctrine

In 1922, in *United States v. Lanza*,⁶³ the U.S. Supreme Court recognized an exception to the Double Jeopardy Clause where successive prosecutions are accomplished by separate sovereigns. This dual sovereignty doctrine relies on the notion that an accused whose conduct violates the laws of two sovereigns "has committed two different offenses by the same act, and [thus] a conviction by a court [of one sovereign] of the offense against that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy."⁶⁴ Yet, the foundation for the doctrine is based more on legal imagination than on legal precedent or reasoning.

1. Pre-Civil War Roots

The dual sovereignty doctrine had its roots in pre-Civil War soil.⁶⁵ In the 1852 case *Moore v. Illinois*, the Supreme Court set forth for the first time the principle that later became the dual sovereignty doctrine.⁶⁶ Moore was convicted in Illinois for harboring and secreting a slave.⁶⁷ Moore argued that the state statute was void because it conflicted with a federal constitutional provision that covered the same offense and therefore violated the Fifth Amendment's Double Jeopardy Clause.⁶⁸ The Court held that the state and federal laws were different and therefore no conflict existed.⁶⁹ The Court further stated that Moore's conduct did not violate the Constitution's prohibition.⁷⁰ Despite this holding, the Court delved into obiter dictum stating,

⁶¹ *Id.* at 81 (quoting *The Congressional Register* for Madison's statements to the House of Representatives on 8 June 1789).

⁶² The method of constitutional interpretation employed in pages 4–6 of this article is what U.S. Supreme Court Justice Antonin Scalia would call "textualism." This method seeks the original meaning of the text by analyzing the context in which it was written. This original meaning does not change as time progresses. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38, 40 (1997). Justice Stephen Breyer has proposed an alternative method of constitutional interpretation in which constitutional provisions are analyzed in the context of active liberty (the ability of citizens to participate in government) and individual liberty (freedom of citizens from governmental intrusion). See BREYER *supra* note 30, at 3–5, 15. The analysis on pages 4–13 of this article is supported by this method as well. The question is whether the dual sovereignty doctrine promotes active or individual liberty or both or inhibits either. The doctrine inhibits both. If the backbone of active liberty is permitting the public to govern itself, the antithesis is "concentrating too much power in too few hands." *Id.* at 8. When the state and federal governments act toward a single goal, individually or cooperatively, they become like one entity that has double the power. This is the antithesis of active liberty. Further, the dual sovereignty doctrine clearly inhibits individual liberty because it permits citizens to be doubly subjected to governmental intrusion. Hence, under Justice Breyer's method of constitutional interpretation, the dual sovereignty doctrine does not promote liberty (active or modern) and it should be discarded. In its absence, the Double Jeopardy Clause does promote liberty.

⁶³ 260 U.S. 377 (1922).

⁶⁴ *Id.* at 382.

⁶⁵ See *Moore v. Illinois*, 55 U.S. 13 (1852); *Fox v. Ohio*, 46 U.S. 410 (1847).

⁶⁶ *Moore*, 55 U.S. at 15–16.

⁶⁷ *Id.* at 10.

⁶⁸ *Id.* Article IV, Section 2 of the Constitution required slaves who escaped into another state to be delivered back to their slave owners if the owners demanded it. This provision was later superseded by the Thirteenth Amendment. U.S. CONST. amend XIII.

⁶⁹ *Moore*, 55 U.S. at 11, 14–15.

⁷⁰ *Id.* at 14–15.

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either [State or federal government] or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other⁷¹

The Court cited *United States v. Marigold*⁷² and *Fox v. Ohio*,⁷³ neither of which supported such a proposition. *Marigold* dealt only with the federal government's ability to criminalize counterfeiting based on its constitutional power to coin money.⁷⁴ *Fox* was perhaps more closely related to the *Moore* dictum, but it did not support the proposition.

Mrs. Fox was convicted in Ohio for passing counterfeit money.⁷⁵ She argued to the Supreme Court that the Ohio criminal statute was unconstitutional because Article I, Section 8 of the Constitution vested the power to coin money in Congress.⁷⁶ The Court noted the difference between minting false money (which would offend the federal government) and passing or uttering false money (which would not offend it⁷⁷), and held that the state and federal governments were not operating in conflict because they were dealing with two different wrongs.⁷⁸ Interestingly, Ohio argued that if the state and federal government could both prosecute for the same act, it would violate the federal Double Jeopardy Clause.⁷⁹ This probably reflected the prevailing notion (established by English common law and perpetuated by the Constitution's Framers) that the Clause applied to successive prosecutions by the state and federal governments. The Court viewed the issue more as a preemption problem than a double jeopardy one.⁸⁰ The Court said the Clause was a restriction on federal power, "intended to prevent interference with the rights of the States, and of their citizens."⁸¹ Therefore, federal action would not prevent a state from acting to enforce its criminal laws. Although the Court avoided a double jeopardy analysis in *Fox*, it later relied on *Fox* to support its dictum in *Moore* regarding dual sovereignty. The problem with the *Moore* Court's reliance on *Fox* is that the *Fox* holding had nothing to do with double jeopardy and that the obiter dictum in *Fox* was devoid of citation to any authoritative precedent.⁸²

Both *Fox* and *Moore* drew strong condemnation from Supreme Court Justice McLean. In *Fox*, he argued the majority's holding established

a great defect in our system. . . . [T]o punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. . . .

There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. . . . [I]ts spirit applies with equal force against a double punishment, for the same act, by a State and a federal government.⁸³

⁷¹ *Id.* at 15–16.

⁷² 50 U.S. 560 (1850).

⁷³ 46 U.S. 410 (1847).

⁷⁴ *Marigold*, 50 U.S. at 567–68. *Marigold* was indicted pursuant to a federal statute proscribing importation and utterance of counterfeit currency. *Id.* at 556. *Marigold* argued that Congress did not have the authority to enact such a law because the Constitution specifically prohibited only counterfeiting itself. Therefore, anything beyond actual counterfeiting was reserved to the states. *Id.* at 568. The Court disagreed, stating that Congress' authority to enact the statute was inherent in its constitutional power to regulate commerce. *Id.* at 570.

⁷⁵ *Fox*, 46 U.S. at 432.

⁷⁶ *Id.* at 433.

⁷⁷ This was before the enactment of the federal statute at issue in *Marigold*.

⁷⁸ *Fox*, 46 U.S. at 433.

⁷⁹ *Id.* at 434.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See id.* at 434–45.

⁸³ *Id.* at 439 (McLean, J., dissenting).

In *Moore*, Justice McLean repeated this theme more powerfully:

It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government, though sovereign within the limitations of its power, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.

It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the State laws, as under the laws of the Federal Government. It is true that he lives under the aegis of both laws; and though he might yield to the power, he would not be satisfied with the logic or justice of the argument.⁸⁴

By 1852, the Supreme Court, in the *Moore* decision, had recognized a rudimentary form of the dual sovereignty exception to the Double Jeopardy Clause without any basis in law. It thereby created the potential for an invasion of an individual's constitutional right to be free from double jeopardy. This potential would become reality in 1922. Rather than recognizing *Fox* and *Moore* for their true value—limited holdings not dealing with double jeopardy issues—the Court in *United States v. Lanza*⁸⁵ relied on the unsupported obiter dicta in those cases to firmly establish a true exception to the Double Jeopardy Clause.

2. The Doctrine

Not only did Chief Justice Taft fail to recognize the limits of the Court's holdings in *Fox* and *Moore*, he relied on a string of similar cases (all of which had their foundation in those two cases) in *Lanza* to reinforce the façade of precedent.⁸⁶ By 1922, the First World War had been put to bed and Prohibition was alive and “flapping.” *Lanza* had been convicted of violating the National Prohibition Act⁸⁷ (which enforced the Eighteenth Amendment⁸⁸) as well as violating state law by manufacturing, transporting, and possessing alcohol.⁸⁹ *Lanza* successfully appealed to a Washington District Court, which dismissed the U.S. indictment.⁹⁰ Interestingly, the Washington statute proscribing *Lanza*'s acts predated the Eighteenth Amendment.⁹¹ The Amendment did not occupy the field; rather it permitted concurrent federal and state enforcement power.⁹² The United States appealed the district court's dismissal, and the Supreme Court reversed.⁹³ The Court held that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”⁹⁴ Chief Justice Taft's logic, rationale, and reliance on “precedent,” however, were all flawed.

⁸⁴ *Moore v. Illinois*, 55 U.S. 13, 21 (1852) (McLean, J., dissenting).

⁸⁵ 260 U.S. 377 (1922).

⁸⁶ *Id.* at 384.

⁸⁷ Pub. L. No. 66-66, 1 Stat. 305 (1919). The Act implemented and provided penalties for the Eighteenth Amendment. See explanation of the Eighteenth Amendment *infra* note 86. The National Prohibition Act became inoperative by repeal of the Eighteenth Amendment. See U.S. CONST. amend XXI (1933); *Massey v. United States*, 291 U.S. 608 (1934).

⁸⁸ U.S. CONST. amend XVIII. The Eighteenth Amendment prohibited the manufacture, sale, and transportation (including importation) of intoxicating liquors in the United States and any of its territories. *Id.*

⁸⁹ *Lanza*, 260 U.S. at 378.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² U.S. CONST. amend XVIII, § 2.

⁹³ *Lanza*, 260 U.S. at 378, 385.

⁹⁴ *Id.* at 382.

a. *Logic?*

Chief Justice Taft said the purpose of the Eighteenth Amendment was to establish “prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate.”⁹⁵ Even the Amendment itself sought state-federal cooperation to achieve this end.⁹⁶ Because of this unity of effort, there could only be one purpose and one goal. Yet, Chief Justice Taft stated that *Lanza*’s one act (or series of acts) really resulted in two harms:

Here the same act was an offense against the State of Washington . . . and also an offense against the United States The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.⁹⁷

In essence, the logic was as follows: there was one purpose and goal, and there was one act (and therefore one harm) affecting that purpose and goal; but because there were two entities acting in unison to achieve the purpose and goal, each entity was entitled to its share of the “just” desserts. If ever there was a legal fiction, this was it.

b. *Rationale*

The Court explained its rationale as preventing a preemption of the federal government’s prosecution by a state’s prosecution where both entities had an interest in seeing justice done and the state’s punishment might be too lenient to satisfy the federal government’s desires.⁹⁸ Specifically, the Court said, “If a State were to punish the [crime] . . . by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.”⁹⁹

Harkening back to original ideas of federalism, however, most of the Framers would likely have had difficulty envisioning a scenario where a person would violate the laws of the United States and a state by one act. James Madison set forth one of the first principles of federalism in *The Federalist No. 45*: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹⁰⁰ Consequently, the areas of federal power—national protection from foreign powers and national preservation through taxes¹⁰¹—were distinct from state powers. The two areas where the Framers envisioned a dual sovereign application of criminal laws were treason and piracy.¹⁰² This is because the Framers wanted and expected the federal government to be limited in its authority and to stay in that lane.¹⁰³ Yet, the future would find the federal government expanding that lane into a major highway through a combination of the Commerce Clause and the Necessary and Proper Clause.¹⁰⁴ Even if the Framers intended the Double Jeopardy Clause to apply only to the federal government (as opposed to a universal application), that intent would have been founded upon the belief that the federal government’s power would be distinct and limited and that there would be little overlap with the states’ powers.¹⁰⁵ Had they foreseen the explosion of federal criminal

⁹⁵ *Id.* at 381.

⁹⁶ U.S. CONST. amend. XVIII, § 2.

⁹⁷ *Lanza*, 260 U.S. at 382.

⁹⁸ *Id.* at 385.

⁹⁹ *Id.*

¹⁰⁰ 1 THE FEDERALIST NO. 45, at 319 (James Madison).

¹⁰¹ Madison went on to explain that the federal government’s power “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.” *Id.*

¹⁰² Kurland, *supra* note 26, at 12.

¹⁰³ See, e.g., 1 THE FEDERALIST NO. 32, 206–07 (Alexander Hamilton) (noting that states would retain all rights of sovereignty that they did not exclusively delegate to the federal government); 1 THE FEDERALIST NO. 39, at 262 (James Madison) (stating that the jurisdiction of the proposed federal government would extend to “enumerated objects only”).

¹⁰⁴ Kurland, *supra* note 26, at 16 n.208.

¹⁰⁵ *Id.* at 9. The Constitutional Convention compromised on the issue of federal courts inferior to the U.S. Supreme Court in that the Constitution ultimately permitted but did not require them. This reflected the “practical principle that areas of ‘exclusive’ constitutional criminal authority would rarely result in mandatory preemption of state laws that criminalized the same act or transaction, even if those acts were technically denominated to be within an area of exclusive federal concern.” *Id.* at 31.

legislation, much of which overlaps state criminal jurisdiction, the debates regarding the Double Jeopardy Clause likely would have had a different flavor.

The *Lanza* opinion was silent regarding the Framers's intent for the Double Jeopardy Clause. It was not silent with regard to precedent, however.

c. "Precedent"

The Court relied heavily on *Fox* and *Marigold*,¹⁰⁶ which, as stated above, did not support the proposition that successive state-federal prosecutions were exempt from the Double Jeopardy Clause. Chief Justice Taft attempted to bolster his position with a long string of cases that failed to do just that.¹⁰⁷ He cited *Moore v. Illinois*,¹⁰⁸ *United States v. Cruikshank*,¹⁰⁹ *Pettibone v. United States*,¹¹⁰ *Ex parte Siebold*,¹¹¹ *Crossley v. California*,¹¹² *Gilbert v. Minnesota*,¹¹³ *Southern Railway Co. v. Railroad Commission of Indiana*,¹¹⁴ and *Cross v. North Carolina*.¹¹⁵ None of those cases involved double jeopardy or dual sovereignty issues. *Cruikshank* and *Pettibone* involved failure of the charges to state an offense.¹¹⁶ *Siebold* questioned whether Congress had the power to enact two particular statutes punishing misconduct of election judges.¹¹⁷ *Crossley*, *Gilbert*, and *Southern Railway Co.* all dealt with preemption issues.¹¹⁸ The defendants in those cases argued that the states could not prosecute them for state offenses that were also federal offenses because the federal government's interest in the crimes was preeminent.¹¹⁹

Cross came the closest to involving a double jeopardy/dual sovereignty issue. The defendant, a bank officer, forged a note (a state offense) and then separately entered false information into the bank's books based on the forgery (a federal offense).¹²⁰ The defendant argued that there was only one act and that the existence of the federal statute barred the state's ability to prosecute.¹²¹ The Court disagreed on both counts: there were two distinct acts—the forgery and subsequent entering of the false information—and the existence of the federal statute did not impede the state's ability to protect its interests.¹²² Further, there was no subsequent federal prosecution.¹²³ Therefore, the value of *Cross* (and all the other cited cases) as precedent for the holding in *Lanza*—i.e., that separate sovereigns could prosecute the same act/crime—was nonexistent.

The other main authority Chief Justice Taft cited was *Barron v. Mayor of Baltimore*,¹²⁴ where the Court held that the constitutional protections afforded by the first eight amendments applied only to proceedings by the federal government.¹²⁵

¹⁰⁶ *United States v. Lanza*, 260 U.S. 377, 382–83 (1922).

¹⁰⁷ *Id.* at 384.

¹⁰⁸ 55 U.S. 13 (1852); see discussion *supra* pp. 6–8.

¹⁰⁹ 92 U.S. 542 (1876).

¹¹⁰ 148 U.S. 197 (1893).

¹¹¹ 100 U.S. 371 (1880).

¹¹² 168 U.S. 640 (1898).

¹¹³ 254 U.S. 325 (1920).

¹¹⁴ 236 U.S. 439 (1915).

¹¹⁵ 132 U.S. 131 (1889).

¹¹⁶ *United States v. Cruikshank*, 92 U.S. 542, 548 (1876); *Pettibone v. United States*, 148 U.S. 197, 203 (1893).

¹¹⁷ *Ex parte Siebold*, 100 U.S. 371, 373 (1880).

¹¹⁸ *Crossley v. California*, 168 U.S. 640, 641 (1898); *Gilbert*, 254 U.S. at 329; *S. Ry. Co.*, 236 U.S. at 446.

¹¹⁹ *Crossley*, 168 U.S. at 641; *Gilbert*, 254 U.S. at 329; *S. Ry. Co.*, 236 U.S. at 446.

¹²⁰ *Cross*, 132 U.S. at 136.

¹²¹ *Id.* at 136–37.

¹²² *Id.* at 139.

¹²³ *Id.*

¹²⁴ 32 U.S. 243 (1833).

¹²⁵ *Id.* at 250.

The *Barron* decision meant that the Fifth Amendment's Double Jeopardy Clause did not apply to the states but applied only to "a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."¹²⁶ Although *Barron* met its demise four decades later, the Supreme Court never reexamined the dual sovereignty doctrine in that light.

3. Entrenching the Doctrine

Barron's anti-incorporation theme carried the day for dual sovereignty for forty years after *Lanza*. Yet the Supreme Court should have heeded Justice McLean's warnings that the dual sovereignty doctrine would produce results antithetical to the Constitution's individual protections. His warnings would become reality in the silver platter doctrine and the arena of compelled self-incrimination.

a. Erosion of Individual Rights—The Silver Platter Doctrine and Compelled Self-Incrimination

In *Weeks v. United States*,¹²⁷ the Court created the silver platter doctrine¹²⁸ by holding that a state was not prohibited by the Fourth and Fourteenth Amendments from introducing evidence that had been obtained by federal agents through an unreasonable search and seizure.¹²⁹ The doctrine allowed state and federal agents to do, through a combination of their powers, what neither of them would be permitted to do alone in order to secure a conviction.

In *Feldman v. United States*,¹³⁰ the Court again used *Barron* to pierce the shield of individual constitutional protections in the context of the Fifth Amendment's protection against self-incrimination.¹³¹ *Feldman* was a judgment debtor who was immunized by the state and compelled to give testimony.¹³² Subsequently, the federal government prosecuted him and used his immunized state testimony against him.¹³³ The Court, relying on *Barron*'s anti-incorporation principle, held that the Fifth Amendment did not bind the states and that, consequently, a state could compel an individual to incriminate himself in a federal prosecution.¹³⁴ Once again, the state and federal governments could combine their powers to accomplish what neither could alone. The Supreme Court reinforced this theme repeatedly over the next two decades.

b. *Bartkus v. Illinois*¹³⁵ and *Abbate v. United States*¹³⁶

The theme of "combined sovereignty" to erode individual rights continued through the 1950s. In 1958, the Supreme Court solidified the dual sovereignty doctrine in *Bartkus v. Illinois*¹³⁷ and *Abbate v. United States*.¹³⁸ In *Bartkus*, the Court held that states were not barred by the Fourteenth Amendment from prosecuting an accused regarding the same offense for

¹²⁶ *United States v. Lanza*, 260 U.S. 377, 382 (1922). This language is strikingly similar to the proposed language for the Double Jeopardy Clause that the House of Representatives voted down twice during the debates regarding the amendments to the Constitution. See discussion *supra* pp. 5–6 and notes 53, 54, 60.

¹²⁷ 232 U.S. 383 (1914).

¹²⁸ See, e.g., Gerald H. Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L. & CRIMINOLOGY 455, 460 (1959); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229, 253.

¹²⁹ *Weeks*, 232 U.S. at 398.

¹³⁰ 322 U.S. 487 (1944).

¹³¹ See, e.g., Akhil Reed Amar & Jonathan L. Marcus, Article: *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 13–15 (1995); Steven J. Winger, *Supreme Court Review: Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1095, 1104–12 (1999).

¹³² *Feldman*, 322 U.S. at 488.

¹³³ *Id.*

¹³⁴ *Id.* at 493; see also *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958) (reaffirming this principle).

¹³⁵ 359 U.S. 121 (1959).

¹³⁶ 359 U.S. 187 (1959).

¹³⁷ *Bartkus*, 359 U.S. 121.

¹³⁸ *Abbate*, 359 U.S. 187.

which he had already been prosecuted by the federal government.¹³⁹ The Court reiterated, “We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such.”¹⁴⁰ The Court specifically referred to the “unquestioned precedent” of *Fox v. Ohio* and its progeny.¹⁴¹ In addition to its reliance on *Barron*, the Court resorted again to Chief Justice Taft’s reasoning in *Lanza* concerning the race to the courthouse.¹⁴² The Court provided an example:

In *Screws v. United States*, . . . defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.¹⁴³

There are two problems with the *Bartkus* Court’s use of *Screws* as an example. First, the federal and state charges in *Screws* actually represented distinct acts. In the former, *Screws* was accused of denying a citizen of his right to trial based on racial considerations.¹⁴⁴ In the latter, *Screws* was accused of murdering that citizen.¹⁴⁵ Hence, the two sovereigns were not punishing the same act. Second, from a practical standpoint, the *Bartkus* majority’s concern was not realistic. If the Court held that the Double Jeopardy Clause prevents successive state and federal prosecutions, state and federal prosecutors would be on notice of this and would ensure that their respective interests were vindicated through a single trial by whichever sovereign could accomplish the greater governmental good.¹⁴⁶ For example, if the Clause prevented successive prosecutions at the time of *Screws*’s misconduct, surely the federal prosecutors would have deferred to the state’s prosecution which had the capability of yielding a greater sentence (that was also more commensurate with the crime). In other words, a federal prosecutor would not knowingly defeat the state’s prosecution and thereby allow *Screws* to “get away with murder” by only serving two years of confinement. Justice Brennan recognized this concept in his dissenting opinion in *Bartkus*: “cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime.”¹⁴⁷

The *Bartkus* majority’s shortcomings were highlighted by Justice Black, who picked up where Justice McLean left off in *Fox v. Ohio*. Justice Black stated, “[D]ouble prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment”¹⁴⁸ First, he highlighted the scant precedent upon which the cases were based.¹⁴⁹ Then he excoriated the underpinnings of the majority opinion. He stated,

Implicit in the Court’s reliance on “federalism” is the premise that failure to allow double prosecutions would seriously impair law enforcement in both State and Nation. For one jurisdiction might provide minor penalties for acts severely punished by the other and by accepting pleas of guilty shield wrongdoers from justice. I believe this argument fails on several grounds. In the first place it relies on the unwarranted

¹³⁹ *Bartkus*, 359 U.S. at 132–33, 139. *Bartkus* had been acquitted by a federal district court of robbing a federal bank before being tried and convicted by the state for the same offense. *Id.* at 121–22.

¹⁴⁰ *Id.* at 124.

¹⁴¹ *Id.* at 129 (citing *Fox v. Ohio*, 46 U.S. 410 (1847)). Ironically, while the Court relied on this “precedent” which was based on pure dicta (*see* discussion *supra* sec. II.C.1), the Court simultaneously cautioned against the reliability of some state cases on the subject because “in some of them the language concerning double jeopardy is but offhand dictum.” *Id.* at 136.

¹⁴² *Id.* at 137.

¹⁴³ *Id.* (citing *Screws v. United States*, 325 U.S. 91 (1945)).

¹⁴⁴ *Screws*, 325 U.S. at 93.

¹⁴⁵ *Id.* at 93–94.

¹⁴⁶ *See* discussion *infra* p. 20 (noting that the Justice Department recognized this principle and voluntarily restricted itself from conducting successive prosecutions).

¹⁴⁷ *Bartkus*, 359 U.S. at 168–69 (Brennan, J., dissenting).

¹⁴⁸ *Id.* at 150–51 (Black, J., dissenting).

¹⁴⁹ Justice Black denounced the majority’s description of the “long, unbroken, unquestioned course of impressive adjudication,” as a “meager basis” that he contrasted with historical opposition to the practice of double prosecutions. *Id.* at 136, 162 (Black, J., dissenting).

assumption that State and Nation will seek to subvert each other's laws. It has elsewhere been persuasively argued that most civilized nations do not and have not needed the power to try people a second time to protect themselves even when dealing with foreign lands. . . .

The Court's argument also ignores the fact that our Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials. . . . If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether.¹⁵⁰

Justice Black's abhorrence of the dual sovereignty exception, presumably shared by two other members of the Court,¹⁵¹ can be summed up as follows:

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

. . . I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.¹⁵²

In *Abbate*, the mirror image of *Bartkus* and decided the same day, the Court held that the federal government is not barred from prosecuting individuals for the same offense for which they were previously tried in state court.¹⁵³ The Court reiterated the same flawed history of judicial dicta as *Lanza* and *Bartkus*—i.e., *Fox*, *Marigold*, and *Moore*.¹⁵⁴ It also trod on the same infertile ground of reasoning: "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered."¹⁵⁵

The *Bartkus* opinion was decided on a five to four vote,¹⁵⁶ and the *Abbate* opinion was decided on a six to three vote.¹⁵⁷ Although the cases hinged on mirror issues, the difference in votes centered on Justice Brennan, the additional dissenter in *Bartkus*.¹⁵⁸ He added his voice to the *Bartkus* dissenters because he believed there was collusion between the federal and state law enforcement agencies that made the second (state) prosecution a sham: "What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street."¹⁵⁹ The Court's division with regard to the dual sovereignty doctrine really reflected a division on the application of *Barron*'s anti-incorporation doctrine. That tension would become more striking and tip in the opposite direction as Justice Frankfurter left the Court and his influence in applying *Barron* left with him.

¹⁵⁰ *Id.* at 156–57 (Black, J., dissenting).

¹⁵¹ Chief Justice Warren and Justice Douglas joined Justice Black's dissent without writing separately. *Id.* at 150. Justice Brennan wrote his own dissent for separate reasons. See discussion *infra*.

¹⁵² *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

¹⁵³ *Abbate v. United States*, 359 U.S. 187, 196 (1959).

¹⁵⁴ *Id.* at 190–93.

¹⁵⁵ *Id.* at 195.

¹⁵⁶ *Bartkus*, 359 U.S. at 121, 150, 164.

¹⁵⁷ *Abbate*, 359 U.S. at 187, 201.

¹⁵⁸ Chief Justice Warren and Justices Black and Douglas consistently dissented in both cases. *Bartkus*, 359 U.S. at 150; *Abbate*, 359 U.S. at 201.

¹⁵⁹ *Bartkus*, 359 U.S. at 169 (Brennan, J., dissenting). As will be discussed later, the *Bartkus* opinion and Justice Brennan's dissent, inadvertently gave birth to the sham prosecution exception to the dual sovereignty doctrine. See *infra* sec. II.C.4.

c. *Restoration of Individual Rights – Barron Rejected*

Justice Frankfurter was a significant proponent of *Barron* and, as such, authored *Feldman*, *Knapp v. Schweitzer*, *Screws*, and *Bartkus*. In Frankfurter's final years on the Court, however, *Barron's* influence, and Frankfurter's influence as its proponent, waned. In 1960, the Court applied the Fourth Amendment to the states through the Fourteenth Amendment in *Elkins v. United States*,¹⁶⁰ thereby repudiating *Barron* and overturning *Weeks* and the silver platter doctrine. The Court addressed the potential prohibitory effect on state and federal cooperation in law enforcement, a concern similar to that raised by Justice Frankfurter in *Bartkus*. Justice Frankfurter believed that a negation of the dual sovereignty doctrine would impair one of the sovereigns rather than encourage them to work together toward a common end.¹⁶¹ Justice Everett, writing for a five Justice majority in *Elkins*, reached the opposite conclusion:

If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.¹⁶²

Hence, once the rule was known to the different sovereigns, they would cooperate to reach a common end. The tables had turned on Justice Frankfurter and the application of *Barron*. Rather than writing for a five member majority, as in *Bartkus*, Justice Frankfurter was now writing for a four member dissent in *Elkins*.¹⁶³ Justice Frankfurter retired from the Court in 1962,¹⁶⁴ and *Barron's* influence retired with him.

In 1964, the Court revisited the issue of compelled self-incrimination. In *Malloy v. Hogan*, the Court held that the Fourteenth Amendment applied the Fifth Amendment self-incrimination protection against the states.¹⁶⁵ During the same term, the Court overruled *Feldman* by holding that “the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”¹⁶⁶ The Court recognized that the dual sovereignty application in *Feldman* had permitted an accused to be “‘whipsawed into incriminating himself under both state and federal law even though’ the constitutional privilege against self-incrimination applied to each.”¹⁶⁷

By 1964, therefore, the abuses *Barron* occasioned through the combined powers of dual sovereigns had been extinguished, and *Barron's* influence was dwindling. In 1969, the Supreme Court pared *Barron* back further, this time in the context of double jeopardy.¹⁶⁸ In *Benton v. Maryland*, the Court held that the Fifth Amendment protection against double jeopardy was applicable to the states so that a state could not twice try a defendant for the same offense.¹⁶⁹ *Benton* therefore demolished one of the major pillars upon which the *Lanza* opinion rested—*Barron's* non-incorporation principle. Yet, the Supreme Court never revisited *Lanza*, *Bartkus*, or *Abbate* given this major development. Rather, it once again broadened the scope of the dual sovereignty doctrine in *Heath v. Alabama*.¹⁷⁰

¹⁶⁰ 364 U.S. 206, 223–24 (1960).

¹⁶¹ *Bartkus*, 359 U.S. at 137 (citing *Screws v. United States*, 325 U.S. 91, 93 (1945)).

¹⁶² *Elkins*, 364 U.S. at 222.

¹⁶³ *Id.* at 233.

¹⁶⁴ SUPREME CT. OF THE U.S., MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 2, available at <http://www.supremecourtus.gov/about/members.pdf> (last visited Jan. 13, 2008).

¹⁶⁵ 378 U.S. 1, 6 (1964).

¹⁶⁶ *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77–78 (1964), overruled in part by *United States v. Balsys*, 524 U.S. 666, 688 (1998) (stating *Murphy* Court went too far in applying Fifth Amendment protections to incrimination under foreign law).

¹⁶⁷ *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958)).

¹⁶⁸ *Benton v. Maryland*, 395 U.S. 784 (1969).

¹⁶⁹ *Id.* at 787.

¹⁷⁰ 474 U.S. 82 (1985).

d. *Heath v. Alabama* – *Expanding the Doctrine and Paving the Way for a Limitation*

Twenty-six years after the Supreme Court decided *Bartkus* and *Abbate*, it again expanded the applicability of the dual sovereignty doctrine. In *Heath v. Alabama*, the Court permitted a state to prosecute an individual for the same offense that another state had already prosecuted.¹⁷¹ In deciding the issue, the Court simply assumed the “precedent” from *Moore*, *Lanza*, *Bartkus*, and *Abbate* was correct without any further analysis, especially in light of the impact *Benton* necessarily had on *Lanza*.¹⁷² In Justice Marshall’s dissent, he highlighted the dichotomy between the Court’s previous narrowing of the dual sovereignty doctrine with regard to the silver platter doctrine and compelled self-incrimination and the Court’s current expansion of the dual sovereignty doctrine in *Heath*.¹⁷³ He stated,

Even where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own. See *Murphy v. Waterfront Comm'n* [compelled self-incrimination]; *Elkins v. United States* [silver platter doctrine]. And just as the Constitution bars one sovereign from facilitating another's prosecution by delivering testimony coerced under promise of immunity or evidence illegally seized, I believe that it prohibits two sovereigns from combining forces to ensure that a defendant receives only the trappings of criminal process as he is sped along to execution.¹⁷⁴

Despite its fallibility and vigorous and pointed dissents by several Supreme Court Justices, the dual sovereignty doctrine survived with one exception—the sham prosecution.

4. *The Sham Prosecution Exception*

As the Supreme Court simultaneously narrowed the reach of the dual sovereignty doctrine (by eliminating the silver platter doctrine and compelled self-incrimination) and expanded its application (in *Heath*), the Court unwittingly carved out an exception. The Court in *Bartkus* had examined the collaboration of the Illinois prosecutors and the federal government and stated, “It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.”¹⁷⁵

Hence, the “sham prosecution” exception¹⁷⁶ to the dual sovereignty doctrine was born. Justice Brennan dissented separately in *Bartkus* stating, “[T]he record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution”¹⁷⁷ The jury in the federal trial acquitted *Bartkus* because they apparently believed his alibi witness more than the two co-conspirator witnesses the government prosecutor presented.¹⁷⁸ Justice Brennan succinctly synopsisized the evidence of the second, sham prosecution as follows:

The federal authorities were highly displeased with the jury’s resolution of the conflicting testimony, and the trial judge sharply upbraided the jury for its verdict. . . . The federal authorities obviously decided immediately after the trial to make a second try at convicting *Bartkus*, and since the federal courthouse was barred to them by the Fifth Amendment, they turned to a state prosecution for that purpose. It is clear that federal officers solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit *Bartkus* and one of his alibi witnesses, and in general prepared and guided the state prosecution.¹⁷⁹

¹⁷¹ *Id.* at 93.

¹⁷² *Id.* at 88–89.

¹⁷³ *Id.* at 102 (Marshall, J., dissenting).

¹⁷⁴ *Id.* (Marshall, J., dissenting) (internal citations omitted).

¹⁷⁵ *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959).

¹⁷⁶ See, e.g., Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296–98 (1992); Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT’L L. REV. 1641, 1669–70, 1674–75 (2000).

¹⁷⁷ *Bartkus*, 359 U.S. at 165–66 (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 164–65 (Brennan, J., dissenting).

¹⁷⁹ *Id.* at 165 (Brennan, J., dissenting).

Justice Brennan said the test to determine whether a second prosecution by a different sovereign was merely a sham to allow the first sovereign to rout the Fifth Amendment,

[M]ust be fashioned to secure the fundamental protection of the Fifth Amendment “that the . . . [Federal Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity”¹⁸⁰

After this, every federal circuit recognized the exception.¹⁸¹ The Supreme Court has not faced a sham prosecution claim after *Bartkus*, but it has tacitly endorsed that exception in subsequent cases. In *Heath*, Justice Marshall was concerned with the possibility that the dual sovereignty doctrine could be undermined by a collusive prosecution between two sovereigns. He stated that “[e]ven where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own.”¹⁸² Justice Marshall also noted that the “courts should not be blind to the impact of combined federal-state law enforcement on an accused’s constitutional rights.”¹⁸³

In *United States v. Balsys*,¹⁸⁴ the Court dealt with dual sovereignty applications with respect to the United States and a foreign government. The Court stated,

This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which . . . an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly “foreign.” The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence-gatherer and prosecutor made one nation the agent of the other¹⁸⁵

Hence, the sham prosecution exception has become a well recognized limit on the dual sovereignty doctrine. Although widely recognized, the sham prosecution defense has rarely succeeded.¹⁸⁶ Yet, the exception is in its relative infancy. As it becomes a ubiquitous issue in dual sovereign prosecutions, the rate of its successful application is sure to rise. The military is particularly susceptible to conducting sham prosecutions because military criminal investigators typically work very closely with state investigators when crimes involve both jurisdictions. Take as examples the two cases at the beginning of this article.¹⁸⁷ In *Hennis*’s case, the state did all the investigative work and seems to have turned to the Army as its agent in carrying out the second trial only because it is constitutionally barred from doing so.¹⁸⁸ What special interest does the Army have in prosecuting someone who was no longer in the military for a twenty-one year old crime, especially when the Army did not pursue a court-martial when the crime occurred? In *Tillery*’s case, the state similarly did all the investigative work and handed the cases to the Army six months after *Tillery*’s acquittal and two and a half years after the crime.¹⁸⁹ The Army retried the state’s case with the same witnesses, no additional investigation, and with the state’s record of trial in the Army

¹⁸⁰ *Id.* at 168 (Brennan, J., dissenting) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

¹⁸¹ See *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996); *United States v. 38 Whaler’s Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1991); *United States v. Berry*, 164 F.3d 844, 845 (3d Cir. 1999); *In re William M. Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990); *United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992); *United States v. Carr*, 1996 U.S. App. LEXIS 8118 (6th Cir. 1996); *United States v. Lopez*, 915 F. Supp. 891, 897 (D. Mich. 1996); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *United States v. Bernhardt*, 831 F.2d 181, 182–83 (9th Cir. 1987); *United States v. Trammell*, 133 F.3d 1343, 1350 (10th Cir. 1998); *United States v. Perchitti*, 955 F.2d 674, 677 (11th Cir. 1992); *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976).

¹⁸² *Heath v. Alabama*, 474 U.S. 82, 102 & n.3 (1985) (Marshall, J., dissenting).

¹⁸³ *Id.* at 102 n.3 (Marshall, J., dissenting).

¹⁸⁴ 524 U.S. 666 (1998). The Department of Justice sought testimony from *Balsys* regarding his wartime activities during World War II and his subsequent immigration to the United States. *Balsys* refused, claiming Fifth Amendment protection on the ground that his testimony might incriminate him in a foreign court. *Id.* at 669. The Court held that the Self-Incrimination Clause does not apply to foreign prosecutions. *Id.*

¹⁸⁵ *Id.* at 698–99.

¹⁸⁶ See, e.g., *supra* note 181.

¹⁸⁷ See discussion *supra* p. 1.

¹⁸⁸ *Id.*

¹⁸⁹ See discussion *supra* p. 1.

prosecutor's hands.¹⁹⁰ Did the Army truly have a special interest separate from the state's, or was this a thinly veiled attempt by the state to prosecute Tillery again by using the Army to avoid the Double Jeopardy Clause? Whether the sham prosecution defense is successful or not in these cases, they prompt the question whether the military had a significant interest separate from the state that justified subjecting those individuals to successive prosecutions.

Military double jeopardy jurisprudence has parroted Supreme Court jurisprudence without addressing whether the dual sovereignty doctrine is necessary to vindicate a separate military interest. Because of this, the military has had little hesitation in conducting successive prosecutions as seen in the following section.¹⁹¹

D. Military Applications

1. *The Clause, the Doctrine, and the Exception Applied*

As early as 1907, the Supreme Court recognized that servicemembers were protected from double jeopardy by the Fifth Amendment.¹⁹² In *Grafton v. United States*, the Court said,

[T]he United States cannot withhold from an officer or soldier of the Army the full benefit of [the double jeopardy] guaranty . . . Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter.¹⁹³

In 1950, with the creation of the UCMJ came Article 44¹⁹⁴ which codified the double jeopardy guarantee for servicemembers. The Article stated, "No person shall, without his consent, be tried a second time for the same offense."¹⁹⁵

Adopting Supreme Court precedent, military courts have tempered the Fifth Amendment protection by applying the dual sovereignty doctrine to military jurisprudence *carte blanche*.¹⁹⁶ The Court of Appeals for the Armed Forces (CAAF) has a duty, regardless of Supreme Court precedent, to "consider the extent to which [a] constitutional provision applies to the military justice system."¹⁹⁷ Yet, CAAF failed to do just that in *United States v. Stokes*.¹⁹⁸ In one sentence, it adopted the dual sovereignty doctrine without analysis: "Undoubtedly [Article 44] was not intended to abolish the dual-sovereignities rule that had been applied in interpreting the constitutional guarantee against successive trials for the same offense."¹⁹⁹ In light of this, military litigation regarding the dual sovereignty doctrine has been scant.²⁰⁰ Similarly, there are no published decisions from the military courts dealing with the sham prosecution exception.

¹⁹⁰ *Id.*

¹⁹¹ See also *supra* p. 2 and note 17.

¹⁹² See *Grafton v. United States*, 206 U.S. 333, 351–52 (1907).

¹⁹³ *Id.* at 352; see also *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978).

¹⁹⁴ 10 U.S.C. § 844 (1950).

¹⁹⁵ *Id.* The Article was later amended to replace the word "shall" with the word "may." 10 U.S.C. § 844(a) (1956).

¹⁹⁶ See, e.g., *United States v. Stokes*, 12 M.J. 229, 231 (C.M.A. 1982).

¹⁹⁷ H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 26 (citing *United States v. Marcum*, 60 M.J. 198 (2004) as an example). Chief Judge Gierke served as a judge at CAAF from 1991 to 2004, when he became the Chief Judge of the CAAF. His term expired in 2006. Judges of the CAAF, <http://www.armfor.uscourts.gov/Judges.htm> (last visited Feb. 28, 2007).

¹⁹⁸ *Stokes*, 12 M.J. 229. In 1994, the Court of Military Appeals was redesignated the CAAF. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(c)(4B), 108 Stat. 2663, 2832 (1994).

¹⁹⁹ *Stokes*, 12 M.J. at 231. *Stokes* was convicted by court-martial of distribution of and conspiracy to distribute drugs while he was in Spain. *Id.* at 229. Prior to his court-martial, he faced action in two different Spanish courts for the same acts. *Id.* at 230. At his court-martial, *Stokes* moved to dismiss on double jeopardy grounds. *Id.* After reviewing the U.S.-Spain treaty provision barring successive prosecutions, the court found that the two remaining Spanish courts were not criminal or quasi-criminal and therefore were not covered by the treaty. *Id.* at 233.

²⁰⁰ See generally *Stokes*, 12 M.J. 229; *United States v. Wilmot*, 29 C.M.R. 777, 783 (C.M.A. 1960) (noting the dual sovereignty doctrine's relationship to the authority to exercise legislative power); *United States v. Murphy*, 21 C.M.R. 158, 162–63 (C.M.A. 1958) (discussing *Feldman* and the application of its compelled self-incrimination rule to the military); *United States v. Duncan*, 34 M.J. 1232, 1241 (A.C.M.R. 1992) (noting that a court-martial and a federal district court are not dual sovereigns); *United States v. Cuellar*, 27 M.J. 50 (C.M.A. 1989) (noting that the NATO Status of Forces Agreement eliminates the dual sovereignty doctrine).

For this reason, or because of the more practical need to manage the use of and conserve military assets, the Secretaries of the military departments implemented policies regarding successive state-military prosecutions.

2. Department of Defense Limitations

Each of the military services has a different policy regarding successive state-military prosecutions. The Army policy states, “A person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial . . . for the same act over which the civilian court has exercised jurisdiction.”²⁰¹ The approval authority for a successive prosecution is the general court-martial convening authority; typically this is the Soldier’s commanding general, who must only determine that punitive action is essential to maintain discipline in the command.²⁰² The Air Force policy states,

Only [the Secretary of the Air Force] may approve initiation of court-martial . . . action against a member previously tried by a state or foreign court for substantially the same act or omission [Secretary of the Air Force] approval will be granted in only the most unusual cases, when the ends of justice and discipline can be met in no other way.²⁰³

The Navy and Marine Corps policy is more detailed than either the Army or Air Force policies.²⁰⁴ It states, generally,

When a person in the naval service has been tried in a state or foreign court, whether convicted or acquitted, or when a member’s case has been “diverted” out of the regular criminal process for a probationary period, or has been adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial . . . for the same act or acts, except in those unusual cases where trial by court-martial . . . is considered essential in the interests of justice, discipline, and proper administration within the naval service.²⁰⁵

The approval authority for successive prosecutions in the naval services is the Navy Judge Advocate General.²⁰⁶ Further, the policy limits those cases for which the Judge Advocate General may approve successive prosecutions to the following:

- (1) Cases in which punishment by civil authorities consists solely of probation, and local practice, or the actual terms of probation, do not provide rigid supervision of probationers, or the military duties of the probationer make supervision impractical.
- (2) Cases in which civilian proceedings concluded without conviction for any reason other than acquittal after trial on the merits.
- (3) Other cases in which the interests of justice and discipline are considered to require further action under the UCMJ (e.g., where conduct leading to trial before a state or foreign court has reflected adversely upon the naval service or when a particular and unique military interest was not or could not be adequately vindicated in the civilian tribunal).²⁰⁷

This last category seems to swallow the rule, because virtually every crime reflects adversely upon the military. Further, it fails to define “unique military interest.”

²⁰¹ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 4-2 (16 Nov. 2005) [hereinafter AR 27-10].

²⁰² *Id.* para. 4-3. For example, Tillery’s GCMCA testified that he felt punitive action was necessary, giving no further explanation. Transcript of Record at 221, United States v. Tillery, No. 20030538 (Army Ct. Crim. App. 2003).

²⁰³ U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE 14–15 (21 Dec. 2007) [hereinafter AFI 51-201].

²⁰⁴ U.S. DEP’T OF NAVY, JAG INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 0124 (15 Mar. 2004) [hereinafter JAGMAN].

²⁰⁵ *Id.* para. 0124a.

²⁰⁶ *Id.* para. 0124c(1).

²⁰⁷ *Id.* para. 0124b(1)-(3).

The Coast Guard policy²⁰⁸ states,

No person in the Coast Guard may be tried for the same acts that constitute an offense against state or foreign law, and for which the accused has been tried or is pending trial by the state or foreign country, without first obtaining authorization from the Chief Counsel. Letter requests for authorization shall contain complete justification as to why deviation from the general policy against second trials . . . is appropriate.²⁰⁹

Although the Coast Guard policy requires “complete justification” for a successive prosecution, it does not detail what the justification should include or what types of cases or circumstances might justify a successive prosecution.

With that backdrop, the following applications are clear: (1) servicemembers are protected by the Fifth Amendment’s Double Jeopardy Clause; (2) the dual sovereignty doctrine permits the states and the military to try servicemembers successively for the same act; and (3) a military prosecution following a state prosecution must be approved by different levels of authority and with different justifications depending on the branch of service. These applications raise several questions. How does the military’s treatment of successive prosecutions compare to other jurisdictions? Why are there different policies regarding successive prosecutions among the several military services? Finally, are the military’s policies good policies? The following sections attempt to answer these questions.

III. What Others Are Doing

Although the Supreme Court has entrenched the dual sovereignty doctrine in American jurisprudence, many jurisdictions have placed limits on their own sovereignty. These jurisdictions have recognized that our unique system of federalism, where one person is subject to the dictates of two sovereigns, can result in an unduly harsh application of the laws of both. Further, because one person is a citizen of both state and nation, the punishment of the person’s crime by either when both sovereigns have a stake in the outcome serves a common end. Consequently, these jurisdictions have willingly sacrificed part of their sovereignty to save citizens from double punishment.

A. The States

Well before the Supreme Court applied the Fifth Amendment’s Double Jeopardy Clause to the states in *Benton v. Maryland*,²¹⁰ forty-five states had double jeopardy provisions in their own constitutions.²¹¹ By 1996, twenty-four states had sacrificed part of their sovereignty by legislating bars to dual sovereign prosecutions.²¹² By 2007, three more states had followed suit thereby putting in the majority those states that abrogated the dual sovereignty doctrine.²¹³ Additionally, three other states reached the same result through judicial fiat.²¹⁴ The statutes are basically broken down into two types: those barring successive prosecution for the same act and those barring successive prosecution for the same offense.²¹⁵ The former examine the overall transaction and determine whether the acts charged by the different sovereigns are essentially the same.²¹⁶ The latter focus on the actual offenses charged and employ an analysis similar to the Supreme Court’s *Blockburger*

²⁰⁸ The Coast Guard is included here even though it is a division of the Department of Homeland Security and not currently a military service within DOD, because this policy existed when the Coast Guard was a military service.

²⁰⁹ U.S. COAST GUARD, COMMANDANT INSTR. M5810.1D, MILITARY JUSTICE MANUAL para. 3.B.4 (17 Aug. 2000).

²¹⁰ 395 U.S. 784, 787 (1969). See discussion *supra* p. 14.

²¹¹ Michael J. Hagburg, *Statutory Bars to Dual Sovereign Prosecutions: The Minnesota and North Dakota Approaches Compared*, 72 N.D. L. REV. 583, 585 & n.20 (1996).

²¹² *Id.* at 590. See also App. A (listing these state statutes). These bars are not absolute in the sense that the statutes that promulgated them are subject to challenge and judicial interpretation like all statutes. Yet, the end result is that successive prosecutions are the exception rather than the accepted rule.

²¹³ See App. A (listing these state statutes).

²¹⁴ See *Commonwealth v. Cepulonis*, 373 N.E.2d 1136 (Mass. 1978); *People v. Cooper*, 247 N.W.2d 866 (Mich. 1976); *State v. Hogg*, 385 A.2d 844 (N.H. 1978).

²¹⁵ Compare, e.g., ALASKA STAT. 12.20.010 (2006), and ARK. CODE ANN. § 5-1-114 (2006), with COLO. REV. STAT. § 18-1-303 (2006), and DEL. CODE ANN. tit. 11, § 209 (2006). The former two focus on the act or conduct that is charged while the latter two focus on the offense charged.

²¹⁶ See, e.g., *North Dakota v. Mayer*, 356 N.W.2d 149, 151–52 (N.D. 1984) (permitting a state prosecution after a federal prosecution despite North Dakota’s statutory bar because the conspiracy charged by the federal government was a different “act” than the concomitant possession and distribution of drugs charged by the state).

v. *United States*²¹⁷ elements test.²¹⁸ The driving force behind both types of statutory bars on successive prosecutions is the idea that, although they are different sovereigns, the state and federal government are cooperative entities and essentially have the same goal with respect to criminal justice.²¹⁹ The department of Justice has agreed in principle (although not in method of execution) with the three-fifths majority of states.

B. The Department of Justice

Following the Supreme Court's opinion in *Bartkus*,²²⁰ and specifically addressing its concern with a potential sham successive prosecution, the Department of Justice (DOJ) implemented the *Petite* policy.²²¹ The policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same acts or transactions" unless the prior prosecution has left a "substantial federal interest . . . demonstrably unvindicated."²²² The policy also notes that statutory bars against successive prosecutions exist for certain federal crimes.²²³ The DOJ seemingly recognized the natural²²⁴ exploitative and excessive nature of a second prosecution for the same offense.²²⁵ It applied the policy for the first time within months of the *Bartkus* and *Abbate* opinions.²²⁶ After the policy's institution, the DOJ strictly adhered to the policy and consistently dismissed any federal convictions obtained in violation of it.²²⁷ The Supreme Court joined the DOJ in this endeavor and vacated judgments obtained in violation of the policy ten times in the two decades after the policy was instituted.²²⁸

In the DOJ press release establishing the policy, Attorney General Rogers offered an explanation that would have turned Chief Justice Taft's "race to the courthouse" reasoning in *Lanza* on its head.²²⁹ He stated,

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur[s] in the jurisdiction, whether it be state or federal, where the public interest is best served. If this [is] determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.²³⁰

²¹⁷ 284 U.S. 299 (1932).

²¹⁸ See, e.g., COLO. REV. STAT. § 18-1-303(1)(a)(I) (2006) ("The offense for which the defendant was formerly convicted or acquitted requires proof of a fact not required by the offense for which he is subsequently prosecuted"); see also *Blockburger v. United States*, 284 U.S. 299 (1932) (if each offense contains an element not contained in the other, they are not the same offense for double jeopardy purposes); *United States v. Dixon*, 509 U.S. 688 (1993).

²¹⁹ See, e.g., *New Jersey v. Sessoms*, 455 A.2d 595, 601 (N.J. Super. Ct. Law Div. 1982) (discussing the requirement for the federal and state offenses to share a similar intent to prevent harm); *Schmidt v. Roberts*, 548 N.E.2d 1284, 1289 (N.Y. 1989) (discussing the common design between the federal crime of interstate transportation of stolen property and the state crime of larceny); *People v. Cooper*, 247 N.W.2d 866 (Mich. 1976) (stating the statutory bar applies when the state and federal laws are framed to protect the same societal interests).

²²⁰ *Bartkus* was decided on 30 March 1959. 359 U.S. 121, 121 (1959). Exactly one week later, via press release on 6 April 1959, the Justice Department implemented its policy against successive state-federal prosecutions. See *Rinaldi v. United States*, 434 U.S. 22, 24 n.5, 28 (1977).

²²¹ UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (July 2007) [hereinafter USAM], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm. The policy derives its name from *Petite v. United States*, 361 U.S. 529, 531 (1960), where the Supreme Court first recognized the policy.

²²² USAM, *supra* note 221, § 9-2.031A.

²²³ *Id.* § 9-2.031A. The policy lists the following crimes: 18 U.S.C. §§ 659 (embezzlement and theft), 660 (same), 1992 (wrecking trains), 2101 (riots), 2117 (robbery and burglary of carrier facilities), and 15 U.S.C. §§ 80a-36 (larceny and embezzlement of registered investment companies) and 1282 (destruction of property of common or contract carriers moving in interstate commerce—repealed).

²²⁴ This is as opposed to the fiction under which the dual sovereignty doctrine operates—i.e., that one offense somehow is transformed into two offenses if two sovereigns have an interest to protect.

²²⁵ See *Petite*, 361 U.S. at 530–31.

²²⁶ *Id.*

²²⁷ *Rinaldi v. United States*, 434 U.S. 22, 30 n.16 (1977).

²²⁸ *Thompson v. United States*, 444 U.S. 248, 250 (1980).

²²⁹ *Rinaldi*, 434 U.S. at 27 n.13.

²³⁰ *Id.* (quoting Press Release, Dep't of Justice 3 (Apr. 6, 1959)).

The policy itself states its purpose is to “protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s).”²³¹ The Supreme Court endorsed the policy, saying it serves the “important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct.”²³² The Court noted that the policy brings into balance the competing interests of individual rights and governmental sovereignty that the dual sovereignty doctrine had tipped in favor of the governments.²³³ Consequently, the Court offered the following guidance: “In light of the parallel purposes of the Government’s *Petite* policy and the fundamental constitutional guarantee against double jeopardy, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy.”²³⁴

An exception to the policy may only be had with the permission of an Assistant Attorney General when three “substantive prerequisites” are met: “first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense.”²³⁵ Further, the policy requires federal prosecutors to consult with their state counterparts in matters of overlapping federal and state interest, “to determine the most appropriate *single* forum in which to proceed to satisfy the substantial federal and state interests involved.”²³⁶ The policy is applicable in the case of either a prior state conviction or acquittal.²³⁷

With regard to the three substantive prerequisites for an exception, the policy is very detailed. In defining “substantial federal interest,” the policy points to four pages in the U.S. Attorney’s Manual describing relevant considerations. These considerations include: federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; the person’s culpability in connection with the offense; the person’s criminal history; the person’s willingness to cooperate with law enforcement; and the probable sentence.²³⁸ The definition section for “substantial federal interest” focuses heavily on the first consideration—federal law enforcement priorities. The priorities are published as part of DOJ’s five-year strategic goals, and progress thereon is reported annually in DOJ’s Performance and Accountability Report.²³⁹ The 2006 report listed, for example, three specific focus areas under the strategic goal of enforcing federal laws.²⁴⁰ The *Petite* policy states that crimes falling within the “national investigative or prosecutorial priorities” are more likely to be a “substantial federal interest” than others.²⁴¹

Once a U.S. Attorney makes the determination that a particular crime involves a substantial federal interest, however, he must still show that the prior state prosecution left that interest demonstrably unvindicated.²⁴² This is a difficult proposition according to the policy: “In general, [DOJ] will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest.”²⁴³ The policy states this presumption may be overcome and lists factors to consider. If a conviction was not achieved, the factors include the following: incompetence, corruption, intimidation, undue influence, court or jury nullification, unavailability of significant evidence, and failure of the state prosecutor to prove an element of a state offense that is not an element of the contemplated federal offense.²⁴⁴ If a conviction was achieved, the factors include the following:

²³¹ USAM, *supra* note 221, § 9-2.031A.

²³² *Rinaldi*, 434 U.S. at 27.

²³³ *Id.* at 29.

²³⁴ *Id.*

²³⁵ USAM, *supra* note 221, § 9-2.031A.

²³⁶ *Id.* (emphasis added).

²³⁷ *Id.* § 9-2.031C.

²³⁸ *Id.* § 9-27.230A.

²³⁹ See DEP’T OF JUSTICE, FY 2006 PERFORMANCE AND ACCOUNTABILITY REPORT I-2, available at http://www.usdoj.gov/ag/annualreports/pr2006/P1/p01_.pdf.

²⁴⁰ *Id.* These were violent crime, drugs, and white collar and cyber crime.

²⁴¹ USAM, *supra* note 221, § 9-2.031D.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

[F]irst, if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence . . . is available through the contemplated federal prosecution, or second, if the choice of charges, or the determination of guilt, or the severity of the sentence in the prior prosecution was affected by [any of the factors applicable when a conviction was not achieved by the state].²⁴⁵

Not only has the federal government restricted its sovereignty with respect to the states, but it has similarly done so with respect to foreign governments.

C. Federal Foreign Relations

The United States has sacrificed part of its sovereignty many times with regard to its ability to prosecute after a foreign prosecution.²⁴⁶ In fact, this limitation reaches back to 1889 when the U.S. Senate ratified an extradition treaty with Germany.²⁴⁷ The language of that treaty would be repeated (with minor alterations) in every other extradition treaty the United States entered into afterwards.²⁴⁸ The United States and Germany agreed that if one of them prosecuted and convicted or acquitted a person, the other would be barred from doing the same for the same crime or offense.²⁴⁹ The United States agreed on a similar provision when it ratified the North Atlantic Treaty Organization Status of Forces Agreement in 1953:

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party.²⁵⁰

If the federal government and the states are willing to limit their sovereignty in recognition of the cooperative nature of their criminal jurisdictions, why does the military stand alone on this issue? The following section will address whether the military has a legitimate reason for doing so.

IV. What We *Should* Do

The Framers intended the Double Jeopardy Clause to provide the widest possible protections to the American people, who, with the creation of the federal government, had been imbued with a unique, bifurcated citizenship. The protection from double prosecutions for the same act, whether by two sovereigns or one, was embedded in American (and English) culture. This was apparent from English common law: Britain would not prosecute a British citizen for an act that was the subject of a foreign prosecution.²⁵¹ The Constitutional Convention debates showed a similar intent.²⁵²

The universal double jeopardy protection intended by the Framers was abandoned with no thought or justification, not by the legislature but by the Supreme Court. Beginning with *Fox v. Ohio* and continuing through *Bartkus v. Illinois* and *Abbate v. United States*, the Supreme Court diluted the Double Jeopardy Clause by its creation of the dual sovereignty doctrine with no analysis of the Framers' intent and no true legal precedent.²⁵³ Despite the fact that the Court erred so often and so significantly in this area, it has, in more recent years, indicated that the "established" doctrine of dual sovereignty may not

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VII, para. 8, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]. See also App. B for a list of other U.S. treaties with double jeopardy provisions.

²⁴⁷ A Treaty for the Extradition of Fugitives from Justice Between the United States of America and Germany art. V, U.S.-F.R.G., June 2, 1889, 1887 U.S.T. LEXIS 17.

²⁴⁸ See App. B.

²⁴⁹ See *supra* note 246.

²⁵⁰ NATO SOFA, *supra* note 247, art. VII, para. 8.

²⁵¹ See *supra* p. 4 and note 40. During the debates regarding the Bill of Rights, Representative Livermore said successive prosecutions were "contrary to the usages of law and practice among us; and so it is to those of that country from which we have adopted our laws." CREATING THE BILL OF RIGHTS, *supra* note 2, at 180 (quoting *The Gazette of the United States*, 22 August 1789).

²⁵² See discussion *supra* pp. 4-6.

²⁵³ See *supra* sec. II.C.

comport with notions of fairness. In *Rinaldi v. United States*, the Court discussed its “continuing sensitivity to the fairness implications of the multiple prosecution power.”²⁵⁴

The federal government has limited its own sovereignty through the *Petite* policy and through treaties and agreements with foreign nations. It has recognized that the dual sovereignty doctrine produces harsh results for individual citizens. Although each citizen owes allegiance to two sovereigns in our federalist system, DOJ recognized that there is still only one public interest and that the two sovereigns could protect that interest together through one trial.²⁵⁵ A majority of the states have come to the same conclusion and have taken one step further by legislating statutory (as opposed to policy) bars to successive prosecutions.²⁵⁶

The military has not kept pace, and, as a result, servicemembers have suffered. Does the military need the dual sovereignty doctrine? To answer this question, we must balance the military’s needs against servicemembers’ rights as citizens.

A. The Military Need—Good Order and Discipline

The Supreme Court has called the military a “specialized society separate from civilian society.”²⁵⁷ The Court said further that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”²⁵⁸ In *Parker v. Levy*, the Court determined that,

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.²⁵⁹

The Supreme Court hit on that which makes the military a special community—the need to maintain good order and discipline.²⁶⁰ *Parker v. Levy* is not particularly helpful to the question presented here, because it involved a constitutional right that, if fully exercised, would have justified Parker in undermining good order and discipline. The question here is whether the military’s need to preserve good order and discipline can justify a second prosecution and punishment. In other words, is the military’s need really different than the public interest in deterring and punishing the particular crime that is committed? In the context of *Parker v. Levy* and its progeny, the military has sought (successfully) to justify practices that would be denounced in the civilian sector as clear violations of constitutional rights, because such practices were necessary to maintain good order and discipline and thereby accomplish its mission.²⁶¹

In this context, how is the military’s interest in good order and discipline furthered by the ability to prosecute a servicemember a second time? The military’s best argument centers on general deterrence. In short, if the military cannot prosecute the servicemember in a military courtroom on a military base, it cannot demonstrate to the military community what is right and wrong and what the consequences of doing wrong are. Further, if the dual sovereignty doctrine did not apply, the military would be forced to consult with state agencies and work in concert with them where the two jurisdictions overlap. This would hinder the military’s ability to ensure that good order and discipline are preserved in a timely fashion. The military’s mission is to fight and win wars, and it should not have to defer to state agencies in accomplishing that mission.

²⁵⁴ 434 U.S. 22, 28 (1977).

²⁵⁵ *Id.* at 27 n.13.

²⁵⁶ *See supra* notes 212, 213 and App. A.

²⁵⁷ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

²⁵⁸ *Id.* at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

²⁵⁹ *Id.* at 758.

²⁶⁰ *See also* UCMJ art. 134 (2005) (criminalizing acts that prejudice good order and discipline).

²⁶¹ *See, e.g.*, *Brown v. Glines*, 444 U.S. 348, 353–58 (1980) (holding First Amendment did not prohibit commander from requiring prior approval for any serviceman soliciting signatures for a petition while in uniform); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (holding disparate treatment of female officers did not violate the Equal Protection Clause); *Rostker v. Goldberg*, 453 U.S. 57, 72–83 (1981) (holding male-only draft registration did not violate the Equal Protection Clause).

Against the military's need must be balanced the rights of servicemembers. Although servicemembers willingly subordinate some of their constitutional rights to the military's "overriding demands of discipline and duty,"²⁶² they are still citizens who sacrifice more (including their lives) than any other for the guarantees set forth in the Constitution. In examining double jeopardy issues in the military, the differences between servicemembers and civilians deserve consideration.

B. The Servicemember Need – "The Great Rights of Mankind"

Servicemembers are unique creatures in the law because they are subjected to the most comprehensive application of criminal laws. Servicemembers can be prosecuted as civilians by states. They can also be prosecuted as civilians in federal courts for federal crimes. For example, a servicemember can be prosecuted by a U.S. Attorney for robbing a federally insured bank. A servicemember can be prosecuted as a civilian in federal courts for state crimes under the Federal Assimilative Crimes Act (FACA).²⁶³ Finally, servicemembers can be prosecuted under the UCMJ by the military by virtue of their military status.

The military's criminal reach over a servicemember is almost boundless. The military can prosecute a servicemember for violations of the enumerated punitive articles of the UCMJ. The military can prosecute a servicemember for state offenses pursuant to the FACA, assuming the offenses are committed on federal territory. The military can prosecute a servicemember for violations of federal law not found in Title 10 of the U.S. Code by virtue of Article 134, UCMJ, Clause 3.²⁶⁴ Finally, by virtue of Clauses 1²⁶⁵ and 2²⁶⁶ of Article 134, military prosecutors can create new offenses as long as the offenses are either "directly prejudicial to good order and discipline"²⁶⁷ or have "a *tendency* to bring the service into disrepute or [tend] to lower it in public esteem."²⁶⁸

Servicemembers are to the criminal law world what the New Zealand Tuatara²⁶⁹ is to the reptile world—unique and highly susceptible to attack. Courts have recognized this. In *United States v. Borys*,²⁷⁰ Chief Judge Quinn wrote, "[T]he legislation for service persons is markedly different from that of the generality of the population. . . . Congress, in my opinion, has constitutional power to govern service persons differently from the generality of the population."²⁷¹ In focusing on the special nature of servicemembers, Chief Judge Quinn said,

If the accused had been a civilian, he would not have violated any Federal law and his act would not have been cognizable as a crime in any Federal civilian court. Stated differently, the accused's conduct is a Federal crime only because the Uniform Code of Military Justice defines it as a crime and he, as a military person, is subject to its provisions.²⁷²

The case of *Solorio v. United States* embodies the ubiquitous exposure of servicemembers to criminal laws.²⁷³ *Solorio* gave the military subject matter jurisdiction over any crime committed by servicemembers simply because they have military status.²⁷⁴ Justice Marshall, uncomfortable with this seemingly limitless exposure, wrote, "members of the Armed Forces may

²⁶² *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

²⁶³ 18 U.S.C. § 13 (LexisNexis 2008).

²⁶⁴ Crimes and offenses not capital. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(4) (2005) [hereinafter MCM].

²⁶⁵ *Id.* pt. IV, ¶ 60c(2).

²⁶⁶ *Id.* pt. IV, ¶ 60c(3).

²⁶⁷ *Id.* pt. IV, ¶ 60c(2)(a).

²⁶⁸ *Id.* pt. IV, ¶ 60c(3) (emphasis added).

²⁶⁹ The Tuatara is the only remnant of the family of beak-headed reptiles dating back 200 million years. The Tuatara spent millions of years isolated in the New Zealand islands with few predators. The advent of man inevitably brought a host of predators to New Zealand, including rats, dogs, ferrets, pigs, and cats, and the Tuatara population was decimated and scattered to outlying islands. ARTHUR HORNBLow & MICHAEL K. FRITH, REPTILES DO THE STRANGEST THINGS 6–7 (1970). See also SandiegoZoo.org, *Reptiles: Tuatara*, <http://www.sandiegozoo.org/animalbytes/t-tuatara.html> (last visited Jan. 14, 2008).

²⁷⁰ 40 C.M.R. 259 (C.M.A. 1969).

²⁷¹ *Id.* at 270 (Quinn, C.J., dissenting).

²⁷² *Id.*

²⁷³ 483 U.S. 435 (1987).

²⁷⁴ *Id.* at 450–51.

be subjected virtually without limit to the vagaries of military control.”²⁷⁵ The Supreme Court has artificially balanced the scales of justice in favor of the state and federal governments. The weight of history (including the English roots of the Double Jeopardy Clause, the Framers’ intent, and the nature and purpose of the United States’ distinct form of federalism) and the importance of individuals’ rights dictates that the scales be rebalanced in favor of servicemember-citizens.

C. Necessary Course of Action

Servicemembers, comprising that segment of the population that is the most vulnerable to prosecution, need the greatest protections that can be afforded them consistent with the military’s mission. The military’s need to preserve good order and discipline through general deterrence and the ability to do so free from state involvement cannot stand in the face of an individual’s (even a servicemember’s) historical and necessary possession of “the great rights of mankind.”²⁷⁶ Therefore, DOD should seek legislation to amend Article 44, UCMJ, to bar courts-martial after a state has prosecuted for the same conduct. Doing so will fulfill the Framers’ intent,²⁷⁷ state the Supreme Court’s reservations,²⁷⁸ avoid issues of sham prosecutions,²⁷⁹ align DOD with the federal government and a majority of the states,²⁸⁰ and reinvest servicemembers with an inherent right they never should have lost.

Even if the military’s need for resort to the dual sovereignty doctrine is viewed as paramount to the servicemember’s “indispensable liberty,”²⁸¹ its policies are not appropriately drafted to balance the two and it should revise them as stated below.

D. Interim Course of Action

The DOD is one agency, and each of its services are equal to one another. Yet, each service has a different policy regarding successive prosecutions. The Navy has the most restrictive requirements, the Air Force has the highest level of approval, and the Army is comparatively lax in both areas. Why does the successive prosecution of a Soldier require the local commanding general’s assent while the same action for a Marine requires the Navy Judge Advocate General’s assent and for an Airman the Secretary of the Air Force’s assent? Why is the successive prosecution of a Soldier permitted after the mere determination that punitive action is essential to maintain discipline in the command²⁸² while the same action for an Airman is permitted “only in the most unusual circumstances when the ends of justice and discipline can be satisfied in no other way,”²⁸³ and the same action for a Sailor is permitted in limited cases that meet specific criteria?²⁸⁴

There is no justification for this disparate treatment. This seems to indicate that DOD views these policy limitations as unimportant. At the very least, DOD should have one policy similar to DOJ’s *Petite* policy, should incorporate those parts of the Air Force and Navy policies that benefit servicemembers, and should rest approval authority for exceptions with the service secretaries.²⁸⁵ The DOD policy should “[preclude] the initiation or continuation of a [court-martial] following a prior state or federal prosecution based on substantially the same act(s) or transaction(s).”²⁸⁶ Permission for an exception to the

²⁷⁵ *Id.* at 467 (Marshall, J., dissenting).

²⁷⁶ CREATING THE BILL OF RIGHTS, *supra* note 2, at 78 (quoting *The Congressional Register* for James Madison’s speech to the House of Representatives on 8 June 1789).

²⁷⁷ See discussion *supra* pp. 4-6.

²⁷⁸ See *infra* p. 21 and note 232.

²⁷⁹ See *infra* sec. II.C.4.

²⁸⁰ See *infra* sec. III.

²⁸¹ Tench Coxe, a Federalist from Philadelphia, wrote to James Madison that the Bill of Rights would heighten and strengthen the “barriers between necessary power and indispensable liberty.” LABUNKSI, *supra* note 45, at 24.

²⁸² AR 27-10, *supra* note 201, para. 4-3.

²⁸³ AFI 51-201, *supra* note 203, para. 2.6.3.

²⁸⁴ JAGMAN, *supra* note 204, para. 0124b.

²⁸⁵ The service secretaries would be an equivalent level, hierarchically, with the Assistant Attorneys General, who are approval authorities for exceptions to the *Petite* policy.

²⁸⁶ USAM, *supra* note 221, § 9-2.031A.

policy should “be granted in only the most unusual cases when the ends of justice can be satisfied in no other way.”²⁸⁷ An exception to the policy should only be permitted if two substantive prerequisites are met: “first, the matter must involve a substantial [military] interest; second, the prior prosecution must have left that interest demonstrably unvindicated.”²⁸⁸ The substantial military interest prerequisite should require military prosecutors to show a “particular and unique military interest”²⁸⁹ that directly affects the unit’s mission. The DOD policy should presume “that a prior prosecution, regardless of result, has vindicated the relevant [military] interest.”²⁹⁰ The DOD policy should adopt factors similar to the DOJ policy to consider whether this presumption may be overcome.²⁹¹ Then, once the DOD policy is established, DOD should strictly comply with its policy as the DOJ has done.²⁹²

V. Conclusion

After analyzing Supreme Court and military case law and reviewing the DOD policy limitations, we know the military can prosecute a servicemember after a state prosecution for the same offenses/acts, regardless whether the end result was a conviction or acquittal. We know the DOD policy limitations are varied among the services and are not particularly difficult to circumvent, especially in the Army’s case. We also know that the military has no hesitation in availing itself of the dual sovereignty doctrine to engage in a successive prosecution and that such prosecutions may be viewed as shams for a second state prosecution. But is the military’s policy and practice consistent with history, with the concerns of the Supreme Court, or with the prevailing practice in this country? The resounding answer is no.

The ability of the military to avail itself of the dual sovereignty doctrine to avoid the Fifth Amendment’s Double Jeopardy Clause does not mean that it is necessary or wise to do so. The Supreme Court has made this point on several occasions. In *Gilbert v. Minnesota*,²⁹³ the Court said

Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all.²⁹⁴

More recently, Justice Brennan made a similar point: “The lesson of the history which wrought the Fifth Amendment’s protection has taught us little if that shield may be shattered by reliance upon the requirements of federalism and state sovereignty”²⁹⁵ to abrogate individual rights.

It is time for the military to ensure that servicemembers are protected by the constitutional rights they preserve through their constant sacrifices. It can do this without sacrificing its mission by providing servicemembers the full protections of the Double Jeopardy Clause intended by the Framers of the Constitution and by restraining itself from prosecuting after a state has done so for the same act or transaction.

²⁸⁷ AFI 51-201, *supra* note 203, para. 2.6.3.

²⁸⁸ USAM, *supra* note 221, § 9-2.031A.

²⁸⁹ JAGMAN, *supra* note 204, para. 0124b(3).

²⁹⁰ USAM, *supra* note 221, § 9-2.031D.

²⁹¹ *See id.*

²⁹² *See Rinaldi v. United States*, 434 U.S. 22, 30 n.16 (1977).

²⁹³ 254 U.S. 325 (1920).

²⁹⁴ *Id.* at 329.

²⁹⁵ *Bartkus v. Illinois*, 359 U.S. 121, 169 (1959) (Brennan, J., dissenting).

Appendix A

State Statutes Barring Dual Sovereign Prosecutions

The following is a list of the state statutes barring prosecutions after another jurisdiction (state or federal) has prosecuted for the same act, transaction, or offense.

By 1996

ALA. CODE § 15-3-8 (2006)
ALASKA STAT. 12.20.010 (2006)
ARK. CODE ANN. § 5-1-114 (2006)
CAL. PENAL CODE § 793 (Deering 2006)
DEL. CODE ANN. tit. 11, § 209 (2006)
GA. CODE ANN. § 16-1-8 (2006)
HAW. REV. STAT. § 701-112 (LexisNexis 2006)
IDAHO CODE ANN. § 19-315 (2006)
720 ILL. COMP. STAT. 5/3-4 (2006)
IND. CODE ANN. § 35-41-4-5 (LexisNexis 2006)
KY. REV. STAT. ANN. § 505.050 (LexisNexis 2006)
MINN. STAT. ANN. § 609.045 (2005)
MISS. CODE ANN. § 99-11-27 (2006)
MONT. CODE ANN. § 46-11-504 (2005)
NEV. REV. STAT. ANN. § 171.070 (LexisNexis 2006)
N.J. REV. STAT. § 2C:1-11 (2007)
N.Y. CRIM. PROC. LAW § 40.20 (Consol. 2006)
N.D. CENT. CODE § 29-03-13 (2006)
OKLA. STAT. ANN. tit. 22, § 130 (LexisNexis 2006)
18 PA. CONS. STAT. § 111 (2006)
UTAH CODE ANN. § 76-1-404 (2006)
VA. CODE ANN. § 19.2-294 (2006)
WASH. REV. CODE ANN. § 10.43.040 (LexisNexis 2006)
WIS. STAT. § 939.71 (2006).

By 2007

COLO. REV. STAT. § 18-1-303 (2006)
KAN. STAT. ANN. § 21-3108 (2006)
MO. REV. STAT. § 99-11-27 (2006).

Appendix B

Treaties with Double Jeopardy Provisions

The following is an alphabetical list of treaties in which the United States has included double jeopardy provisions:

- Extradition Treaty with Argentina, art. V, U.S.-Arg., Jun. 10, 1997, 1997 U.S.T. LEXIS 94
- Extradition Treaty with the Bahamas, art. V, U.S.-Bah., Mar. 9, 1990, 1990 U.S.T. LEXIS 223
- Extradition Treaty with Belgium, art. 5, U.S.-Belg., Apr. 27, 1987, 1987 U.S.T. LEXIS 203
- Extradition Treaty with Belize, art. 5, U.S.-Belize, Mar. 30, 2000, 2000 U.S.T. LEXIS 59
- Extradition Treaty with Bolivia, art. V(2), U.S.-Bol., Jun. 27, 1995, 1995 U.S.T. LEXIS 221
- Extradition Treaties with the Organization of Eastern Caribbean States, art. 5, U.S.-Ant. & Barb., U.S.-Dominica, U.S.-Gren., U.S.-St. Lucia, U.S.-St. Kitts & Nevis, U.S.-St. Vincent & The Grenadines, Jun. 3, Oct. 10, May 30, Apr. 18, Sep. 18, Aug. 15, 1996, 1996 LEXIS 57
- Extradition Treaty with the Republic of Columbia, art. 5, U.S.-Colum., Sep. 14, 1979, 1979 U.S.T. LEXIS 199
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Costa Rica, art. VI, U.S.-Costa Rica, Dec. 4, 1982, 1982 U.S.T. LEXIS 224
- Extradition Treaty with Cyprus, art. 5, U.S.-Cyprus, Jun. 17, 1996, 1996 U.S.T. LEXIS 50
- Extradition Treaty with France, art. 8, U.S.-Fr., Apr. 23, 1996, 1996 U.S.T. LEXIS 53
- A Treaty for the Extradition of Fugitives from Justice Between the United States of America and Germany, art. V, U.S.-F.R.G., Jul. 11, 1889, 1887 U.S.T. LEXIS 17
- Agreement with Hong Kong on Mutual Legal Assistance in Criminal Matters, art. 3, U.S.-H.K., Apr. 15, 1997, 1997 U.S.T. LEXIS 115
- Extradition Treaty with Hungary, art. V, U.S.-Hung., Dec. 1, 1994, 1994 U.S.T. LEXIS 206
- Extradition Treaty with India, art. 6, U.S.-India, Jun. 25, 1997, 1997 U.S.T. LEXIS 97
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, art. VI, U.S.-Italy, Sep. 24, 1984, 1984 U.S.T. LEXIS 153
- Treaty on Extradition Between the United States of America and Japan, art. IV, U.S.-Japan, Mar. 26, 1980, 1980 U.S.T. LEXIS 301
- Extradition Treaty with Jordan, art. 5, U.S.-Jordan, Mar. 28, 1995, 1995 U.S.T. LEXIS 215
- Extradition Treaty with Korea, art. 5, U.S.-S. Korea, Jun. 9, 1998, 1998 U.S.T. LEXIS 168
- Extradition Treaty with Luxembourg, art. 6, U.S.-Lux., Oct. 1, 1996, 1996 U.S.T. LEXIS 51
- Extradition Treaty with Malaysia, art. 5, U.S.-Malay., Aug. 3, 1995, 1995 U.S.T. LEXIS 203
- Extradition Treaty Between the United States of America and the United Mexican States, art. 6, U.S.-Mex., May 4, 1978, 1978 U.S.T. LEXIS 317
- Extradition Treaty with the Kingdom of the Netherlands, art. 6, U.S.-Neth., Jun. 24, 1980, 1980 U.S.T. LEXIS 133
- Treaty with Panama on Mutual Assistance in Criminal Matters, art III, U.S.-Pan., Apr. 11, 1991, 1991 U.S.T. LEXIS 174

Extradition Treaty with Paraguay, art. V, U.S.-Para., Nov. 9, 1998, 1998 U.S.T. LEXIS 205

Extradition Treaty with Peru, art. IV, U.S.-Peru, Jul. 26, 2001, 2001 U.S.T. LEXIS 94

Extradition Treaty with the Philippines, art. 4, U.S.-Phil., Nov. 13, 1994, 1994 U.S.T. LEXIS 185

Extradition Treaty with Poland, art. 7, U.S.-Pol., Jul. 10, 1996, 1996 U.S.T. LEXIS 54

Extradition Treaty with South Africa, art. 6, U.S.-S. Afr., Sep. 16, 1999, 1999 U.S.T. LEXIS 158

Agreement in Implementation of the Treaty of Friendship and Cooperation Between Spain and the United States of America, art. XXII, U.S.-Spain, Jan. 31, 1976, 1976 U.S.T. LEXIS 230

Extradition Treaty with Sri Lanka, art. 5, U.S.-Sri Lanka, Sep. 30, 1999, 1999 LEXIS 171

Extradition Treaty with Switzerland, art. 4, U.S.-Switz., Nov. 14, 1990, 1990 U.S.T. LEXIS 221

Extradition Treaty with Thailand, art. 5, U.S.-Thail., Dec. 14, 1983, 1983 U.S.T. LEXIS 418

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Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals

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*The surest way to be late is to have plenty of time.*¹

I. Introduction

One of the unique aspects of litigating contract disputes before the Government Accountability Office (GAO)² is its iron-clad adherence to the timeliness rules contained in its bid protest regulations.³ Under the Competition in Contracting Act (CICA) of 1984, the GAO has 100 days to resolve bid protests.⁴ This statutory requirement (known as the “100 Day Rule”⁵) has yielded a significant body of case law that upholds what has been referred to as the “golden rule”⁶ of the GAO: “late is late!”⁷

The CICA’s 100 Day Rule, coupled with the GAO’s strict enforcement of this requirement, strongly promotes the timely disposition of bid protests.⁸ Very often, significant litigation resources can be saved if the litigator is aware of the rules and applicable decisions of the Comptroller General regarding the timeliness of bid protests and related submissions. When presented with a motion to dismiss for lack of timeliness that is factually sufficient, the GAO will, in all likelihood, grant the request, thereby allowing the acquisition process to continue without the delay that would be required by litigation.⁹

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¹ Leo Kennedy, QuoteWorld.org, http://www.quoteworld.org/category/time/author/leo_kennedy (last visited Dec. 13, 2007).

² See generally GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (renaming the General Accounting Office to the Government Accountability Office).

³ See, e.g., *Edron, Inc.—Reconsideration*, Comp. Gen. B-207353.2, Sept. 8, 1982, 82-2 CPD ¶ 207 (dismissing protest as untimely when protest was filed seven days late). In *Edron*, the GAO provided a concise yet illuminating justification on why it strictly enforces the timeliness provisions of its bid protest rules:

Although the rule may seem harsh . . . we do not regard our timeliness standards as mere technicalities. To raise a legal objection to the award of a Government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of the contracting agency and other interested parties. Effective and equitable procedural standards are necessary so that parties have a fair opportunity to present their case and so that protests can be resolved in a reasonably speedy manner. Accordingly, the rules on timeliness impose strict time standards that we enforce strictly.

Id.

⁴ Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 [hereinafter CICA 1984], amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, § 5501(2)(A) [hereinafter NDAA 1996].

⁵ See, e.g., Roseanne Gerin & Mary Mosquera, *Qwest, Northrop Grumman Protest \$1 Billion TCE Award*, WASH. TECH., Dec. 13, 2004, available at http://www.washingtontechnology.com/news/1_1/industry/25153-1.html.

⁶ See, e.g., GAO: “Late is Late” Doesn’t Apply Just to Receipt of Bids, ARMY LAW., Jan. 2000, at 1, 48.

⁷ See, e.g., *id.* n.476 (“The phrase ‘late is late’ is used frequently by practitioners to refer to the GAO’s stringent timeline that a protester must meet in filing its protest.”).

⁸ See Ralph O. White & Kenneth L. Kilgour, *Agency ‘Corrective Action’ in the Face of a GAO Bid Protest: An Increasingly Likely Outcome for Protesters?*, 86 FED. CONT. REP. (BNA) 411 (Oct. 24, 2006) (“[CICA] ensures the expeditious handling of protests by requiring that GAO resolve all protests within 100 calendar days of the date filed.”).

⁹ See, e.g., Raith Eng’g & Mfg. Co., W.L.L., Comp. Gen. B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 (dismissing protest as untimely because agency-level protest was untimely); Advanced Fed. Servs. Corp., Comp. Gen. B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 (dismissing protest issues raised against a negotiated procurement, when the issues were based on information contained in the agency report and protester failed to raise the issues within ten days after receipt of the agency report); Buckley & Kaldenbach, Inc., Comp. Gen. B-298572, Oct. 4, 2006, 2006 CPD ¶ 138 (dismissing as untimely a protest challenge to an agency’s refusal to set-aside procurement for small-business, because protester failed to raise the issue before bid opening).

The speedy and economical nature of litigation before the GAO stands in stark contrast to the “complex, slow, expensive, inefficient, processing-oriented system”¹⁰ that is in place at the boards of contract appeals. The boards are tasked with reviewing contractor claims filed under the Contract Disputes Act (CDA) of 1978.¹¹ Although both the CICA and CDA provide for alternative, non-judicial forums that resolve disputes related to government procurements, the CDA lacked a key feature that the CICA possessed: a specific and strict deadline for the resolution of cases.¹² In the absence of a CICA-like legislative mandate to review and decide cases within an established timeframe, “[c]oncerns . . . related to the (apparent, or at least perceived) decrease in speed of board resolution are not new.”¹³ This is particularly true in the case of the Armed Services Board of Contract Appeals (ASBCA), the largest of the boards of contract appeals.¹⁴

This article is premised upon the following thesis: the ASBCA should adopt a modified version of the 100 Day Rule in order to achieve the administrative efficiencies originally envisioned by the CDA. This thesis will be advanced from four vantage points. First, the GAO’s bid protest rules on timeliness (as formulated in the CICA and implemented by the GAO’s Bid Protest Regulations and decisions of the Comptroller General) will be examined.¹⁵ Second, the CDA’s provisions on timely contract appeals will be summarized in concert with the ASBCA’s rules of procedure. Third, the case load statistics for the GAO and the ASBCA will be reviewed. Fourth and finally, a variant of the 100 Day Rule for the ASBCA will be proposed, so that the ASBCA may replicate the success the GAO enjoys in its expeditious and equitable processing of bid protests.

II. The Timeliness Provisions of the GAO’s Bid Protest Regulations

Bid protests generally involve disputes concerning the award of a federal contract.¹⁶ Under the CICA, the Comptroller General is authorized to review bid protests and issue recommendations on the merits.¹⁷ The GAO’s Bid Protest Regulations, codified in Title 4, Part 21 of the Code of Federal Regulations (C.F.R.), provide the regulatory foundation upon which the bid protest process is based.¹⁸ Originally promulgated in 1985 (one year after the enactment of the CICA), the GAO’s Bid Protest Regulations implement the requirements of the CICA and provide “the rules concerning where and how to file a protest, what to expect in the way of subsequent actions, and the time frames established for completion of those actions.”¹⁹ Parties to a bid protest are considered to have constructive knowledge of the contents of the GAO’s Bid Protest Regulations because the regulations are published in the Federal Register.²⁰

In addition to the GAO’s Bid Protest Regulations, bid protest decisions have been issued by the Comptroller General that expressly recognize and rigidly uphold the timeliness requirements contained in these regulations.²¹ The GAO recognizes relatively few exceptions to its timeliness rule, and these exceptions have high substantive thresholds, making their successful

¹⁰ Steven L. Schooner, *What Next? A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978*, 28 PUB. CONT. L.J. 635 (1999).

¹¹ See generally Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 [hereinafter CDA 1978].

¹² Compare *id.*, with CICA 1984, *supra* note 4.

¹³ Schooner, *supra* note 10, at 650.

¹⁴ See generally Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 PUB. CONT. L.J. 505, 527 (2004).

¹⁵ It is not the intent of this article to conduct a recitation and/or comparison of the full spectrum of rules and regulations that govern the litigation of bid protest and contract appeals. This article will instead focus only on those rules and regulations that impact the timely submission and prosecution of bid protests under the CICA and contract appeals under the CDA.

¹⁶ See 31 U.S.C. § 3551(1) (2000).

¹⁷ CICA 1984, *supra* note 4. The Budget and Accounting Act of 1921 established both “the position of Comptroller General of the United States and the office he heads, the General Accounting Office.” 1 JOHN C. MCBRIDE & THOMAS J. TOUHEY, *GOV’T CONTRACTS: LAW, ADMIN. & PROCEDURES* § 7.10 (2007). See also Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

¹⁸ 4 C.F.R. pt. 21 (2007). See also U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-06-797SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* 40 (8th ed. 2006) [hereinafter GAO GUIDE].

¹⁹ GAO GUIDE, *supra* note 18, at 5. See also CICA 1984, *supra* note 4.

²⁰ GAO GUIDE, *supra* note 18, at 6.

²¹ *Id.* at 11 (“Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces these timeliness requirements.”). See, e.g., *CBMC, Inc., Comp. Gen. B-295586*, Jan. 6, 2005, 2005 CPD ¶ 2 (dismissing as untimely a protest that was received by GAO less than four hours after the deadline established by 4 C.F.R. § 21.0(g)).

use a rare occurrence.²² As a consequence, the GAO has been able to maintain the integrity of the bid protest process while still providing a forum for protesters where their grievances can be reviewed in a fair, economical, and speedy manner.²³

A. The Competition in Contracting Act of 1984 and the 100 Day Rule

On 18 July 1984, President Ronald Reagan signed the CICA into law.²⁴ The CICA represented the first statutory codification of the GAO's bid protest review authority, a power it had been exercising since 1926.²⁵ Prior to the passage of the CICA, a major deficiency in the bid protest process was the amount of time that elapsed before the GAO was able to resolve a protest.²⁶ To solve this problem, and to "strengthen the bid protest function currently in operation"²⁷ at the GAO, the CICA amended Title 31 of the United States Code (31 U.S.C.) by adding Subchapter V, Procurement Protest System.²⁸ In addition to granting express (although not exclusive) authority to the Comptroller General to review bid protests, the CICA also provided the framework against which the GAO's Bid Protest Regulations are based.²⁹

As originally enacted under the CICA, 31 U.S.C. § 3554(a)(1) required the Comptroller General to "issue a final decision concerning a protest within 90 working days from the date the protest is submitted . . ."³⁰ The Comptroller General could issue a final decision on a bid protest after the 90 working-day requirement had expired upon issuance of written justification for the additional time; however, this authority was for "unique circumstances only."³¹ In 1988, a revision to 31 U.S.C. § 3554(a)(1) stripped the Comptroller General of his authority to extend the period for issuing his decision on a bid protest.³² In 1994, the decision deadline changed from "90 working days"³³ to "125 days."³⁴ In 1996, 31 U.S.C. § 3554(a)(1) was amended again; under the revised statute, the Comptroller General was allotted 100 days³⁵ to render a decision on a bid protest.³⁶ The GAO has expressly recognized its obligation to adhere to the stringent bid protest timelines established by Congress:

²² See, e.g., *R&K Contractors, Inc.*, B-292287, 2003 U.S. Comp. Gen. LEXIS 139, at *12 (July 23, 2003) (dismissing as untimely a protest that did not fall within the scope of "the significant issue or good cause exceptions to the timeliness requirements of [the GAO's] Bid Protest Regulations, 4 C.F.R. § 21.2(c).").

²³ See *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107, at *6 ("In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used.").

²⁴ Statement of President Ronald W. Reagan on Signing the Deficit Reduction Act of 1984, 2 PUB. PAPERS 1053 (July 18, 1984), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40166>. Although there was no apparent disharmony between the legislative and executive branches over the bid protest timeliness provisions contained in the CICA, President Reagan used his signing statement to express his strong opposition to the CICA provision that enabled the Comptroller General to stay the award of a federal contract:

I am today signing H.R. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.

Id. See also *MCBRIDE & TOUHEY*, *supra* note 17, § 7.10.

²⁵ *The Effort to Increase Competition in Procurement: A Twenty-Year Perspective*, 42 FED. CONT. REP. (BNA) 1045 (Dec. 24, 1984) [hereinafter *CICA Twenty-Year Perspective*]. Prior to the enactment of the CICA, the GAO invoked "the Budget and Accounting Act of 1921 as authority . . . to decide bid protests." *Id.*; see also *GAO GUIDE*, *supra* note 18, at 5.

²⁶ *CICA Twenty-Year Perspective*, *supra* note 25.

²⁷ *Conf. Rep. on Competition and Protest Provisions in H.R. 4170, The Tax/Deficit Reduction Bill*, 42 FED. CONT. REP. (BNA) 28 (July 2, 1984) [hereinafter *CICA Conference Report*].

²⁸ CICA 1984, *supra* note 4, § 2741(a). See also *CICA Twenty-Year Perspective*, *supra* note 25.

²⁹ § 2741(a). See also *CICA Conference Report*, *supra* note 27; *MCBRIDE & TOUHEY*, *supra* note 17, § 7.10. Although the statutory genesis of the GAO's Bid Protest Regulations can be traced directly to the CICA, the GAO did have regulations on its bid protest function as early as 1966. See *CICA Twenty-Year Perspective*, *supra* note 27.

³⁰ § 2741(a).

³¹ *CICA Conference Report*, *supra* note 27; see also CICA 1984, *supra* note 4, § 2741(a).

³² Department of Defense Appropriations Act of 1989, Pub. L. No. 100-463, 102 Stat. 2270, § 8139 (1988).

³³ *Id.*

³⁴ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, § 1403(a)(1).

³⁵ NDAA 1966, *supra* note 4, § 5501(2)(A).

³⁶ *Id.*; see also 31 U.S.C. § 3554(a)(1) (2000).

The Competition in Contract Act of 1984 (CICA), as amended, requires our Office to complete its review of bid protests within 100 calendar days—a deadline consistently met—to minimize the disruption that protests necessarily engender. 31 U.S.C. § 3554(a)(1) (2000). Congress decided that, in the event that a protest qualifies for a stay of performance under the terms of the [Competition in Contracting] Act, the 100-day timeframe strikes an appropriate balance between agency needs and the need to preserve the possibility of meaningful relief for contractors whose protests are vindicated upon review.³⁷

B. Key GAO Definitions Regarding Timeliness

Since the bid protest process has the potential to be dominated (if not ultimately determined) by issues related to the timeliness of filings, the GAO's Bid Protest Regulations include definitions for three basic, yet crucial, terms that are used throughout its timeliness provisions: "days," "filed," and "adverse agency action."³⁸ The GAO's definition for these terms can be the decisive factor in resolving a timeliness issue; therefore, a summary review of these terms is appropriate.³⁹

Pursuant to 4 C.F.R. § 21.0(e), days are defined as "calendar days."⁴⁰ The calculation of time periods during the bid protest process is subject to three conditions: (1) the day upon which a triggering event takes place is excluded; (2) if the final day for timeliness purposes is a Saturday, Sunday, or federal holiday, then the deadline is extended to the next day that is not one of the aforementioned days; and (3) if the GAO is closed on the day when a filing is due, the deadline for submission becomes the day that the GAO re-opens.⁴¹ Under 4 C.F.R. § 21.0(g), a document is considered to be filed in a timely manner with the GAO if it is received on the final day of timeliness "by 5:30 p.m., eastern time."⁴² In choosing a method for transmitting protest documents (e.g., regular mail, electronic mail, or facsimile), "the protester assumes the risk that the protest will not be received at [the GAO] in a timely manner."⁴³ An agency action (or lack thereof) is considered to be adverse under 4 C.F.R. § 21.0(f) if it is "prejudicial to the position taken in a protest with the agency"⁴⁴

C. Timeliness of Bid Protests Filed with the GAO

Under the GAO's Bid Protest Regulations, the question of when to file a bid protest is generally determined by the substantive arguments that are advanced in the protest, and the forum within which the protester chooses to obtain relief.⁴⁵

³⁷ SMF Sys. Tech. Corp., Comp. Gen. B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203, at *11–*12.

³⁸ See 4 C.F.R. § 21.0 (2007).

³⁹ See, e.g., Lifecare Mgmt. Partners, Comp. Gen. B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 (dismissing protest issue as untimely, following analysis of the GAO's definition of "adverse agency action"); Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186 (Sept. 16, 2004) (dismissing protest issue as untimely, following analysis of the GAO's definition of "days"); Koehlke Components, Inc.—Reconsideration, B-243248.2, 1991 U.S. Comp. Gen. LEXIS 512 (Apr. 8, 1991) (affirming dismissal of untimely protest, following analysis of the GAO's definition of the term "filed").

⁴⁰ 4 C.F.R. § 21.0(e).

⁴¹ *Id.*; see also Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186, at *5 (Sept. 16, 2004) ("While we recognize that our Regulations define the term "days" as "calendar days," 4 CFR § 21.0(e), the clear intent behind the Regulations, read as a whole, is that documents may be, and are considered, filed only on days when our Office is open for business.").

⁴² 4 C.F.R. § 21.0(g). When the GAO receives a protest-related document, it will mark the document with a date and time stamp. See GAO GUIDE, *supra* note 18, at 16. However, the presumed accuracy of the GAO's own date and time stamp can be overcome "where other evidence clearly establishes the time that the protest arrived at" the GAO. Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186, at *3–*4 (Sept. 16, 2004) ("While we rely upon our time/date stamp to determine the timeliness of protest filings with our Office where other evidence clearly establishing the time that the protest arrived is absent . . . we will not rely upon the stamp where other acceptable evidence of earlier receipt is available . . ."). *Id.* at *4. Protest-related documents that are transmitted to GAO via electronic mail or facsimile after 5:30 p.m. eastern time are considered "filed as of the opening of business on the following business day." *Id.* at *5. This distinction is important in cases "where the bid opening or due date is to take place in an office located in another time zone and is scheduled right before or after a weekend or holiday." *Id.* at *6 n.2.

⁴³ GAO GUIDE, *supra* note 18, at 17; see also Peacock, Myers & Adams, B-279327, 1998 U.S. Comp. Gen. LEXIS 102, at *7 (Mar. 24, 1994) ("[GAO's] timeliness rules may seem harsh in some cases" and that "a protester's inability to successfully send a fax to our Office shortly before closing does not provide a basis for waiving our timeliness rules.").

⁴⁴ 4 C.F.R. § 21.0(f).

⁴⁵ See *id.* § 21.2(a)(1)–(3).

The resolution of these two issues will determine which timeliness provisions are applicable, and can make the difference between a summary dismissal of a protest, or a decision on the merits.⁴⁶

1. *The Substantive Arguments*

The timeliness provisions of the GAO's Bid Protest Regulations contemplate two basic types of substantive arguments that can be advanced in protests: arguments that allege the presence of defects in a solicitation (i.e., "improprieties in a solicitation"), and arguments that allege other defects in the procurement process (i.e., "all other cases").⁴⁷ In order to be considered on the merits, each protest argument "must independently satisfy GAO's timeliness requirements."⁴⁸

a. *"Improprieties in a Solicitation"*⁴⁹

As a general rule, a protest that alleges a defect in a solicitation must be filed with the GAO prior to the deadline for the opening of bids, or before the deadline for the submission of initial proposals, if the defect is apparent on its face.⁵⁰ If a defect in a solicitation does not become apparent until after bids are opened or initial proposals are submitted, a protest must be filed with the GAO within ten days "after the defect became apparent."⁵¹ In the case of a solicitation for a negotiated procurement, a protest against a defect contained in an amendment to the solicitation must be filed with the GAO "before the next closing time established for submitting proposals."⁵²

b. *"All Other Cases"*⁵³

A protester who wishes to challenge a solicitation based on an argument that does not fall within the scope of 4 C.F.R. 21.2(a)(1) must raise the issue with the GAO within ten days of the date that the protester became aware of or should have become aware of the issue, whichever state of knowledge occurs earlier.⁵⁴ The basis for a protest can be a protester's actual

⁴⁶ See *id.* § 21.2(b) ("Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.").

⁴⁷ GAO GUIDE, *supra* note 18, at 9, 12 ("Although most protests challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract, GAO considers protests of defective solicitations, . . . as well as certain other procurement actions . . ."); see 4 C.F.R. § 21.2(a)(1).

⁴⁸ GAO GUIDE, *supra* note 18, at 15; see also *Haworth Inc.*, B-297053.4, 2006 U.S. Comp. Gen. LEXIS 90, at *7 (June 7, 2006) ("Further, where, after filing a timely protest, the protester later supplements it with new protest grounds, the later-raised grounds must independently satisfy our timeliness requirements."); *Bristol Group, Inc.—Union Station Venture*, B-298086, B-298086.3, 2006 U.S. Comp. Gen. LEXIS 96, at *3 (May 30, 2006) ("Further, where a protester initially files a timely protest, either with our Office or at the agency, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements." (emphasis added)).

⁴⁹ 4 C.F.R. § 21.2(a)(1).

⁵⁰ *Id.* § 21.2(a)(1); GAO GUIDE, *supra* note 18, at 11. See, e.g., *Buckley & Kaldenbach, Inc.*, Comp. Gen. B-298572, Oct. 4, 2006, 2006 CPD ¶ 138 (dismissing as untimely a protest challenge to an agency's refusal to set-aside procurement for small-business, because protester failed to raise the issue before bid opening); *Advanced Tech. Sys., Inc.*, Comp. Gen. B-296493.5, Sept. 26, 2006, 2006 CPD ¶ 147, at *53 (dismissing as untimely a protest issue that "essentially argues that the solicitation was defective"); *Brian X. Scott*, Comp. Gen. B-298370, B-298490, Aug. 18, 2006, 2006 CPD ¶ 125 (dismissing as untimely protest issues related to defects in the solicitation, after protester initially raised the issues in his comments to the agency report); *Morgan-Keller, Inc.*, Comp. Gen. B-298076.2, Aug. 1, 2006, 2006 CPD ¶ 116 (dismissing as untimely a protest challenge to a request for proposals, after protester failed to raise the issue before the deadline for receipt of proposals); *SI Int'l, SEIT, Inc.*, Comp. Gen. B-297381.5, B-297381.6, July 19, 2006, 2006 CPD ¶ 114 (dismissing as untimely a protest challenge to agency's decision to limit discussions, because protester failed to raise the issue before the deadline for receipt of revised proposals); *King Constr. Co., Inc.*, Comp. Gen. B-298276, July 17, 2006, 2006 CPD ¶ 110 (dismissing as untimely protest issue alleging that a solicitation prevented small business from effectively competing, because protester failed to raise the issue before the deadline for receipt of proposals).

⁵¹ GAO GUIDE, *supra* note 18, at 11; see also 4 C.F.R. § 21.2(a)(1).

⁵² GAO GUIDE, *supra* note 18, at 12 (citing 4 C.F.R. § 21.2(a)(1)).

⁵³ GAO GUIDE, *supra* note 18, at 12.

⁵⁴ *Id.* See, e.g., *Advanced Fed. Servs. Corp.*, Comp. Gen. B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 (dismissing protest issues raised against a negotiated procurement, when the issues were based on information contained in the agency report and protester failed to raise the issues within ten days after receipt of the agency report); *Gen. Injectables & Vaccines, Inc.*, Comp. Gen. B-298590 et. al., Nov. 15, 2006, 2006 CPD ¶ 173 (dismissing protest issue raised against a negotiated procurement, where the protester was placed on notice of an error in the agency's competitive range determination, and failed to raise the issue within ten days); *DeTekion Sec. Sys., Inc.*, Comp. Gen. B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 (dismissing protest issue involving a negotiated procurement, where the protester failed to raise the issue (challenge to the agency's affirmative responsibility determination) within ten days after the protester learned about the agency's award decision); *Am. Floor Consultants, Inc.*, B-294530.7, 2006 U.S. Comp. Gen. LEXIS 101 (June 15, 2006)

or constructive knowledge.⁵⁵ Absence of actual and constructive knowledge of a protest issue will toll the timeliness provisions of the Bid Protest Regulations.⁵⁶ In addition, in the case of a negotiated procurement in which a debriefing is requested by the protester (and required by law), the protester has ten days to file a protest based on issues raised by the debriefing, but may not file a protest prior to the debriefing date offered by the agency.⁵⁷ A protest issue that runs afoul of the special timeliness provisions for negotiated procurements involving a debriefing is subject to summary dismissal by the GAO.⁵⁸

2. Agency-level Protests

The timeliness provisions of the GAO's Bid Protest Regulations impose special rules for the submission of protests that are initially filed with procuring agencies, and later filed with the GAO.⁵⁹ In order for an agency-level protest to be timely, it must be filed within the timeframes established by 4 C.F.R. 21.2(a)(1) and (a)(2) (the same provisions that govern the timely filing of protests with the GAO), unless the agency has stricter filing rules, in which case the agency's rules are controlling.⁶⁰ An untimely agency-level protest that is filed later with the GAO will also be considered untimely.⁶¹ A protest that was initially filed in a timely manner with the agency and subsequently filed with the GAO must be submitted "within 10 days of actual or constructive knowledge of initial adverse agency action."⁶² An adverse agency action is not limited to a formal denial of an agency-level protest.⁶³

(dismissing protest issue raised against a negotiated procurement, where the protester failed to challenge the responsiveness of the awardee's price proposal within ten days of becoming aware of the issue).

⁵⁵ See, e.g., Int'l Marine Prods., Inc., Comp. Gen. B-296127, June 13, 2005, 2005 CPD ¶ 119 ("The time period for filing a protest with our Office commences with a protester's actual or constructive knowledge of initial adverse agency action."). If a protester receives notice of the basis for a protest on a non-business day and does not read the notice on the day of receipt, the protester will be deemed to have constructive knowledge of the notice on the next business day. See *id.* Although protesters "have a duty to diligently pursue their bases for protest," due diligence does not include "conducting business outside of ordinary business hours (for example, a weekend)." *Id.* "In contrast, actual knowledge of adverse agency action, even when received on a non-business day, commences the time for filing a protest" with the GAO. *Id.*

⁵⁶ See, e.g., Lockheed Martin Corp., Comp. Gen. B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 (sustaining protest issue as timely, where the issue was based on events occurring between 2001 and 2003, and the issue was based on information contained in documents publicly disclosed in 2004 that the protester "had no reason to previously know"); WorldWide Language Res., Inc.; SOS Int'l Ltd., Comp. Gen. B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (sustaining protest issue as timely, where the announcement of a sole-source award on DefenseLink (the official website of the Department of Defense) failed to provide constructive notice to the protester).

⁵⁷ 4 C.F.R. § 21.2(a)(2). See GAO GUIDE, *supra* note 18, at 12 ("The purpose of the exception to the timeliness rules for negotiated procurements where debriefings are required by law is to encourage vendors to seek, and contracting agencies to give, early and meaningful debriefings prior to the vendor's deciding whether or not to file a protest."). The procedures for conducting a "statutorily required debriefing" (which are limited to negotiated procurements) are promulgated in Part 15 of the Federal Acquisition Regulation. *Id.* at 14.

⁵⁸ See, e.g., Sealift, Inc., Comp. Gen. B-298588, Oct. 13, 2006, 2006 CPD ¶ 162 (dismissing protest issue first raised in protester's comments to the agency report, when the protester first learned of the issue during a debriefing and failed to raise the issue with the GAO within ten days); PAI Corp., Comp. Gen. B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 (dismissing protest issues "disclosed at the debriefing," when the protester failed to raise the issue with the GAO within ten days); Sw. Educ. Dev. Lab., Comp. Gen. B-298259, July 10, 2006, 2006 CPD ¶ 105 (dismissing protest issue as untimely when the issue was based on information provided in a debriefing, and protester subsequently failed to raise the issue in its agency-level protest); Nicholson/Soletanche Joint Venture, Comp. Gen. B-297011.3, B-297011.4, Apr. 20, 2006, 2006 CPD ¶ 70 (dismissing protest issue as untimely where the issue was based on information contained in a post-award written debriefing, but not raised by the protester until he filed a supplemental protest). Upon notification by an agency that a debriefing date has been offered, the GAO may dismiss a protest without prejudice if the protest is filed before the debriefing date. See GAO GUIDE, *supra* note 18, at 13.

⁵⁹ See 4 C.F.R. § 21.2(a)(3); see also GAO GUIDE, *supra* note 18, at 12.

⁶⁰ 4 C.F.R. § 21.2(a)(3).

⁶¹ GAO GUIDE, *supra* note 18, at 13; Lifecare Mgmt. Partners, Comp. Gen. B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 (dismissing protest issue as untimely, when the protester failed to raise the issue within ten days after learning of adverse agency action on agency-level protest); ABF Freight Sys., Inc., Comp. Gen. B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 (dismissing protest issue as untimely, since the issue was not contained in the protester's agency-level protest); King Nutronics Corp., Comp. Gen. B-228596, Nov. 5, 1987, 87-2 CPD ¶ 453 (dismissing protest as untimely, because protester's agency-level protest was untimely).

⁶² 4 C.F.R. § 21.2(a)(3).

⁶³ See GAO GUIDE, *supra* note 18, at 12 ("GAO views as adverse agency action any action that makes clear that the agency is denying the agency-level protest."). The GAO has recognized a wide range of conduct that it deems to constitute adverse agency action, including "the agency's proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, or the award of a contract despite the agency-level protest." *Id.* at 12-13.

3. Exceptions

The GAO's Bid Protest Regulations recognize only two circumstances under which an otherwise untimely protest may still be considered: protests that are untimely for good cause, and protests that "present novel or significant issues of interest to the procurement community."⁶⁴ In order to successfully invoke the good cause exception, a protester must demonstrate that it "faced an extremely limited timeframe within which to challenge the solicitation provisions at issue."⁶⁵ Consistent with the GAO's traditionally strict interpretation of its timeliness regulations, the Comptroller General has narrowly defined the duration of the aforementioned period to one day or less.⁶⁶ In order to successfully invoke the novel or significant issue exception, a protester must demonstrate that a protest ground satisfies two criteria: (1) the issue has not already been reviewed by the GAO, and (2) the issue is "of widespread interest to the procurement community."⁶⁷ The GAO will not apply the novel or significant issue exception in cases where the applicable law is settled and the GAO's decision "would be limited to the facts of that particular case and of primary interest only to the parties involved."⁶⁸ The determination of whether a protest raises a novel or significant issue is fact-specific and will be made by the GAO on a case-by-case basis.⁶⁹ The GAO will apply the good cause and novel or significant issue exceptions only "sparingly."⁷⁰ The GAO's strong

⁶⁴ GAO GUIDE, *supra* note 18, at 13. See also 4 C.F.R. § 21.2(c) ("GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest."). In addition to the "good cause shown" and "novel or significant issue" exceptions, the GAO will also afford "full treaty rights" to a party filing a protest pursuant to the provisions of the North American Free Trade Agreement (NAFTA). GAO GUIDE, *supra* note 18, at 13. This accommodation is based on the GAO's recognition that NAFTA "contains a 10-working day timeliness requirement, which is inconsistent with GAO's timelines rules." *Id.* See also North American Free Trade Agreement, U.S.-Can.-Mex., art. 1017(1)(f), Dec. 17, 1992, 32 I.L.M. 289 (1993) ("[A] Party may limit the period within which a supplier may initiate a bid challenge, but in no case shall the period be less than 10 working days from the time when the basis of the complaint became known or reasonably should have become known to the supplier . . ."). The scope of a protester's "full treaty rights" as they pertain to when to file a protest under NAFTA is unclear, and the author could find no decisions issued by the Comptroller General that addressed the timeliness of a NAFTA-based protest.

⁶⁵ *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107 (dismissing protest as untimely, where protester was on notice for four days (which included two working days) of alleged solicitation improprieties and failed to file its protest before the due date for proposals). In reaching its conclusion in *WareOnEarth Communications, Inc.*, the GAO expressly declined to follow the earlier precedent it had established in *Morrison Knudsen Corp.*, Comp. Gen. B-247160, Jan. 7, 1992, 92-1 CPD ¶ 35, in which a five-day-period (which included three working days) was deemed insufficient to afford the protester a reasonable opportunity to protest the solicitation prior to the due date for receipt of proposals. *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107.

⁶⁶ *Id.* (citing *Dube Travel Agency & Tours, Inc.*; *Garber Travel, Comp. Gen. B-270438, B-270438.2*, Mar. 6, 1996, 96-1 CPD ¶ 141 (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *Skyline Indus., Inc.*, Comp. Gen. B-257340, Sept. 22, 1994, 94-2 CPD ¶ 111 (finding due date for receipt of proposals was "practically simultaneous with the solicitation itself"); *Ling Dynamic Sys., Inc.*, Comp. Gen. B-252091, May 24, 1993, 93-1 CPD ¶ 407 (finding protest issue timely, where protester was on notice of protest grounds only two hours prior to bid opening); *G. Davidson Co., Inc.*, Comp. Gen. B-249331, July 14, 1992, 92-2 CPD ¶ 21 (finding protest issue timely, where it was determined that the time available to file a protest (less than three hours) was unreasonable); *Bardes Servs., Inc.*, Comp. Gen. B-242581, Apr. 29, 1991, 91-1 CPD ¶ 419 (finding protest issue timely, where protester was on notice of the grounds for protest only one day before proposals due); *ImageMatrix, Inc.*, Comp. Gen. B-243170, Mar. 11, 1991, 91-1 CPD ¶ 270 (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *The Big Picture Co.*, Comp. Gen. B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166 (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *Ampex Corp.*, Comp. Gen. B-190529, Mar. 16, 1978, 78-1 CPD ¶ 212 (finding protest issue timely, where "the time for receipt of proposals was practically simultaneous with the solicitation, the entire process apparently taking only 10 minutes").

⁶⁷ *Celadon Labs., Inc.*, Comp. Gen. B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 (finding "significant issue" exception applicable for a protest issue that had not been previously decided by the GAO (the issue involved "the application of conflict of interest regulations to peer review evaluators in SBIR procurements")).

⁶⁸ *Ingenieria y Construcciones Omega—Request for Reconsideration*, Comp. Gen. B-237430.2, Dec. 21, 1989, 89-2 CPD ¶ 580 (affirming dismissal of untimely protest where the protest ground (involving the agency's determination that the protester was non-responsible) was not "a novel issue and would be principally of concern only to the protester . . .").

⁶⁹ *Id.* See also *Sys. Plus, Inc.*, Comp. Gen. B-297215, B-297215.2, B-297215.3, B-297215.4, Dec. 16, 2005, 2006 CPD ¶ 10 (dismissing protest issue as untimely, because the issue (challenging the adequacy of evaluation terms in a Federal Supply Schedule (FSS) procurement) has been previously reviewed by the GAO); *Sys. Automation Corp.*, Comp. Gen. B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493 (dismissing protest issue as untimely, because the issue of whether or not an agency conducted meaningful discussions "has been considered frequently" by the GAO); *Santa Fe Eng'rs, Inc.*, Comp. Gen. B-218268, June 3, 1985, 85-1 CPD ¶ 631 (dismissing protest issue as untimely, because the propriety of prequalification procedures is an issue that has been previously considered by the GAO); *Cal Capital Exps.*, 62 Comp. Gen. 345, 83-1 CPD ¶ 439 (finding protest issue timely where the issue (involving the evaluation of "nonqualifying offers competing against partial domestic bids" under Defense Acquisition Regulation § 6-104.4) was "a novel issue which has not previously been considered" by the GAO); *Stanley & Rack*, Comp. Gen. B-204565, Mar. 9, 1982, 82-1 CPD ¶ 217 (finding protest issue timely where the issue (involving agency's decision to make award to an FSS vendor whose price included both FSS and non-FSS items) raised "a novel issue of widespread interest concerning the use of the FSS"); *Access Corp.*, B-189661, 1978 U.S. Comp. Gen. LEXIS 2827 (Feb. 3, 1978) (finding protest issue timely where the issue (involving the use of the two-step formally advertised procurement procedure) was a "matter of widespread interest" because the GAO had "never addressed the issue raised before" and because of the "frequent use" of the procedure).

⁷⁰ GAO GUIDE, *supra* note 18, at 13. See, e.g., *Ball Aerospace & Techs. Corp.*, Comp. Gen. B-298522, Aug. 11, 2006, 2006 CPD ¶ 113 (dismissing protest as untimely, because the protest "does not provide novel issues that have not been previously considered by [the GAO]"); *R&K Contractors, Inc.*, B-292287, 2003 U.S. Comp. Gen. LEXIS 139 (July 23, 2003) (dismissing protest issues as untimely, finding that neither the protester's "pressing work schedule" nor the matters raised by the protest issues constituted sufficient justification to invoke either the good cause shown or significant issue exceptions to the timeliness rules).

disinclination to review untimely protests was re-emphasized in a recent decision by the Comptroller General, in which the GAO refused to recognize the alleged complexity of the protest grounds at issue or the protester's status as a small business as sufficient grounds upon which to justify waiving its timeliness rules:

Giving weight to such considerations would undermine the bright-line nature of our timeliness rules, which serve as a predictable guide to the procurement community and, as noted above, strike an appropriate balance between two principal goals of our bid protest forum, giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process.⁷¹

D. Timeliness Provisions Impacting Post-Filing Litigation at the GAO

In addition to strictly adhering to its rules on the timely filing of bid protests, the GAO also vigorously enforces its rules on the timely litigation of bid protests.⁷² These procedural rules primarily impact the discovery phase of litigation, which has led at least one commentator to claim that “discovery is severely limited”⁷³ at the GAO. However, it bears repeating that the GAO's Bid Protest Regulations are intended to ensure that it will be able to “comply with the [CICA] mandate that [it] resolve bid protests expeditiously.”⁷⁴

Following receipt of telephonic notification from the GAO that it received a bid protest against a particular procurement, the procuring agency has thirty days to submit an agency report to the GAO.⁷⁵ The agency report typically includes “a statement of the relevant facts (and an estimate of the contract value) signed by the contracting officer, a memorandum of law explaining the agency's position in terms of procurement law, and a list of copies of all relevant documents, or portions of documents not previously furnished.”⁷⁶ Although the thirty day deadline for the submission of agency reports places an enormous strain on government personnel and resources, this short-lived negative impact is substantially outweighed by the fact that the agency report process dramatically accelerates the discovery process. Although protesters are able to request specific documents both before and after an agency report is submitted, protesters are usually afforded only two days to make such requests.⁷⁷ The procuring activity, in turn, has only two days to produce documents that are requested by the protester.⁷⁸ Since the discovery phase in other litigation forums has the potential to take months or even years to complete (a luxury that the CICA does not provide to the GAO), the “GAO expects parties initially to attempt to resolve document disputes themselves.”⁷⁹ If a dispute cannot be resolved, there is little room for doubt as to what will follow next: “GAO will resolve the matter.”⁸⁰

⁷¹ WareOnEarth Commc'ns, Inc., Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107.

⁷² See, e.g., 4 C.F.R. § 21.3(c) (2005) (requiring procuring agency to submit a “report on the protest” (i.e., the agency report) within thirty days of receipt of notification of the protest from the GAO); *id.* § 21.3(g) (requiring protesters to submit additional document requests within two days “after their existence or relevance is known or should have been known, whichever is earlier”); *id.* § 21.3(i) (requiring protester to submit comments on the agency report within ten days of receipt, and allowing for dismissal of protest if protester comments are not submitted); *id.* § 21.14(b)-(c) (requiring protesters to submit requests for reconsideration within ten days “after the basis for reconsideration is known or should have been known, whichever is earlier,” and allowing for summary dismissal of untimely requests).

⁷³ Richard D. Lieberman, *Bid Protests at the Court of Federal Claims and the General Accounting Office*, 67 FED. CONT. REP. (BNA) 13 (Mar. 31, 1997).

⁷⁴ Fisons Instruments—Reconsideration, Comp. Gen. B-254939.2, Dec. 8, 1993, 93-2 CPD ¶ 310 (affirming dismissal of protest following protester's failure to submit timely comments on the agency report).

⁷⁵ 4 C.F.R. § 21.3(c). The agency report is submitted to the GAO, the protester, and any intervenors. *Id.*

⁷⁶ GAO GUIDE, *supra* note 18, at 26. See also 4 C.F.R. § 21.3(d).

⁷⁷ 4 C.F.R. § 21.3(c). If a protester makes a specific request for documents prior to the submission of an agency report, the procuring activity is required to provide the GAO, the protester, and any intervenors with “a list of those documents, or portions of documents, that it has previously released or intends to produce in [the agency] report, and of the documents it intends to withhold and the reasons for the proposed withholding.” GAO GUIDE, *supra* note 18, at 27. See also 4 C.F.R. § 21.3(c). Upon receipt of this list (which must be provided at least five days prior to the due date for the agency report), a protester has two days to notify all parties of any “[o]bjections to the scope of the agency's proposed disclosure or nondisclosure of documents.” GAO GUIDE, *supra* note 18, at 28. See also 4 C.F.R. § 21.3(c). A protester may also submit a request for additional documents within two days of learning “of the existence or relevance of additional documents that it believes GAO needs to consider in deciding the protest.” GAO GUIDE, *supra* note 18, at 28; see also 4 C.F.R. § 21.3(g). In this regard, the two-day “clock” generally starts when the protester receives the agency report. See GAO GUIDE, *supra* note 18, at 29.

⁷⁸ 4 C.F.R. § 21.3(g).

⁷⁹ GAO GUIDE, *supra* note 18, at 28.

⁸⁰ *Id.*

Following submission of the agency report, a protester has ten days to respond with written comments.⁸¹ In the absence of contrary notice from the protester, the GAO will assume that the protester received the agency report on the date that it was due.⁸² Therefore, even if it is undisputed that a procuring activity failed to provide the agency report to a protester in a timely manner, the protester still maintains the burden of demonstrating that the GAO was provided with (and received) written notification of this circumstance before the due date for the protester's comments.⁸³ In addition, comments will be considered insufficient if they consist "solely of general statements requesting that GAO review the protest on the existing record."⁸⁴ The GAO can shorten or lengthen the deadline for submission of the protester's comments on a case-by-case basis.⁸⁵ If a protester fails to comply with the ten day response requirement, the GAO can (and frequently does) exercise its authority to summarily dismiss the protest.⁸⁶

The GAO resolves the majority of its bid protest cases without a hearing.⁸⁷ However, when the GAO determines that a hearing is necessary, parties to the protest must be prepared for not-too-distant hearing dates, and even shorter periods in which to submit post-hearing comments. Unless the GAO stipulates otherwise, parties to a protest must submit their post-hearing comments within five days of the conclusion of the hearing.⁸⁸ If a protester fails to submit timely post-hearing comments, the GAO will summarily dismiss the protest.⁸⁹

From the commencement to the conclusion of a bid protest, the specter of summary dismissal serves as a constant shadow for protesters who (willfully or not) violate the timeliness provisions of the GAO's Bid Protest Regulations. Although the GAO's strict enforcement of its timeliness rules may sometimes appear to be a "harsh"⁹⁰ sanction for protesters, the GAO's actions are justified for a single, simple reason: Congress wants bid protests resolved within 100 days.⁹¹ Since the GAO is directly accountable "to Congress and the American people,"⁹² it can hardly be faulted for its steadfast adherence to its statutory responsibilities.

⁸¹ 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 29.

⁸² *See* GAO GUIDE, *supra* note 18, at 29.

⁸³ *See* Unicorn Servs., Inc.—Reconsideration, Comp. Gen. B-252429.3, May 28, 1993, 93-1 CPD ¶ 425 (affirming dismissal of protest for failure to timely submit comments, where the protester failed to establish that the GAO was provided with (and had received) written notification of the protester's late receipt of the agency report).

⁸⁴ GAO GUIDE, *supra* note 18, at 30.

⁸⁵ 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 29.

⁸⁶ 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 30; Keymiaee Aero-Tech, Inc.—Reconsideration, Comp. Gen. B-274803.3, Apr. 29, 1997, 97-1 CPD ¶ 163 (affirming dismissal of protest following protester's failure to submit timely comments on the agency report); Carmon Constr., Inc.—Reconsideration, Comp. Gen. B-271316.2, June 28, 1996, 96-2 CPD ¶ 3 (affirming dismissal of protest for failure to submit timely comments, where protester's failure "to respond to the [agency] report at all" resulted in a proper dismissal); MCC Devices—Request for Reconsideration, Comp. Gen. B-256007.2, June 28, 1994, 94-1 CPD ¶ 390 (affirming dismissal of protest for failure to submit timely comments, where the protester had failed to demonstrate timely notification of its late receipt of the agency report).

⁸⁷ *See, e.g.*, Letter from Gary L. Kepplinger, General Counsel, U.S. Government Accountability Office, to Dennis J. Hastert, Speaker of the U.S. House of Representatives (Nov. 15, 2006) [hereinafter GAO FY 2006 Bid Protest Report] (on file with author). During FY 2006, the GAO conducted hearings for fifty-one cases, which constituted approximately 11% of its docket. *Id.*; *see also* GAO GUIDE, *supra* note 18, at 31 ("Because hearings increase the costs and burdens of protests, GAO holds hearings only when necessary.").

⁸⁸ 4 C.F.R. § 21.3(g). *See also* GAO GUIDE, *supra* note 18, at 33.

⁸⁹ 4 C.F.R. § 21.3(g).

⁹⁰ *See* Peacock, Myers & Adams, B-279327, 1998 U.S. Comp. Gen. LEXIS 102 (Mar. 24, 1998).

While our timeliness rules may seem harsh in some cases, they reflect the dual requirements of giving all parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process [*citing* Mead Data Central, 70 Comp. Gen. 371, B-242598, 91-1 CPD ¶ 330, *3]. Application of the timeliness requirement here establishes a readily discernible rule, which results in fair and equal treatment of all protesters.

Id. at *7.

⁹¹ CICA 1984, *supra* note 4, amended by NDAA 1996, *supra* note 4, § 5501(2)(A). It should be noted that, under 31 U.S.C. § 3554(a)(2) (as implemented by 21 C.F.R. §§ 21.9(b) and 21.10), protesters may request an "express option" that allows for an expedited review of bid protests. 31 U.S.C. § 3554(a)(2); 21 C.F.R. §§ 21.9(b), 21.10. Under the "express option," the GAO has sixty-five days to issue its decision. 31 U.S.C. § 3554(a)(2); 21 C.F.R. § 21.9(b).

⁹² David M. Walker, *GAO Answers the Question: What's In a Name?*, ROLL CALL, July 19, 2004, available at <http://www.gao.gov/about/rollcall/07192004.pdf>.

III. The Timeliness Provisions of the ASBCA Rules

In contrast to bid protests filed under the CICA (which normally deal with disputes related to the award of a federal contract), appeals filed pursuant to the CDA generally involve claims related to the administration of a federal contract.⁹³ The CDA empowers boards of contract appeals to serve as the primary administrative forum for the litigation of CDA appeals.⁹⁴ The ASBCA is authorized to review and issue decisions on CDA appeals filed against contracts administered by the DOD.⁹⁵ The ASBCA is the largest board of contract appeals and is a DOD activity.⁹⁶ The Charter of the ASBCA, codified in Appendix A of the Defense Federal Acquisition Regulation Supplement (DFARS), authorizes the ASBCA to “adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions.”⁹⁷ The ASBCA Rules, also codified in Appendix A of the DFARS, implement the procedural requirements of the CDA and Title 41 of the United States Code, Sections 601 through 613.⁹⁸

A. The Contract Disputes Act of 1978⁹⁹

On 1 November 1978, President Jimmy Carter signed the Contract Disputes Act of 1978 into law.¹⁰⁰ The CDA provided legislative recognition to the boards of contract appeals (established earlier by various departments within the executive branch) by conferring jurisdiction to these boards over appeals arising from a contracting officer’s final decision.¹⁰¹ Under the CDA, such jurisdiction would attach if an appellant submitted an appeal within ninety days of the date on which the appellant received the contracting officer’s final decision.¹⁰² The Federal Acquisition Streamlining Act of 1994 imposed a six-year statute of limitations on CDA appeals against contracts that were awarded on or after 1 October 1995.¹⁰³ The ninety-day appeal window and the six-year statute of limitations are the most significant timeliness requirements imposed by the CDA and, since they are statutory mandates, they cannot be waived by the boards of contract appeals.¹⁰⁴ Unlike the CICA, the CDA does not require the boards of contract appeals to issue decisions within a specific period of time.¹⁰⁵ Rather, the

⁹³ Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11.

⁹⁴ CDA 1978, *supra* note 11.

⁹⁵ *Id.*, amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, § 847. The “present” ASBCA was chartered in 1949. MCBRIDE & TOUHEY, *supra* note 17, § 6.100. For an excellent recitation of the genesis and development of the ASBCA, the author recommends Nicholas P. Reston & Craig S. Clarke, *Overjudicialization of the Contract Dispute Process—Fact or Fiction?*, 28 PUB. CONT. L.J. 613, 614 (1999).

⁹⁶ Lees, *supra* note 14, at 527.

⁹⁷ U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. app. A, pt. 1, A-2, para. 5 (1998, revised June 27, 2000). The ASBCA’s authority to prescribe its rules is “[s]ubject to the approval of the Undersecretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement.” *Id.*

⁹⁸ *Id.* at app. A, pt. 1, A-4 [hereinafter ASBCA RULES]; 41 U.S.C. §§ 601–13.

⁹⁹ CDA 1978, *supra* note 11.

¹⁰⁰ Statement of President James E. Carter on Signing the Contract Disputes Act of 1978, 2 PUB. PAPERS 1922 (Nov. 1, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30092>. When President Carter signed the CDA into law, he issued a signing statement that indicated the high expectations generated by the legislation:

[I]t provides the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for federal agencies and their contractors.

Id.

¹⁰¹ CDA 1978, *supra* note 11, at sec. 8(d). See also MCBRIDE & TOUHEY, *supra* note 17, § 6.100(2)(a).

¹⁰² CDA 1978, *supra* note 11, at sec. 7.

¹⁰³ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; 41 U.S.C. § 605. The six-year statute of limitations does not apply to claims filed by the government alleging fraud by the contractor. *Id.*; see also Dual, Inc., ASBCA Nos. 53827, 53889, 2006-1 BCA ¶ 33,243 (finding that CDA’s six year statute of limitations inapplicable to a contract awarded in 1994).

¹⁰⁴ MCBRIDE & TOUHEY, *supra* note 17, § 6.100(4) (citing Sur. Roofing Contractors, ASBCA No. 37894, 89-2 BCA ¶ 21,730; Aqua-Aire Prods., Inc., ASBCA No. 28588, 84-1 BCA ¶ 16,955; Bechtel Nat’l, Inc., ASBCA No. 31945, 86-2 BCA ¶ 18,977; Universal Elevator Co., VABCA No. 2008, 84-3 BCA ¶ 17,588; Denver Pump Co., IBCA No. 1725-9-83, 84-1 BCA ¶ 16,922).

¹⁰⁵ Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11. Appellants with CDA claims of \$100,000 or less may elect to have their appeals decided upon within either 120 days (for claims of \$50,000 or less) or 180 days (for claims over \$50,000 but not in excess of \$100,000). CDA 1978, *supra* note 11, § 8(f), amended by Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, § 2351(c)-(d). A recent statutory revision to the CDA permits small businesses to elect either the 120-day or 180-day processing option if their CDA claim is \$150,000 or less. See John Warner

CDA requires the boards to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.”¹⁰⁶

B. Key ASBCA Definitions Regarding Timeliness

The difference in the regulatory tenor between the GAO and the ASBCA on the need to expeditiously resolve disputes is most evident in ASBCA Rule 33, Time, Computation, and Extensions.¹⁰⁷ Under ASBCA Rule 33(a), requests for “extensions of time *will* be granted”¹⁰⁸ when such requests are “appropriate and justified.”¹⁰⁹ In addition, unlike the GAO’s Bid Protest Regulations, the ASBCA Rules do not provide express definitions of key timeliness-related terms such as “days” or “filed.” However, ASBCA Rule 33(b) does provide a formula for “computing any period of time” that essentially mirrors the formula utilized by the GAO.¹¹⁰

C. Timeliness of Appeals filed with the ASBCA

The ASBCA’s Rule 1(a) implements the CDA’s requirement that a notice of appeal be filed within ninety days of the date that the appellant’s receipt of the contracting officer’s final decision.¹¹¹ Under ASBCA Rule 1(b), in cases where the amount in dispute is \$100,000 or less and the appellant requests a contracting officer’s final decision within sixty days, the appellant may file his appeal with the ASBCA if and when a final decision is not issued within the time requested.¹¹² Under ASBCA Rule 1(c), in cases where the amount in dispute exceeds \$100,000, or if the dispute “presently involves no monetary amount pursuant to the Disputes clause” of the contract, the appellant may file his appeal with the ASBCA if the contracting officer does not provide his final decision “within a reasonable time, taking into account such factors as the size and complexity of the claim.”¹¹³

Under ASBCA Rule 1, the key event that initiates the period in which an appellant may seek redress with the ASBCA is the issuance (or non-issuance) of a contracting officer’s final decision.¹¹⁴ In analyzing whether an appellant has submitted a timely appeal under the CDA, it is important to note that the rendering of a final decision by a contracting officer can open the appeal window even if an appellant did not expressly request such a decision.¹¹⁵ Since a motion to dismiss for lack of timeliness under the CDA calls into question the ASBCA’s jurisdictional authority, a party can file such a motion at any time under ASBCA Rule 5(a) so long as the motion is “promptly filed.”¹¹⁶ The government must affirmatively establish (using “objective indicia”¹¹⁷) the date on which the contracting officer’s final decision was served on either appellant or a person

National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2349. In contrast with 31 U.S.C. § 3554(a)(1) (under which the Comptroller General “shall issue a final decision . . . within 100 days”), the time limits imposed by 41 U.S.C. §§ 607 and 608 are not automatically imposed and need only be adhered to “whenever possible.” Compare 31 U.S.C. § 3554(a)(1), with 41 U.S.C. §§ 607(f) and 608(c).

¹⁰⁶ CDA 1978, *supra* note 11, at sec. 8(e).

¹⁰⁷ See ASBCA RULES, *supra* note 98, at A-18.

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ Compare ASBCA RULES, *supra* note 98, at A-18, with 4 CFR § 21.0(e) (2005).

¹¹¹ CDA 1978, *supra* note 11; ASBCA RULES, *supra* note 98, at A-5.

¹¹² ASBCA RULES, *supra* note 98, at A-5.

¹¹³ *Id.*

¹¹⁴ See CDA 1978, *supra* note 11, at secs. 6(c)(5), 7.

¹¹⁵ Env’tl. Safety Consultants, Inc., ASBCA No. 54995, 2006-2 BCA ¶ 33,321 (finding that appellant’s repeated requests for equitable adjustments “impliedly requested a [contracting officer’s] decision and was a proper CDA claim.”).

¹¹⁶ See *Cosmic Constr. Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541, *aff’d*, *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (1982) (holding that the CDA’s ninety-day filing requirement is “part of a statute waiving sovereign immunity, which must be strictly construed, . . . and which defines the jurisdiction of the tribunal, here the board.”) In *Cosmic Construction Co.*, the appellant asserted that the ASBCA abused its discretion by refusing to waive the CDA’s ninety-day filing requirement. 697 F.2d at 1390. The U.S. Court of Appeals for the Federal Circuit disagreed, noting that, “The board cannot abuse a discretion it doesn’t have.” *Id.* at 1391; see also ASBCA RULES, *supra* note 98, at A-6 to A-7.

¹¹⁷ *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460 (denying government motion to dismiss for lack of timeliness, where the government failed to prove that it mailed the contracting officer’s final decision to an individual authorized to receive service), *citing* *Riley & Ephriam Constr. Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005).

empowered by appellant to receive service.¹¹⁸ In the alternative, the government must prove that the contracting officer's final decision was "received at the location designated by a contractor for receipt of project-related correspondence."¹¹⁹ Receipt of a contracting officer's final decision occurs upon "actual physical receipt of that decision by the contractor."¹²⁰

If the government is able to make a prima facie case that an appeal is untimely, the evidentiary burden shifts to the appellant, who must demonstrate that he transmitted the notice of appeal within the prescribed period.¹²¹ In contrast to filing a bid protest or related documents with the GAO (where timeliness is determined by when the GAO receives a filing), the ASBCA will consider an appeal to be timely if it was mailed on or before the ninetieth day of the filing window.¹²² The ASBCA has "long held that the date of filing of an appeal is the date of transfer to [the] U.S. Postal Service (i.e., the postmark date)."¹²³ Interestingly, the ASBCA recently recognized an exception to this general rule that, in essence, negates the presumption of reliability of a U.S. Postal Service post-mark.¹²⁴ Declaring a postmark to be only "prima facie evidence that transfer had occurred by that date,"¹²⁵ the ASBCA held that "a sworn statement or testimony to the effect that the transfer occurred on an earlier date is credible evidence"¹²⁶ that can establish an earlier mailing date (and therefore a timely appeal).¹²⁷

Another interesting facet of the ASBCA's views on the timely submission of appeals is its interpretation of the proper place to file a notice of appeal.¹²⁸ Both the CDA and 41 U.S.C. § 606 expressly address this issue: "Within ninety days from the date of receipt of a contract officer's decision . . . the contractor may appeal such decision to an *agency board of contract appeals*"¹²⁹ Neither the CDA nor 41 U.S.C. § 606 expressly authorize any other activity to receive appeals on behalf of a board of contract appeals.¹³⁰ However, if an appellant mails an otherwise properly constituted appeal to the responsible contracting officer (instead of the ASBCA), the ASBCA will consider the filing to be "tantamount to filing an appeal with this board."¹³¹ This holding is in line with the ASBCA's "practice of liberally construing appeal notices."¹³² In contrast, an appellant who mails his notice of appeal to the wrong board of contract appeals runs the risk of rendering his appeal

¹¹⁸ *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460. See also *MCBRIDE & TOUHEY*, *supra* note 18, § 6.100(4) (citing *Structural Fishing, Inc. v. United States*, 14 Cl. Ct. 447, 450 (1988); *Nexus Constr. Inc.*, ASBCA No. 31070, 85-3 BCA ¶ 18,476; *Brooks E. Cook*, GSBCA No. 1350, 86-1 BCA ¶ 18,724).

¹¹⁹ *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460 (citing *Brinderson Corp.*, ASBCA No. 31831, 86-1 BCA ¶ 18,616, *aff'd on recons.*, 86-2 BCA ¶ 18,905).

¹²⁰ *Id.*

¹²¹ See *MCBRIDE & TOUHEY*, *supra* note 17, § 6.100(4) (citing *Dawson Constr. Co., Inc.*, ASBCA No. 29447, 85-1 BCA ¶ 17,862; *Universal Elevator Co., VABCA* 2008, 84-3 BCA ¶ 17,588; *Micrographic Tech., Inc.*, ASBCA No. 25577, 81-2 BCA ¶ 15,357; *Lockport Mills, Inc.*, ASBCA No. 9151, 64 BCA ¶ 9151).

¹²² See *MCBRIDE & TOUHEY*, *supra* note 17, § 6.100(4). The GAO will accept a bid protests transmitted via mail, fax, or e-mail. 4 C.F.R. § 21.0(g) (2005); *GAO GUIDE*, *supra* note 17, at 15. The ASBCA will accept appeals transmitted via mail or fax, but not e-mail. See *GSBCA Solicits Vendor Input on Facilitating E-filings*, Fed. Con. Daily, Feb. 27, 2002 (noting that, according to ASBCA Chairman Paul Williams, e-filings at the ASBCA are "a long way off").

¹²³ *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232; see also *Hugo Auchter GmbH*, ASBCA No. 39642, 91-2 BCA ¶ 23,777.

¹²⁴ See *Premier Consulting & Mgmt. Servs.*, ASBCA No. 54691, 2005-1 BCA ¶ 32,949 (holding that an affidavit asserting a mailing date earlier than that indicate on the postmark to be sufficient to establish the earlier mailing date).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (denying motion to dismiss where the contracting officer received a timely copy of the notice of appeal). In *Thompson*, appellant mailed the notice of appeal to both the ASBCA and the contracting officer. *Id.* Although the contracting officer received the appeal in a timely manner, the ASBCA "refused to accept the letter containing Thompson's [notice of appeal] because \$1.35 postage was due." *Id.*

¹²⁹ 41 U.S.C. § 606 (2000) (emphasis added). See also *CDA*, *supra* note 11.

¹³⁰ *But see ASBCA RULES*, *supra* note 98, at A-5. The ASBCA's Rule 1(a) provides that a copy of a notice of appeal "shall be furnished to the contracting officer from whose decision the appeal is taken." *Id.* However, an appellant's failure to furnish a copy of the notice of appeal to the contracting officer will not invalidate the appeal. *Rex Sys., Inc.*, ASBCA No. 50456, 98-2 BCA ¶ 29,956 (1998).

¹³¹ *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (quoting *McNamara-Lunz Vans & Warehouses, Inc.*, ASBCA No. 38057, 89-2 BCA ¶ 21,636 (1989)); see also *Hellenic Enters.*, ASBCA No. 47129, 94-3 BCA ¶ 27,189; *Yankee Telecomm. Labs., Inc.*, ASBCA No. 25240, 82-1 BCA ¶ 15,515; *I.T.S. Corp.*, ASBCA No. 31993, 86-1 BCA ¶ 18,678.

¹³² *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (citing *AIW-Alton, Inc.*, ASBCA No. 46917, 94-3 BCA ¶ 27,279) ("Historically this Board has interpreted contractor's communications liberally in deciding whether a notice of appeal is effective.").

untimely, as his error will not toll the ninety-day submission requirement.¹³³ Appeals that are dismissed as untimely under 41 U.S.C. § 606 are generally disposed of “without prejudice.”¹³⁴ Therefore, an untimely ASBCA appellant may still have the opportunity to obtain relief from the U.S. Court of Federal Claims (COFC), the designated judicial forum for CDA appeals.¹³⁵

Although the ASBCA Rules do not expressly address the six-year statute of limitations on CDA appeals filed against federal contracts awarded after 1 October 1995, when litigants raise the issue, the ASBCA considers the matter to be an affirmative defense that does not impact the board’s jurisdiction.¹³⁶ As a consequence, the ASBCA can review and act upon non-jurisdictional motions under ASBCA Rule 5(b), which provides no further procedural guidance or deadlines.¹³⁷ The ASBCA will treat a government motion to dismiss based on the statute of limitations as a de facto motion for summary judgment with a high substantive threshold, and will grant such a motion “only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”¹³⁸ Since the statute of limitations commences with “the accrual of the claim,”¹³⁹ the ASBCA will focus on when “all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.”¹⁴⁰

D. Timeliness Provisions Impacting Post-Filing Litigation at the ASBCA

Although the ASBCA Rules provide some time limitations on the filing of motions, pleadings and the conduct of discovery, these limits are relatively generous and subject to extension.¹⁴¹ For example, ASBCA Rule 4(a) requires the contracting officer to prepare “an appeal file consisting of all documents pertaining to the appeal”¹⁴² This submission (commonly referred to as the “Rule 4 file”¹⁴³) can be reasonably viewed as the ASBCA’s version of the agency report required by the GAO during a bid protest; in fact, both submissions have a thirty-day deadline.¹⁴⁴ However, whereas the GAO places very short and strict deadlines for supplementing the agency report, ASBCA Rule 4(b) provides appellants with thirty days to supplement the appeal file.¹⁴⁵ In the absence of a statutory requirement to resolve CDA appeals within a specified period of time, the boards of contract appeals are able to provide parties with more time to develop their cases. At the same time, however, the possibility for protracted litigation is also increased.

¹³³ See *Interaction Research Inst., Inc.*, ASBCA No. 55198, 2006-1 BCA ¶ 33,189 (dismissing appeal as untimely, where appellant failed to file his appeal to the ASBCA within the ninety-day submission period). The appellant initially filed his appeal with the General Services Board of Contract Appeals (GSBCA). *Id.* The appellant later withdrew his appeal from the GSBCA after that board questioned its jurisdiction over the appeal. *Id.* The appellant subsequently re-filed his appeal with the ASBCA, after the ninety-day submission period had elapsed. *Id.* The ASBCA determined that the erroneous filing with the GSBCA did not toll the ninety-day submission period, because the appellant had not initially appealed “to the board of contracting appeals ‘servicing the agency that issued the final decision,’ viz. the ASBCA.” *Id.*

¹³⁴ See *Dick Pacific/GHEMM JV*, ASBCA Nos. 55562, 55563, 2007-2 BCA ¶ 33,469 (dismissing untimely appeal under 41 U.S.C. § 606 without prejudice). In *Dick Pacific/GHEMM JV*, the ASBCA clarified its holding in *Grand Service, Inc.*, ASBCA No. 42448, 9103 BCA ¶ 24,164, in which an untimely appeal under 41 U.S.C. § 606 was dismissed with prejudice. *Id.* at *4. In *Dick Pacific/GHEMM JV*, the ASBCA held that an untimely appeal under 41 U.S.C. § 606 was dismissed “with prejudice to re-filing at the Board,” but was otherwise dismissed without prejudice for purposes of re-filing with the U.S. Court of Federal Claims. *Id.*

¹³⁵ See *id.* (“Nevertheless, any appeals to the Court of Federal Claims from the final decisions at issue must be made within twelve months from the date appellant received them.”); see also CDA, *supra* note 11.

¹³⁶ *Woodside Summit Group, Inc.*, ASBCA No. 54554, 2005-2 BCA ¶ 33,113 (citing *Do-Well Mach. Shop v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989)).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; 41 U.S.C. § 605 (2000).

¹⁴⁰ *Woodside Summit Group, Inc.*, ASBCA No. 54554, 2005-2 BCA ¶ 33,113; see also *Gray Personnel*, ASBCA No. 54652, 2006-2 BCA ¶ 33,378.

¹⁴¹ See, e.g., ASBCA RULES, *supra* note 98, at A-5 (Rule 4, Preparation, Content, Organization, Forwarding, and Status of Appeal File), A-7 (Rule 6, Pleadings), A-12 (Rule 15, Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents).

¹⁴² *Id.* at A-6.

¹⁴³ See, e.g., *Astor Bolden Enters., Inc.*, ASBCA No. 52377, 2000-2 BCA ¶ 31,115.

¹⁴⁴ See 4 C.F.R. § 21.3(c) (2005); ASBCA RULES, *supra* note 98, at A-5.

¹⁴⁵ Compare 4 C.F.R. § 21.3(g), with ASBCA RULES, *supra* note 98, at A-6.

Under ASBCA Rule 6(a), when an appellant files his notice of appeal, he then has thirty days to file his complaint, which should contain “simple, concise and direct statements of each of its claims,”¹⁴⁶ as well as “the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known.”¹⁴⁷ Generally, the Government’s Rule 4 file and the appellant’s complaint are filed with the ASBCA on the same day. However, if an appellant fails to submit a complaint, the ASBCA may deem either the appellant’s notice of appeal or a claim that is based upon the contracting officer’s final decision as the functional equivalent of the complaint.¹⁴⁸ Under ASBCA Rule 6(b), upon receipt of the complaint, the Government has thirty days to submit an answer to the claims contained in the complaint.¹⁴⁹ The ASBCA may dismiss an appeal if the appellant fails to file a complaint and otherwise fails to prosecute the appeal.¹⁵⁰

Following receipt of the appellant’s complaint and the Government’s answer, the discovery phase of the appeal normally commences.¹⁵¹ Under ASBCA Rule 15, a party to an appeal may serve written interrogatories and requests for production of documents.¹⁵² The opposing party must provide written responses to these discovery requests within forty-five days of receipt.¹⁵³ If an extension is needed, the requesting party will normally have to obtain the concurrence of the opposing party before the ASBCA will consider extending the deadline under ASBCA Rule 33.¹⁵⁴ Failure to adhere to the forty-five-day response requirement may prompt the ASBCA (either sua sponte or upon motion) to invoke its sanction authority under ASBCA Rule 35.¹⁵⁵ The severity of the sanction normally depends on the duration of a party’s non-responsiveness to a discovery request, although there is a certain degree of uncertainty in this equation.¹⁵⁶ For example, in *Appeal of Graham International*, the Government moved to dismiss the appeal based on the appellant’s repeated failure to respond to the ASBCA’s request for an election on whether to proceed with or without a hearing.¹⁵⁷ The ASBCA acknowledged that, “[o]ver the next year, the Board made numerous attempts to obtain an election from appellant”¹⁵⁸ and “that much, if not all, of the mail sent to appellant from June 1997 through June 1998 could not be delivered to the addresses provided by appellant.”¹⁵⁹ In February of 1998, the Government submitted its motion to dismiss for failure to prosecute; in December of 2000, the ASBCA denied the motion.¹⁶⁰ The ASBCA determined that “[d]espite appellant’s long periods of inattention,”¹⁶¹ the appellant made a constructive election in correspondence submitted to the ASBCA approximately seven months after the Government filed its motion to dismiss.¹⁶² The ASBCA’s decision in *Graham International* stands in contrast to its decision two years later in *Generator Technologies, Inc.*¹⁶³ Faced with an appellant that disregarded a show-cause order, two motions,

¹⁴⁶ ASBCA RULES, *supra* note 98, at A-7.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Sun Tech. Servs., Inc., ASBCA No. 48788, 96-1 BCA ¶ 28,075.

¹⁵¹ See generally ASBCA RULES, *supra* note 98, at A-11, A-12. The discovery schedule for an appeal is normally determined during a conference call between the ASBCA administrative law judge and the parties; this exchange typically occurs after the submission of the appellant’s complaint and the Government’s answer and is conducted pursuant to ASBCA Rule 10. See generally *id.* at A-8. During this conference call, various administrative issues are addressed, including whether the parties desire to proceed with or without a hearing (under ASBCA Rules 11, and 17 through 25, respectively), and whether pre-hearing briefs will be required. See generally *id.*

¹⁵² *Id.* at A-12. In addition to written interrogatories and requests for production of documents, the taking of depositions is permitted under ASBCA Rule 14. *Id.* at A-11, A-12. The only timeliness requirement under Rule 14 with respect to depositions is that they be taken only after the appellant’s complaint and the government’s answer have been submitted. *Id.*

¹⁵³ *Id.*

¹⁵⁴ This is an unwritten requirement that the author regularly encountered while litigating appeals before the ASBCA.

¹⁵⁵ ASBCA RULES, *supra* note 98, at A-12, A-18.

¹⁵⁶ Compare, e.g., *Graham Int’l*, ASBCA No. 50360, 2001-1 BCA ¶ 31,222 (denying the government’s motion to dismiss for failure to prosecute, after the appellant evidenced an intent to prosecute its appeal in correspondence submitted seven months after the government filed its motion), with *Generator Techs., Inc.*, ASBCA No. 53206, 2003-1 BCA ¶ 32,058 (granting the government’s motion to dismiss for failure to prosecute, after the appellant repeatedly failed to respond to discovery requests submitted by the government and a show-cause order issued by the ASBCA).

¹⁵⁷ *Graham Int’l*, ASBCA No. 50360, 2001-1 BCA ¶ 31,222.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Generator Techs., Inc.*, ASBCA No. 53206, 2003-1 BCA ¶ 32,058.

and two discovery requests (which had been awaiting a response for almost eleven months), the Government moved to dismiss the appeal for failure to prosecute in April of 2002.¹⁶⁴ Six months later, the ASBCA granted the Government's motion and invoked its sanctions authority under ASBCA Rule 35 to dismiss the appeal with prejudice under ASBCA Rule 31.¹⁶⁵ Although the outcomes in *Graham International* and *Generator Technologies, Inc.* differed, both cases lend credence to the perception that the ASBCA will, in all likelihood, exercise a much greater degree of procedural patience with an appellant than the GAO would accord a bid protester.

The ASBCA's Rules regarding the conduct of hearings, the filing of post-hearing briefs, and the issuance of decisions contain virtually no firm deadlines.¹⁶⁶ However, ASBCA Rule 29 does impose a thirty-day filing deadline for parties who, following receipt of the ASBCA's decision, desire reconsideration of their appeal.¹⁶⁷ Although appellants have sought to invoke the extension authority available to the ASBCA under ASBCA Rule 33, the Board has noted that this rule is limited to procedural actions, and that "motions for reconsideration are not merely procedural."¹⁶⁸ The ASBCA "generally strictly"¹⁶⁹ enforces Rule 29 and denies motions even where prejudice to the opposing party is not established.¹⁷⁰ However, even when in receipt of a facially untimely motion for reconsideration, the Board reviewed the circumstances underlying "the apparent tardiness of the motion."¹⁷¹

When dismissing an appeal, the ASBCA will generally articulate whether the dismissal is undertaken pursuant to either ASBCA Rules 30 or 31.¹⁷² The difference is crucial from a timeliness perspective, because an appeal that is dismissed under ASBCA Rule 30 has already been placed in a "suspense status"¹⁷³ by the Board due to its inability "to proceed with disposition thereof for reasons not within the control of the Board."¹⁷⁴ A dismissal under ASBCA Rule 30 permits an appellant to re-file his appeal without prejudice for a three-year period, thereby sustaining the life of the appeal and the need for continued commitment of government personnel and resources to monitor the status of the appeal.¹⁷⁵ An ASBCA Rule 30 dismissal automatically converts to a prejudicial dismissal after the three year re-filing period has expired, and the Board is not required to take additional affirmative action.¹⁷⁶ Conversely, if the ASBCA dismisses an appeal under ASBCA Rule 31, the dismissal is with prejudice.¹⁷⁷ The ASBCA will generally invoke ASBCA Rule 31 when it dismisses appeals that are either untimely or that manifest a failure to prosecute.¹⁷⁸ In addition to barring the subsequent re-filing of an appeal with the ASBCA, a dismissal under ASBCA Rule 31 "acts as an adjudication on the merits."¹⁷⁹ As a consequence, the ASBCA

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See generally ASBCA RULES, *supra* note 98, at A-12 through A-17. Although the ASBCA Rules provide a wide degree of latitude in the scheduling of hearings, the filing of post-hearing briefs, and the issuance of decisions, there are two notable exceptions: ASBCA Rule 18 (requiring fifteen days advance notice of a hearing date) and ASBCA Rule 21(c) (establishing deadlines for requesting subpoenas). *Id.* at A-13, A-14.

¹⁶⁷ *Id.* at A-17.

¹⁶⁸ Performance Constr., Inc., ASBCA No. 53575, 2006-2 BCA ¶ 33,372 (dismissing motion for reconsideration after finding "no grounds for excusing appellant's failure to comply with Rule 29") (citing AEC Corp., ASBCA No. 42920, 2003-1 BCA ¶ 32,139).

¹⁶⁹ *Id.*

¹⁷⁰ Buckner & Moore, Inc., ASBCA No. 44113, 93-3 BCA ¶ 26,085.

¹⁷¹ Performance Constr., Inc., ASBCA No. 53575, 2006-2 BCA ¶ 33,372.

¹⁷² See, e.g., Phoenix Petroleum Co., ASBCA No. 45414, 2002-1 BCA ¶ 31,835 (affirming earlier dismissal of appeal under ASBCA Rule 30); Env'tl Safety Consultants, Inc., ASBCA No. 54995, 2006-1 BCA ¶ 33,230 (dismissing appeal as untimely under ASBCA Rule 31). See also ASBCA RULES, *supra* note 98, at A-17, A-18.

¹⁷³ See generally ASBCA RULES, *supra* note 98, at A-17.

¹⁷⁴ *Id.*

¹⁷⁵ See generally *id.*

¹⁷⁶ See, Phoenix Petroleum Co., ASBCA No. 45414, 2002-1 BCA ¶ 31,835; see also ASBCA RULES, *supra* note 98, at A-17.

¹⁷⁷ See ASBCA RULES, *supra* note 98, at A-18.

¹⁷⁸ See, e.g., Env'tl Safety Consultants, Inc., ASBCA No. 54995, 2006-1 BCA ¶ 33,230; Airborne Indus., Inc., ASBCA Nos. 45491, 45492, 45524, 45525, 45979, 46185, 46441, 46442, 46443, 46444, 95-1 BCA ¶ 27,496 (dismissing appeal under ASBCA Rule 31 for failure to prosecute).

¹⁷⁹ Gov't Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774, at *6 (dismissing protest under ASBCA Rule 31 due to appellant's repeated failure to comply with discovery requests and orders from the ASBCA).

generally will issue a “show cause”¹⁸⁰ order under ASBCA Rule 31, to provide an appellant with “the opportunity to explain the circumstances surrounding its failure to move the appeal forward before it is dismissed.”¹⁸¹

IV. The GAO and ASBCA Case Loads and Processing Times

It can reasonably be argued that comparing a bid protest under the CICA and a contract dispute under the CDA is an unfair comparison of apples and oranges, because the degree of administrative and substantive complexity underlying a bid protest may not equal that of a CDA appeal. Under this logic, it would be unreasonable to compare the case loads of the GAO and the ASBCA. However, the statutes that established these systems shared a common goal: the development of alternative, non-judicial forums that would *expeditiously* resolve contract disputes while simultaneously preserving the due process rights of the parties concerned.¹⁸² One unscientific method of determining whether or not this goal has been achieved is through comparing the number of cases, and the types of dispositions, that the GAO and the ASBCA have processed for fiscal years (FYs) 2001 through 2006.

Table 1: The GAO’s Bid Protest Case Load in FYs 2001 through 2006¹⁸³

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001
Cases Filed During the Fiscal Year	1327	1356	1485	1352	1204	1146
Cases Closed During the Fiscal Year	1274	1341	1405	1244	1133	1098
Decisions on the Merits (Sustain + Deny)	249	307	365	290	256	311
Number of Cases Dismissed	1025	1035	1040	954	877	787
Number of Cases Denied	177	236	290	240	215	245
Number of Cases Sustained	72	71	75	50	41	66
Percentage of Cases Sustained	29%	23%	21%	17%	16%	21%

¹⁸⁰ ASBCA RULES, *supra* note 98, at A-18. See also Gov’t Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774; Generator Techs., Inc., ASBCA No. 53206, 2003-1 BCA ¶ 32,058.

¹⁸¹ Gov’t Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774 (citing Scorpio Piping Co., ASBCA No. 34073, 89-2 BCA ¶ 21,813).

¹⁸² See generally CICA Conference Report, *supra* note 27; Thomas C. Wheeler, *Let’s Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655, 656 (1999) (citing S. REP. NO. 95-1118, at 12–13 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5239).

¹⁸³ GAO FY 2006 Bid Protest Report, *supra* note 87; Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gov’t Accountability Office, to Dennis J. Hastert, Speaker of the U.S. House of Representatives (Jan. 12, 2006) [hereinafter GAO FY 2005 Bid Protest Report] (on file with author). The GAO FY 2006 Bid Protest Report includes pertinent caseload data from FYs 2002 through 2006. The GAO FY 2005 Bid Protest Report includes pertinent caseload data from FYs 2001 through 2005.

Table 2: The ASBCA's Case Load in FYs 2001 through 2006¹⁸⁴

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001
Cases Filed During the FY	438	476	461	429	435	539
Cases Closed During the FY	530	484	481	539	559	721
Decisions on the Merits (Sustain + Deny)	137	150	159	182	205	271
Number of Cases Dismissed	393	334	322	357	354	450
Number of Cases Denied	51	63	49	65	75	114
Number of Cases Sustained	86	87	110	117	130	157
Percentage of Cases Sustained	18%	18%	23%	22%	23%	22%

A. The GAO's Case Load

Although the number of new bid protest filings at the GAO fluctuated during FY 2001 through 2006, the GAO's average case load for this period was almost three times the size of the ASBCA's case load.¹⁸⁵ During the aforementioned period, the average number of new bid protests filed with the GAOs exceeded 1300 (or approximately five new bid protests per working day in a single year).¹⁸⁶ In light of this statistic, it would appear to be virtually impossible (at least from the administrative standpoint) to process such a large caseload in an orderly and equitable manner within 100 days. However, the data reveals two compelling statistics that strongly support the conclusion that the GAO is able to successfully overcome this seemingly insurmountable burden.

The first compelling statistic is the average percentage of difference between the number of new cases filed with the GAO and the number of cases disposed of by the GAO: this figure was less than 5%.¹⁸⁷ Viewed from a different perspective, over 95% of the bid protests that the GAO receives in a single FY are either dismissed, denied, or sustained in the same FY.¹⁸⁸ The second compelling statistic is the number of bid protests that are sustained by the GAO: for the period encompassing FYs 2001 through 2006, the GAO sustained on average less than 22% of the bid protests it reviewed on the merits.¹⁸⁹ During the same period, the ASBCA also sustained on average less than 22% of the appeals it considered.¹⁹⁰ These statistics clearly support the argument that the CICA's 100 Day Rule and the GAO's strict compliance with this rule facilitates both the expeditious processing of bid protests, and the equitable review of bid protests that are ripe for either a review on the merits, or for summary dismissal.

¹⁸⁴ Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2006 (31 Oct. 2006) [hereinafter ASBCA FY 2006 Report] (on file with author); Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2005 (8 Nov. 2005) [hereinafter ASBCA FY 2005 Report] (on file with author). The ASBCA FY 2006 Report includes pertinent caseload data from FYs 2002 through 2006. The ASBCA FY 2005 Report includes pertinent caseload data from FYs 2001 through 2005.

¹⁸⁵ See GAO FY 2006 Bid Protest Report, *supra* note 87; ASBCA FY 2006 Report, *supra* note 184; GAO FY 2005 Bid Protest Report, *supra* note 183; ASBCA FY 2005 Report, *supra* note 184.

¹⁸⁶ See GAO FY 2006 Bid Protest Report, *supra* note 87; GAO FY 2005 Bid Protest Report, *supra* note 183.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

B. The ASBCA's Case Load

In FY 1990, the ASBCA docketed 2218 new CDA appeals; by FY 2006, the number of newly docketed CDA appeals before the ASBCA had shrunk by over 80%, to 438.¹⁹¹ For the period encompassing FYs 2001 through 2006, the ASBCA closed more appeals than it docketed.¹⁹² Despite these promising statistics, however, the ASBCA continues to be burdened with a backlog of appeals that has outnumbered its newly docketed appeals for each year of the period examined.¹⁹³ The ASBCA's backlog of appeals could possibly be reduced or even eliminated if more stringent procedural and timeliness rules were in place and enforced to expeditiously dispose of those appeals that merit summary dismissal. Of the cases that the ASBCA closed in FY 2005, 69% were appeals that were dismissed.¹⁹⁴ Although the data does not provide the reasons for these dismissals, this statistic nevertheless supports the argument that a majority of the ASBCA's appeals might have the potential to be disposed of in a speedy manner. It is also possible that a significant number of these cases could be eligible for review using the "expedited"¹⁹⁵ and "accelerated"¹⁹⁶ procedures of ASBCA Rule 12; in FY 2006, thirty-three appeals were disposed of under this rule.¹⁹⁷

The ASBCA's backlog of appeals could also be lessened if a greater emphasis was placed on expeditiously reviewing appeals.¹⁹⁸ The ASBCA's annual report on its case load for FY 1995 was the last such report that included statistics on the average time required to resolve an appeal, i.e., the number of days that elapsed "from date of docketing to date of decision."¹⁹⁹ In FY 1995, it took an average of 528 days to resolve an appeal (the median was 389 days).²⁰⁰ Although this data is more than ten years old, the ASBCA's backlog of appeals in 2006 suggests that its current processing times may not be that far removed from what they were in 1995.²⁰¹

V. Applying a One-Year Rule to the ASBCA

After comparing the timeliness provisions of the GAO's Bid Protest Regulations and the ASBCA's Rules, and after analyzing the caseloads and processing times of both of these forums, it is clear that timeliness requirements contained in the CICA have enabled the GAO to process disputes in an efficient and equitable manner.²⁰² Unfortunately, the same cannot be said of the CDA and the ASBCA, which is ironic given the fact that the original intent underlying the boards of contract appeals was "to provide a swift, inexpensive method of resolving contract disputes."²⁰³ The need to reform the timeliness rules under which the ASBCA and other boards of contract appeals work has been courageously illuminated by one private

¹⁹¹ Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1990 (31 Oct. 1990) (on file with author); ASBCA FY 2006 Report, *supra* note 185; ASBCA 2005 Report, *supra* note 184. *See also* Lees, *supra* note 14, at 526-27 ("There can be no question that CDA litigation before agency boards of contract appeals has declined consistently and significantly in the past fifteen years.").

¹⁹² ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

¹⁹³ *See id.* In FY 2006, the ASBCA docketed 438 new appeals, disposed of 530 appeals, and carried a backlog of 552 appeals (a net reduction of ninety-two appeals from the previous FY).

¹⁹⁴ ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

¹⁹⁵ ASBCA RULES, *supra* note 98, at A-9.

¹⁹⁶ *Id.*

¹⁹⁷ ASBCA FY 2005 Report, *supra* note 184.

¹⁹⁸ The ASBCA currently has twenty-eight administrative law judges. Armed Services Board of Contract Appeals, <http://docs.law.gwu.edu/asbca/biog.htm> (last visited Mar. 15, 2007). John Howell, a private practitioner, has commented that the productivity of "[board of contract appeals] administrative judges vary greatly." John A. Howell, *The Role of the Office of Federal Procurement Policy in the Management of Boards of Contract Appeals: From Great Expectations to Paradise Lost?*, 28 PUB. CONT. L.J. 559, 566 (1999). The author includes this comment for informational purposes only, and advances no opinion on the validity (or lack thereof) of the aforementioned comment.

¹⁹⁹ Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1995 (1 Oct. 1995) (on file with author).

²⁰⁰ *Id.*

²⁰¹ The ASBCA's annual reports after FY 1995 do not contain statistics on its appeal processing times. *See* e-mail from the ASBCA to Major Eugene Kim (Jan. 24, 2007, 17:37 EST) (on file with author).

²⁰² *See generally* White & Kilgour, *supra* note 8.

²⁰³ Wheeler, *supra* note 182, at 657 (citing S. REP. NO. 95-1118, at 12-13 (1978)).

practitioner: “This statement may shock some, but it is an open secret in the government contracts bar, and indeed in the Government, that some appeals take too long to reach decision.”²⁰⁴

Developing a solution that would preserve a contractor’s ability to have his grievance properly addressed, while at the same time facilitate the speedy resolution of CDA appeals is an extremely difficult task.²⁰⁵ This challenge was expressly recognized while the CDA was being legislated: “The dictates of justice in these disputes have emphasized thoroughness and due process at the expense of both speed and cost, and the procedures of the boards have thus become increasingly formalized through demands by contractors and their counsel that further safeguards be afforded them.”²⁰⁶ As a practical matter, Appellants and their counsel would vigorously defend the current CDA appeals system, since it provides litigants with extensive due process rights at the expense of administrative efficiency.²⁰⁷ Therefore, any meaningful reform of the CDA appeals system should “streamline or expedite the administrative board process while still offering the litigants procedural fairness.”²⁰⁸ In response to these concerns, at least one prominent commentator raises the possibility of imposing time limitations on the processing of CDA appeals.²⁰⁹ Thanks to the CICA and the GAO, we have an example of an instance where Congress provided clear and firm deadlines for when it wanted something accomplished, and where the affected agency utilized this mandate to develop and enforce implementing rules that allowed it to comply with its statutory obligation.²¹⁰

A. The Mechanics of the One Year Rule

In light of the successful precedent established by the CICA and the GAO, a modified version of the 100 Day Rule should be created by congressional legislation and enforced by the ASBCA so that it may overcome the challenges it currently faces with its backlog of appeals and extended processing times.²¹¹ Under this proposed new timeliness requirement, the ASBCA would have 365 calendar days from the date an appeal is docketed to conduct its review and issue a decision on the merits. The longer review and decision period afforded under this proposed One Year Rule would be in recognition of the prevailing presumption that CDA appeals are more administratively and substantively complex than bid protests. As is the case with the 100 Day Rule, the One Year Rule would contain no statutory exception that would permit an extension of the review and decision period. In addition, the “expedited”²¹² and “accelerated”²¹³ procedures contained in ASBCA Rule 12 would be applied automatically (instead of upon election by the appellant) for cases that meet the current rule’s eligibility criteria.²¹⁴

²⁰⁴ Howell, *supra* note 198, at 564.

²⁰⁵ *See id.*

²⁰⁶ *See Wheeler, supra* note 182, at 657 (citing CDA Senate Report, *supra* note 182, at 12–13).

²⁰⁷ *See generally id.* at 656 (noting that the boards of contract appeals “gradually have yielded to due process pressures over the years and have become heavily ‘judicialized’ in efforts to afford their litigants fair procedures”).

²⁰⁸ *Id.* at 657.

²⁰⁹ *See Schooner, supra* note 10, at 651. In brainstorming perceived problems with the CDA and possible solutions, Professor Schooner brings to light a key concern of stakeholders in the CDA appeal process:

Are there obvious solutions responsive to the period complaints – by contractors, the bar, government agencies, and private industry – regarding the length of time certain appeals languish at [boards of contract appeals]? Is it appropriate to set – whether by statute or administrative rule – maximum time periods for decision after filing or, at the very least, the time at which hearings and briefings have concluded and the decision is “ready to write?”

Id.

²¹⁰ *See generally* CICA 1984, *supra* note 4, amended by NDAA 1996, *supra* note 4, § 5501(2)(A); 4 C.F.R. pt. 21 (2007); GAO Guide, *supra* note 18, at 5.

²¹¹ Pursuant to the National Defense Authorization Act for Fiscal Year 2006, the boards of contract appeals for eight federal agencies were merged into a new Civilian Board of Contract Appeals (CBCA). National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3391. The merger did not include the ASBCA, the Postal Service Board of Contract Appeals, or the Tennessee Valley Authority Board of Contract Appeals. *Id.* at 3392. The CBCA was formally established on 6 January 2007 and issued its first decision on 18 January 2007. *See New Civilian BCA Decides First CDA Case; Holdings of Predecessors Will Be Binding*, FED. CONT. DAILY, Feb. 14, 2007. Due to the CBCA’s nascent status, this article has focused on the ASBCA and its procedural rules to highlight the need for a One Year Rule for the processing of CDA appeals at all of the boards of contract appeals.

²¹² ASBCA RULES, *supra* note 98, at A-9.

²¹³ *Id.*

²¹⁴ *See generally id.*

As proposed, the One Year Rule would be enacted through legislation so that the rule would enjoy the executive deference it would require in order to ensure compliance. In the alternative, the One Year Rule could be imposed on the ASBCA through one of three executive actions: a joint directive issued by the Secretary of Defense and the heads of the other federal agencies serviced by the ASBCA; a directive issued by the Administrator of the Office of Federal Procurement Policy, which has oversight responsibility over the boards of contract appeals; or by Executive Order.²¹⁵

In order to adhere to the One Year Rule, the ASBCA would have to extensively modify its rules so that both litigants and the ASBCA's administrative law judges would have sufficient time to accomplish their respective responsibilities. For example, the current version of ASBCA Rule 6(a) essentially provides appellants up to 120 days to submit their complaint: ninety days are provided under Rule 1 to submit a notice of appeal (a requirement that can be satisfied by a simple written declaration of an intent to appeal), and an additional thirty days are provided under Rule 6(a) to submit the complaint.²¹⁶ In order to streamline the procedure for initiating an appeal, ASBCA Rules 1 and 6(a) should be revised by eliminating the notice of appeal requirement, and substituting it with a requirement that the complaint be filed within ninety days of receipt of the contracting officer's final decision.²¹⁷ Once the complaint is received by the ASBCA, the One Year Rule clock would start.

Under the current versions of ASBCA Rules 4(a) and 6(a), the appellant's submission of the complaint generally coincides with the government's submission of the Rule 4 file.²¹⁸ Afterwards, the government and appellant can request that documents be added to or removed from the Rule 4 file throughout the discovery phase and up to (and even during) a hearing pursuant to ASBCA Rules 4(e) and 20(a).²¹⁹ Under the One Year Rule, upon receipt of the complaint from the ASBCA, the government would have ninety days to prepare the Rule 4 file and its answer to the appellant's complaint (under the current ASBCA Rule 6(b), the answer is due within thirty days of receipt of the complaint).²²⁰ Although contracting officers and government attorneys might argue that ninety days is insufficient time to prepare a Rule 4 file, it is important to note that, by the time litigation at the ASBCA commences, the government should have already conducted internal document discovery in order to prepare the contracting officer's final decision.²²¹ The ninety days afforded to the government to prepare the Rule 4 file and its answer would strike a fair and appropriate balance with the ninety days afforded to the appellant to prepare his complaint, and should obviate the need for extensions on either side.

Implementation of the One Year Rule would also require the ASBCA to amend its rules on discovery. For example, ASBCA Rules 14 and 15 would have to be amended to include express deadlines for conducting discovery (e.g., depositions, interrogatories, and document discovery).²²² These amendments would dramatically reduce the length and breadth of discovery, which is normally the root cause for the protracted nature of many appeals.²²³ Similar types of deadlines would need to be included with ASBCA Rules 17 through 25 in order to expedite the conduct of hearings and the submission of post-hearing briefs, which at times have also been sources for longer processing times.²²⁴ All of these new deadlines would support the objective of a revised ASBCA Rule 28 which, as amended, would reflect the intent of the ASBCA to issue a decision on an appeal within 365 calendar days from the date of docketing.²²⁵

²¹⁵ See 41 U.S.C. § 607(h) (2000) ("The [Office of Federal Procurement Policy] Administrator is authorized . . . to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for the board established by the Tennessee Valley Authority)."); Howell, *supra* note 198, at 559.

²¹⁶ See generally ASBCA RULES, *supra* note 98, at A-5, A-7.

²¹⁷ See generally Wheeler, *supra* note 182, at 658 (noting that the notice of appeal "serves no purpose in a board proceeding" and recommending its abolishment).

²¹⁸ See generally ASBCA RULES, *supra* note 98, at A-6, A-7.

²¹⁹ See generally *id.* at A-6, A-13.

²²⁰ See generally *id.* at A-7.

²²¹ Interview with Lieutenant Colonel Ralph Tremaglio, Professor and Chair, Contract and Fiscal Law Department, TJAGLCS, U.S. Army, in Charlottesville, Va. (Feb. 27, 2007) [hereinafter Tremaglio Interview].

²²² See generally ASBCA RULES, *supra* note 98, at A-11 to A-12.

²²³ Howell, *supra* note 198, at 564 n.20 ("In BCA practice, discovery and case presentation ordinarily absorb a substantial majority of the time from filing of an appeal to the disposition of the appeal.")

²²⁴ See, e.g., Grumman Aerospace Corp., ASBCA Nos. 46834, 48006, 51526, 2003-1 BCA ¶ 32,203. In the *Grumman* case, the ASBCA conducted a hearing "covering 77 trial days over a one year period." *Id.*

²²⁵ See generally ASBCA RULES, *supra* note 98, at A-17.

B. The Impact of the One Year Rule on Appellants and the Government

An argument can be made that the One Year Rule would dramatically reduce the amount of time available for both appellants and the government to develop their cases and defenses. This would be especially detrimental for appeals that are large, complex, and/or present issues of first impression.²²⁶ This argument implicates the balancing test that every administrative adjudicatory system must apply: the desire for efficiency versus the need to provide aggrieved parties with a fair and equitable forum.²²⁷

Appellants who oppose the One Year Rule would most likely argue that the rule would deprive them of their due process rights because the generous discovery entitlements contained in the current ASBCA rules would have to be curtailed in order for the ASBCA to comply with the One Year Rule.²²⁸ It is true that the One Year Rule would significantly reduce the length and breadth of discovery for CDA appeals. However, a reasonable counter-argument can be made that, in the case of small and/or uncomplicated appeals (i.e., the type of appeals the CDA envisioned the ASBCA would hear), appellants do not need to conduct extensive discovery to substantiate their appeal.²²⁹ It can also be reasonably counter-argued that, in the case of appellants with large, complex, and/or novel claims, the CDA provides a solution when more time is needed for discovery: appellants can file their cases with the COFC.²³⁰ Congress originally intended for the boards of appeals “to hear most of the routine contract appeals”²³¹ while the COFC (which has a one-year filing deadline for CDA appeals) would “hear the more complex, large-dollar cases and cases involving landmark issues of law.”²³² This is consistent with Congress’ original desire for the boards of contract appeals to provide “expeditious, less formal, less expensive resolution of government contract claims.”²³³ Since the firm time constraints contained in the One Year Rule would dissuade appellants with large, complex, and/or novel claims from filing their appeals with the ASBCA, the rule would promote the forum selection methodology that the CDA intended to establish.²³⁴ This, in turn, would result in the filing of fewer, smaller, and less complex appeals at the ASBCA, which would then be able to more efficiently employ its resources to address both its current and backlog caseload.

Government attorneys and contracting officers who oppose the One Year Rule would most likely argue that the rule would deny them the necessary time to properly re-construct, review, and assess a disputed contract’s pre-and post-award history.²³⁵ This is a valid concern, since CDA appeals can, on occasion, involve contracts that were performed many years prior to the start of litigation.²³⁶ Under these circumstances, government attorneys and contracting officers face the daunting and time-consuming tasks of locating and retrieving archived contract files and identifying, finding, and interviewing government witnesses who have often either retired or been reassigned.²³⁷ The One Year Rule actually alleviates these burdens in two ways: first, it increases the amount of time the government has to prepare the Rule 4 file and its answer; and second, it encourages government attorneys and contracting officers to develop and apply litigation risk management and mitigation techniques for contracts they suspect will eventually be the subject of a future CDA appeal.

In addition, the One Year Rule would provide a significant financial benefit to both appellants and the government. Contract disputes that are litigated in the streamlined manner contemplated by the One Year Rule would reduce the amount of appellant’s attorney fees and lower the administrative overhead that appellants would incur as a result of devoting its personnel and resources to the prosecution of an appeal. The One Year Rule would also enable the government to realize significant cost savings because its personnel would be engaged in litigation of more limited duration which, in turn, would allow these resources to be more quickly committed elsewhere.

²²⁶ See generally Tremaglio Interview, *supra* note 221.

²²⁷ See generally Howell, *supra* note 198, at 559.

²²⁸ See generally Tremaglio Interview, *supra* note 221.

²²⁹ See generally Wheeler, *supra* note 182, at 655.

²³⁰ See CDA 1978, *supra* note 11, at sec. 10(a)(1).

²³¹ Wheeler, *supra* note 182, at 655.

²³² *Id.*

²³³ *Id.* (quoting S. REP. NO. 95-1118, at 12–13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5239).

²³⁴ See generally *id.*

²³⁵ See generally Tremaglio Interview, *supra* note 221.

²³⁶ See, e.g., Guarino Corp., ASBCA No. 55015, 55028, 2006-2 BCA ¶ 33,426 (dismissing an appeal from a contracting officer’s final decision issued in 2005 for a services contract that was awarded in 1985 and substantially completed by 1986).

²³⁷ See generally Tremaglio Interview, *supra* note 221.

VI. Conclusion

Thanks to the 100 Day Rule and the GAO's unwavering compliance with this requirement, allegations of errors or deficiencies in government procurement actions can be reviewed and, if necessary, corrected in an expeditious manner.²³⁸ The 100 Day Rule and its regulatory progeny, i.e., the GAO's Bid Protest Regulations and the decisions of the Comptroller General, have enabled the GAO to provide a model administrative forum that resolves bid protests in an "easy and inexpensive"²³⁹ manner and "more quickly . . . than by court litigation."²⁴⁰ Unfortunately, the ASBCA has been unable to follow the GAO's example. Even though the ASBCA's caseload of CDA appeals has significantly decreased in the last fifteen years, the ASBCA continues to carry a backlog of cases that hinders its ability to provide prompt decisions on appeals.²⁴¹ This circumstance can be attributed, at least in part, to the CDA's lack of a CICA-like legislative requirement to resolve appeals within a definite period of time.²⁴²

Although the CDA was enacted almost thirty years ago, the act has been described as an "adolescent"²⁴³ and its evolution akin to "a parent watching a teenager become an adult."²⁴⁴ Building upon this analogy, the protracted and complex nature of CDA litigation can be described as one of the CDA's more visible growing pains. Despite the intent of the CDA's drafters to develop an administrative system that would review and resolve contract disputes in a timely and economical manner, "the CDA today stands as a structured adversarial disputes resolution edifice"²⁴⁵ under which "[l]itigation, ever more complex and formal, is the statute's keystone and legacy."²⁴⁶ Nevertheless, although the world of federal contracting and dispute resolution has changed significantly since the birth of the CDA, one core principal remains unchanged: "the foundation of our entire federal procurement system demands that contract disputes be resolved swiftly and efficiently."²⁴⁷

As a consequence, the legislative and executive branches should consider whether the current challenges facing the ASBCA with respect to its processing times and backlog of cases merit the adoption of new, definite, and strict litigation deadlines akin to those in the CICA. If the ASBCA were required to review and decide upon CDA appeals within 365 calendar days as proposed, and if the ASBCA were to embrace a One Year Rule in the same way that the GAO has done so in the case of the 100 Day Rule, then the CDA litigation landscape would be dramatically altered for the better. Processing times for CDA appeals would be reduced, the ASBCA's backlog of cases could be eliminated, and appellants and the government would incur substantially lower litigation costs. Adoption of a One Year Rule would therefore allow the ASBCA to become what the drafters of the CDA intended: "the least expensive, most expeditious forum available to the contractor."²⁴⁸

²³⁸ See generally White & Kilgour, *supra* note 8, at 411.

²³⁹ GAO GUIDE, *supra* note 18, at 5.

²⁴⁰ *Id.*

²⁴¹ See ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

²⁴² Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11.

²⁴³ Wheeler, *supra* note 182, at 664.

²⁴⁴ *Id.*

²⁴⁵ Schooner, *supra* note 10, at 638.

²⁴⁶ *Id.*; see also Wheeler, *supra* note 182, at 655 (citing S. REP. NO. 95-1118, at 12-13 (1978), reprinted in 1978 U.S.C.A.N. 5235, 5239).

²⁴⁷ Wheeler, *supra* note 182, at 657.

²⁴⁸ *Id.* at 655 (citing S. REP. NO. 95-1118, at 12-13 (1978)).

Interpreting Recent Changes to the Standing Rules for the Use of Force

Major Daniel J. Sennott*

I. Introduction

On 29 August 2005, Hurricane Katrina swept through the Gulf Coast Region, causing unprecedented devastation and widespread flooding.¹ In response, thousands of National Guard Soldiers deployed to the area to provide assistance. In addition, the President ordered U.S. Army active-duty units to immediately deploy to the region to provide additional medical, transportation, and communication support.² This short-notice deployment came, for many Soldiers, on the heels of a one-year tour in Iraq or Afghanistan.³ The potential for Soldiers to confuse combat rules of engagement with domestic rules for the use of force was a major concern.⁴ As a result, Soldiers received a comprehensive rules for the use of force (RUF) brief that emphasized the differences between combat operations and the type of mission they were about to undertake.⁵

The Department of Defense (DOD) released the current Standing Rules for the Use of Force (SRUF), dated 13 June 2005, in early July 2005.⁶ These rules are drastically different from prior versions. Both the format and the language have changed, but probably the most important modification is the addition of new terms and definitions. While some of the modifications serve to simplify the SRUF, other modifications may not be as favorably received. The SRUF, which are designed for use in the United States, and therefore based on domestic law, now include language that is identical to the Standing Rules of Engagement (SROE),⁷ which are rooted in international law. As a result, the potential for confusion in application of these two distinct sets of rules may be significant.

This article will argue that the recent injection of international law concepts into SRUF may blur the line between SRUF and SROE, thereby resulting in unnecessary confusion to both Soldiers and the Judge Advocates that advise them. Many veterans of Operation Iraqi Freedom and Operation Enduring Freedom are intimately familiar with ROE, but have little or no experience with SRUF.⁸ Therefore, the resulting confusion could lead to two significant issues. First, combat ROE are

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¹ United States Army National Guard, *National Guard Homeland Defense White Paper: September 11, 2001, Hurricane Katrina, and Beyond*, Oct. 11, 2005, <http://www.armg.army.mil/Publications.aspx>.

² The units deployed included elements of 13th Corps Support Command, Fort Hood, Tex., and elements of the 82d Airborne Division. STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE, RL 33095 (2005).

³ Many of the Soldiers deployed to the region from 1st Cavalry Division, Fort Hood, Texas, had recently re-deployed from Iraq. Interview with Major Deidre Brou, then assigned as Judge Advocate, 1st Cavalry Division, in Charlottesville, Va. (Jan. 22, 2007); see also *Hurricane Katrina—The Aftermath Weblog for Day 14, Friday, September 9, 2005*, TIMES-PICAYUNE (New Orleans), Sept. 9, 2005, at 99 (“Army Capt. Dave Maxwell from Fort Hood, Texas, said he and several of his soldiers, many of whom returned from Iraq five months ago, volunteered for duty in New Orleans.”); Jonathan Pitts, *Giving Respect, Getting Respect in New Orleans*, BALTIMORE SUN, Sept. 11, 2005, at 7E (“Blum and his 60-soldier unit, more than half of them Iraq or Afghanistan veterans, flew into New Orleans to help.”).

⁴ Interview with Lieutenant Colonel (LTC) Joseph S. Dice, Director, Domestic Operational Law, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 23, 2007) (While assigned to CLAMO, LTC Dice deployed to the region during the days following Hurricane Katrina and served as an analyst for the Joint Center for Operational Analysis). See generally Joint Ctr. for Operational Analysis, *Hurricane Katrina Lessons Learned*, JOINT CTR. FOR OPERATIONAL ANALYSIS Q. BULL. 8 (June 2006) [hereinafter *Katrina Lessons Learned*] (discussing the Joint Task Force (JTF) rules for the use of force (RUF), which reflected the command's concern that federal troops would overstep their bounds and violate the Posse Comitatus Act).

⁵ Major Deidre Brou, Standing Rules for the Use of Force Brief (Sept. 5, 2005) (unpublished PowerPoint Presentation, on file with author). Elements of the 82d Airborne Division received their brief immediately after arriving in New Orleans. Interview with Colonel Stephen Berg, former Staff Judge Advocate, 82d Airborne Division, in Rosslyn, Va. (Jan. 22, 2008) [hereinafter Berg Interview].

⁶ JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES para. 3b (13 June 2005) [hereinafter CJCSI 3121.01B]. Although released in July 2005, many of the units deployed to Hurricane Katrina in August 2005 relied primarily on the “old” RUF and not on the SRUF discussed in this article. Brou, *supra* note 5; Berg Interview, *supra* note 5.

⁷ *Id.*

⁸ The recent federalization of National Guard troops to support Border Patrol agents demonstrates how challenging and unfamiliar RUF development can be. In a 2006 press conference, Lieutenant General Steven Blum, Chief of the National Guard Bureau, described the difficulty of drafting the RUF:

typically much more aggressive than domestic RUF, so the potential for excessive use of force incidents in domestic operations may be significant. Secondly, the confusion may expose Soldiers to greater danger, as they will be uncertain of the limits of their authority.⁹ Because domestic operations are usually short-notice deployments, lack of training in SRUF may compound this confusion.

To support this thesis, this article will explore the history of rules for the use of force and how they differ from rules of engagement. This article will then highlight some of the positive and negative changes, comparing the new SRUF to previous versions of RUF and SROE. It will then provide specific examples of how the SRUF are applied in domestic operations, and how past challenges with the application of RUF can provide valuable lessons about the dangers of ambiguous RUF. Finally, the article will propose some possible solutions to ensure that Soldiers properly apply SRUF in domestic operations without inhibiting their right to self-defense.

II. History of the Standing Rules for the Use of Force

The DOD defines rules for the use of force as “[d]irectives issued to guide United States forces on the use of force during various operations.”¹⁰ This rather general definition is further augmented by the definition contained in the current SRUF: Standing Rules for the Use of Force “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DOD civil support and routine Military Department functions occurring within U.S. territory or U.S. territorial seas.”¹¹

Perhaps the best way to define SRUF is in the negative: SRUF are not SROE. The SROE “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies . . . occurring outside U.S. territory . . . and outside U.S. territorial seas.”¹² Although SRUF and SROE share some common principles, SRUF are based on domestic law, while SROE is largely based on international law.¹³ Therefore, any definitions and concepts contained in RUF must be rooted in the U.S. Constitution and domestic laws.¹⁴

The use of force, and the reasonableness of such force, is governed by the Fourth Amendment. Among other protections, the Fourth Amendment prohibits “unreasonable . . . seizures”¹⁵ The Supreme Court, in *Graham v. Connor*,

The rules of engagement and the rules of use of force are absolutely essential. Any time you put uniformed military personnel in an operational role in the United States of America, they have to meet the intent of the Constitution. The four Attorney Generals of the affected states are working with the Judge Advocate and my General Counsel and the Department of Defense General Counsel and others to make sure that we have a rules of use of force and a rules of engagement that are appropriate and are consistent across all four states, even though we will be very sensitive to the state laws.

U.S. Dep’t of Homeland Security, *Press Briefing by Secretary Chertoff and Other Government Officials on the President’s Immigration Plan*, May 16, 2006, available at <http://www.freerepublic.com/focus/f-news/1637775/posts>.

⁹ The balance between using the least amount of force necessary to accomplish the mission, while at the same time ensuring that Soldiers understand their right to self-defense, is a difficult one. As one author notes:

First, troops should demonstrate initiative in defending themselves and members of their unit. Second, troops should apply all levels of force only when necessary. The first criterion recognizes that a military force must protect itself to accomplish its objective. The second acknowledges that use of excessive force could jeopardize claims to legitimacy and frustrate both short-term and long-term goals.

Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 13 (1994) (citing U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS V (14 June 1993)).

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Aug. 2006), available at <http://www.dtic.mil/doctrine/jel/doddict/>.

¹¹ CJCSI 3121.01B, *supra* note 6, para. 3b. “SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians, and contractors performing law enforcement and security duties at all DOD installations (and off-installation while conducting official DOD security functions), within or outside US territory, unless otherwise directed by the SecDef.” *Id.*

¹² *Id.* para. 3a. In addition, SROE “apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the Secretary of Defense (SecDef).” *Id.*

¹³ *Id.*; see also Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1.

¹⁴ See Commander Sean P. Henseler, *Self-Defense in the Maritime Environment Under the New Standing Rules of Engagement/ Standing Rules for the Use of Force (SROE/SRUF)*, 53 NAVAL L. REV. 211 (2006) (highlighting the different standards that must be met in order to use force inside the United States vice outside the United States).

¹⁵ U.S. CONST. amend. IV.

held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”¹⁶ This reasonableness standard has been articulated as requiring consideration of “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁷ Although many of the underlying cases in this area of law deal with civilian law enforcement,¹⁸ the fundamental analysis of the use of force can aptly be applied to federal forces in domestic military operations as well.

Given that SROE governs military operations occurring primarily outside U.S. territory,¹⁹ international law, not domestic law, logically serves as the basis for these rules. The most identifiable example is the concept of a “hostile act.” A hostile act is defined in SROE as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property.”²⁰ This concept is rooted in the United Nations Charter, Article 51, which declares: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²¹ Legal scholars and practitioners almost universally agree that an armed attack, or “hostile act,” triggers the right of self-defense.²²

The SROE does provide examples of the United States’ expanded interpretation of international law as well. For instance, the concept of “hostile intent” is not explicitly rooted in the U.N. Charter. In fact, Article 51 makes it clear that the inherent right of self-defense is only triggered “if an *armed attack occurs* against a Member of the United Nations.”²³ Therefore, some Nations believe that this permits use of force for self-defense only *after* an armed attack occurs.²⁴ However, the United States and many other nations believe that the right of “anticipatory self-defense”²⁵ is not negated by the U.N. Charter. Rather, they contend that countries may act with force to prevent imminent attacks against their interests.²⁶ However, the debate often focuses on when an attack is “imminent” enough to justify anticipatory self-defense. As such, the definition of “hostile intent” is far from definitively established in the international community.

As with the concepts of “hostile act” and “hostile intent,” SROE are based on an extremely dynamic and diverse body of international law.²⁷ This body of law, as a general rule, is significantly different from domestic law dealing with use of force within the United States. Therefore, the military must avoid establishing RUF for domestic operations that are actually rooted in international law. The current version of the SRUF, however, appears to do exactly that.

¹⁶ *Graham v. Connor et al.*, 490 U.S. 386, 395 (1989).

¹⁷ *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). For a discussion of the effects of stress on the reasonableness analysis, see Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515 (2002).

¹⁸ See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a cause of action for violation of the Fourth Amendment’s guarantee against unreasonable searches by federal agents). *But see Saucier v. Katz*, 533 U.S. 194 (2001) (a U.S. Army military police officer was entitled to qualified immunity in a *Bivens* suit alleging he used excessive force in detaining a protester at an on-post appearance by then-Vice President Albert Gore, Jr.).

¹⁹ CJCSI 3121.01B, *supra* note 6, at enclosure A, para. 3a.

²⁰ *Id.*

²¹ U.N. Charter art. 51. For a contemporaneous analysis of Article 51, see HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 795–97 (1950).

²² Major Joshua E. Kastenber, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 *A.F. L. REV.* 87, 112–13 (2004).

²³ U.N. Charter art. 51 (emphasis added).

²⁴ Kastenber, *supra* note 22, at 113 (quoting PHILIP JESSUP, *THE USE OF INTERNATIONAL LAW* 165 (1959)); see also LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 178 (1946).

²⁵ The concept of anticipatory self-defense in the United States was first articulated by Daniel Webster, the Secretary of State at the time of the destruction of the U.S. steamer *Caroline* in New York. During subsequent negotiations with British officials, Webster stated the U.S. view as: “Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’” *Destruction of the “Caroline,”* 2 *MOORE DIGEST* §§ 217, 409, 412 (1906).

²⁶ See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 331 (1963).

²⁷ See, e.g., *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* xix (W. Michael Reisman & Chris T. Antoniou eds., 1994) (“The sources of the law of armed conflict, like international law of which it is a part, are more diverse and complex than in domestic legal systems.”).

After the September 11th attacks, the U.S. Northern Command (USNORTHCOM) was established, with a mission to provide “command and control of DOD homeland defense efforts and to coordinate defense support of civil authorities.”²⁸ In apparent furtherance of this consolidated domestic command, various RUF were consolidated into one document, covering responses to all types of domestic missions.²⁹ The current versions of SRUF/SROE consolidate use of force guidance previously found in at least three different sources:³⁰ counter drug operations,³¹ civil disturbances (GARDEN PLOT),³² and law enforcement and security duties.³³ Unlike previous versions, which were tailored to the type of attack (chemical, conventional, natural disaster), the current version is triggered by the various responses to those types of attacks and the level of force required to respond. Although consolidation of RUF is generally considered a positive development, some of the new language contained in the SRUF was not as favorably received.³⁴

III. Recent Changes to SRUF

A. Beneficial Changes

The form and layout of the new SRUF is drastically different from, and in many ways an improvement over, previous versions. The current SRUF serves as one comprehensive source that consolidates the previous versions of RUF into several core principles that are applicable to every type of domestic operation. This approach allows for mission-specific RUF to be developed from these basic principles, thereby reducing the need for commanders to consult several different sources for guidance.

1. *How Imminent Is “Imminent”?*

The definition of the term “imminent” under the new SRUF is an example of the improvements over previous versions. The old RUF merely stated, “[t]he determination of whether a particular threat or danger is ‘imminent’ is based on an assessment of all the circumstances known to DoD personnel at the time. ‘Imminent’ does not necessarily mean ‘immediate’ or ‘instantaneous.’”³⁵ However, if a Judge Advocate were searching for additional guidance, RUF for counter drug operations contained not only that definition, but the following clarification: “Thus, an individual could pose an imminent danger even if he or she is not at that very moment pointing a weapon at DOD personnel or someone within the immediate vicinity of the DOD personnel.”³⁶ In addition, the counter drug operation RUF provided specific examples of when a threat may be imminent.³⁷ By consolidating various RUF into one complete document, the new SRUF states:

²⁸ United States NORTHCOM, http://www.northcom.mil/about_us/about_us.htm (last visited Feb. 20, 2007). The specific mission is to “conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories and interests within the assigned area of responsibility (AOR); and [a]s directed by the president or secretary of defense, provide defense support of civil authorities including consequence management operations.” *Id.* See also Lance Gurwell, *NORTHCOM Responsible for U.S. Homeland Defense*, COLO. SPRINGS BUS. J., Aug. 30, 2002, at 1.

²⁹ CJCSI 3121.01B, *supra* note 6.

³⁰ The current version cancels CJCSI 3121.01A, 15 January 2000, CJCSI 3121.02, 31 May 2000 and CJCSI 3123.01B, 01 March 2002. CJCSI 3121.01B, *supra* note 6, para. 2.

³¹ JOINT CHIEFS OF STAFF, INSTR. 3710.01A, DOD COUNTERDRUG SUPPORT (30 Mar. 2004) [hereinafter CJCSI 3710.01A].

³² U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) app. 8 (Special Instructions) to Annex C (Concept of Operations) (4 Feb. 1994) [hereinafter DOD DIR. 3025.12]; U.S. DEP’T OF DEFENSE, CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991) [hereinafter GARDEN PLOT].

³³ U.S. DEP’T OF DEFENSE, DIR. 5210.56, USE OF FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (1 Nov. 2001) [hereinafter DOD DIR. 5210.56].

³⁴ Telephone Interview with LTC Vanessa Berry, Operational Law Attorney, U.S. Northern Command (Feb. 18, 2007) [hereinafter Berry Interview]. The debate centers around whether or not the international law terms injected in the current SRUF will actually cause confusion. While some argue that Soldiers are sophisticated enough to discern between using force in combat and using force in domestic operations, others argue that using international law terms in domestic SRUF will cause confusion even among Judge Advocates, not to mention Soldiers. *See id.*

³⁵ DOD DIR. 5210.56, *supra* note 33, para. 3.6. In comparison, the dictionary definition of “imminent” is: “likely to happen without delay; impending; threatening: said of danger, evil, misfortune.” WEBSTER’S NEW WORLD DICTIONARY 675 (3rd Coll. ed. 1988).

³⁶ JOINT CHIEFS OF STAFF, INSTR. 3121.02, RULES ON THE USE OF FORCE BY DOD PERSONNEL PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES, at A-4 (31 May 2000) [hereinafter CJCSI 3121.02].

³⁷ *Id.* The examples include:

1. An individual possesses a weapon or is attempting to gain access to a weapon under circumstances indicating an intention to use it against DOD personnel or other person within the immediate vicinity of the DOD personnel.

Imminent Threat. The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DOD forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous. Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat.³⁸

In addition to attempting to clarify the meaning of “imminent,” the new definition also reminds Soldiers that they are responsible for making a subjective determination based on the facts available at that time.³⁹ While the language still leaves some room for ambiguity regarding demonstrated intent, the new language is a vast improvement over previous versions and succeeds in providing guidance in one source.

2. Escalation of Force

The current SRUF also provides a definitive statement on the escalation of force (EOF).⁴⁰ Soldiers have an inherent right to use force in self-defense.⁴¹ However, prior to employing force, they are encouraged to defuse the situation, thereby avoiding the necessity to use force.⁴² Escalation of force is a concern in any operation involving civilians, whether in the United States or in a foreign country. For example, commanders in Iraq have greatly emphasized de-escalation, particularly given the relatively large number of EOF incidents.⁴³ Lieutenant General (LTG) Peter Chiarelli, former Multi-National Corps – Iraq commander, recently instituted additional training requirements and revamped the ROE card to provide additional guidance on EOF issues.⁴⁴ The challenge with such an emphasis, however, is ensuring a proper balance between the need to use the minimum amount of force, while not appearing to restrict the individual Soldier’s right to self-defense. Lieutenant General Chiarelli faced skepticism with his introduction of the EOF measures, to which he responded: “I’m not trying to change the ROE . . . I’m trying to prepare soldiers better. Give them more tools and data. It’s a force protection issue.”⁴⁵

The current SRUF reflects the importance of clearly enunciated EOF policies during complex domestic operations. Although prior versions provided minimal guidance on the subject, the current SRUF (and SROE) provides “De-escalation” guidance as the first instruction under the “Procedures” section. The SRUF states: “De-Escalation. When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.”⁴⁶ While prior versions of the RUF made passing reference to de-escalation, allowing deadly force only after “[I]f lesser means have been exhausted, are unavailable, or cannot be reasonably employed,”⁴⁷ the current SRUF dedicates an independent paragraph to the concept, making it clear that de-escalation is an important concept that must be addressed in formulating RUF. This clarification assists Soldiers and their leaders in balancing their obligation to defend themselves and others, while also helping to prevent the use of excessive force.

2. An individual without a deadly weapon, but who has the capability of inflicting death or serious physical injury and is demonstrating an intention to do so (e.g., an attempt to run over DOD personnel or other persons within the immediate vicinity of the DOD personnel with a car).

Id.

³⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4b.

³⁹ *Id.*

⁴⁰ *Id.* at enclosure L, para. 5a. While not specifically using the term “escalation of force,” the SRUF does provide a subheading entitled “de-escalation.” *Id.*

⁴¹ *Id.*

⁴² *Id.* para. 5b.

⁴³ Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints*, STARS & STRIPES, Mar. 18, 2006, available at <http://www.stripes.com/article.asp?section=104&article=34944&archive=true>. During one eight week period in February–March 2006 in Iraq, there were “more than 600 [EOF] incidents . . . with more than 30 deaths and more than 60 injuries.” *Id.*

⁴⁴ The current ROE provides additional guidance on the use of “Graduated Measures of Force,” consisting of a reiteration of the 5 S’s (shout, show, shove, shoot (to warn), shoot). INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 118 (2006).

⁴⁵ Montgomery, *supra* note 43.

⁴⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5a.

⁴⁷ DOD DIR. 5210.56, *supra* note 33, at 9.

3. Eliminating Confusing Language

The current SRUF also eliminated some language that could cause confusion regarding a Soldier's right to self-defense. The previous RUF contained a section entitled "Additional requirements for the use of firearms,"⁴⁸ which listed five general requirements that must be satisfied prior to using firearms. One of the listed requirements was: "When a firearm is discharged, it will be fired with the intent of rendering the person(s) at whom it is discharged incapable of continuing the activity or course of behavior prompting the individual to shoot."⁴⁹ Although the formulation of this passage may have its roots in federal law enforcement rules,⁵⁰ the language is rather legalistic and unhelpful to the layperson. Instead of simply stating that "every time you shoot, aim center of mass," it leaves some doubt as to the Soldier's responsibility. In fact, it may cause some leaders and Soldiers to wrongly believe that they must attempt to first "shoot to wound," thereby rendering the hostile person "incapable of continuing the activity," without actually killing him.⁵¹

In reality, the idea that one can incapacitate a human being with a non-deadly shot is a fallacy.⁵² The only reason a Soldier would be justified in shooting at another person is if the "activity or course of behavior"⁵³ the perpetrator was engaging in posed a deadly threat to that Soldier or others.⁵⁴ Therefore, in responding to a deadly threat, the only way to ensure that the perpetrator is rendered incapable of continuing the activity would be to shoot to kill.⁵⁵ By deleting this ambiguous passage, and relying on the guidance provided in the definition and application of deadly and non-deadly force, the SRUF has eliminated this potential confusion.

B. Potentially Confusing Language

Although some changes to SRUF may be beneficial, other modifications may prove confusing. The definitions of deadly force and self-defense have changed significantly, with language that may unwittingly expand use of force criteria. Although the current language is more aggressive, these changes do not necessarily provide more protection to Soldiers. Instead, ambiguities in the language may expose them to additional risk.⁵⁶ Also, the terms "hostile act" and "hostile intent" are new additions to the SRUF, and represent a significant change in the language usually associated with domestic operations.⁵⁷ These additions to the current SRUF raise the question: What role, if any, should international law concepts play in domestic operations?

⁴⁸ *Id.* at 11.

⁴⁹ *Id.*

⁵⁰ The Federal Bureau of Investigation guidance on the application of deadly force states: "When the decision is made to use deadly force, agents may continue its application until the subject surrenders or no longer poses an imminent danger." John C. Hall, *FBI Training on the New Federal Deadly Force Policy*, Apr. 1996, <http://www.fbi.gov/publications/leb/1996/apr1966.txt>.

⁵¹ DOD DIR. 5210.56, *supra* note 33, at 11. The RUF under GARDEN PLOT, which has also been preempted by the new SRUF, had even more explicit "shoot to wound" language, stating: "when firing ammunition, the marksman should, if possible, aim to wound rather than to kill." DOD DIR. 3025.12, *supra* note 32, at 8 (Special Instructions) to Annex C (Concept of Operations). This type of language regarding "shooting to wound" is similar to that assailed by critics of ROE training tools used in past peacekeeping operations. W. Hays Parks, *Deadly Force is Authorized*, U.S. NAVAL INST. PROC., Jan. 2001, at 32-37, available at <http://www.usni.org/Proceedings/Articles01/PROparks1.html>. In response to Parks's criticisms, LTC Mark S. Martins acknowledged that shooting to wound was dangerous, but that the U.S. Army has never mandated such a practice. Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, But Also Trained*, ARMY LAW., Sept. 2001, at 1, 8. The FBI also discourages this practice, stating: "When deadly force is permitted under this policy, attempts to shoot to cause minor injury are unrealistic and can prove dangerous to agents and others because they are unlikely to achieve the intended purpose of bringing an imminent danger to a timely halt." Hall, *supra* note 50.

⁵² UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS 62 (2005). Medical and ballistic studies have shown that:

The human target can be incapacitated reliably and immediately only by the disruption or destruction of the brain or upper spinal cord. Otherwise, incapacitation is subject to a random host of variables, the most important of which are beyond the control of the shooter. Incapacitation becomes an eventual event, not necessarily an immediate one. If the proper psychological factors that contribute to incapacitation are present, even a minor wound can be immediately incapacitating. If they are not present, incapacitation can be significantly delayed even with major non-survivable wounds.

Id.

⁵³ DOD DIR. 5210.56, *supra* note 33, para. E2.1.6.2.

⁵⁴ *Id.*

⁵⁵ PATRICK & HALL, *supra* note 52, at 62.

⁵⁶ Martins, *supra* note 51 (arguing that liberal use of force policies do not necessarily provide additional protection to Soldiers); see also Martins, *supra* note 9 ("Soldiers can learn to defend themselves and their units with initiative and to apply deadly force only when necessary. Clear and simple rules on the use of force can complement the learning process." (emphasis added)).

⁵⁷ CJCSI 3121.01B, *supra* note 6, enclosure L, para. 5c.

1. *Deadly Force*

The meaning and proper application of deadly force is the central issue in any set of RUF.⁵⁸ Soldiers operating in a domestic setting must know what constitutes deadly force and when they are justified in employing such force. If Soldiers are uncertain, or hesitate in responding to a deadly threat, they are risking their lives and the lives of their fellow Soldiers.⁵⁹ On the other hand, if they are too aggressive, they can compromise the mission and cause unnecessary injury or death.⁶⁰ In order for Soldiers and commanders to accurately balance these competing interests, SRUF must provide definitive guidance on the employment of deadly force. The current SRUF falls short of that requirement.

a. *Format Changes*

The use of deadly force paragraph changed both in format and content. The format modifications, although seemingly insignificant, do represent a potential change in the way Soldiers approach a “deadly force” analysis. Previous RUF required Soldiers to satisfy a mental checklist of considerations prior to applying deadly force.⁶¹ Under that methodology, deadly force was authorized “only under conditions of extreme necessity.”⁶² In addition, the RUF required Soldiers to find *all* three of the following elements: (1) “Lesser means have been exhausted, are unavailable, or cannot be reasonably employed;” (2) “[t]he risk of death or serious bodily harm to innocent persons is not significantly increased by use;” and (3) “[t]he purpose of its use is one or more of the following:” self-defense and defense of others; to protect assets involving national security, or assets that are inherently dangerous to others; to prevent serious offenses against persons; to protect public health or safety; arrest or apprehension; and to prevent escape.⁶³ In comparison, the new SRUF simply states: “Deadly force is to be used only when all lesser means have failed or cannot reasonably be employed.”⁶⁴ By changing the definition from a list of elements that must be satisfied prior to using deadly force to a mere caveat requiring Soldiers to use lesser means if reasonable, the definition of “deadly force” is decidedly more aggressive.⁶⁵ This format modification may cause Soldiers to change the way they approach use of force issues, prompting them to omit important considerations like necessity and risk to innocent bystanders.

b. *Necessity*

While the previous RUF stated: “Deadly force is justified only under conditions of *extreme necessity*,”⁶⁶ the current SRUF provides only that “[d]eadly force is to be used only when all lesser means have failed or cannot reasonably be employed.”⁶⁷ The “necessity” concept is central to any discussion of deadly force.⁶⁸ The FBI uses the following definition of

⁵⁸ *Id.*

⁵⁹ See Martins, *supra* note 9 (analyzing several scenarios in which Soldiers hesitated to apply deadly force when such force, in hindsight, appeared to be clearly justified).

⁶⁰ Compare Montgomery, *supra* note 43 (article discussing measures taken by MNC-I to reduce the number of EOF incidents in Iraq), with Brady McCombs, *Tense Moments Revealed in Guard Border Incident*, ARIZ. DAILY STAR, Jan. 20, 2007, at 1 (article detailing a confrontation between federalized National Guard troops supporting the Border Patrol and an armed group attempting to cross the US-Mexican border. The National Guard troops, following their RUF, withdrew from the area and called on Border Patrol agents for reinforcement. Their actions are credited with preventing a gunfight.), and *Guardsmen to Be Honored for Border Actions*, ARIZ. DAILY STAR, Jan. 22, 2007, at 1 (reporting that the Soldiers were to be honored for their actions in a ceremony in late January 2007). Shortly after the incident on the Arizona-Mexico border, Arizona politicians, obviously unaware of the PCA’s restrictions, began to criticize the Soldiers’ actions, asking, “What are they [National Guard] here for if they are going to retreat from people with automatic weapons?” *Mixed Reports on National Guard Border Confrontation*, FOX NEWS, Feb. 1, 2007, http://www.foxnews.com/printer_friendly_story/0,3566,248124,00.html. Such comments illustrate how Americans lack familiarity with the concept of military forces operating within the United States. In an effort to clarify, the Governor’s office stated that under the RUF, “soldiers are not supposed to stop, arrest, or shoot armed illegal immigrants. They are instructed only to look, listen and report their location to the Border Patrol,” but that “the rules allow Guard members to use force when they believe they face an imminent threat and all other means are exhausted.” *Id.*

⁶¹ DOD DIR. 5210.56, *supra* note 33, at 9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c. The definition then goes on to detail the circumstances under which deadly force may be used, including self-defense and defense of others, assets vital to National Security, inherently dangerous property, and national critical infrastructure. *Id.*

⁶⁵ *Id.*

⁶⁶ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2 (emphasis added).

⁶⁷ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c.

necessity: “In evaluating the necessity to use deadly force, two factors are relevant: (1) The presence of an imminent danger to the agents or others, and (2) the absence of safe alternatives to the use of deadly force.”⁶⁹ Furthermore, the Department of Justice’s *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations*⁷⁰ states:

[T]he touchstone of the Department’s policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time. The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail.⁷¹

As with most of the changes in the current SRUF, the omission of the term “extreme necessity,” in and of itself, will likely not lead Soldiers and their commanders to believe that they may use deadly force without necessity. However, the cumulative effect of omitting many of these limiting terms is an SRUF that reads much more aggressively than previous versions.

2. Self-Defense

The old RUF authorized self-defense “[w]hen deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).”⁷² This language mirrors the holding in *Graham v. Connor*, in which the Supreme Court interpreted the Fourth Amendment as requiring the use of force to be evaluated under an “objective reasonableness” standard, requiring “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁷³ Indeed, the similarity between the language in *Graham v. Connor* and RUF was no accident. The RUF is used for operations within the United States, and therefore requires Soldiers to operate within the confines of the U.S. Constitution, the Fourth Amendment, and the Supreme Court’s interpretations of the application of the Fourth Amendment to use of force scenarios.⁷⁴

The current SRUF, however, provides for the “Inherent Right of Self-Defense.” It states:

Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.⁷⁵

This new definition matches verbatim the language in the SROE.⁷⁶ However, the application of the phrase “inherent right and obligation to exercise unit self-defense”⁷⁷ to the right of self-defense in domestic operations may not set the correct tone for domestic operations. The dictionary definition of inherent includes: “existing in someone or something as a natural and inseparable quality, characteristic, or right; innate; basic; inborn”⁷⁸ While legal sources as early as *Blackstone’s*

⁶⁸ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.

⁶⁹ See Hall, *supra* note 50.

⁷⁰ *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations*, <http://www.usdoj.gov/ag/readingroom/resolution14c.htm> (last visited Mar. 18, 2007).

⁷¹ *Id.*

⁷² DOD DIR. 5210.56, *supra* note 33, at 9.

⁷³ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁷⁴ U.S. CONST. amend. IV.

⁷⁵ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4a.

⁷⁶ *Id.* at enclosure A, para. 3a.

⁷⁷ *Id.* at enclosure L, para. 4a.

⁷⁸ WEBSTER’S NEW WORLD DICTIONARY 695 (3rd Coll. ed. 1988).

Commentaries observed that “[s]elf-defense . . . is justly called the primary law of nature, so it is not, neither can it be . . . taken away by the law of society,”⁷⁹ the rights afforded to law enforcement officials and military personnel may not be as expansive as those extended to individual citizens. In evaluating excessive use of force incidents, the Supreme Court has applied a reasonableness test, requiring “a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”⁸⁰ The Court in *Graham* held that the reasonableness test is applied in the following manner:

Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application’ . . . , its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.⁸¹

The Court goes on to clarify this test even further, stating: “the question is ‘whether the totality of the circumstances justify[es] a particular sort of . . . seizure.’”⁸² Furthermore, as the Court in *Garner* makes clear, “[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect’s fundamental interest in his own life need not be elaborated upon.”⁸³ As a result, in balancing the interests of the government with those of the individual, the court could determine that a law enforcement official failed to use lesser means of force in order to address the threat, even in cases where the right to self-defense was clearly implicated.⁸⁴ As such, the inclusion of “inherent right and obligation” instead of the previous “when reasonably necessary” language in the self-defense portion of SRUF may not comport with the more nuanced application of force in domestic operations.⁸⁵

3. When Directly Related to the Assigned Mission

Another addition to the current SRUF acts as an ambiguous qualifier to the use of deadly force in certain circumstances. Under the current SRUF, “Deadly force is authorized in defense of non-DOD persons in the vicinity, *when directly related to the assigned mission.*”⁸⁶ However, the previous RUF simply stated; “When deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the person(s).”⁸⁷ In addition, those provisions authorizing up to deadly force to prevent serious offenses against persons, to prevent escape, and aid in arrest or apprehension are all qualified by the same language: “Additionally, *when directly related to the assigned mission*, deadly force is authorized under the following circumstances”⁸⁸ Once again, this language is new and no similar provision requiring a connection to an assigned mission is found in previous versions of RUF.⁸⁹

⁷⁹ WILLIAM BLACKSTONE, 3 COMMENTARIES *4, quoted in PATRICK & HALL, *supra* note 52, at 16.

⁸⁰ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

⁸¹ *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

⁸² *Id.* (quoting *Garner*, 471 U.S. at 8–9); see also Seth D. DuCharme, Note: *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515 (2002). “It is important to emphasize that the perception of danger, not the actual existence of a threat, is the critical issue in determining whether an officer is entitled to the protection of a qualified immunity. . . . While the test is objective on its face, it still takes into account the uniquely difficult perspective of the actor and the variables inevitably surrounding the use-of-force incident.” *Id.* at 2532.

⁸³ *Garner*, 471 U.S. at 8–9.

⁸⁴ See, e.g., *Johnson v. Waters*, 317 F. Supp. 2d 726 (E.D. Tex. 2004). The court held that a constable who shot a woman laying in her bed in a dark room during a drug raid was unreasonable for the purposes of summary judgment. The constable argued that because the woman suddenly moved toward him, and because “he was caught in tense and uncertain circumstances,” his actions were “reasonable under the circumstances” *Id.* at 737. The court, however, held that “the record is devoid of any evidence that Defendant considered any other option before employing the use of deadly force.” *Id.*

⁸⁵ CJCSI 3121.01B, *supra* note 6, at 3. While this phrasing may be an appropriate reminder in combat ROE, there may be too many factors that need to be weighed in domestic operations to make such a broad statement applicable to SRUF.

⁸⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5(c)(2) (emphasis added).

⁸⁷ DOD DIR. 5210.56, *supra* note 33, at 9.

⁸⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5(d) (emphasis added).

⁸⁹ DOD DIR. 5210.56, *supra* note 33, at 9–10.

The addition of this language has injected unnecessary ambiguity into the SRUF. First, no where in the SRUF or accompanying documents is a definition of “directly related to the assigned mission” found. Therefore, commanders and Soldiers at all levels will be forced to determine whether using force to protect a civilian who is being beaten to death falls under their assigned mission. Some might argue that this addition is a positive development because it allows commanders on the ground the flexibility to tailor the mission to the current security situation. So, for instance, if the commander’s mission is to provide urgently needed security at a water purification site, the commander can limit the mission to that task, and inform the Soldiers that if they see civilian-on-civilian violence along the way, they should not stop, but report it through the headquarters to local law enforcement. On the other hand, the commander may elect to correlate the “assigned mission” to saving lives, alleviating human suffering, and mitigating great property damage.⁹⁰ However, this discretion comes at a heavy cost to commanders because the burden is on the commander (and the supporting JAs) to interpret the definition of assigned mission without any guidance from the SRUF. As a result, the application of this language will not be uniformly given the many meanings that can be assigned to this phrase.

The problem with the “assigned mission” language is evident in other scenarios. For instance, if a unit is assigned in purely a support role, is it appropriate for them to fail to intervene when witnessing a civilian being gravely harmed if such intervention is not part of their “assigned mission”? The ramification of television footage of U.S. Soldiers standing by as a civilian is beaten to death would most likely lead to outrage among U.S. citizens and humiliation among the military involved in the operation. The language requiring such an absurd result is unnecessary and should be clarified or removed.

4. Hostile Act and Hostile Intent

The terms “hostile act” and “hostile intent” are also new additions to the SRUF.⁹¹ In previous versions, the self-defense passage contained the only guidance regarding “hostile” individuals, stating that force could be used against “a hostile person(s) to protect law enforcement or security personnel who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).”⁹² The new SRUF defines a “hostile act” as “[a]n attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG [U.S. government] property.” Meanwhile, “hostile intent” is defined as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.”⁹³

While these new definitions do provide additional clarity to the definition of a hostile person, they also introduce international law concepts into SRUF.⁹⁴ While these terms may arguably be similar to the “hostile person” language used by previous versions, the language, and not necessarily the meaning, may be the problem. First, the definitions are provided in the document, but then never appear again in the text, leaving one to wonder how these terms apply to the SRUF. Secondly, both “hostile act” and “hostile intent” are central terms used in SROE and are important to any ROE training.⁹⁵ Therefore, Soldiers and their leaders, who use these terms on a daily basis to describe civilians on the battlefield who have lost their protected status, associate these terms with combat scenarios. As a result, the potential for confusion during subsequent domestic operations may be significant.

⁹⁰ When defined so broadly, the practical effect is to allow Soldiers to use up to deadly force to prevent serious offenses against persons, to prevent escape, and allow for arrest and apprehension. Telephone Interview with Mr. Robert F. Gonzales, Domestic Operational Law Attorney, U.S. Army North (Jan. 17, 2008).

⁹¹ *Id.* at 2–3.

⁹² DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.3.1.

⁹³ *Id.*

⁹⁴ As discussed in Section II, the genesis of hostile intent and hostile act is, Article 51 of the U.N. Charter. *See supra* notes 17–24 and accompanying text.

⁹⁵ CJCSI 3121.01B, *supra* note 6, at enclosure A, para. 3e–f. Although the vast majority of Soldiers in Iraq and Afghanistan have properly applied these concepts, some journalists report that:

[o]n other occasions, U.S. troops have interpreted “hostile act” and “hostile intent” in dubious ways. In some instances, merely spotting military-aged men engaged in suspicious activities or gathered in a questionable location has been enough for them to be treated as “bad guys” and “terrorists.” In others, U.S. forces acting in legitimate self-defense during firefights, roadside attacks, and insurgent ambushes, have responded with overwhelming force in the general direction of the attacks without taking sufficient care to positively identify their targets.

Colin H. Kahl, *How We Fight*, FOREIGN AFF., Nov.–Dec. 2006, at 83, 93.

5. Using Deadly Force Against Those Impeding a Mission

In addition to carrying a combat connotation, hostile act/intent is defined not only as the threat of imminent use of force against U.S. forces, but “also includes the threat of force to *preclude or impede the mission* and/or duties of US forces, including the recovery of US personnel or vital USG property.”⁹⁶ This language may lead many Soldiers to the false assumption that they can use up to deadly force in order to clear a road, enforce a roadblock, or maintain order at an aid distribution site. However, this additional language seems superfluous, given that when a civilian uses force against a Soldier, regardless of whether it is to impede a mission or for some other motive, the Soldier will have the right to use self-defense in response. This right of self-defense is present regardless of whether the SRUF gives express permission to use force against those impeding the mission.⁹⁷ Likewise, under a separate paragraph, the SRUF already authorizes the use of force to “preserve vital U.S. government property.”⁹⁸

The authorization of force against those impeding a military mission is new to domestic operations.⁹⁹ This language is not found in any other versions of RUF, nor is it contained in any other federal law enforcement agency RUF. GARDEN PLOT RUF makes provision for the use of force against those impeding a mission, but also makes clear that “[i]f a mission cannot be accomplished without the use of deadly force, but deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed until sufficient non-deadly force can be brought to bear.”¹⁰⁰ By including the “impeding mission” language without a qualifier, the difficult questions become: What about those situations in which civilians use force to impede the mission, but the force is not directed against the Soldiers? Could Soldiers, for example, use up to deadly force to remove unarmed demonstrators blocking the only bridge out of a city? Although the answer should be no, the SRUF would not assist in arriving at this conclusion.

In Iraq or Afghanistan, if foreign nationals are impeding a crucial military mission through the use of less-than-deadly force, U.S. forces must consider the totality of the circumstances, including the level of force used and the importance of the mission. In such cases, the use of deadly force may be justified even when responding to less than deadly force, if the mission being thwarted is crucial to the success of the battle. However, the same may not hold true for Soldiers who are responding to civilians who are disrupting a convoy. If U.S. Soldiers encounter civilian interference in a domestic setting, they must, of course, use lesser means of force to eliminate the threat. However, if these lesser means fail, they would not be justified in using deadly force unless such use satisfied the Fourth Amendment. As such, the Supreme Court has determined that there are generally two situations in which force is authorized:

- 1) To protect themselves or others from immediate threats of serious physical injury; and/or, 2) To prevent escape of a person who may justifiably be characterized as ‘dangerous’ to the officers or to the community if allowed to remain at large.¹⁰¹

Neither of these general categories contemplates a situation in which deadly force is reasonable, unless there is a danger of death or serious bodily harm to the actual law enforcement officer or to the community. In the scenario presented above, if the demonstrators turn violent against the Soldiers, then the Soldiers will be justified in responding to such violence in self-defense. However, if the civilians are merely impeding the mission and not directing unlawful force against the Soldiers, then domestic law would not support using up to deadly force to remove them. The current SRUF language fails to make that clear.

⁹⁶ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4c (emphasis added).

⁹⁷ See William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735 (2004) (opining that even in the absence of explicit rules for the use of force, attacks against service members conducting convoys would trigger their individual right to self-defense).

⁹⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 5c. Under paragraph 5c(3), deadly force is authorized to protect “assets vital to National Security.” *Id.* It is unclear, however, whether “vital USG property” is the same as “assets vital to National Security,” because there is no independent definition for “vital USG property” contained in the SRUF. *Id.*

⁹⁹ In addition to a lack of legal support in the United States, “[m]any countries do not share the aggressive American stance, woven into the fabric of the Standing ROE,” regarding “hostile intent” and the use of deadly force when a mission is being impeded. Stafford, *supra* note 13, at 1.

¹⁰⁰ DOD DIR. 3025.12, *supra* note 32, app. 8 (GARDENPLOT was superseded by CJCSI 3121.01B).

¹⁰¹ PATRICK & HALL, *supra* note 52, at 15; see also WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(d) (3d ed. 1996); MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

IV. Application of the SRUF to Domestic Operations

Before determining the proper application of SRUF to domestic crises, one must first explore the capacities in which U.S. forces may be employed in domestic operations. The use of federal military forces for law enforcement purposes is normally limited by the Posse Comitatus Act (PCA), which states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁰²

However, the use of military forces has generally been interpreted to mean “the direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel.”¹⁰³ More specifically, the PCA prohibits “direct active use of federal troops by civil law enforcement officers.”¹⁰⁴ The court in *United States v. Red Feather*¹⁰⁵ defined a “direct” role in law enforcement as: “arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities.”¹⁰⁶ On the other hand,

[a]ctivities which constitute a *passive* role which might *indirectly* aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities.¹⁰⁷

Given the rather expansive list of tasks that the Army and Air Force may perform without even implicating the PCA, military forces have an extensive history of involvement in domestic operations.¹⁰⁸ Even in those situations where the PCA does apply, there are several exceptions which operate to preclude its effect.

A. Exceptions to the PCA

Although the PCA prohibits direct military involvement in domestic law enforcement, statutes like the the Insurrection Act (formerly known as the Enforcement of the Laws to Restore Public Order Act (Restoration Act))¹⁰⁹ provide exceptions to

¹⁰² 18 U.S.C. § 1385 (2000). Although not explicitly prohibited in the PCA, 10 U.S.C. § 375 directed the DOD to establish policy that applied the PCA to both the Navy and Marine Corps. Department of Defense Directive 5525.5 states that the PCA “is applicable to the Department of the Navy and the Marine Corps as a matter of DOD policy.” U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS enclosure 4 (20 Dec. 1989).

¹⁰³ *United States v. Red Feather et al.*, 392 F. Supp. 916 (D.S.D. 1975).

¹⁰⁴ *Id.* at 922 (citing 7 CONG. REC. 3845–52, 4240–48, 4295–04, 4288 (1878)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 925.

¹⁰⁷ *Id.*

¹⁰⁸ For a discussion on the role of Posse Comitatus in federal law enforcement, see David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619 (1997) (analyzing the militarization of federal law enforcement through the incident at the Branch Davidian Compound in Waco, Tex.); see also CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW, No. 95-964 S (2000).

¹⁰⁹ 10 U.S.C §§ 331–334 (2000). In addition to the Insurrection Act, 18 U.S.C. § 831, allows federal forces to intervene in the event of a nuclear, biological, or chemical attack. In addition to materiel and equipment support, “[a]ssistance under this section may include . . . use of personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violation of this section; and . . . such other activity as is incident to enforcement of this section . . .” *Id.* Similarly, 10 U.S.C. § 382 allows the Attorney General to request assistance from the Secretary of Defense “during an emergency situation involving a biological or chemical weapon of mass destruction.” *Id.* The U.S.A. Patriot Act expanded “[this] exception to include emergencies involving other weapons of mass destruction,” instead of just chemical or biological. CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, THE USA PATRIOT ACT: A LEGAL ANALYSIS, RL 31377 (2002); see also John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). However, the updated statute only allowed for “the operation of equipment . . . to monitor, contain, disable, or dispose of the weapon involved or elements of the weapon,” and does not authorize federal forces to perform law enforcement functions. 18 U.S.C. § 831. These changes were short lived. The 2008 NDAA changed all of the language back to that found in the original Insurrection Act. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 23 (2008). For a discussion of the military’s role in defending against domestic terrorist attacks, see

the PCA. First, § 331 allows the President to use federal forces to intervene when “there is an insurrection in any State against its Government”¹¹⁰ Section 332 allows for the enforcement of federal authority. The Act states:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.¹¹¹

Section 333 has long allowed the President to use federal troops in order to “suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if it . . . hinders the execution of the laws of that State, and the United States . . . that any part or class of its people is deprived of a right . . . named in the Constitution.”¹¹² However, the 2007 Defense Authorization Act recently expanded § 333 by adding the following provision:

The President may employ the armed forces, including the National Guard in Federal service, to . . . restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that . . . domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order¹¹³

The significance of this expansion has yet to be determined, but from its broad language, it appears that the Insurrection Act may now allow federal forces to play a significant role in any domestic crisis.¹¹⁴

While the recent expansion of the Insurrection Act may foretell an increased invocation of presidential powers in the future, the prior application of the statute was rare.¹¹⁵ No President has invoked the statute since 1992, when the Rodney King verdict led to widespread rioting in Los Angeles.¹¹⁶ By invoking the Insurrection Act, the President was able to use federal forces to perform civilian law enforcement functions when the state government lacked the resources and personnel to accomplish the mission itself.

JEFFREY D. BRAKE, CONG. RESEARCH SERV. REPORT, TERRORISM AND THE MILITARY’S ROLE IN DOMESTIC CRISIS MANAGEMENT: BACKGROUND AND ISSUES FOR CONGRESS, RL 30938 (2003).

¹¹⁰ 10 U.S.C. § 331.

¹¹¹ *Id.* § 332.

¹¹² *Id.* § 333. However, prior to using federal troops, § 334 requires the President to immediately order the “insurgents to disperse.” *Id.* § 334.

¹¹³ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). The language has therefore changed from allowing Presidential intervention during an “insurrection” to allowing intervention to “restore public order” after a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” *Id.*

¹¹⁴ After Hurricane Katrina, many lawmakers wanted to expand the exceptions to the PCA in order to make military intervention and management of relief efforts easier. Alex Leary & Paul De La Garza, *Expanded Military Rule a Touch Issue*, ST. PETERSBURG TIMES, Sept. 27, 2005, at 1A. *But see* Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007, at 6 (characterizing the changes as “[p]ossibly the most sinister of . . . pro-totalitarian measures, this act would impose military domination over civil institutions and civilian life, and could ultimately target anyone as an ‘illegal enemy combatant’ to be dealt with accordingly.”); *Posse Politics*, GOVERNING MAG., Dec. 2006, at 18 (opining that the changes to the PCA give “fresh reason to fear that Washington will take control of . . . Guardsmen, even while they’re still at home”). Gutierrez’s rather extreme characterization illustrates some Americans’ suspicions regarding federal military troops operating within the United States.

¹¹⁵ The reluctance to use federal military forces in domestic military operations is reflected in Army doctrine. Field Manual (FM) 3-19.15, *Civil Disturbance Operations*, cautions:

The commitment of federal troops to deal with domestic civil disturbances must be viewed as a drastic measure of last resort. Their role should never be greater than what is absolutely necessary under the circumstances. Commanders should take every measure to avoid the perception of an invading force. A JTF designated to respond to a civil disturbance should project the image of a restrained and well-disciplined force whose sole purpose is to help restore law and order with minimal harm to the people and property and with due respect for all law-abiding citizens.

U.S. DEP’T OF ARMY, FIELD MANUAL 3-19.15, CIVIL DISTURBANCE OPERATIONS B-54 (18 Apr. 2005) [hereinafter FM 3-19.15].

¹¹⁶ For an in-depth discussion of the L.A. Riots, *see infra* Section V.A.

B. The Stafford Act

Along with the Insurrection Act, the Stafford Act¹¹⁷ serves as a basis for federal intervention in state operations when a natural disaster occurs within the state. The Act allows the President to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services)”¹¹⁸ Among the federal agencies, upon request from the governor, “the President may authorize the DOD to carry out emergency work for a period not to exceed ten days. The DOD emergency work is limited to work essential for the preservation of life and property.”¹¹⁹

Although the DOD may organize emergency efforts, the Stafford Act does not directly allow federal forces to perform law enforcement functions, and therefore is not an actual exception to the PCA.¹²⁰ However, if civil unrest were to develop in the aftermath of the disaster, the President, with the consent of the governor if the legislature is not in session, could invoke the powers granted him under Section 331.¹²¹ In addition, even if the federal troops are deployed in a purely humanitarian capacity, there is little doubt that they would be authorized to use force in defense of themselves and others when directly related to their assigned mission.¹²² Although the Stafford Act does not expressly allow for the employment of federal troops as law enforcement, the nature of a disaster relief mission may mean that federal troops are nonetheless interacting with the civilian population and regulating their conduct.

The PCA is a prohibition on the use of federal troops in a law enforcement capacity within the United States. However, military troops are allowed to act in a number of support roles that avoid triggering the PCA. In addition, the Insurrection Act and other statutes serve as express exceptions to the PCA. Finally, the Stafford Act, although not an exception to the PCA, does permit military forces to provide support during national disasters. Given the various exceptions and exclusions to the PCA, employing military forces in domestic operations is both complex and nuanced. Therefore, it is imperative that the SRUF used by these forces clearly reflect the domestic laws that govern the population with which they are dealing.

V. Practical Application of the SRUF to Domestic Operations

The United States has an extensive history of using federal forces to respond to domestic crises—both natural and manmade. From providing support and training to the FBI¹²³ to quelling the Los Angeles riots in 1992,¹²⁴ the past use of federal forces in both direct law enforcement and support roles provides valuable lessons on the proper application of the rules for the use of force. This section will review three types of domestic operations: response to civil disturbances, support to law enforcement, and response to natural disasters. Each case provides valuable lessons about the proper use of federal forces, the proper application of the RUF in these crises, and insight on how the current SRUF can best be applied.

A. Response to Civil Disturbances—the Need for Distinct RUF and Adequate Training

Once the President invokes the Insurrection Act, he may then use federal forces in a law enforcement capacity without violating the PCA. The most recent invocation of the former Insurrection Act took place in 1992 in response to the L.A. Riots.

¹¹⁷ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

¹¹⁸ *Id.* § 5192.

¹¹⁹ KEITH BEA, CONG. RESEARCH SERV. REPORT, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING, RL 33053 (2005).

¹²⁰ JENNIFER K. ELSEA, CONG. RESEARCH SERV. REPORT, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES, RS 22266 (2005); *see also* 42 U.S.C. §§ 5121–5206 (2000).

¹²¹ 10 U.S.C. §§ 331–334 (2000).

¹²² Soldiers deployed from the 13th COSCOM out of Fort Hood, Texas to New Orleans, Louisiana, had the mission of providing logistical support to the victims of Hurricane Katrina, but were also authorized to use force in defense of themselves, others, and “to prevent non-DOD persons in the vicinity from the imminent threat of death or serious bodily harm, if directly related to the mission.” Major Deirdre Brou, Standing Rules for the Use of Force Brief (Sept. 5, 2005) (unpublished PowerPoint Presentation, on file with author). The units deployed from Fort Hood included the 21st Combat Support Hospital and elements of the 64th Corps Support Group, the 13th Corps Materiel Management Center, the 49th Movement Control Battalion, and the Special Troops Battalion, all of 13th Sustainment Command (Expeditionary). *Id.*

¹²³ Such assistance was either requested or made available at both the Ruby Ridge and Branch Davidian standoffs. *See infra* Section V.B.

¹²⁴ *See infra* notes 123–144 and accompanying text.

On 29 April 1992, a jury found four police officers not guilty in the Rodney King beating.¹²⁵ Within an hour of the verdict's announcement, an unruly crowd began to gather in an economically depressed section of Los Angeles.¹²⁶ Over the course of the next two days, widespread rioting and looting caused millions of dollars in property damage and the death of fifty-three people.¹²⁷ In response to a request by the governor of California, then-President Bush invoked the Insurrection Act and ordered the deployment of over 4200 U.S. Army Soldiers and Marines.¹²⁸ The President also federalized the California National Guard (CANG), which had been operating for the first day of the crisis in Title 32 (non-federal) status.¹²⁹ Operating as a single Joint Task Force (JTF), the Central Command required that all requests for law enforcement assistance be vetted through it.¹³⁰ Unfortunately, the commander of the JTF, Major General Marvin Covault, believed that the federal troops (and federalized National Guard troops) could not perform law enforcement functions without violating the PCA.¹³¹ The JTF was apparently unaware that the Presidential proclamation issued on 1 May provided an exception to the Act. As a result, CANG troops previously working in concert with local police to quell the riots now believed that they were forbidden from doing so.¹³² In addition, the process for determining whether or not a mission was classified as "law enforcement" or an authorized "support mission" was unnecessarily complex, leading to substantial backlogs in filling support requests.¹³³ In the end, effective use of federal troops was compromised by a misunderstanding of the laws governing Posse Comitatus.

Although many lessons emerged from the L.A. Riots, one of the most significant involves the importance of training federal troops on the practical application of rules for the use of force. Federal troops had deployed from Fort Ord, California to El Toro Marine Base, located on the outskirts of L.A., arriving on the afternoon of 2 May.¹³⁴ Almost immediately, the troops began "training for the civil disturbance missions and learning the applicable rules of engagement."¹³⁵ By the next morning, the troops were on the streets, having been given only hours to learn appropriate tactics, learn RUF, and adapt to their surroundings.¹³⁶ Although the Soldiers performed admirably, the lack of training in domestic operations resulted in the following situation:

Police officers responded to a domestic dispute, accompanied by marines. They had just gone up to the door when two shotgun birdshot rounds were fired through the door, hitting the officers. One yelled 'cover me!' to the marines, who then laid down a heavy base of fire The police officer had not meant 'shoot'

¹²⁵ WILLIAM H. WEBSTER, *A CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES* (Oct. 21, 1992).

¹²⁶ *Id.* at 11.

¹²⁷ James D. Delk, *The Los Angeles Riots of 1992*, in *SOLDIERS IN CITIES: MILITARY OPERATIONS ON URBAN TERRAIN* 89, 95 (Michael C. Desch ed., 2001); *Battle-torn L.A. Gropes Toward Order*, CHI. TRIB., May 2, 1992, at C1.

¹²⁸ WEBSTER, *supra* note 125, at 152. In Presidential Proclamation 6427, 57 Fed. Reg. 19,359 (May 5, 1992), and Executive Order 19,361, 57 Fed. Reg. 19,361 (May 5, 1992), the President first ordered the rioters to disperse, then authorized the intervention of U.S. forces to quell the disturbances. See also Lieutenant Colonel Christopher M. Schnaubelt, *The 1992 Los Angeles Riots: Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, at 88; Janet Cawley, *Bush Sends in Troops, Vows to Seek Justice*, CHI. TRIB., May 2, 1992, at C1; Douglas Jehl & John M. Broder, *Bush Sends Force at Request of Bradley, Wilson*, L.A. TIMES, May 3, 1992, at A1.

¹²⁹ Schnaubelt, *supra* note 128, at 88; Rich Connell & Jim Newton, *King Case Aftermath: A City in Crisis; Guard Takes Positions After Delays, SNAFUs*, L.A. TIMES, May 2, 1992, at A1. National Guard troops operate in three distinct statuses: Title 10 (federal active duty status), state active duty status, and Title 32 (non-federal duty status). ROGER ALLEN BROWN ET AL., *ASSESSING THE STATE AND FEDERAL MISSIONS OF THE NATIONAL GUARD* 10 (1995). When in Title 32 status, National Guard missions are "paid for by the federal government . . . [but] authorized by the Governor of the state and are under the control of the State Adjutant General or other authorized state National Guard officials." *Id.* at 9–10. The authorized missions include: "mandatory active and inactive duty training requirements and drills conducted within the boundaries of the United States in preparation for potential federal missions; full-time support for those members of the National Guard in military Technician or Active Guard and Reserve (AGR) status; and participation in Congressionally directed domestic operations." *Id.*

¹³⁰ Schnaubelt, *supra* note 128.

¹³¹ WEBSTER, *supra* note 125, at 152–53.

¹³² Schnaubelt, *supra* note 128, at 88.

¹³³ See *id.* fig. 2. This backlog can also be attributed to the lack of delegation to commanders on the ground. *Id.* "It appeared to many participants that the JTF headquarters insisted on total control of all decisions regarding military support without soliciting input from subordinate units, liaison officers, or the supported law enforcement agencies." *Id.*

¹³⁴ WEBSTER, *supra* note 125, at 152.

¹³⁵ *Id.*

¹³⁶ *Id.* The federal troops arrived on the heels of an incident in which National Guard troops fatally shot a civilian. In response, "Guard units were drilled on the rules of engagement, which state that Guard members may shoot to kill, but only if their lives or the lives of others are threatened." Jim Newton & Bob Pool, *Riot Aftermath; Under the Gun; Thousands of Troops are Caught in the Cross Fire Between Street Violence and Maintaining the Peace*, L.A. TIMES, May 6, 1992, at A7.

when he yelled ‘cover me’ to the marines. [He] meant . . . point your weapons and be prepared to respond if necessary. However, the marines responded instantly in the precise way they had been trained, where ‘cover me’ means provide me with cover using firepower Over two hundred bullets [were] fired into that house.¹³⁷

When Soldiers are not properly trained on, or confused about, SRUF, they will fall back on the combat training they received throughout their time in the military. This is particularly relevant today, when a large percentage of the military has deployed to Afghanistan or Iraq, but very few have even heard of SRUF.¹³⁸ If the SRUF is not clear about the level of force authorized, Soldiers will fill that information void with their past combat experience and training.¹³⁹ Additionally, when SRUF contain terms that are traditionally associated with combat operations, the chance for confusion is even greater.

Many leaders believe that “in combat you do not rise to the occasion, you sink to the level of your training.”¹⁴⁰ This is largely due to physical, sensory, and cognitive changes that occur when a Soldier is put in a situation involving great danger.¹⁴¹ When faced with fear-induced stress, a Soldier’s heart rate will increase dramatically.¹⁴² While a slight increase in heart rate can cause heightened awareness, fear-induced stress often causes a significant elevation in heart rate that has deleterious effects on the brain.¹⁴³ As such, the brain begins to shut down, causing memory loss, distorted vision, and an inability to reason.¹⁴⁴ Scientific studies of law enforcement officers under these circumstances have found that “74 percent of the officers involved in a deadly force encounter acted on automatic pilot. In other words, the actions of three out of four officers in combat were done without conscious thought.”¹⁴⁵ When acting on “autopilot,” the person is relying on the training he has received. But in order to function under such circumstances, a Soldier must have “rehearsed and trained, turning each action into ‘muscle memory,’ permitting himself to function at an expert level” under stressful conditions.¹⁴⁶

While “muscle memory” can be beneficial, it can also be detrimental. “We can teach warriors to perform a specific action required for survival without conscious thought but, if we are not careful, we can also teach them to do the wrong thing.”¹⁴⁷ In the case of the vast number of Soldiers who have trained for and executed extended combat operations in Iraq and Afghanistan, they have developed muscle memory regarding their reaction to threats of force. They have become intimately familiar with the terms “hostile act” and “hostile intent,” and have conducted the split-second analysis required in order to assess a threat and respond accordingly. While this analysis comports with international law, the standards may be different in domestic operations. Consequently, if these same Soldiers are then deployed in support of a domestic operation, they may retain their “combat muscle memory.” If federal forces are required to respond to a domestic crisis, they will have little time to train on application of SRUF. The confusion may be further compounded by the terminology of the RUF, which contains similar language to that found in ROE. As a result, when Soldiers are faced with a potentially deadly situation, their autopilot reflex may lead them to make a decision that is perfectly legal in combat, but not appropriate when applied in the United States against a person who is protected by the Fourth Amendment. Therefore, it is imperative that Soldiers receive unambiguous and distinct RUF, as well as RUF training that helps them forget their “combat muscle memory” and helps them develop “domestic operations muscle memory.”

¹³⁷ Schnaubelt, *supra* note 6, at 88 (quoting James D. Delk, FIRES AND FURIES: THE L.A. RIOTS 221–22 (1995)). While the appropriate level of force in this case may be debatable, the main concern remains that a lack of training and poor communication resulted in a potentially dangerous situation.

¹³⁸ Compare Michelle Tan, *By the Numbers: Who’s Fighting: Deployment Data Underscore the Strain of Combat Operations*, ARMY TIMES, Dec. 11, 2006, at 14 (“Since September 2001, a total of 683,380 [S]oldiers have deployed to Afghanistan or Iraq, 163,949 of them at least twice, the Defense Department data show.”), with STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE, RL 33095 (2005) (70,000 federal and National Guard troops deployed in support of Hurricane Katrina, the last major domestic operation requiring RUF).

¹³⁹ See LIEUTENANT COLONEL DAVE GROSSMAN, ON COMBAT 71 (2004).

¹⁴⁰ *Id.*

¹⁴¹ See Seth D. DuCharme, *supra* note 82 (citing Bruce K. Siddle, *Sharpening the Warrior’s Edge: The Psychology and Science of Training* 76–77 (1995)).

¹⁴² See GROSSMAN, *supra* note 139, at 31.

¹⁴³ *Id.*

¹⁴⁴ See *id.* Grossman introduced research that in an average person, 115–145 beats per minute (bpm) is the “optimal survival and combat performance level for: “complex motor skills,” “visual reaction time,” and “cognitive reaction time.” *Id.* However, once the heart rate goes above 175 bpm, the average person will experience deterioration of “cognitive processing, . . . loss of peripheral vision (tunnel vision), loss of depth perception, loss of near vision, [and] auditory exclusion.” *Id.* It is interesting to note that this data only applies to “hormonal or fear induced heart rate increases resulting from sympathetic nervous system arousal. Exercise induced increases will not have the same effect.” *Id.*

¹⁴⁵ See *id.* at 71.

¹⁴⁶ *Id.* at 35.

¹⁴⁷ *Id.* at 71.

B. Support to Civilian Law Enforcement—Lessons in RUF Development

1. Ruby Ridge and the “Special” Rules of Engagement

The importance of ensuring that SRUF comports with Fourth Amendment law cannot be overstated. When rules for the use of force stray from the established Fourth Amendment standards, Soldiers or law enforcement agents acting under those rules may violate the Constitution, breeding distrust among the public.¹⁴⁸ In addition, the individuals may be exposed to criminal and civil liability, while also exposing the government to financial liability. The confrontation at Ruby Ridge, Idaho demonstrates the significant consequences that can result when RUF strays from constitutional standards.

Randy Weaver, a member of the White Aryan Nation, had a long history of trouble with federal authorities.¹⁴⁹ Weaver built an isolated cabin in the hills of Idaho in an attempt to insulate his family from what he perceived to be excessive federal government interference.¹⁵⁰ Because of his association with extremist organizations, federal agents monitored Weaver and eventually arrested him for illegal manufacture and possession of an unregistered firearm in June 1990.¹⁵¹ United States Marshals tried unsuccessfully to get Weaver to surrender after he refused to appear for trial.¹⁵² On 21 August 1992, a surveillance team conducted reconnaissance on Weaver’s home in order to prepare for his future apprehension.¹⁵³ While conducting this reconnaissance, the agents were discovered and engaged in a firefight with Weaver, Weaver’s son Sammy, and Weaver’s friend, Kevin Harris.¹⁵⁴ In the exchange of gunfire, one agent was killed along with Weaver’s son, Sammy.¹⁵⁵ The U.S. Marshals Service immediately referred the issue to the FBI, and a hostage rescue team (HRT) deployed to the scene to begin planning for an assault.¹⁵⁶ The HRT commander and the FBI Associate Director drafted special ROE¹⁵⁷ for the mission. Instead of using the standard FBI rules for deadly force, which allowed for the use of deadly force in self-defense or defense of others, the ROE for this mission stated:

1. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.
2. If any adult in the compound is observed with a weapon after the surrender announcement is made, and is not attempting to surrender, deadly force can and should be employed to neutralize the individual.¹⁵⁸

The ROE went on to state that any subjects other than Weaver, his wife Vicki Weaver, or Kevin Harris, should be dealt with under the standard FBI ROE allowing use of force only in self-defense.¹⁵⁹

After stationing snipers in the hills around Weaver’s home, the HRT waited for Weaver to come out of the house.¹⁶⁰ Eventually, Weaver emerged and went to a barn on the property. At that point, a sniper shot him, causing a minor injury.¹⁶¹

¹⁴⁸ Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, PARAMETERS, Autumn 1997, at 82.

¹⁴⁹ U.S. DEP’T OF JUSTICE, REPORT REGARDING INTERNAL INVESTIGATION OF SHOOTINGS AT RUBY RIDGE, IDAHO, DURING ARREST OF RANDY WEAVER (n.d.) [hereinafter DOJ RUBY RIDGE REPORT]. Weaver first came to the attention of federal authorities in 1985, when he “made threats against the President and other government and law enforcement officials. The Secret Service was told that Weaver was associated with the Aryan Nations, a white supremacist group, and that he had a large cache of weapons and ammunition.” *Id.* § IIIA. Later in the year, Weaver “filed an affidavit with the county clerk, giving ‘legal and official notice that [he] believe[d] [he] may have to defend [him]self and [his] family from physical attack on [his] life’ by the FBI.” *Id.* Finally, in 1989, Weaver sold a government “informant two ‘sawed-off’ shotguns.” *Id.* This final act was the basis for the arrest warrant issued against him. *Id.*

¹⁵⁰ *Id.* § III A.

¹⁵¹ *Id.*; see also *Showdown Looms at Fugitive’s Stronghold*, CHI. TRIB., Aug. 23, 1992, at M2.

¹⁵² DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁵³ *Id.*

¹⁵⁴ *Id.*; *Federal Marshal is Slain in Idaho Near Mountain Home of Fugitive*, N.Y. TIMES, Aug. 22, 1992, at 9 (describing the firefight and resulting casualties).

¹⁵⁵ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; *U.S. Lawman Killed While Watching Home of Fugitive*, L.A. TIMES, Aug. 22, 1992, at A18; *U.S. Marshal Killed Amid Idaho Standoff*, CHI. TRIB., Aug. 22, 1992, at C2.

¹⁵⁶ DOJ RUBY RIDGE REPORT, *supra* note 149, § III B;

¹⁵⁷ *Id.* The FBI used the term rules of engagement for this mission, even though rules for the use of force would have been the more accurate term.

¹⁵⁸ *Id.* § III.C.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Weaver ran back to the cabin, at which time the sniper fired at Weaver, but instead shot and killed Vicki Weaver and seriously injured Kevin Harris.¹⁶² After an eight-day standoff, Harris surrendered.¹⁶³ Weaver surrendered the following day.¹⁶⁴ At trial, both Harris and Weaver were cleared of all charges relating to the standoff because of the FBI's unreasonable ROE, but Weaver was found guilty of the original charges from the warrant.¹⁶⁵

The HRT commander, Richard Rogers, and the Assistant Director of the FBI, Larry Potts, were responsible for drafting the modified ROE.¹⁶⁶ In the subsequent investigation, they revealed that they made the changes after assessing the probable threat and considering what level of force would adequately protect their agents. Rogers stated: "It appeared to me that it would have been irresponsible for me to send my agents into the situation without at least giving them a set of rules within the greater framework of the standard FBI rules, [sic] that would allow them to defend themselves."¹⁶⁷ Meanwhile, Potts believed "that this crisis was the most dangerous situation into which the HRT had ever gone."¹⁶⁸ He stated: "I was extremely fearful of sustaining casualties while attempting to establish a perimeter at the crisis site, since the subject possessed every tactical advantage. . . . I considered every armed adult in the vicinity of the Weaver cabin to be potentially hostile and a threat to HRT personnel."¹⁶⁹ In addition, Potts believed that the passage stating deadly force "can and should be employed" was simply a reflection of the heightened danger that the agents would encounter, and not a mandate to use deadly force.¹⁷⁰

The investigation found that although Potts and Rogers believed that the ROE "were merely a means of identifying the level of risk presented by the situation and were not intended to change or modify the FBI's standard deadly force policy,"¹⁷¹ the agents executing the mission believed that the new language was an expansion of the existing FBI deadly force rules. The FBI Special Agent in Charge of the mission believed that this was a "broadening of the FBI's deadly force policy . . . based upon these specific subjects having demonstrated their willingness to kill a Federal official to avoid capture."¹⁷² In other words, the Special Agent believed that the adult males had already been "declared hostile" for the purposes of the operation. In addition, the FBI Hostage Negotiator "was surprised and shocked by the Rules of Engagement. The Rules were the most severe he had ever seen in the approximately 300 hostage situations in which he had been involved."¹⁷³ And finally, many of the snipers "interpreted the Rules as a 'green light' to use deadly force against armed adult males."¹⁷⁴

In evaluating the ROE, the investigation determined that the language stating the agents "can and should" use deadly force against adult males "flatly contradict[s] the commands of [*Tennessee v. Garner* and *Graham v. Connor*], which require the careful evaluation of the risk posed by a suspect before law enforcement can employ deadly force."¹⁷⁵ The investigation determined that by designating adult males as hostile, the ROE circumvented the requirement that law

¹⁶² *Id.*

¹⁶³ *Id.*; *Fugitive's Friend Gives Up in Idaho*, N.Y. TIMES, Aug. 31, 1992, at A8; *Man Wanted in Idaho Siege Surrenders*, CHI. TRIB., Aug. 31, 1992, at C5.

¹⁶⁴ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; Ashley Dunn, *Surrender Ends Mountain Siege*, L.A. TIMES, Sept. 1, 1992, at A3; Timothy Egan, *White Supremacist Surrenders After 11-Day Siege*, N.Y. TIMES, Sept. 1, 1992, at B6; John E. Yang, *Idaho Siege Ends as Fugitive Gives Up in Killing of Marshal*, WASH. POST, Sept. 1, 1992, at A3.

¹⁶⁵ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A; Timothy Egan, *July 4-10: 19-Days of Deliberation; A Jury Rebuffs U.S., Acquits 2 of Marshal's Death*, N.Y. TIMES, July 11, 1993, at 2 (the jury returned the verdict of not guilty on 8 July 1993 after nineteen days of deliberation).

¹⁶⁶ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁶⁷ *Id.* § IV F(2)(a).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* Potts went on to state:

These ROE were established to assist the HRT personnel in making a determination regarding what constituted a threat to them in this extraordinary circumstance. The ROE were not intended to supersede the FBI standard deadly force policy. The final determination regarding such implementation of deadly force must always remain with the individual . . . and each individual must make an individual, final determination of threat.

Id.

¹⁷⁰ *See id.*

¹⁷¹ *Id.* § F(1)(c).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* § IV F(3)(a)(3)

enforcement officials evaluate the threat at the time it is presented.¹⁷⁶ The DOJ noted that “[t]he Constitution allows no person to become ‘fair game’ for deadly force without law enforcement evaluating the threat that person poses, even when, as occurred here, the evaluation must be made in a split second.”¹⁷⁷

The Ruby Ridge incident demonstrates two dangers in the drafting of rules for the use of force. First, in the FBI’s attempt to draft special rules, they failed to ensure that the rules fully complied with the Fourth Amendment. The Fourth Amendment allows law enforcement to use deadly force in self-defense and defense of others, or in order to capture a dangerous fleeing felon. In this case, the rules were designed to allow agents to kill the “adult males” based on their past hostile conduct, essentially “declaring them hostile.” This international law concept, although permissible in armed conflict, does not comport with the Constitution. This is similar to the current SRUF, which contains international law concepts like “hostile act” and “hostile intent,” even though such terms may be inconsistent with Fourth Amendment law.¹⁷⁸

The second danger is that by drafting overly aggressive ROE in an attempt to highlight the agents’ right to use self-defense, some agents will become confused about what they are allowed to do. In this case, the drafters believed that the additional ROE was simply a tool to remind the agents of the dangers present in this operation. But the agents and snipers perceived the “can and should” language as an expansion of the existing rules and a *requirement* to use deadly force. As such, the language violated the constitutional requirement that law enforcement officers evaluate the threat at the moment it is presented and only then make an assessment as to the appropriate level of force needed to eliminate the threat. Much like these ROE, the current SRUF language can be interpreted as being more aggressive. While it is important for the SRUF to be clear regarding a Soldier’s right to self-defense, including more aggressive language may not be the way to achieve this goal. As DOJ stated in its investigation, “these Rules of Engagement created an atmosphere in which the sniper/observers were more likely to employ deadly force than had the FBI standard deadly force policy been in effect.”¹⁷⁹ If snipers who deal with the FBI deadly force policy every day get confused by additions to these rules, then there is a great likelihood that the SRUF will confuse Soldiers who are not accustomed to dealing with domestic operations. Therefore, the SRUF must clearly articulate the Fourth Amendment requirements for use of deadly force.

2. Assault on the Branch Davidian Compound in Waco, Texas—An Argument for Restraint

On 28 February 1993, members of the Bureau of Alcohol, Tobacco and Firearms (BATF) led an assault on the Branch Davidian compound in Waco, Texas in order to serve a warrant on cult leader David Koresh.¹⁸⁰ A gunfight erupted between the cult members and the agents, resulting in the death of four agents and the injury of twenty others.¹⁸¹ The Branch Davidians were successful in repelling the initial assault. After a two-month standoff, however, an FBI HRT led another assault on the compound.¹⁸² After they “punched large holes in the walls of the building, [the team] drove M-728 Combat Engineering Vehicles deep into the building” and launched pyrotechnic rounds into the building.¹⁸³ The building erupted into fire, causing the deaths of the compound’s seventy-four inhabitants.¹⁸⁴

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* The excessive use of force in this case led to a *Bivens* action against the agents for violation of both Kevin Harris’s and Vicki Weaver’s Fourth Amendment rights. The court, in *Harris v. Roderick et al.*, held that the agents were not entitled to qualified immunity for following the special rules of engagement because “[t]he order mandated an unconstitutional use of force, and no reasonable officer could have believed otherwise.” *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997). The Harris case was eventually settled out of court and Harris was paid \$380,000. *U.S. Settles Final Civil Lawsuit Stemming from Ruby Ridge Siege*, N.Y. TIMES, Sept. 23, 2000, at A12. The heirs of Vicki Weaver received a \$3.1 million settlement. Ken Fuson, *Conversations/Randy Weaver; He’s a Rallying Cry of the Far Right But a Reluctant Symbol*, N.Y. TIMES, Aug. 27, 1995, at 7.

¹⁷⁸ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. 4c.

¹⁷⁹ DOJ RUBY RIDGE REPORT, *supra* note 149, § III A.

¹⁸⁰ U.S. DEP’T OF TREASURY, REPORT OF THE DEP’T OF THE TREASURY ON THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS INVESTIGATION OF VERNON WAYNE HOWELL ALSO KNOWN AS DAVID KORESH (Sept. 1993).

¹⁸¹ *Id.* at 102; see also Pierre Thomas, *Raid on Cult Exploded in First Minute; ATF Plan Went Awry in Withering Gunfire*, WASH. POST, Mar. 27, 1993, at A1 (reporting four deaths, but only fifteen injuries to ATF agents).

¹⁸² H.R. REP. NO. 106-1037, at 1 (2000). This second assault took place on 19 April 1993. *Id.*

¹⁸³ *Id.* at 8; Stephen Braun, *Will Smoke in Waco Ever Clear?*, L.A. TIMES, Apr. 23, 1993, at A1.

¹⁸⁴ H.R. REP. NO. 106-1037, at 1.

In the resulting investigation into the Waco incident, much attention focused on the role of Special Forces personnel in planning and executing the raid.¹⁸⁵ A JTF stationed near Fort Bliss provided support to local, state, and federal entities under Section 1004 of the National Defense Authorization Act for Fiscal Year 1991.¹⁸⁶ This legislation allowed the Army to “provide equipment, training, and expert military advice to civilian law enforcement agencies” in support of counter-drug activities.¹⁸⁷ The FBI, in anticipation of the raid, requested training, communication, and medical support for the mission from the Special Forces element of the JTF.¹⁸⁸ The FBI stated that a methamphetamine lab allegedly housed on the compound provided the necessary drug nexus that allowed Special Forces personnel to participate.¹⁸⁹ After reviewing the request, senior Army lawyers determined that the proposed nexus—an alleged methamphetamine lab reportedly operated on the property six years prior—was too attenuated to justify direct military support.¹⁹⁰ As a result, the Special Forces unit provided medical and communications training and equipment, but declined to provide direct support for fear that it would violate the PCA.¹⁹¹

In its investigation into the “Tragedy at Waco,” the House Committee on Government Reform determined that:

Relations between civilian officials and the military with regard to Waco were characterized by disregard of the PCA on the part of the civilians, and by diligence on the part of the military. Two senior Army officers were asked to evaluate the FBI’s proposed operations plan for April 19, and consistently refused to do so, as such support would have made them direct participants in planning the arrest of the Branch Davidians, and would have therefore violated the PCA.¹⁹²

The incident at Waco demonstrates the eagerness of federal law enforcement officers to enlist the support of the military in purely civil law enforcement matters. As a result, it is important for commanders and their Judge Advocates to carefully analyze the legal basis for domestic missions prior to supporting them.

In this case, the careful mission analysis by the leaders and Judge Advocates avoided involvement in a disastrous mission in which “[t]he specter of members of the Army’s special operations forces accompanying BATF agents storming a religious compound, however misguided its leader, could have seriously compromised public support of the US Army.”¹⁹³ This same scrutiny must be applied to drafting RUF for domestic operations. “[T]he military’s fervor to compete the mission, so essential in desperate battles to take the high ground,”¹⁹⁴ can sometimes lead to hasty decisions regarding the level of support that can be given, or the aggressiveness of RUF that military forces will operate under. If the mission, and RUF for that mission, is not clearly defined, the consequences can be dire. Not only could errors result in ineffective support, but “[a]ny actual or perceived departure from applicable legal restrictions can lead to an unacceptable loss of confidence in the Army.”¹⁹⁵ Therefore, in order to preserve the public’s confidence in the Army, the legal basis for each concept in the SRUF must be firmly cemented in domestic law, and Judge Advocates must be able to draw on that domestic law to answer questions regarding its application.

¹⁸⁵ Lujan, *supra* note 148, at 82.

¹⁸⁶ Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1990). Congress extended and restated the authority for DOD support for counter-drug enforcement in 2002. National Defense Authorization Act for Fiscal Year 2002, 107 Pub. L. No. 107-107, § 1021, 115 Stat. 1012 (2001).

¹⁸⁷ Lujan, *supra* note 148 (citing H.R. REP. 97-71 (1981)).

¹⁸⁸ *Id.* The FBI requested that the medical and communications support accompany them on the mission. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* But see Michael Tackett, *Reno Again Defends Waco Strategy*, CHI. TRIB., Apr. 29, 1993, at N3 (reporting that then-Attorney General Janet Reno “said the Justice Department concluded that federal law prohibited the use of the military in a domestic law-enforcement situation.”).

¹⁹² *The Tragedy at Waco: New Evidence Examined*, H.R. REP. NO. 106-1037, at 1 (2000). “[A]dvice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics” is not a violation of the PCA because such generalized input is considered “passive.” *United States v. Red Feather et al.*, 392 F. Supp. 916 (D. S.D. 1975). However, in this case, “an Army general officer and a colonel were asked to review and comment upon the tactical details discussed within the proposed operations plan to insert tear gas into the Branch Davidian compound.” *Id.* at 61–62. Such intimate involvement in the planning would constitute “direct participation” in violation of the PCA. *Id.*

¹⁹³ Lujan, *supra* note 148, at 82.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

C. Response to Natural Disasters—Successfully Applying RUF in a Hurricane

The U.S. military often plays a vital role in recovery efforts following natural disasters. In recent years, support for hurricane victims has taken on a whole new level of importance. By invoking the Stafford Act,¹⁹⁶ the President may direct federal agencies to provide support to “state and local emergency assistance efforts” in the aftermath of a natural disaster.¹⁹⁷ As a part of this support, the DOD may send federal troops to provide logistical support and recovery assets to the stricken region.¹⁹⁸ Even though these forces may not perform policing functions without the Insurrection Act first being invoked, they will still be allowed to act in self-defense and defense of others. Therefore, Soldiers responding to such disasters must have clearly defined RUF based on domestic law.

Possibly the best example of the value of clear and concise rules for the use of force is the Hurricane Katrina recovery effort. On 27 August 2005, President Bush declared a federal emergency in Louisiana, two days before Hurricane Katrina devastated the coastal region.¹⁹⁹ This allowed Federal Emergency Management Agency (FEMA) to begin the flow of federal assistance under the Stafford Act.²⁰⁰ Shortly thereafter, the Secretary of Defense ordered active duty units, primarily from Fort Bragg and Fort Hood, to deploy to the area to provide supplies, transportation, and medical support during the recovery effort.²⁰¹ Over 20,000 federal troops, under the operational control of Joint Task Force Katrina, augmented the “nearly 50,000 National Guardsmen . . . [] operating in Louisiana and Mississippi.”²⁰² Although the JTF commander had command responsibility for the JTF and the joint operations area (JOA), he “had only a coordinating relationship with the Adjutant Generals of Louisiana and Mississippi; no formal command relationship existed”²⁰³ The governor of Louisiana was hesitant to request federalization of the National Guard Soldiers, partly because she feared that these Soldiers would not be able to continue in their capacity as law enforcement officers without violating the PCA.²⁰⁴ As a result, and adding to the confusion, National Guard Soldiers in Title 32 status operated under the rules for the use of force tailored to their home states, while the Title 10 Soldiers were operating under a modified version of the SRUF.²⁰⁵

The various rules for the use of force were tailored depending on the authorized missions for the Soldiers. The Title 32 Soldiers were authorized to conduct law enforcement actions, while federal forces received the following guidance in their RUF:

You will not engage in any civilian law enforcement matters, unless specifically authorized by your commander and only when certain exceptions apply. You may not apprehend or detain civilians unless you are in immediate danger of death or serious bodily injury. Any detained civilians must be turned over to civilian law enforcement personnel as soon as possible.²⁰⁶

¹⁹⁶ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

¹⁹⁷ *Id.* § 5192.

¹⁹⁸ *Id.*

¹⁹⁹ *Katrina Lessons Learned*, *supra* note 4, at 11.

²⁰⁰ *Id.*

²⁰¹ STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE 13, RL 33095 (2005); Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City’s Chaos; Confusion Reigns at Every Level of Government*, WASH. POST, Sept. 11, 2005, at A01 (reporting on the delayed deployment of these units as the President and governors negotiated control over the military).

²⁰² STEVEN R. BOWMAN ET AL., CONG. RESEARCH SERV. REPORT, HURRICANE KATRINA: DOD DISASTER RESPONSE 21, RL 33095 (citing National Guard Bureau Statistics). Joint Task Force Katrina was headed by First Army Commander Lieutenant General Russel L. Honore. *Id.*

²⁰³ *Katrina Lessons Learned*, *supra* note 4, at 21.

²⁰⁴ *Id.* at 22; Peter Gosselin & Doyle McManus, *Katrina’s Aftermath; Wider Powers for U.S. Forces in Disasters are Under Review*, L.A. TIMES, Sept. 11, 2005, at A36.

²⁰⁵ Interview with Lieutenant Colonel Joseph S. Dice, Director, Domestic Operational Law, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 23, 2007). The difference between the federal and state National Guard troops’ rules for the use of force was significant. While federal troops were acting only in self-defense, “Louisiana Gov. Kathleen Blanco declared war on looters who have made New Orleans a menacing landscape of disorder and fear. ‘They have M-16s and they’re locked and loaded,’ Blanco said of 300 National Guard troops who landed in New Orleans fresh from duty in Iraq. ‘These troops know how to shoot and kill, and they are more than willing to do so, and I expect they will.’” Allen G. Breed & David Espo, *Aid vs. Anarchy in New Orleans*, PHILADELPHIA ENQUIRER, Sept. 2, 2005, at A18.

²⁰⁶ *Katrina Lessons Learned*, *supra* note 4, at 8.

Adding to the already sensitive situation on the ground, the mayor of New Orleans ordered the police and military forces to conduct a forced evacuation of the city.²⁰⁷ From a military perspective, this presented uncertainty over what level of force could be used to execute the forced evacuation and whether federal forces could participate.²⁰⁸ Lieutenant General Honore, after determining that forced evacuation was a law enforcement action, issued a “fragmentary order (FRAGO) that stated: ‘No JTF Katrina task force service member will perform or assist with any type of forced evacuation of any citizen in the AO [area of operations].’”²⁰⁹ Ultimately, federal forces assisted in numerous voluntary evacuations, while police and National Guardsmen conducted the few forced evacuations that took place.²¹⁰

Another challenge faced by both the National Guard and federal forces was civil disorder. In addition to looting, Soldiers also came under fire from local gangs. In one highly publicized incident, Guardsmen came under fire from snipers while evacuating patients from a New Orleans Hospital.²¹¹ Instead of responding to these clear hostile acts with deadly force as their RUF would have allowed them to do, however, the National Guard opted to suspend evacuation operations from that location for two days.²¹² Only three days after the incident at the hospital, New Orleans police responded to a similar situation on the Danziger Bridge.²¹³ After receiving reports of gunfire, seven police officers responded to the scene, and allegedly shot six fleeing individuals, killing two.²¹⁴

Despite the lack of a unified command and varying RUF, the National Guard avoided a potentially major use of force issue. The Guard’s reaction may be attributed to the extensive experience that many of the National Guardsmen have in responding to domestic crises. In this case, they likely considered the resulting ramifications of engaging in a firefight in a U.S. city, even one that was largely abandoned. However, they were not compelled to continue to risk their lives under the circumstances. As a result, and in an effort to protect themselves, they elected to temporarily suspend evacuations from that area. Soldiers acting in a law enforcement capacity are certainly authorized to use force in self-defense and defense of others. However, when considering the use of force, these Soldiers must also consider the safety of the community and the ramifications that their actions will have on the greater mission. This is particularly true in domestic operations, where potential aggressors are protected by the Fourth Amendment. The current SRUF, with the addition of more aggressive language in some provisions, seems counter to the nuanced operations that the rules govern.

VI. Consequences of Excessive Use of Force

Domestic operations demand a clear and concise set of RUF because of the many limitations inherent in the use of federal troops within the United States. As highlighted above, when Soldiers are forced to interpret ambiguous and unfamiliar RUF, they will apply it inconsistently and sometimes incorrectly.²¹⁵ But what are the practical implications of an ambiguous set of RUF that leads to excessive use of force? While force protection must be of utmost concern in any operation, this protection cannot come at the cost of the constitutional rights of persons in the United States. If the RUF is unclear, the Soldiers participating may become ineffective and demoralized because of the confusion. Ambiguity may lead to ineffective and demoralized units participating in the action. In addition, the limitations on the use of federal forces within the boundaries of the United States are well-known and firmly rooted. Therefore, even one violation of the Fourth Amendment during a domestic crisis can have far-reaching effects on the public’s perception of the military.²¹⁶

²⁰⁷ *Id.*; Howard Witt & Michael Martinez, *Thousands Feared Dead in Lawless City; Feds Send Troops, Aid Amid Looting and Gunfire*, CHI. TRIB., Sept. 1, 2005, at C1.

²⁰⁸ *Katrina Lessons Learned*, *supra* note 4, at 8.

²⁰⁹ *Id.* at 5.

²¹⁰ *Id.*

²¹¹ Scott Gold et al., *Katrina’s Aftermath*, L.A. TIMES, Sept. 3, 2005, at A1. Aside from these documented incidents, however, many of the reports of widespread murders, rapes, and violence were later proven to be little more than urban legend. David Carr, *More Horrible Than Truth: News Reports*, N.Y. TIMES, Sept. 19, 2005, at C1.

²¹² *Katrina Lessons Learned*, *supra* note 4, at 29.

²¹³ Michael Kunzelman, *Policemen Indicted in Post-Katrina Shootings; 7 New Orleans Officers Charged in Incident in Which 2 Died and 4 Were Wounded*, WASH. POST, Dec. 29, 2006, at A9.

²¹⁴ *Id.* Four of the officers were charged with murder, while the other three were charged with attempted murder. As of 15 March 2007, they are all pending trial. Ann M. Simmons, *Death Penalty Dropped in Shooting*, L.A. TIMES, Feb. 2, 2007, at A16.

²¹⁵ See *supra* Section V and accompanying notes.

²¹⁶ These violations may also lead to individual and government liability. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that where a federal actor, acting under “color of federal law,” violates an individual’s right guaranteed under the

A. Ambiguous RUF Leading to Decreased Unit Morale

Regardless of the mission, Soldiers at all levels take pride in their units' successes and share in the disappointment of their units' failures. These Soldiers are even more invested when those successes and failures take place during a deployment. If Soldiers operating in a domestic environment are uncertain regarding the use of force, the uncertainty can lead to hesitation and ineffectiveness, putting both the Soldiers and the public in danger. In addition, a unit's morale can be significantly eroded if its Soldiers discover that their use of force decisions, although consistent with the RUF, may have actually violated the law.

The CANG support of the L.A. Riots provides a good illustration of how confusion can lead a unit to become paralyzed, thereby lessening its effectiveness and negatively impacting morale. Although the CANG originally operated in a Title 32 (non-federal) status, which allowed it to directly support law enforcement missions without violating Posse Comitatus,²¹⁷ after federalization, it became subject to the PCA. The CANG commanders, like the JTF commander, shared the mistaken belief that they were constrained by the PCA despite the President's invocation of the Insurrection Act.²¹⁸ This confusion paralyzed the CANG. "Prior to federalization, the National Guard in their Title 32 status responded to every request for assistance. After transformation to Title 10 status, the response rate dropped to approximately 20 percent owing to the perceived effect of Posse Comitatus."²¹⁹ In addition, Soldiers were confused as to whether or not they could patrol with loaded weapons.²²⁰ "The practical effect [of this confusion] was to leave some first line leaders with the perception they had to 'take casualties before they could'" load their weapons.²²¹ While these particular limitations were a result of the weapons arming policy, the ambiguous RUF contributed to the uncertainty, leaving Soldiers and commanders unsure about the appropriate use of force. The resulting confusion from the ambiguous RUF not only increased the risk to Soldiers, but also "led to underutilization of a potent force and to morale problems with the National Guard."²²²

Constitution, that individual may sue the defendant in his individual capacity for money damages. *Id.* at 396–97. Normally, however, defendants may receive qualified immunity, insulating them from personal liability, if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, even if a Soldier is not held personally liable, he will still be worried about the case until it is resolved and the subject of numerous criminal and civil investigations. In some cases, like the lawsuits stemming from the Ruby Ridge incident, the case could drag on for several years. All the while, both the Soldier and the unit will be distracted by a flurry of depositions and other litigation preparation.

Beyond the impact on individual Soldiers, litigation against the federal government can have significant consequences for the military's autonomy over creating RUF. When a Soldier or federal agent is sued under *Bivens* for excessive use of force, the court must determine if the excessive use of force constituted a Fourth Amendment violation. In so doing, the court will analyze the military's rules for the use of force and make a determination as to whether or not they comport with the Constitution. In the Ruby Ridge case, the civil court analyzed the rules of engagement and made a determination that the rules violated the Fourth Amendment. In making this determination, the court created federal precedent regarding what provisions federal rules for the use of force can and cannot contain.

Similarly, in *Sabino v. United States*, No. 03-CIV-80340-COOKE/MCALILEY (S.D. Fla. May 31, 2005), a civilian boat captain sued for damages after a member of the Coast Guard used excessive force in detaining her. In analyzing the case, the court interpreted the Coast Guard RUF and found that the seaman's "handling of the incident was not in conformity with approved Coast Guard policy requiring that a reduced level of force be used, particularly when an individual is handcuffed." *Id.* The court awarded the plaintiff nearly \$1.5 million in damages. The court, in analyzing the appropriateness of the Seaman's actions, made determinations regarding the appropriate level of force—determinations that, up until that point, were the exclusive purview of military commanders.

The potential for increased litigation for excessive force increases when SRUF is ambiguous. Every case involving use of force will create a new, and likely varying, definition on the limits of SRUF. As a result, military commanders and Soldiers could be faced with a bewildering body of inconsistent cases defining the constitutional limits on the use of force. Consequently, the power to define RUF will no longer be vested in the military, but instead defined by the courts. The only way to definitively prevent this from occurring is to ensure that Soldiers and commanders have clear SRUF that is consistent with the Fourth Amendment, thereby preventing excessive force incidents.

For a detailed discussion of the civil and criminal consequences resulting from excessive force, see Stafford, *supra* note 13, at 1.

²¹⁷ See, e.g., WEBSTER, *supra* note 125, at 152–54. The PCA limits federal troops from providing domestic law enforcement, so National Guard units operating in a Title 32 status are not limited by the Act.

²¹⁸ Lujan, *supra* note 185, at 82.

²¹⁹ *Id.*

²²⁰ Memorandum, Staff Judge Advocate, JTF-LA, U.S. Marine Corps, to JTF-LA J3, subject: Joint Task Force Los Angeles After Action Report—(GARDEN PLOT)—Staff Judge Advocate (7 May 1992) [hereinafter SJA JTF-LA AAR] (on file with author).

²²¹ *Id.*

²²² *Id.*

B. Loss of Confidence in the Military

In addition to affecting Soldiers, excessive force may lead to poor public perception of the military. The PCA was passed in 1878, primarily at the urging of a Southern Democratic contingent in Congress that wanted to end the U.S. Army's attempts in the South to enforce recently-enacted Reconstruction and civil rights laws.²²³ Over the years, this act has transformed into a symbol of federalism, while continuing to be an indication of the American public's skepticism of a federal military force conducting law enforcement operations.²²⁴ Although the Insurrection Act now provides for expanded exceptions to the PCA,²²⁵ skepticism remains. In fact, many militia groups throughout the United States still point to the rumored role of Army Special Forces in the Waco tragedy as an example of the need for strong prohibitions on military law enforcement action within the U.S. borders.²²⁶

The very nature of domestic operations—American military forces policing Americans—has such significant implications that even the mistakes of a few can have far-reaching effects. As one officer who commanded Soldiers during the L.A. Riots noted:

The actions of a single small unit during combat have been known to influence the outcome of a battle, but it would be highly unusual for one squad to be responsible for losing a campaign. During [operations other than war (OOTW)], however, the misconduct or mistakes or ineptitude of a handful of troops might negate the achievements of an entire brigade. Because public perception plays such a large role in determining the outcome of an OOTW mission, small-unit actions in such missions appear to have a significant potential for large-scale effects.²²⁷

Because the actions of individual Soldiers can have such a large effect on domestic missions, clear standards for the use of force must be established and consistently trained before the unit receives a mission to respond to a domestic crisis. If the SRUF contains unnecessarily aggressive or ambiguous language, Soldiers are more likely to use excessive force, thereby eroding the public's confidence in the military. Once the public perception of the military decreases, civilian leaders may call for greater restriction on the use of federal forces, thereby lessening the effectiveness of these units in providing assistance during a crisis. Alternatively, ambiguous SRUF could also force commanders to act too conservatively, fearful that they will unwittingly step outside the murky boundaries of the SRUF.²²⁸ Therefore, the best way to protect the military and civilians during domestic operations is to ensure they operate with clear and consistent SRUF.

VII. Proposal

The SRUF is designed to be a series of core concepts applicable to all domestic operations. As such, the SRUF is not, nor can it be, a complete articulation of the rules for the use of force applicable in any of the numerous types of operations that may occur. The mission-specific RUF for disaster relief operations are going to be much different than that needed in civil disturbance operations. However, for the concepts that the SRUF does cover, the language must be clear, unambiguous, and rooted in domestic law. The current SRUF contains international law concepts that may not be consistent with the Fourth Amendment. In addition, the sections dealing with deadly force, self-defense and hostile act/intent are ambiguous, allowing for unnecessary confusion. These issues can be resolved in two key ways: altering, or at least interpreting, the language of the current SRUF so that it is clearly consistent with domestic law, and providing periodic and realistic training to units that may be ordered to respond to domestic crises. None of the changes proposed in this section are radical, but rather are modest modifications based on language contained in previous versions of RUF.

By and large, the language in the SRUF is clear and consistent. The consolidation of the various RUF from counter drug operations, GARDEN PLOT, and DOD Use of Deadly Force rules into one universal set of SRUF is a positive

²²³ See MATT MATTHEWS, *THE PCA AND THE UNITED STATES ARMY: A HISTORICAL PERSPECTIVE* (2006).

²²⁴ *Id.*; see also CHARLES DOYLE, CONG. RESEARCH SERV. REPORT, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW*, No. 95-964 S (2000).

²²⁵ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

²²⁶ See, e.g., MORRIS DEES, *GATHERING STORM* (1996). As the congressional investigation discovered, the Special Forces personnel did not provide direct support to the raid. However, this has not prevented a significant group of conspiracy theorists from accusing the government of a cover-up. *Id.*

²²⁷ Schnaubelt, *supra* note 128, at 88.

²²⁸ See Martins, *supra* note 9.

development.²²⁹ However, SRUF does not have to be consistent with SROE. Therefore, sifting out the terminology based on international law can resolve the shortfalls outlined in this article.

First, the language dealing with “hostile act” and “hostile intent” should be removed.²³⁰ These international law terms may lead to confusion among Soldiers operating in a domestic setting.²³¹ Specifically, the passage classifying a hostile act or hostile intent as “force used directly to preclude or impede the mission and/or duties of U.S. forces”²³² gives no indication of what level of force is authorized against those impeding the mission. In addition, assuming it authorizes up to deadly force, such a provision is not recognized under the Fourth Amendment.²³³ The only justifications for the use of deadly force are self-defense and defense of others, or to stop a fleeing felon who reasonably appears to “pose an imminent threat or death or serious bodily harm to DOD forces or others in the vicinity.”²³⁴

Second, the definition of “inherent right of self-defense” should be changed. The current definition allows service members to exercise self-defense “in response to a hostile act or demonstrated hostile intent.” As outlined above, this terminology should be removed so as to avoid potential confusion between international and domestic law concepts. Instead of the more combat-oriented “inherent right and obligation” language, domestic operations require less confrontational language. Finally, the definition must include “reasonably necessary” language to comport with Fourth Amendment precedent.²³⁵ Therefore, the following language similar to the previous DOD rules for deadly force²³⁶ should be reinstated:

Self-Defense and Defense of Others. When deadly force reasonably appears to be necessary against a hostile person(s) to protect law enforcement or security personnel (both DoD and non-DoD personnel) who reasonably believe themselves or others to be in imminent danger of death or serious bodily harm by the hostile person(s).²³⁷

This definition is more in keeping with the language of *Graham v. Connor*²³⁸ and is consistent with the FBI rules for deadly force,²³⁹ while at the same time leaving no doubt that Soldiers have the right of self-defense.²⁴⁰

In addition to self-defense, the language authorizing Soldiers to intervene to protect non-DOD personnel and civilians against serious injury or death only when “directly related to the assigned mission” should be either deleted or clarified. Although the addition of this language could be viewed as giving additional flexibility to the commander to focus his Soldiers on the assigned mission, the lack of any definitions will lead to uncertainty and inconsistent application. By making changes to the current SRUF language, and omitting the language not rooted in domestic law, the SRUF can be a clear, concise tool for commanders and Soldiers.

²²⁹ CJCSI 3121.01B, *supra* note 6, at enclosure L.

²³⁰ *Id.*

²³¹ See Martins, *supra* note 9, at 79–80 (arguing for clarification of the nebulous peacetime/wartime distinction, which “has grown too elusive to be of use in imparting ROE to soldiers.”). Just as with ROE, the SRUF must be purged of the nebulous terms that might confuse Soldiers. *Id.*

²³² CJCSI 3121.01B, *supra* note 6, para. 4c.

²³³ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force”).

²³⁴ CJCSI 3121.01B, *supra* note 6, at enclosure L, para. c(1).

²³⁵ *Graham v. Connor*, 490 U.S. 386 (1989).

²³⁶ DOD DIR. 5210.56, *supra* note 33, at enclosure 2, para. E2.1.2.

²³⁷ *Id.*

²³⁸ 490 U.S. 386 (1989).

²³⁹ The FBI Rules for Deadly Force state:

Law enforcement officers . . . of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

Hall, *supra* note 50.

²⁴⁰ See Martins, *supra* note 9, at 80 (arguing that “[t]elling soldiers in capital letters that they may ‘take all necessary measures in self-defense’ is not a panacea.”). Soldiers deserve accurate language that details the rights *and* limitations of self-defense.

Even a flawless SRUF, however, will be ineffective without periodic, realistic training. In the event of a domestic crisis, commanders will have only hours to deploy troops and equipment, draft an operations order, and provide training on domestic operations and SRUF.²⁴¹ Therefore, it is imperative to train for these types of operations prior to receiving the call to deploy. The training, however, will only be effective if it is based on “clear and simple rules for the use of force,”²⁴² which is why the changes to SRUF language highlighted above are so critical. The FBI training materials warn that “[i]nadequate training can cause officers to use deadly force when it is not appropriate. Conversely, it may cause uncertainty and hesitation on the part of officers in circumstances that increase the danger to themselves and to the public.”²⁴³ This observation also applies to the many Soldiers deployed on short notice to chaotic urban environments.

In light of the extraordinary number of worldwide contingency operations currently competing for the attention of commanders, adding an additional training requirement may not be welcome. One way to mitigate this potential resistance is to prioritize training based on the likelihood of being called to respond to a domestic crisis. For instance, units that have recently returned from deployment and will not deploy in the near future should be targeted for realistic SRUF training, while deploying troops should remain focused on combat training.

The training, much like ROE training, should include a crawl, walk, run method of instruction.²⁴⁴ The crawl phase should include training on the SRUF and constitutional limitations on the use of force. The walk phase should include unit level situational training exercise lanes that allow first line leaders to train their Soldiers on domestic operations and law enforcement support. Finally, the run phase should include an installation-wide training event, in which a domestic crisis scenario is portrayed over the course of a day. Many of the skills learned during these training events are readily transferable to counter-insurgency operations, and yet the training will be separate and distinct from combat training so as to minimize the potential for confusion. Simple familiarization with the SRUF in a class setting will be ineffective, and may put Soldiers’ lives at risk when they are called upon to respond to a domestic crisis. Just as ROE training has evolved from just another “required class” to an integral part of any mission-readiness exercise, so too must SRUF training be expanded and improved to ensure that Soldiers at all levels gain familiarity with this important and complex aspect of the military mission.

VIII. Conclusion

The constant tension between protecting Soldiers and accomplishing the mission is not unique to combat. The SRUF, by mirroring SROE, has changed into a more combat-oriented set of rules. Some may argue that this new language is necessary to ensure that Soldiers understand their inherent right to self-defense. However, the result may be confusion in the minds of combat veterans who have been dealing with hostile threats from insurgents—not from Americans protected by the Fourth Amendment. Still another motivation may have been to provide clear, standardized rules that can be applied to any situation. However, an unintended consequence of this standardization has been to introduce international concepts that are not rooted in the Fourth Amendment.

The SRUF is merely a directive, and not U.S. law. “Consequently, if the Standing ROE or Rules of Deadly Force are not grounded in law, a serviceperson could be held liable . . . for exceeding the law.”²⁴⁵ As the examples set forth in Section V of this article make clear, if the military allows Soldiers to operate under an SRUF that does not comport with domestic law, it runs the risk of exposing both the Soldier and the government to liability, while possibly tarnishing the military’s reputation as a defender of the Constitution.²⁴⁶

Some question the wisdom of making any alterations to the current SRUF. Critics argue that the SRUF is merely a starting point, and that in the military decision-making process and RUF development, any ambiguities can be clarified. Certainly the commander, and not legalistic SRUF, sets the tone for the unit during a deployment. But while commanders have significant influence over their Soldiers’ proper use of force, they rely on clear, concise SRUF that are wholly consistent with domestic law in order to train their Soldiers. In addition, although SRUF are merely a starting point for mission-specific

²⁴¹ See *supra* notes 131–34 and accompanying text.

²⁴² Martins, *supra* note 9, at 20. Even though SRUF is only the starting point for the mission-specific RUF, “these rules can provide a base of understanding on which a larger system of contingent . . . [RUF] may rest.” *Id.*

²⁴³ Hall, *supra* note 50.

²⁴⁴ See generally Martins, *supra* note 9, at 82–93 (proposing a standardized ROE training plan that includes classroom and practical vignette training).

²⁴⁵ Stafford, *supra* note 13, at 16.

²⁴⁶ See Lujan, *supra* note 185, at 82; see also *supra* note 216 (discussing *Bivens* actions).

RUF, Soldiers' day-to-day training will be based on the SRUF. Mission-specific RUF will likely not be approved and disseminated until after the Soldiers have already deployed to the site of the domestic crisis.²⁴⁷ Therefore, accurate and understandable SRUF is a necessity, not a luxury.

In order to protect individual Soldiers while still meeting Fourth Amendment standards, the SRUF should be modified, or at least interpreted, so as to eliminate international law concepts and reflect Fourth Amendment precedent. The omission of important qualifiers and limitations has left the current SRUF more aggressive than prior versions. In addition, the omissions have injected ambiguity into vital terms like "deadly force" and the boundaries of self-defense. The modifications proposed in Section VII are certainly not revolutionary—the proposed language is a return to previous versions of the RUF. This change will not only protect civilians from excessive force, but also help Soldiers avoid putting themselves in unnecessarily dangerous situations. In addition, in order to truly protect Soldiers, leaders must provide realistic training that applies SRUF to possible scenarios found in domestic operations. Again, this proposed training is not a new concept—the model for this training is the ROE training that Army Judge Advocates have perfected over the last ten to fifteen years.²⁴⁸

By slightly modifying the current SRUF and developing realistic training for domestic operations, Judge Advocates can assist Soldiers in preparing for the next major domestic crisis. Without these vital tools, Soldiers deployed in future domestic operations may unwittingly undermine the support they have been tasked to provide.

²⁴⁷ Once domestic operations RUF is developed and approved by the Secretary of Defense for a particular mission, it is then forwarded to the U.S. Attorney General for approval. This process can take days to complete. Berry Interview, *supra* note 34. In addition, units typically have only hours to prepare to respond to a domestic crisis. During the L.A. Riots, federal military troops received RUF training just hours before they began patrolling the streets. *See supra* notes 125–147 and accompanying text.

²⁴⁸ *See, e.g.,* Martins, *supra* note 9.

Book Review

NIXON AND KISSINGER: PARTNERS IN POWER¹

MAJOR SHANE REEVES²

*[F]ate is character.*³

*To advance themselves and their policies, they had few qualms making bargains with the devil—Nixon deceiving himself, the Congress, the courts, the press, and the public; Kissinger endorsing or acquiescing in many presidential acts of deception and engaging in many of his own.*⁴

I. Introduction

In 1972 Richard Nixon was re-elected as the President of the United States by the third largest margin in history,⁵ winning forty-nine of fifty states.⁶ This overwhelming margin of victory demonstrated that the American people emphatically believed that Nixon, in partnership with his National Security Advisor Henry Kissinger, had “earned another four years.”⁷ It is difficult to argue with the election results. During the first four years of their partnership, Nixon and Kissinger achieved an astonishing list of foreign policy accomplishments.⁸ Specifically, the unpopular Vietnam War was all but over, détente with the Soviet Union had begun, and diplomatic channels with China were opened.⁹ The election victory, coupled with the foreign policy successes, had placed the Nixon-Kissinger collaboration at the pinnacle of power with four more years of opportunity. The potential of those four years would go unfulfilled, however, as within twenty-one months of the 1972 election, Richard Nixon would resign as President of the United States and history would forever link the Nixon-Kissinger partnership to corruption and abuse of power in government.¹⁰

Nixon and Kissinger: Partners in Power by Robert Dallek is a detailed account of the partnership between Richard Nixon and Henry Kissinger and the dominant impact their relationship played in the Nixon Administration. Dallek, a prominent presidential historian,¹¹ does not simply restate well known historical facts concerning the Nixon Administration. Instead, he explores the personal ambitions that consumed both men, their joint willingness to break all ethical boundaries in furtherance of their goals, and the detrimental consequences of their decisions.¹² Focusing on the extraordinarily complex relationship between Nixon and Kissinger, the book offers a new understanding of the Nixon Administration’s strategy in Vietnam, its approach to international relations, and its use of executive power. With Iraq and Vietnam comparisons

¹ ROBERT DALLEK, *NIXON AND KISSINGER: PARTNERS IN POWER* (2007).

² U.S. Army. Student, 56th Judge Advocate Graduate Course, The Judge Advocate General’s Legal Center and School, Charlottesville, Va.

³ DALLEK, *supra* note 1, at 609 (referring to an ancient Greek saying).

⁴ *Id.* at 615.

⁵ *Id.* at 433.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 612.

¹¹ Robert Dallek has been called “the eminent American presidential historian.” Emily Ghods-Esfahani, *Dallek Lectures on Nixon, Kissinger*, 25 DARTMOUTH REV., May 18, 2007, available at http://dartreview.com/archives/2007/05/18/dallek_lectures_on_nixon_kissinger.php. He has written and co-authored numerous books concerning U.S. Presidents including: *Let Every Nation Know: John F. Kennedy In His Own Words* (2006), *Lyndon B. Johnson: Portrait of a President* (2005), *An Unfinished Life: John F. Kennedy, 1917–1963* (2003), *Flawed Giant: Lyndon B. Johnson and His Times, 1961–1973* (1999), *Ronald Reagan: The Politics of Symbolism* (1999), *Lone Star Rising: Lyndon Johnson and His Times 1908–1960* (1994), *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* (1979), *Roosevelt Diplomacy and World War II* (1970).

¹² DALLEK, *supra* note 1, at 614–15.

dominating the news, continuing discussions concerning the U.S. approach to international relations, and present day debates over the limits of executive branch power, *Nixon and Kissinger* provides valuable lessons and has contemporary relevance.¹³

II. Nixon and Kissinger

From the outset of *Nixon and Kissinger*, Dallek concedes that the historical record concerning the Nixon Administration is well documented.¹⁴ Rather than simply re-hashing these well known historical facts, Dallek takes a unique approach and attempts to explain why and how Richard Nixon, in partnership with Henry Kissinger, exercised power.¹⁵ Relying on Richard Nixon's presidential papers and tapes, recently released archival material of Henry Kissinger,¹⁶ personal diaries, national security files, White House special files, and a variety of secondary material, the author adeptly answers these questions.¹⁷ Combining his exhaustive research with narrative ability, Dallek provides fascinating insights into the dynamics of the Nixon-Kissinger partnership, its decision making process, and its often shocking ethical shortfalls.

Nixon and Kissinger seamlessly illustrates the evolution of the Nixon-Kissinger partnership from its inception until its demise due to the Watergate scandal. Dallek begins the book by describing each man's personal background, early career highlights, and independent paths toward politics.¹⁸ Immediately, the reader is bowled over by the overwhelming ambition demonstrated by both Nixon and Kissinger to achieve individual greatness. Describing Nixon's ambition as "a little engine that knew no rest"¹⁹ and Kissinger's as a "ceaseless force,"²⁰ it is clear that above all else, each man's personal desire for individual gain was the force that brought them together.²¹

Markedly absent from the relationship is any type of friendship or mutual affection. Instead their partnership is a poisonous combination of deception, competitiveness, and resentment.²² Nixon's and Kissinger's veiled hostility towards each other²³ and their continual battle for supremacy²⁴ is vividly described throughout the book. The viability of such a shallow relationship seems always in question, yet individual ambitions force each man to concede that he needs the other.²⁵

¹³ See, e.g., CNN.com/, *Bush Invokes "Tragedy of Vietnam" Against Iraq Pullout*, Aug. 22, 2007, <http://www.cnn.com/2007/POLITICS/08/22/bush.iraq.speech/index.html?iref=newssearch>; Mark Mazzetti, *Bin Laden Releases Video as C.I.A. Issues Warning*, N.Y. TIMES, Sept. 8, 2007, at A6 (noting that Osama bin Laden in a recent video tape compares Iraq to Vietnam); IVAN ELAND, *THE EMPIRE HAS NO CLOTHES: U.S. FOREIGN POLICY EXPOSED* (2004) (discussing current U.S. foreign policy); Dan Eggen & Amy Goldstein, *Broader Privilege Claimed in Firings; White House Says Hill Can't Pursue Contempt Cases*, WASH. POST, July 20, 2007, at A1 (detailing dispute between the executive branch and Congress over contempt charges filed against White House aids).

¹⁴ DALLEK, *supra* note 1, at ix.

¹⁵ *Id.*

¹⁶ Dallek notes that "[t]he most important collateral collections are Henry Kissinger's office memos, memoranda of conversations, and transcripts of telephone conversations made by aides listening in on a 'dead key or undetectable extension.' The transcripts were opened to researchers in May 2004." *Id.* at 629.

¹⁷ See generally *id.* at 629–96 (Source Notes).

¹⁸ See generally *id.* at 3–59.

¹⁹ *Id.* at 4 (quoting Nixon's law partner William Herndon).

²⁰ *Id.* at 503.

²¹ See *id.* at 81 (stating that other less important factors also played a part in the genesis of the collaboration including: circumstances, "shared interest in great foreign policy issues," distrust of establishment liberals, and life experience).

²² *Id.* at 615.

²³ See, e.g., *id.* at 93 (quoting Nixon as calling Kissinger "Jew boy" as a form of humiliation and Kissinger privately referring to Nixon as "our drunken friend" or "the meatball mind").

²⁴ See, e.g., *id.* at 330–31 (describing the envy and competition between Nixon and Kissinger when vying for public recognition for positive developments in Sino-American relations).

²⁵ *Id.* at 615.

Dallek concisely describes this seemingly impossible arrangement when he states that Nixon and Kissinger were “rivals who could not satisfy their aspirations without each other.”²⁶

As Dallek describes the complexities of the Nixon-Kissinger partnership, he illustrates how their mutual obsession with personal recognition, coupled with their individual desire for control, resulted in a streamlined decision making process in the White House.²⁷ Despite their personal competitiveness, the men became increasingly dependent on each other²⁸ and viewed the media, much of the public, and the rest of the government as hostile.²⁹ Marginalizing all other members of the administration, and paranoid of disseminating any power, Nixon and Kissinger held all major foreign policy decisions between the two of them.³⁰ Dallek, in engrossing fashion, lays bare the often vulgar, blunt, and pragmatic³¹ manner in which Nixon and Kissinger made those foreign policy decisions and the effect those decisions had on world affairs.³²

However, the author’s detailed description of the men’s decision making and joint approach to foreign policy is also where the book is most lacking. Dallek begrudgingly recognizes the accomplishments of the Nixon-Kissinger collaboration and its approach to international relations.³³ He gives limited credit for the partnership’s historic accomplishments, and at times, seems unable to overcome his disdain for Nixon’s and Kissinger’s personalities or their method of governing when discussing their foreign policy successes.³⁴

Though *Nixon and Kissinger* may not give extensive credit to the Nixon Administration for foreign policy accomplishments, the author is not unfair in his criticism of the Nixon-Kissinger partnership. Some accuse Dallek as being anti-Republican and having a liberal bias.³⁵ Dallek’s impressive research and reliance on taped conversations, memos, and direct correspondence easily rebuts any accusations that *Nixon and Kissinger* is promoting an agenda other than adding to the historical record.³⁶ Dallek’s extensive use of primary resources not only deflates any accusations of bias, but is also damning to any who argue that Nixon and Kissinger acted ethically during their collaboration.³⁷ Dallek presents overwhelming evidence that Nixon established a White House atmosphere devoid of all ethical boundaries. A White House where Nixon’s self-interests were the primary concern,³⁸ and where aides could “assume[] that behind-the-scenes maneuvering, including

²⁶ *Id.* at 81.

²⁷ *See, e.g., id.* at 623 (noting their “shared affinity for exclusive control of foreign policy”).

²⁸ *See, e.g., id.* at 100 (“From the beginning of Nixon’s tenure, Henry became one of the few who could see him repeatedly almost every day, with numerous phone conversations filling the gaps between visits.”); *id.* at 201 (“During the first nine days of May, Nixon had sixteen telephone conversations and seventeen face-to-face meetings with Kissinger . . .”).

²⁹ *See, e.g., id.* at 270 (discussing Nixon’s paranoia concerning the Democrats); *id.* at 500 (discussing Nixon and Kissinger’s paranoid conversations concerning the media); *id.* at 92 (quoting Lawrence Eagleburger, Kissinger’s civilian deputy at the National Security Council, as saying: “Kissinger and Nixon both had degrees of paranoia. . . . It led them to worry about each other, but it also led them to make common cause on perceived mutual enemies.”).

³⁰ From the outset of the partnership and throughout the five and half years they worked together, Nixon and Kissinger asserted dominance over foreign policy and gave only cursory input to the State Department or other Administration personalities. *Id.* at 84–85, 100.

³¹ Nixon and Kissinger’s pragmatic approach to international relations is often called “real politik.” *See, e.g.,* Mark Atwood Lawrence, *The Odd Couple*, N.Y. TIMES, May 13, 2007, sec. 7, at 29 (reviewing ROBERT DALLEK, NIXON AND KISSINGER: PARTNERS IN POWER (2007)). Lawrence refers to Nixon and Kissinger as “[c]hampions of realpolitik.” Realpolitik is defined as “political realism or practical politics, esp. policy based on power rather than on ideals.” Dictionary.com <http://dictionary.reference.com/browse/Realpolitik> (last visited Dec. 14, 2007).

³² *See generally* DALLEK, *supra* note 1, at 617–23.

³³ *See, e.g., id.* at 440–46. To re-start the peace negotiations between North and South Vietnam Nixon orders renewed bombing of North Vietnam. *Id.* Dallek spends significant time discussing the negative ramifications of the decision, but only spends one sentence stating that the strategy was successful. *Id.* at 446 (“The devastation from the raids, however, forced the North Vietnamese to agree to return to the peace table in January.”).

³⁴ *See id.* at 346 (Dallek states “it is amazing how well Nixon and Kissinger did in making foreign policy in spite of unacknowledged impulses to make decisions partly based on their amour prop[er].”).

³⁵ One conservative critic has explicitly accused Dallek of bias and promoting a liberal agenda. *See* Clay Waters, *NYT: Iraq Isn’t Like Vietnam—Now That Bush Makes Comparison*, Aug. 22, 2007, <http://www.newsbusters.org/blogs/clay-waters/2007/08/22/nyt-suddenly-iraq-isnt-vietnam-least-not-when-bush-makes-comparison> (stating that “Dallek . . . has long been the [N.Y.] Times’s go-to guy for criticism of Bush as well as past Republican presidents.”).

³⁶ *See generally* DALLEK, *supra* note 1, at 631–96 (Source Notes).

³⁷ *Id.*

³⁸ *See id.* at 409–11.

illegalities, were acceptable.”³⁹ It is also clear that Kissinger contributed to this atmosphere and was more than willing to use foreign policy to distract the public from Watergate.⁴⁰ *Nixon and Kissinger* is well researched and therefore, by extension, it is difficult to argue with Dallek’s objectivity as he describes the Nixon-Kissinger partnership, its decision making, and the ethical shortfalls that permeated throughout the relationship.

III. Contemporary Relevance

Nixon and Kissinger offers numerous valuable lessons on an array of contemporary issues. The most visible lesson that emerges from the book is the failure of “Vietnamization”⁴¹ to successfully end the Vietnam War on terms advantageous to the United States.⁴² The parallels between Vietnamization and the current U.S. strategy in Iraq⁴³ are striking.⁴⁴ The failure of Vietnamization and the eventual collapse of South Vietnam illustrate the difficulty in using a similar strategy in Iraq. *Nixon and Kissinger* offers readers insights into why Nixon’s strategy for Vietnam failed and an opportunity to critically compare and analyze the current strategy in Iraq with Vietnamization.

Dallek also highlights the advantages and disadvantages of the Nixon-Kissinger theory to foreign policy and illustrates the limitations of relying on a single approach to practicing international relations. Nixon’s and Kissinger’s belief that their primary responsibility was “to foreign affairs and the defense of the nation’s security,”⁴⁵ combined with their willingness “to do whatever seemed necessary to defeat opponents of what they saw as good for the country,”⁴⁶ resulted in many historic foreign policy successes.⁴⁷ However, their unwillingness to entertain alternative ideas, their preoccupation with personal control, and their paranoia of other government actors⁴⁸ resulted in numerous foreign policy failures.⁴⁹ *Nixon and Kissinger* demonstrates that the complexities of foreign policy makes any one approach unlikely to be consistently successful, and makes a compelling case for relying on a diversity of theories and opinions when practicing international relations.

Finally, *Nixon and Kissinger* offers the stark reminder “that even a president, however effective his policy making skills, cannot escape the rule of law.”⁵⁰ Dallek describes the Nixon presidency as an “Imperial Presidency”⁵¹ and Kissinger as his

³⁹ *Id.* at 410.

⁴⁰ See, e.g., *id.* at 585 (discussing Kissinger’s involvement in illegal wiretaps on “leaks” in the administration); *id.* at 565 (noting that during the Watergate crisis, Kissinger described Nixon as indispensable to world peace); *id.* at 569 (discussing Kissinger’s attempt to boost Nixon by holding a press conference detailing new possible breakthroughs on arms control with the Soviets).

⁴¹ “Vietnamization” was the term the Nixon Administration used to describe the U.S. strategy in Vietnam. *Id.* at 125. Vietnamization relied on U.S. forces to provide security, training, and equipment to the South Vietnamese military and government. *Id.* at 125–27. The intent was to create an effective South Vietnamese fighting force simultaneously with an autonomous South Vietnam government thus allowing for the eventual withdrawal of U.S. forces. See generally *id.* Vietnamization was to “replace the Americanization of the war.” *Id.* at 125.

⁴² See *id.* at 619 (discussing the many failures of Vietnamization; the most notable was the fall of Hanoi to the North Vietnamese in 1975).

⁴³ The current strategy in Iraq was outlined in a speech by President Bush. President George W. Bush, President’s Address to the Nation (Jan. 10, 2007) (transcript available at <http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html>). A portion of the strategy for success in Iraq outlined by President Bush includes securing Iraq with U.S. forces, training and equipping the Iraqi Army, and supporting the young Iraqi government. *Id.* The long-term goal of this strategy is to eventually withdraw U.S. forces. *Id.*

⁴⁴ Though Iraq is only mentioned once in *Nixon and Kissinger*, Dallek has been interviewed to discuss the similarities between Iraq and Vietnam. See generally James Gerstanzang & Maura Reynolds, *Bush to Cite Vietnam in Defense of Iraq*, L.A. TIMES, Aug. 22, 2007, at A10 (quoting Dallek’s critical comments concerning Bush’s comparisons between Iraq and Vietnam).

⁴⁵ DALLEK, *supra* note 1, at 99.

⁴⁶ *Id.*

⁴⁷ See *id.* at 617–19.

⁴⁸ See *id.* at 84–85, 124, 247.

⁴⁹ See *id.* at 618–22.

⁵⁰ *Id.* at 622.

⁵¹ *Id.* at 84.

most important aide.⁵² Both Nixon and Kissinger wielded enormous power⁵³ and were willing to use their positions to punish their enemies, deceive the American public, and to further their own self-interests.⁵⁴ *Nixon and Kissinger* illustrates the inherent danger in allowing so few to possess such enormous power, while simultaneously warning those that are entrusted with positions of authority that abuse of power is intolerable in the U.S. system of government.

IV. Conclusion

Robert Dallek's *Nixon and Kissinger: Partners in Power* is an easy read, well organized, and impressively researched. Dallek does a masterful job detailing the partnership between Richard Nixon and Henry Kissinger and outlining the impact their relationship had on the national and international arenas. Though the author reluctantly gives Nixon and Kissinger credit for their foreign policy accomplishments, it is difficult to question Dallek's objectivity due to his extensive research and reliance on primary sources. The book clearly explains how and why the Nixon Administration created and implemented policy, and gives the reader a number of relevant lessons on current issues. *Nixon and Kissinger* is an exceptional book and should be read by anyone having an interest in history, leadership, or ethics.

⁵² *Id.* at 99.

⁵³ Dallek states that "the Nixon-Kissinger relationship was one of or possibly the most significant White House collaboration in U.S. history." *Id.* at 623.

⁵⁴ *See id.* at 622–23.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC7	9th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	21 – 25 Apr 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F28E	2007 USAREUR Income Tax CLE	3 – 7 Dec 07
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08

CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F103	2008 Advanced Contract Law Course	7 – 11 Apr 08
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08

CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operations Law Course	26 – 30 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN) 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (010)	10 – 14 Mar 08

	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (020)	1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08

049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 08
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 08
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 08
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 08
Pacific Trial Advocacy Course, Class 08-A (Off-site, Yokota AB, Japan)	10 – 14 Mar 08
Senior Defense Counsel Course, Class 08-A	14 – 18 Apr 08
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 08
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 08
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 08
Environmental Law Course, Class 08-A	28 Apr – 2 May 08

Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 08
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2008**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually

Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).

**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
1-2 Mar 2008	75th LSO Burlingame (San Francisco, CA)	005	Lessons Learned International & Operational Law	CPT Steven Wang 916-642-2102 steven.wang1@us.army.mil COL Roger Matzkind Roger.Matzkind@us.army.mil LTC Ronald Rallis
1-2 Mar 2008	151st LSO Fort Belvoir, VA	006	International & Operational Law, Criminal Law	LTC Anthony Ricci, 151st LSO, 508-982-1628, tpricci@hotmail.com MAJ Jen Connelly 571-272-7003 Jennifer.Santiago@us.army.mil
29-30 Mar 2008	WIA&ARNG Fort McCoy, WI	NA	Air Force JAG School	Lt Col Julio R. Barron 608-242-3077 / DSN 724-3077 julio.barron2@us.army.mil
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO 1st Division Museum at Cantigny Wheaton, IL	009	Administrative & Civil Law, Contract & Fiscal Law	1LT Ewa Dabrowski Ewa.dabrowski@us.army.mil 773.593.5978
25-27 Apr 2008	8th LSO/89th RRC Kansas City, MO	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical

Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option

1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.
- AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

- A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).
- AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).
- AD A326002 Wills Guide, JA-262 (1997).
- AD A346757 Family Law Guide, JA 263 (1998).
- AD A384376 Consumer Law Deskbook, JA 265 (2004).
- AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).
- AD A360700 Tax Information Series, JA 269 (2002).
- AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
- AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
- AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).
- AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).
- AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).
- AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).
- AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

- AD A351829 Defensive Federal Litigation, JA-200 (2000).
- AD A327379 Military Personnel Law, JA 215 (1997).
- AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

- AD A452516 Environmental Law Deskbook,
JA-234 (2006).
- AD A377491 Government Information Practices,
JA-235 (2000).
- AD A377563 Federal Tort Claims Act, JA 241
(2000).
- AD A332865 AR 15-6 Investigations, JA-281
(1998).

Labor Law

- AD A360707 The Law of Federal Employment,
JA-210 (2000).
- AD A360707 The Law of Federal Labor-
Management Relations,
JA-211 (2001).

Criminal Law

- AD A302672 Unauthorized Absences
Programmed Text,
JA-301 (2003).
- AD A302674 Crimes and Defenses Deskbook,
JA-337 (2005).
- AD A274413 United States Attorney
Prosecutions, JA-338 (1994).

International and Operational Law

- AD A377522 Operational Law Handbook,
JA-422 (2005).

* Indicates new publication or revised edition.

** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the September 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

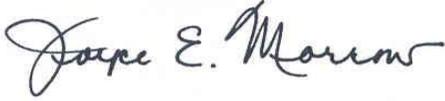
Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

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