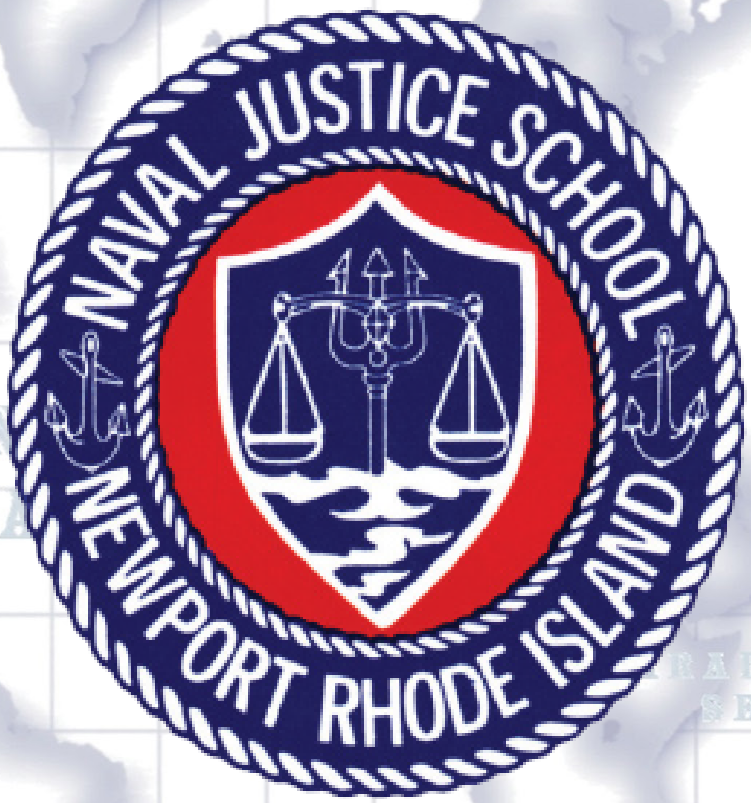
VOL. 68

NAVAL LAW REVIEW

2022

NAVAL LAW REVIEW



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Articles

LAWFUL MISCHIEF AT MISCHIEF REEF

Lieutenant Commander Ryan J. Sylvester, JAGC, USN*

China has occupied Mischief Reef, a submerged low-tide elevation located in the South China Sea and claimed by the Philippines, since 1994. Despite its location within the Philippine Exclusive Economic Zone, China continues to alter the feature through land reclamation and other efforts thereby creating sufficient territory for infrastructure projects, including a runway. In response to China's actions on Mischief Reef and other locations, in 2013 the Philippines initiated a successful action before an Arbitral Tribunal.

This Article leverages the South China Sea Arbitration case, and its legal status determinations regarding Mischief Reef, to propose a novel means of challenging China's continued exclusive occupation and unlawful development of this maritime feature. In light of the Arbitral Tribunal's determinations, Mischief Reef is not subject to the territorial sovereignty of any state. Therefore, any state presumably has an equal, lawful right to visit despite China's continued assertions to the contrary. This Article examines the lawfulness, at the domestic and international levels, of the United States executing such a visit through a Maritime Stability Operation.

I. INTRODUCTION

China has been aggressively advancing its purported claims over maritime features within the South China Sea (SCS) for many years. One of the features China has exploited as part of its strategy in the SCS is Mischief Reef, which is a maritime feature claimed by the Philippines but that China has occupied since 1994.[1] In response to China's activities at Mischief Reef and beyond, the

* The author is an active-duty U.S. Navy Judge Advocate and a 2022 LL.M. graduate of Columbia Law School. He dedicates this article to his late father, James Richard Sylvester, who passed away at the close of his LL.M. studies and the writing of this article. He wishes to thank Commander Jonathan Odom for providing invaluable feedback on this article and for continued mentorship since his first tour in the U.S. Navy. He also expresses appreciation for the Naval Law Review team for their support and improvements to this Article. Any mistakes are attributable to the author alone. Finally, the author thanks his wife Kristen and children Andrew, Daniel, and Moriah for their unwavering support. The positions and opinions expressed in this article are those of the author and do not necessarily represent the views of the U.S. Government, the U.S. Department of Defense, or the U.S. Navy.

[1] Sean Quirk, *Water Wars: Lines in the Great Wall of Sand*, LAWFARE (Aug. 17, 2020, 8:01 AM) [hereinafter Quirk, *Water Wars: Lines in the Great Wall of Sand*], https://bit.ly/3z5YMKm. Although the maritime feature is known by a variety of names, Mischief Reef is the name sanctioned by the United States Board on Geographic Names. *See id.*; *Mischief Reef*, ASIA MAR. TRANSPARENCY INITIATIVE, https://bit.ly/3PNP32n.

Philippines initiated an arbitration action against China in 2013 within an Arbitral Tribunal constituted under United Nations Convention on the Law of the Sea (UNCLOS), Annex VII. The Philippines sought judicial resolution of disputes over "maritime entitlements" and "the lawfulness of Chinese activities in the South China Sea" as part of the case.[2]

The Tribunal made favorable findings and holdings on many of the Philippines' claims, but this Article will center on the favorable findings and holdings pertaining to Mischief Reef. Despite the Philippines' significant success in court, China persists in its activities in the SCS and particularly at Mischief Reef where it has extensively developed the reef from being "mostly an arc of underwater atoll" into an expanded land area serving as a "Chinese military base, complete with radar domes, shelters for surface-to-air missiles and a runway long enough for fighter jets."[3]

One way that the United States has attempted to counter China's activities in the SCS and similar activities in the East China Sea is through its Freedom of Navigation Operations (FONOPs). In relation to Mischief Reef, such FONOPs include the U.S. Navy sailing and flying near it as an act of challenge against China's presumed maritime claims over the area and broadly its claim of "indisputable sovereignty" to Mischief Reef.[4] But like the Tribunal's ruling, there seems to be no meaningful impact in disrupting China's status quo position on Mischief Reef.

This Article poses the question of whether a next generation of activities beyond FONOPs that raises the temperature in challenging China's position would be within permissible legal limits. Such an activity could be characterized as a Maritime Stability Operation (MSO) and would go beyond mere close-in navigation; an MSO could consist of an actual visit to the feature or executing a controlled amphibious landing. It would not be appropriate to characterize this activity as a FONOP because freedom to land upon a maritime feature such as Mischief Reef, which the Arbitral Tribunal classified as a low-tide elevation that is not subject to the territorial sovereignty of any state, is not a specifically articulated freedom of navigation right under UNCLOS. Additionally, FONOPs have typically only challenged excessive maritime claims whereas this would be

[2] South China Sea Arbitration (Phil. v. China), PCA Case Repository 2013-19, Award on Jurisdiction and Admissibility ¶ 2 (Perm. Ct. Arb. 2015) [hereinafter PCA Award on Jurisdiction], https://bit.ly/3okydf9.
[3] Hannah Beech, *China's Sea Control Is a Done Deal, 'Short of War With the U.S.'*, N.Y. TIMES (Sept. 20, 2018), https://nyti.ms/3cu0f5o.
[4] James Kraska, *Dewey Freedom of Navigation Operation Challenges China's Sovereignty to Mischief Reef*, LAWFARE (May 25, 2017, 9:56 AM), https://bit.ly/3b4yM9U.

a challenge to China's now judicially determined unlawful territorial sovereignty claim.

A proposed MSO at Mischief Reef is not entirely without precedent, as one scholar recently noted that a recent FONOP near Mischief Reef in 2017 "shoehorned a rejection of China's sovereignty over Mischief Reef into a routine FON operation."[5] But arguably, there is a need to take this further in operations wholly separate from the FONOP program aimed at directly addressing China's persistent claim despite the Arbitral Tribunal's decision. Such an approach is also consistent with an expression of U.S. policy in July 2020, articulated by U.S. Secretary of State Mike Pompeo, which declared that "Beijing's claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them."[6] Secretary Pompeo also stated that the U.S. position is that China has no lawful territorial or maritime claim to Mischief Reef.[7]

This proposed activity sounds aggressive but under the right conditions (that is, advanced notice of peaceful intentions and possibly with the consent of the Philippines), an MSO could be conducted lawfully and in a non-threatening manner. This operation could afford U.S. Marines an opportunity to join the U.S. Navy in the FONOP business particularly since an amphibious landing compared to an actual port visit might be the most feasible approach. Additionally, if the U.S. Coast Guard participates, this activity would be consistent with the aim of the tri-service maritime strategy that calls for "[i]ntegrated all-domain naval power, leveraging the complementary authorities and capabilities of the U.S. Navy, Marine Corps, and Coast Guard, [that] advances the prosperity, security, and promise of a free and open, rules-based order."[8] As noted later in this Article, it could be advantageous to include U.S. Army Corps of Engineers personnel or a contingent of civilian U.S. Government personnel in the MSO to reduce the potential for misperception that it is a hostile act or threat of force.

The key threshold question is whether such an operation would be lawful. The proposal demands a more satisfying answer than the one "Chancellor" Palpatine gave to the Viceroy of the Trade Federation regarding the legality of landing troops on the planet of Naboo.[9] Part VI of this Article will analyze the

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[5] *Id.*

[6] Press Statement, Michael R. Pompeo, U.S. Sec'y of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), https://bit.ly/3CDi7ps.

[7] *Id.*

[8] ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER (2020), https://bit.ly/3zm1j4i.

[9] In Star Wars Episode I, Chancellor Palpatine ordered the Viceroy of the Trade Federation, which at the time was imposing a blockade against the planet of Naboo, to accelerate their plans and "[b]egin

legality of the proposed MSO to Mischief Reef first from U.S. domestic law perspectives and then through application of relevant international law frameworks. The latter review will examine the operation under three commonly applied legal frameworks to evaluate the legality of military activities which include: (a) the use of force framework within Article 2(4) of the United Nations Charter, (b) the Internationally Wrongful Acts framework within the Articles of State Responsibility, and (c) the commentary related to actions that are "below the use of force threshold," "short of war," or in the "gray zone." First, however, the Article provides background about Mischief Reef in Part II and more details about the Arbitral Tribunal's ruling as it relates to Mischief Reef in Part III, reviews the contemporary situation at Mischief Reef since the Tribunal's ruling in Part IV, and Part V gives an overview of traditional FONOPs to place the proposed Mischief Reef MSO into context.

This Article concludes that there is sufficient authority in both the domestic and international law domains to find that the proposed MSO is legally permissible. This proposed operation could also be further strengthened by obtaining consent from the Philippines to conduct a visit to this maritime feature that is within its Exclusive Economic Zone (EEZ). Despite the existence of legal support for an MSO, the political context of the SCS and the historical practice of FONOPs necessitate caution to assess the prudence of such a novel policy decision of whether to expand traditional FONOP activities to include an activity such as visiting Mischief Reef. That is an argument beyond the scope of this Article and best addressed in a different kind of article.

II. ABOUT MISCHIEF REEF

Mischief Reef, in its unaltered state, is a submerged low-tide elevation that is located 130 miles off the western coast of the Philippine island of Palawan and 600 miles southeast of China's Hainan Island.[10] It is "a large oval-shaped atoll, approximately 6.5 kilometres wide, with three natural entrances into the lagoon."[11] The Tribunal found that, in its natural condition, the highest rocks at Mischief Reef are covered at high tide. The Arbitral Tribunal classified Mischief Reef as a low-tide elevation located on the continental shelf of the Philippines within its EEZ and decided it was not within 200 nautical miles (the defining distance for claiming an EEZ) of any other maritime feature claimed by China.[12]

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landing your troops," to which the Viceroy replied, "[M]y Lord, is that . . . legal?" The Chancellor said, "I will make it legal." STAR WARS: EPISODE I –THE PHANTOM MENACE (Lucasfilm Ltd. 1999).

[10] Kristen E. Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. U. GLOBAL STUD. L. REV. 487, 500 (2014).

[11] South China Sea Arbitration (Phil. v. China), PCA Case Repository 2013-19, Award ¶ 887 (Perm. Ct. Arb. 2016) [hereinafter PCA Award on Merits], https://bit.ly/3OruOG0.

[12] *Id.* ¶¶ 887, 1175(b), 1177, 1203(A)(2)(a).

Although not explicitly stated by the Arbitral Tribunal, Mischief Reef is not within the territorial sea of the Philippines, or any other state for that matter.[13]

Its geography has been altered through China's "[i]ntense land reclamation [that] began at Mischief Reef in January 2015."[14] The intensity was such that, "[b]y November 2015, the total area of land created by China on Mischief Reef was approximately 5,580,000 square metres."[15] China has made use of the expanded land territory through various infrastructure projects including "fortified seawalls, temporary loading piers, cement plants, and a 250-metre-wide channel to allow transit into the lagoon by large vessels."[16] At the time of the Tribunal's consideration of the case, the potential for an airstrip at the northern portion of the reef's rim, based on the evidence that an area of about 3,000 meters in length had "been cleared and flattened" by China, was only speculation.[17] That speculation is now reality with the existence of a "runway long enough for fighter jets."[18]

China has arguably made something out of nothing. The problem is, as the next section reveals, it was not China's place to be so pioneering.

III. IMPLICATIONS OF THE PHILIPPINES – CHINA ARBITRAL RULING FOR MISCHIEF REEF

In 2013, the Philippines initiated an arbitration action against China based on disputes over "maritime entitlements" and "the lawfulness of Chinese activities in the South China Sea."[19] It is important to note that China did not appear for the proceedings, but the Tribunal unanimously found that "China's non-appearance in these proceedings [did] not deprive the Tribunal of jurisdiction."[20]

The Tribunal made favorable findings and holdings on many of the Philippines' claims, but for the purposes of this Article, the focus will center on the key excerpts from the case pertaining to Mischief Reef. Most notably, the

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[13] The Tribunal award noted that Mischief Reef was located 125.4 nautical miles from the nearest Philippine archipelagic baseline and that "there is no maritime feature that is above water at high tide in its natural condition and that is located within 12 nautical miles of . . . Mischief Reef . . . ." *Id.* ¶¶ 290, 632, 693. Twelve nautical miles is the generally accepted defining distance to be within a cognizant state's territorial sea.
[14] *Id.* ¶ 889.
[15] *Id.* ¶¶ 889, 1008.
[16] *Id.* ¶ 1009.
[17] *Id.* (quoting G. Poling, *Spratly Airstrip Update: Is Mischief Reef Next?*, CTR. FOR STRAT. & INT'L STUDIES (Sept. 16, 2015), https://bit.ly/3CDgGY5.
[18] Beech, *supra* note 3.
[19] PCA Award on Jurisdiction, *supra* note 2, ¶ 2.
[20] *Id.*

Tribunal held "that China's actions at Mischief Reef have unlawfully interfered with the Philippines' enjoyment of its sovereign rights."[21] It also characterized "China's violation of its obligations [under international law] to be manifest."[22] The case settled three matters that provide insight into Mischief Reef including (a) its legal status as a maritime feature, (b) China's lack of entitlement to Mischief Reef, and (c) the implications of the build-up and reclamation activities executed by China at Mischief Reef.

A. Mischief Reef's Legal Status as a Maritime Feature

The Tribunal held that Mischief Reef is a low-tide elevation and is "not a rock or fully entitled island."[23] Under this status, the feature is not capable of generating "entitlement to maritime zones."[24] Furthermore, the Tribunal noted that such a maritime feature "do[es] not form part of the land territory of a state in the legal sense," instead it is considered "part of the submerged landmass of [the Philippines] and . . . fall[s] within the legal regime of the [Philippines'] continental shelf."[25] The Tribunal also noted that "distinct from land territory, a low-tide elevation [like Mischief Reef] cannot be appropriated."[26] In other words, China's continued presence on Mischief Reef cannot lead to lawful possession.

Because Mischief Reef does not possess any of the maritime zone rights that might exist with other features (for example, rocks and islands), any state, including the United States, can navigate ships close to the Reef as well as fly over it; the full range of high seas freedoms apply to the reef.[27] Furthermore, because the reef is not under the territorial sovereignty of any state, nothing precludes the United States or any state from pulling into its port, conducting amphibious landings, or landing aircraft there.[28] Ironically, the full range of these activities are only possible because of the unlawful actions by China to convert Mischief Reef from a low-tide elevation into an artificial island. Mischief Reef's status as an artificial reef will be discussed further in Part III.C below. The Tribunal determined that "[t]he Philippines enjoys sovereign rights and jurisdiction over the feature, including all of its living and non-living resources."[29] As a result, the legal status of Mischief Reef is that it is a low-tide elevation that

[21] PCA Award on Merits, *supra* note 11, ¶ 1041.
[22] *Id.* ¶ 1038.
[23] *Id.* ¶¶ 378, 632, 1025, 1030.
[24] *Id.* ¶¶ 632, 1025, 1030.
[25] *Id.* ¶¶ 309, 1040, 1030.
[26] *Id.* ¶ 1040.
[27] David Cluxton, *The Chicago Convention 1944 in an UNCLOS 1982 World: Maritime Zones, Continental Shelves, Artificial Islands, and Some Other Issues*, 41 U. LA VERNE L. REV. 137, 183 (2020).
[28] *See* Kraska, *supra* note 4.
[29] *Id.*

is not under the territorial sovereignty of any state. Consequently, there are no legal barriers for the United States to execute a visit to Mischief Reef as long as it does not interfere with the Philippines' sovereign rights to the feature. Traditionally, this would preclude economic exploitation but, as discussed in subpart C, consent from the cognizant coastal state (i.e., the Philippines) might further solidify the legality of the proposed operation, because Mischief Reef also has a status as an artificial island, and "use" of such islands is subject to coastal state jurisdiction under Article 60 of UNCLOS.

B. China's Lack of Entitlement to Mischief Reef

The Tribunal noted that Mischief Reef is "located within 200 nautical miles of the Philippines' baselines and falls within the exclusive economic zone claimed by the Philippines under its Republic Act No. 9522 of 2009."[30] Additionally, the Tribunal conducted a review of Mischief Reef's geographic surroundings and found "there exists no legal basis for any entitlement by China to maritime zones in the area of Mischief Reef."[31] In this regard, the Tribunal validated the Philippines' claim that Mischief Reef is within its EEZ and rejected any competing claim by China to the same.[32]

The Tribunal's decision on this particular aspect paves the way for executing an MSO because it denies any state from claiming territorial sovereignty over the feature. This means any state may lawfully visit and be physically present on such a feature. But it should be noted this does not mean China's presence is lawful. China's presence is more than a mere visit. Instead, China continues to occupy Mischief Reef while maintaining its unlawful claim to the same despite the Tribunal's decision. China's activities on the feature are interfering with the Philippines' sovereign rights to the feature. This was the case prior to the Tribunal's decision, and China has not relented in its exploitation and use of the reef for its own economic and strategic benefits since the decision. This provides an argument for the United States to do something more than the traditional FONOPs it has already executed near Mischief Reef. The proposed MSO is aimed at demonstrating that the United States, or any other state, has an equal right to visit and be physically present on the same feature. Although the Tribunal noted that such a feature is not subject to appropriation merely by occupation, akin to the concept of adverse possession, that does not mean China's physical presence should go unchecked. Merely sailing by this feature through traditional FONOPs has not altered China's position. A visit or visits to Mischief Reef might be disruptive enough or inconvenience China sufficiently to limit its

[30] PCA Award on Merits, *supra* note 11, ¶¶ 399, 1025.
[31] *Id.* ¶¶ 633, 1030.
[32] *Id.* ¶ 1025.

ability to further exploit the feature and might prevent expanded exploitation of resources within the Philippines' EEZ.

C. Implications of China's Mischief Reef Build-Up

The Tribunal found that China's island-building activities at Mischief Reef were a breach of "Articles 192, 194(1), 194(5), 197, 123, and 206 of [UNCLOS]."[33] These breaches are contrary to provisions within Part XII of UNCLOS designed to protect and preserve the marine environment while affording certain sovereign rights to cognizant states over their natural resources.[34] Additionally, these breaches undermine obligations to cooperate in the maritime domain.[35]

The Tribunal also noted that because Mischief Reef is an artificial island located within the Philippines' EEZ, Article 56(1)(b) of UNCLOS applies under which the Philippines "enjoys 'jurisdiction as provided for in the relevant provisions of [UNCLOS] with regard to: (i) the establishment and use of artificial islands, installations and structures.'"[36] The Tribunal also both explained how a number of UNCLOS' provisions work together to afford the coastal state (i.e., the Philippines) with exclusive rights to Mischief Reef, and found that China violated those rights. The Tribunal referenced the first two provisions of UNCLOS Article 60, which pertain to artificial islands in the EEZ, in their entirety:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands; (b) installations and structures for the purposes provided for in article 56 and other economic purposes; (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.[37]

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[33] *Id.* ¶ 993.
[34] *See generally* U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, Part XII (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
[35] *Id.* arts. 197, 123.
[36] PCA Award on Merits, *supra* note 11, ¶ 1032 (quoting UNCLOS, *supra* note 34, art. 56(1)(b)).
[37] *Id.* ¶ 1033 (quoting UNCLOS, *supra* note 34, art. 60).

The Tribunal noted that "[t]he remaining paragraphs of Article 60 address (a) the notice that must be given regarding the construction of artificial islands, installations, and structures; (b) the procedures with respect to safety zones; and (c) the obligation to remove abandoned or disused installations and structures."[38] But the Tribunal also noted that Article 60(8) expressly provides that "[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."[39]

As noted above, the Tribunal found Mischief Reef is subject to the legal regime for the continental shelf, and it noted that Article 80, which pertains to artificial islands on the continental shelf, connects these two regimes in that "Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf."[40]

In applying these provisions from UNCLOS, the Tribunal noted that,

> [t]hese provisions speak for themselves. In combination, they endow the coastal State—which in this case is necessarily the Philippines—with exclusive decision-making and regulatory power over the construction and operation of artificial islands, and of installations and structures covered by Article 60(1), on Mischief Reef. Within its exclusive economic zone and continental shelf, only the Philippines, or another authorised State, may construct or operate such artificial islands, installations, or structures.[41]

The Tribunal found that China's "construction of installations and artificial islands at Mischief Reef without the authorization of the Philippines, breached Articles 60 and 80 of [UNCLOS] with respect to the Philippines' sovereign rights in its exclusive economic zone and continental shelf."[42] In addition, the Tribunal also found that, "as a low-tide elevation, Mischief Reef is not capable of appropriation."[43]

One additional summary statement from the Tribunal's decision is helpful:

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[38] *Id.* ¶ 1033.
[39] *Id.* (quoting UNCLOS, *supra* note 34, art. 60).
[40] *Id.* ¶ 1034 (quoting UNCLOS, *supra* note 34, art. 80).
[41] *Id.* ¶ 1035.
[42] *Id.* ¶ 1043.
[43] *Id.*

> China's activities at Mischief Reef have since evolved into the creation of an artificial island. China has elevated what was originally a reef platform that submerged at high tide into an island that is permanently exposed. Such an island is undoubtedly "artificial" for the purposes of Article 60. It is equally clear that China has proceeded without receiving, or even seeking, the permission of the Philippines. Indeed, China's conduct has taken place in the face of the Philippines' protests. Article 60 is unequivocal in permitting only the coastal State to construct or authorise such artificial islands.[44]

This part of the Tribunal's decision discussing the implications of China's activities in building up Mischief Reef highlights one way the legality of a United States MSO can be strengthened. Since Mischief Reef is an artificial island within the EEZ of the Philippines, if the Philippines provides consent for the United States to execute such a visit, then its execution would be under authority consistent with the Philippines' right to authorize the *use* of this artificial island. Additionally, because low-tide elevations are not capable of appropriation, China's activities have not strengthened its claim to this maritime feature.

Additionally, despite the decision, China has not relented in its exploitation and use of the reef for its own economic and strategic benefits. This proposed visit operation is primarily aimed at leveraging the opportunity to visit a maritime feature that any state can freely visit that may also have the benefit of indirectly dissuading China's continued exploitation of resources within the Philippines' EEZ and might persuade China to accept that it does not have a valid claim to Mischief Reef.

IV. POST-ARBITRAL TRIBUNAL RULING CONTEXT (MISCHIEF REEF)

Despite the Tribunal's ruling, "China shows no sign of vacating its occupation and buildup on Mischief Reef" five years later.[45] Instead, China continues to assert sovereignty over the sea and airspace surrounding Mischief Reef and employs its "fishing militia" to swarm and crowd out other vessels.[46] Based on its militarization of the reef, it is unlikely that China will relinquish to the Philippines its base and facilities upon the reef.[47]

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[44] *Id.* ¶ 1037.
[45] Sourabh Gupta, *The South China Sea Arbitration Award Five Years Later*, LAWFARE (Aug. 3, 2021, 2:42 PM), https://bit.ly/3JhzoG2.
[46] *Id.*
[47] *See* Quirk, *Water Wars: Lines in the Great Wall of Sand*, *supra* note 1.

China continues to aggressively promote its purported interests in the area. In April 2021, a China Coast Guard vessel and two Chinese People's Liberation Army (PLA) vessels chased a boat with Philippine journalists out of the Spratly Islands.[48] This was made possible by China's buildup from December 2020 "of approximately 220 Chinese fishing boats and People's Armed Forces Maritime Militia vessels" in the area.[49] Commentators categorize this as "'gray-zone' strategy—coercive force short of war—of using fishing boats and Chinese military militia to occupy reefs [that] may be 'unprecedented in scale and notable for its duration.'"[50]

The United States has attempted to counter this activity relatively recently by conducting at least six FONOPs near Mischief Reef.[51] One of the FONOPs in 2018, as a *New York Times* article captures, highlights the steadfastness of China despite the Tribunal's ruling. As a "United States Navy reconnaissance plane banked low near Mischief Reef in the South China Sea . . . a Chinese warning crackled on the radio. 'U.S. military aircraft . . . You have violated our China sovereignty and infringed on our security and our rights. You need to leave immediately and keep far out.'"[52]

U.S. Navy Captain Tuan N. Pham projects a grim future in the SCS if China's activities are left unchecked, noting that

> [t]he risk is too high to defer action or do nothing on the wishful hope of Chinese benevolence. The time to act is now . . . . Inaction, or worse yet, retrenchment further reinforces the ingrained Chinese belief that it is an unstoppable rising power, and the United States is an irreversible waning power.[53]

Pham recommends that "the United States should promote and support more legal challenges to China's excessive maritime claims[,] ratify UNCLOS . . . [and] increase and enhance persistent and collective maritime presence in the SCS to include holding the next biennial Rim of the Pacific (RIMPAC) exercise in the strategic waterway."[54] Finally, Pham urges the United States to "deny Beijing's objectives in the SCS, or at least diminish the benefits of its actions therein. There is still much value in continuing to challenge China's excessive maritime claims

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[48] *See* Sean Quirk, *Water Wars: Chinese Maritime Militia Disperses Amid Political Standoff with the Philippines and the United States*, LAWFARE (Apr. 21, 2021), https://bit.ly/3PES3xT.
[49] *Id.*
[50] *Id.*
[51] Quirk, *Water Wars: Lines in the Great Wall of Sand*, *supra* note 1.
[52] Beech, *supra* note 3.
[53] Tuan N. Pham, *Envisioning a Dystopian Future in the South China Sea*, CTR. FOR INT'L MAR. SEC. (May 10, 2021), https://bit.ly/3SddB6f.
[54] *Id.*

through a deliberate and calibrated campaign of persistent presence operations—transits and overflights, exercises, and [FONOPs]."[55]

Given that China is undeterred by the Tribunal's ruling and because traditional FONOPs conducted by the United States in the past have not altered China's behavior, this suggests something more is needed. A peaceful MSO to Mischief Reef by U.S. personnel could open a new tactic to challenge both China's presumed excessive maritime claims and its purported claim of territorial sovereignty of Mischief Reef—though it would entail expanding beyond the traditional program of FONOPs.

V. OVERVIEW OF U.S. FONOPS

Since its founding, the United States "has asserted a vital national interest in preserving the freedom of the seas, calling on its military forces to protect that interest."[56] It has embraced FONOPs as a means to demonstrate that it "will continue to fly, sail, and operate wherever international law allows."[57] These operations are aimed at challenging "excessive maritime claims—that is, claims to maritime zones or jurisdiction that are inconsistent with the international law of the sea and, if left unchallenged, could impinge on the rights, freedoms, and uses of the sea and airspace guaranteed to all states under international law."[58]

The primary lines of effort under FONOPs are diplomatic exchanges conveying U.S. positions on disputed claims as well as operational assertions by U.S. military forces.[59] The U.S. Department of Defense produces an annual report on FONOP activities for the prior fiscal year. In the most recently reported period for fiscal year 2020, the United States "challenged the excessive maritime claims of 19 claimants [and many of them] were challenged multiple times."[60] This breadth of activity undermines claims that the United States is singling out any particular country with its FONOP program.

Two scholars at the U.S. Naval War College, commenting on a FONOP near Mischief Reef, noted the purpose of a FONOP:

> [It] is not to menace the offending state with gunboats or to upstage [other states] with publicity. Rather, the program

[55] *Id.*
[56] U.S. DEP'T OF DEF., FREEDOM OF NAVIGATION (FON) PROGRAM FACT SHEET 1 (2017), https://bit.ly/3JeOdJi.
[57] *Id.*
[58] *Id.*
[59] *See id.*
[60] U.S. DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT FISCAL YEAR 2020 3 (2021), https://bit.ly/3BuWdUY.

> asserts the relevant legal norm in word and in deed. FONOPs are not primarily designed to send targeted signals of resolve, reassurance, commitment, deterrence, or any other of the many political-military signals the United States sends through its naval operations. A FONOP is a specialized tool to protect discrete legal norms that underpin the order of the oceans. This order is largely codified in [UNCLOS] and is also widely accepted as customary international law. American FONOPs therefore do not just protect American freedoms—they protect the right of all states to benefit from the open oceans regime.[61]

This description appears to cut against the proposed MSO to Mischief Reef and highlights how this proposed activity departs from the traditional FON assertion under that program. First, a landing might be viewed as escalatory and characterized as an attempt to deter China from continuing its activities at Mischief Reef or a reassurance to the Philippines and others that the United States is committed to undermining China's territorial sovereignty claim. The proposed visit operation also does not involve a challenge that reinforces a traditional freedom of navigation legal norm but rather a norm related to resolving territorial sovereignty disputes. This nuance among operations is often lost; as one legal scholar notes, these distinct forms of challenges are often incorrectly characterized in the media and by others who have conflated them.[62]

Although an MSO is distinct from traditional FONOPs, it still could be conducted lawfully and in a less confrontational manner consistent with the spirit of the FONOP program. First, carefully calibrated messaging (i.e., advanced notice of an intended peaceful purpose to reinforce legal norms) in advance of the proposed visit to Mischief Reef could mitigate some of these concerns. The relevant legal norm for such a visit operation would be Article 2(3) of the U.N. Charter that calls upon "[m]embers to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[63] In essence, the message to China through the visit operation is that their continued presence and activities upon Mischief Reef are inconsistent with an international Tribunal's decision (that is, a recognized international dispute mechanism) and contrary to the obligation under Article 2(3). Additionally, countering China in this manner may also undermine efforts by China to use coercion in reaching resolution of such disputes through negotiation even though such coercion would technically render such agreements

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[61] Peter A. Dutton & Isaac B. Kardon, *Forget the FONOPs—Just Fly, Sail and Operate Wherever International Law Allows*, LAWFARE (June 10, 2017), https://bit.ly/3BwE6hd.
[62] *See* Julian Ku, *Dear World Media: The U.S. is Not Challenging China's Territorial Claims in the South China Sea (Yet)*, OPINIO JURIS (May 27, 2015), https://bit.ly/3oFUioJ.
[63] U.N. Charter art. 2, ¶ 3.

void under the Vienna Convention on the Law of Treaties.[64] Championing these aims through this visit operation is to the benefit of all states because it challenges the strategy and tactics of China seeking to claim maritime features unilaterally through its ability to occupy and capacity to develop these features. This Article reveals that there are no legal barriers to conducting such a visit to a maritime feature such as Mischief Reef that is not part of nor capable of being subject to the territorial sovereignty of any state.

As this Article explores, the legal landscape does not pose explicit legal barriers to executing an MSO. Rather, FONOPs as currently conducted do not encompass a "visit" per se. In order to maintain the "neutral" stance of the FONOP program (that is, merely preserving freedom of navigation rights without taking sides on territorial disputes), the United States could create a new category of activities such as MSOs to encompass the envisioned operation at Mischief Reef proposed in this Article. This is not a decision to be taken lightly because of the ways it departs from current practice and because it has the potential to escalate tensions with China.

One notable reality of FONOPs in relation to China is that "while some countries have issued diplomatic protests when U.S. naval vessels have operated in their EEZ without consent, only China has 'operationally challenged' U.S. warships on multiple occasions, resulting in several dangerous confrontations at sea . . . ."[65] This represents a key consideration of whether to conduct an MSO at Mischief Reef. China would almost certainly challenge the proposed landing in some manner. Upon approach to Mischief Reef, it is likely China would communicate over radio transmission, as described in the prior section, something to the effect of "U.S. military [vessel and personnel] . . . You have violated our China sovereignty and infringed on our security and our rights. You need to leave immediately and keep far out." Would China reiterate this message in face-to-face communication after U.S. personnel landed on Mischief Reef? Or would China resort to forceful violence in defense of its purported claim of territorial sovereignty over a maritime feature that is not subject to the territorial sovereignty of any state? Additionally, it may be too risky of an operation when there are human beings on both sides, who by their nature are prone to mistakes or misunderstanding, in a tense context, although very near to each other. As such,

[64] *See* Vienna Convention on the Law of Treaties art. 52, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[65] *Maritime Sovereignty in the East and South China Seas*, *Joint Hearing Before the Subcomm. on Seapower & Projection Forces of the Comm. on Armed Servs.*, 113th Cong. 72 (2014) (written testimony of Jeff M. Smith, Director of South Asia Programs, American Policy Council), https://bit.ly/3oGZwka.

although there may not be legal barriers to its execution, an MSO may not be a wise policy choice.

VI. LEGAL ANALYSIS OF PROPOSED VISIT OPERATION

This section of the Article will examine the legal considerations surrounding this proposed operation under domestic and international legal frameworks.

A. Considerations Under U.S. Law

This examination of relevant aspects under United States domestic law seeks to reveal the legal authority underpinning an MSO, as well as constraining or limiting forces under the law. As a starting point, this Part discusses the legal authority for conducting traditional FONOPs, as this is arguably the foundation upon which the President could rely to order the proposed Mischief Reef operation. Because this proposed operation is something more than a traditional FONOP, this section reviews a legal analytical framework put forward by the U.S. Department of Justice Office of Legal Counsel (OLC) to support the President in conducting activities that are not war in the constitutional sense. Although these frameworks make a strong case for the President to act unilaterally to conduct this proposed operation, given its novelty, it arguably calls for greater recognition of the shared authority in this space between the President and Congress to act in unison regarding such important military and foreign policy matters. To that end, several perspectives on the overlapping authority in these realms are reviewed. Next, the applicability of the War Powers Resolution (WPR) to this proposed operation is discussed. Finally, to ensure that all three branches are represented in this review, a cursory review of the Judiciary's role in this sphere is conducted.

1. Legal Authority for Traditional FONOPs

Traditional FONOPs over the past thirty years that entail flying, sailing, and operating "wherever international law allows," are so routine and part of normal military operations that they almost hardly require an assessment of the authority under which they are conducted.[66] One treatment of the subject promises to review "the legal justification advanced for the [FONOP] program," but does not explicitly articulate the constitutional or statutory basis for the program.[67] Yet the article, by implication, reveals that it is constitutionally grounded in the President's Article II authority based on the fact that it cites to a National Security Decision Directive (NSDD) by President Ronald Reagan issued in 1982 for the

[66] Dutton & Kardon, *supra* note 61.
[67] Ryan Santicola, *Legal Imperative: Deconstructing Acquiescence in Freedom of Navigation Operations Legal Imperative*, 5 NAT'L SEC. L.J. 58, 62 (2016).

program's existence.[68] That NSDD and a subsequent policy statement and additional NSDDs that renewed the program make no reference to other domestic legal authority upon which the program is based nor do these documents articulate which Article II powers support the program.[69]

FONOPs, as noted above in the discussion, are inherently a diplomatic program, as each FONOP is an act of diplomatic protest to an excessive maritime claim. Still, there is also a military aspect to them given that the U.S. military executes many such operations. As such, the authority to conduct FONOPs could be articulated leveraging phrasing that sets out the President's authority to conduct military operations more broadly: '[t]he President's power to [conduct FONOPs] abroad derives from his constitutional responsibility as Commander in Chief and Chief Executive for foreign and military affairs.'[70]

The quoted passage comes from a 2016 White House report articulating policy and legal frameworks relied upon for the use of force and related national security operations. It was modified to replace "employ military force" with "conduct FONOPs" for the purpose of crafting a statement of authority that could be used in describing the legal authority for conducting such operations. The phrasing above also excised this verbiage from the original: "in the absence of specific prior congressional approval." Excising this verbiage is appropriate because the nature of FONOPs, although they at times involve the use of military forces, are unlike employing military force in the kinetic sense that puts such employment at risk of possibly running afoul of Congress's "declare war" power. Traditional FONOPs by their nature do not require congressional approval.

Although this crafted phrase may well articulate the legal authority for traditional FONOPS, it may be insufficient to analyze the proposed operation here. The MSO suggested in this Article is something more than a traditional FONOP; it involves landing a contingent of personnel upon a maritime feature in international waters that otherwise would not be problematic but for China's presence on the feature, coupled with China's asserted claim to sovereignty thereto, even though that claim has been legally rejected by an international

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[68] EXEC. OFF. OF THE PRESIDENT, NAT'L SEC. DECISION DIRECTIVE NO. 72, UNITED STATES PROGRAM FOR THE EXERCISE OF NAVIGATION AND OVERFLIGHT RIGHTS AT SEA (1982), https://bit.ly/3zlopa3.

[69] *See generally* EXEC. OFF. OF THE PRESIDENT, NAT'L SEC. DECISION DIRECTIVE NO. 49, FREEDOM OF NAVIGATION PROGRAM (1990), https://bit.ly/3oERsQP; EXEC. OFF. OF THE PRESIDENT, NAT'L SEC. DECISION DIRECTIVE NO. 265, FREEDOM OF NAVIGATION PROGRAM (1987), https://bit.ly/3oLHLju; President Ronald Reagan, Statement on United States Oceans Policy (Mar. 10, 1983), https://bit.ly/3Ji0zAn.

[70] *See* EXEC. OFF. OF THE PRESIDENT, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 7 (2016), https://bit.ly/3PQ0VB0.

tribunal. It can be safely asserted that ordering an MSO as described is not tantamount to a declaration of war, which would otherwise be the province of Congress. For activities below that threshold, one framework for analyzing lawfulness is found in a construct developed by the executive branch to justify kinetic activity that does not amount to war in the constitutional sense. Even though an MSO is not intended to be kinetic, this framework is the best available means for analyzing this proposed activity from a U.S. domestic law perspective.

2. Operations Not War in the Constitutional Sense

One of the more recent justifications of presidential authority for operations short of war is set forth in a March 2020 OLC memorandum that articulates the legal rationale for the drone strike that killed Major General Qassem Soleimani of Iran's Islamic Revolutionary Guard Corps on January 2, 2020.[71] OLC's discussion of authorities is framed with respect to deployment of military force by stating that "the Constitution vests the President with independent authority to deploy military force, it reserves to Congress the power to 'declare war,' U.S. Const. art. I, § 8, cl. 11, and the authority to fund military operations, *id.* art. I, § 8, cl. 12."[72] The military activity involved in that strike authorization is quite distinct from the proposed military deployment described in this Article. As a less "severe" or non-kinetic operation, it would, by logical implication, be included within the scope of the language used in the OLC memorandum that provides a legal rationale under which the President could authorize the more intense and kinetic type of operation that led to the targeted killing of Major General Qassem Soleimani.

The memorandum also recognizes the authority of Congress in this sphere, referencing its "declare war" power and fiscal authority, and recognizes the potential limit on the President's authority by noting that "use of force 'cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action.'"[73] In order to determine whether a proposed military action runs afoul of Congress's authority to "declare war," OLC sets out a two-step analytical framework that entails first examining "whether the President could reasonably determine that the use of force would be in the national interest, and, second, whether the anticipated nature, scope, and duration of the conflict would rise to the level of war under the Constitution."[74] This framework was previously

[71] Memorandum Re: January 2020 Airstrike in Iraq Against Qassem Soleimani from Steven A. Engel, Assist. Att'y Gen., to John A. Eisenberg, Legal Advisor to the Nat'l Sec. Council (Mar. 10, 2020), https://bit.ly/3zGLIMU.
[72] *Id.* at 11.
[73] *Id.*
[74] *Id.* at 12.

articulated in a 2011 OLC memorandum that determined that operations "limited to airstrikes and associated support missions" in Libya did not amount to "a 'war' in the constitutional sense necessitating congressional approval under the Declaration of War Clause."[75]

An MSO is legally supportable under this framework. As an initial matter, the operation proposed is distinct from the single Soleimani strike because, although it entails deployment of military forces, it does not contemplate the use of military force in the kinetic sense. If the framework supports a kinetic strike leading to the death of a high-ranking military leader of an adversary state, surely it supports a non-kinetic mere visit to a maritime feature in international waters to which no state has a valid legal claim of territorial sovereignty. Nonetheless, a full analysis of the framework is warranted.

As to the first step, the proposed non-use-of-force activity is in the national interest. Countering China has been one of the most prominent and longstanding national security interests of the United States as described in National Security Strategies and National Defense Strategies for at least the last two decades.[76] More specifically, the U.S. position on China's claim to Mischief Reef is that China "has no lawful territorial or maritime claims to Mischief Reef . . . which fall[s] fully under the Philippines' sovereign rights and jurisdiction."[77] An MSO would reinforce the U.S. position as the U.S. presence on the feature would be a physical demonstration that China does not have an exclusive right to occupy this maritime feature. Allowing China to persist as the only occupant of Mischief Reef, contrary to a legal determination that it has no lawful territorial claim to that feature, is an affront to the credibility of the rule of international law. An operation like the one proposed at Mischief Reef would

[75] Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 37 (2011), https://bit.ly/3zmhsoX.

[76] *See generally* EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), https://bit.ly/3zfx8eU; EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2010), https://bit.ly/3uXFu8I; EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2015), https://bit.ly/3aSBsaM; EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), https://bit.ly/3PlBKWC; EXEC. OFF. OF THE PRESIDENT, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE (2021), https://bit.ly/3oc2ltk; U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY (2005), https://bit.ly/3aP6WP5; U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY (2008), https://bit.ly/3PHDgSu; U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY (2018), https://bit.ly/3v1iKVg; U.S. DEP'T OF DEF., FACT SHEET, NATIONAL DEFENSE STRATEGY (2022), https://bit.ly/3PIDrgn.

[77] Raul Pedrozo, *U.S. Policy on the South China Sea*, 97 INT'L L. STUD. 76, 78 (2021), https://bit.ly/3Q2DzaX (quoting U.S. DEP'T OF STATE, U.S. POSITION ON MARITIME CLAIMS IN THE SOUTH CHINA SEA (July 13, 2020), https://bit.ly/3odMtpZ).

serve an important national interest as an action in support of the "rules-based international order [that] has come under an 'unprecedented threat' from China."[78]

Applying the second step yields some uncertainty as to whether the operation is supportable. The MSO could be designed to be limited in nature, scope, and duration (that is, a visit of several hours for peaceful purposes merely to demonstrate the United States, or any state for that matter, has equal lawful right to be physically present upon this maritime feature). Additionally, the operation is not intended to be, nor is it part of, a "conflict" per se, at least in the kinetic sense, so as contemplated, it is not anticipated that it would rise to the level of war in the constitutional sense. The uncertainly is how China would respond to the visit. China might respond kinetically under a claim of self-defense and that could lead to a war in the constitutional sense. However, China's claim to self-defense would be undermined by advanced notification regarding the peaceful visit. Additionally, and at the risk of comparing apples and oranges, the Soleimani strike had a much greater potential to escalate to war in the constitutional sense (and it did not) than an MSO at Mischief Reef. This factor in the analysis, however, is somewhat irrelevant to legality. The speculative potential for escalation does not make this proposed non-kinetic and peaceful visit outside the bounds of the President's authority to order it; it just raises the possibility of constraints on the President's response in the event of escalation.

This "less than war" analysis may well provide the legal justification for this operation, but this Article will also consider whether the statutory requirements set forth in the War Powers Resolution are triggered by this activity, which will be analyzed further below. First, it is worth examining the overlapping authority between the President and Congress in this sphere.

3. Shared Presidential and Congressional Authority

The OLC's Soleimani strike and Libya memoranda, as noted in the latter memorandum, are the outgrowth of "[e]arlier opinions [by OLC] and other historical precedents" including memoranda pertaining to activities that were conducted in Somalia in 1992, Haiti in 1994, Bosnia in 1995, and Kosovo in 2000.[79] A review of these memoranda without a critical eye yields a perception that the President's Article II powers related to foreign affairs and his role as

[78] *Id.* at 77 (quoting U.S. DEP'T OF STATE, U.S. POSITION ON MARITIME CLAIMS IN THE SOUTH CHINA SEA (July 13, 2020), https://bit.ly/3odMtpZ).

[79] Authority to Use Military Force in Libya, *supra* note 75, at 27; *see also* Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6 (1992), https://bit.ly/3cUPg5i; Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994), https://bit.ly/3JjOf2w; Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995), https://bit.ly/3OELbzi; Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000), https://bit.ly/3BpEfDf.

Commander in Chief are exclusive and plenary, enjoy a status of primacy or have preclusive effect, and may be exercised independently or unilaterally from the powers conferred upon the other branches of government most notably Congress. The Libya memorandum makes heavy use of case law to this effect and as such it is worth reviewing those cases in closer detail.

The Libya memorandum quotes from a U.S. Supreme Court case from 1850, *Fleming v. Page*, recognizing that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command."[80] At first blush, this seems to be an even stronger articulation of the legal authority for conducting traditional FONOPs. Reading the full passage from the opinion seems to provide a legal rationale for the proposed operation described in this Article, which concludes that the President may "employ [the naval and military forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."[81] If the President can do all these things, then it is reasonable to conclude he could order a peaceful landing upon Mischief Reef. But in expanding the aperture on this passage, additional context is revealed. The quoted text falls within a paragraph that begins with reference to a war declared by Congress and the implications that flow from such a declaration. This does not suggest that the President lacks the authority as stated, but the quoted text obscures the looming role of Congress referenced in that case in relation to the President's authority.

The Libya memorandum also quotes from a 1993 U.S. Supreme Court case, *Sale v. Haitian Centers Council, Inc.,* noting that the President has a "unique responsibility" with respect to "foreign and military affairs."[82] Standing alone, the quoted text seems to suggest a level of presidential primacy, but the full context of the Court's holding includes qualifying language not included in the memorandum. Indeed, the *Sale* Court upheld a presidential order directing the U.S. Coast Guard to intercept certain vessels on the high seas (i.e., outside the territorial jurisdiction of the United States) to prevent the migration of Haitians.[83] The Court also held that the order was not limited by a federal statute and an international treaty related to refugee rights.[84] However, it is worth noting that the Court added qualifying language stating that "[a]cts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing a treaty and statutory provisions that may involve foreign and military affairs for which the President

[80] Authority to Use Military Force in Libya, *supra* note 75, at 28 (quoting Fleming v. Page, 50 U.S. 603, 615 (1850)).
[81] *Fleming*, 50 U.S. at 615.
[82] Authority to Use Military Force in Libya, *supra* note 75, at 28 (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)).
[83] *Sale*, 509 U.S. at 188.
[84] *Id.* at 158.

has unique responsibility."[85] This suggests that had the cognizant treaty and statute been more clearly intended to apply extraterritorially, then it would at least give the Court additional pause in considering whether Congress, through statute, could constrain the President's actions in the foreign and military sphere despite his "unique responsibility."[86]

Next, the memorandum quotes a 2003 U.S. Supreme Court case that determined a California state statute interfered with the national government's conduct of foreign relations.[87] The memorandum pulls from the case language about "the historical gloss on the '[E]xecutive Power' vested in Article II of the Constitution" as part of what affords the President the "'vast share of responsibility for the conduct of our foreign relations.'"[88] It then uses another quote from this case to assert that the President holds "independent authority 'in the areas of foreign policy and national security.'"[89] As to this latter quote about the President's independent authority, the memorandum fails to include the sentence preceding this quoted language and the language immediately following the quoted language that completes the sentence. In full, the language from the case reads as follows: "In sum, Congress has not acted on the matter addressed here. Given the President's independent authority 'in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval."[90] The full context conveys that the President may act independently in these spheres but leaves the door open for Congress to break its silence on such matters.

The preceding review of a few of the cases cited in the OLC Libya memorandum is not intended to undermine the President's authority, but rather is intended to create space for consideration of Congress's role in a decision whether to execute a novel operation that would place U.S. military and/or government personnel in arguably uncomfortably close geographic proximity to China on Mischief Reef while at the same time challenging China's claim to the same. The prior section concluded that the OLC framework provides a legal rationale the President could rely upon to order an MSO at Mischief Reef. This section thus far draws out what was not included in the memoranda—the shared role of Congress in the space of foreign and military affairs—in an attempt to heed the spirit of this cautionary introduction to an essay from 1999 discussing the President's authority over foreign affairs:

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[85] *Id.* at 188.
[86] *Id*.
[87] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 417 (2003).
[88] *Id.* at 414 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).
[89] Authority to Use Military Force in Libya, *supra* note 75, at 28 (quoting *Sale*, 509 U.S. at 188).
[90] *Garamendi*, 539 U.S. at 429 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).

> The United States government has enormous power to affect the lives of people all over the globe; the decisions it makes in the name of American foreign policy and national security are of great human importance. How those decisions are actually made is therefore of great importance as well. Among the major factors shaping the process by which the United States determines policy and takes actions, one is directly a product of the United States Constitution: even when one political party is dominant, American foreign and security policies are the product of two quite distinct and often antagonistic institutions - the legislative and executive branches of the federal government. Even if one is skeptical about the influence that constitutional law has or ought to have in these matters, the political potency, real and potential, of Congress and the President makes the constitutional law officially governing their relationship of more than academic concern.[91]

In this regard, it is prudent to explore some academic perspectives on the shared powers in this space. This certainly risks violating the caution in the text just quoted that this should not be merely an academic concern. However, given the oft-repeated concern about a runaway executive in these spheres[92] and congressional acquiescence, silence, or inaction[93] in response, these academic perspectives fill the void arguably left unfilled by Congress.

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[91] H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 527 (1999), https://bit.ly/3Sbc94y.

[92] One such account asserts that there has been an "unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years [that] represents a dramatic departure from the basic scheme of the Constitution." David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 19 (David G. Adler & Larry N. George eds., 1996). A more recent critique focuses on the overly broad presidential claim of power over diplomacy. *See* Jean Galbraith, *The Runaway Presidential Power Over Diplomacy*, 108 VA. L. REV. 81 (2022), https://bit.ly/3Q8UtVt.

[93] *See generally* Anthony J. Ghiotto, *The Presidential Coup*, 70 BUFFALO L. REV. 369 (2022), https://bit.ly/3vOYN4z; Scott S. Barker, *Reforming the War Powers Relationship Between Congress and the President in the Post-Trump Era*, 98 DENV. L. REV. ONLINE 1 (Mar. 20, 2021), https://bit.ly/3RP8mtp; Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231 (2016), https://bit.ly/3vuT97h; David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685 (2014), https://bit.ly/3OFKMN7; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012), https://bit.ly/3vsyssy; Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553 (2007), https://bit.ly/3ScnmBS; Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988), https://bit.ly/3cUSgyA.

One account argues that Congress is more than a "legislature" as it is also "an executive institution, with authorities over war, the military, and foreign affairs, each of which were long deemed executive."[94] This account argues that "Congress's power over the military is almost without limit" and notes its early involvement determining not just "whether to wage war [but] how it ought to be fought." For example, Congress only authorized "limited hostilities" in the Quasi-War with France and specified "where American ships could patrol, which enemy ships to target, and where they could be attacked."[95] These examples are drawn from exercises of authority over military operations by Congress under its Declare War clause. This may not be the present reality of how things work, but it is nonetheless notable to consider the historical precedent of overlapping authority when often only Presidential independent exercises of authority are referenced as historical support for continued unilateral executive action.

Another scholarly work departs from the tendency to focus primarily on the "Militia and Declare War Clauses" and instead focuses on the "Land and Naval Forces Clause" found in Article I, Section 8, Clause 14 of the U.S. Constitution that provides Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[96] The author contends that although it has traditionally been associated primarily with authority over military justice, "[t]his provision's full history and significance beyond the military justice context . . . are unappreciated, in some respects ambiguous, and insufficiently studied."[97] Drawing on case law that points to the term "Government" in the clause, as opposed to traditional emphasis on "make Rules," the author argues the existence of an "[e]xternal Government power [that] provides Congress legislative authority to write statutory 'Rules' controlling operations of the national security apparatus that involve third parties, both at home and abroad."[98] The author further emphasizes that "[r]egarding both internal military matters and external operations (wherever such congressional powers originate), separation of powers doctrine holds generally that the President and Congress have overlapping and ultimately shared power."[99]

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[94] Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 841 (2018), https://bit.ly/3ziEFsq.
[95] *Id.* at 824.
[96] Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391, 393 (2018), https://bit.ly/3ScxHOd.
[97] *Id.*
[98] *Id.* at 393.
[99] *Id.* at 447.

Two scholars further emphasize this overlapping power by making the case that the preclusive Commander in Chief power is quite limited.[100] However, this position is contested considering historical practice and in scholarly debates.[101] And yet another perspective recognizes the practical reality (that is, "the presidency's arrogation of war powers since World War II") and argues for various reforms to promote presidential cooperation in this area.[102]

Although there is a substantial amount of literature suggesting that Congress has abdicated its role in these spheres, including commentary by two U.S. Senators,[103] one perspective notes that despite "reduction in legislative participation at the front end of [Presidents deploying force abroad, it] is being counterbalanced to some extent by legislative willingness to intervene at the back end if the campaign goes poorly or the public begins to doubt certain of the President's decisions about how it should be prosecuted."[104] One notable mechanism that in part reflects this approach is the War Powers Resolution (WPR), which will be discussed next, as another means of analyzing the U.S. legal perspectives related to an MSO at Mischief Reef.

4. Application of the War Powers Resolution

a. Requirements Under the War Powers Resolution

The most relevant provisions of the WPR, for the purposes of this Article, are its provisions related to consultation with Congress, reporting requirements, and the temporal limitation (generally, sixty days) on presidential use of U.S. Armed Forces without congressional support.[105]

The consultation requirement states that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[106] It could be argued that this provision is inapplicable because hostilities are not occurring on Mischief Reef or

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[100] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 774–80 (2008), https://bit.ly/3oE61Er.
[101] Rudesill, *supra* note 96, at 448.
[102] Barker, *supra* note 93.
[103] *See generally* Tim Kaine & Todd Young, Essay, *War, Diplomacy, and Congressional Involvement*, 58 HARV. J. ON LEGIS. 195 (2021), https://bit.ly/3zlwmfp.
[104] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 945 (2008), https://bit.ly/3vuUACH.
[105] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified in 50 U.S.C. §§ 1542–44) [hereinafter WPR], https://bit.ly/3PrTzn3.
[106] *Id*. § 3

between the United States and China. Additionally, although the intended peaceful visit to Mischief Reef arguably has the potential to increase or escalate tensions, this is perhaps too abstract and speculative to qualify as 'imminent' under the circumstances. Nonetheless, as the earlier part in this Article on shared presidential and congressional authority suggests, it may still be prudent for the President to consult with Congress before conducting such a novel operation.

The reporting requirement in the WPR requires reporting by the President to certain congressional leaders within forty-eight hours of the introduction of U.S. Armed Forces under three situations and absent a Congressional declaration of war.[107] The first situation covers the introduction of forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[108] This language mirrors the consultation requirement and, as such, although arguably not required, reporting under this category may be warranted. However, there may be a more relevant category than this one.

The second situation pertains to the introduction of forces "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces."[109] This category of reporting is arguably not relevant to the proposed operation because Mischief Reef is not under the territorial sovereignty of China or any other state. As such, forces under this operation would not be introduced into the territory of a foreign nation. One might argue that the forces would be introduced into the EEZ waters of the Philippines, but the tenor of that provision seems to apply only to the territorial waters, not water space that is considered international waters. Additionally, the personnel conducting the operation would not be equipped for combat. However, of the three categories, this might be the most appropriate categorization of the Mischief Reef operation, even though it does not fit exactly within this category.

The third situation requires reporting for an introduction of forces "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[110] Again, this category is not germane to the proposed operation at Mischief Reef because it is not part of a "foreign nation," but also because there are no forces currently stationed there for this operation to constitute an 'enlargement' of existing forces. Additionally, the proposed number of personnel for this operation would likely be minimal—vice substantial—to reduce the potential for escalation. Finally, these personnel would

[107] *Id.* § 4(a).
[108] *Id.* § 4(a)(1).
[109] *Id.* § 4(a)(2).
[110] *Id.* § 4(a)(3).

not be equipped for combat. Instead, these personnel may not be armed with weapons at all or may possess minimal weaponry merely for self-defense purposes.

Lastly, the temporal limit on use of forces for this operation would likely not apply. The time limit applies if a report has been submitted (or was required) under WPR Section 4(a)(1) because forces were introduced into hostilities or into situations where imminent involvement in hostilities was clearly indicated by the circumstances; in such cases, unless Congress declares war or authorizes the activity, the President must—absent a justification for a limited extension—withdraw the forces within sixty days.[111] Additionally, if Congress follows certain procedures set forth in separate statutory authority that modify WPR Section 5(c), then the President might need to withdraw such forces sooner assuming the Congress could override a possible presidential veto.[112] The temporal limitations on the introduction of forces are likely inapplicable here because the operation at Mischief Reef proposed in this Article would likely only be conducted for a matter of hours. As such, it would never come close to the sixty-day time limitation and would likely be over before Congress could attempt to pass legislation to terminate the operation.

Overall, the WPR is an interesting mechanism. On one hand, it is not an affirmative authority that could be relied upon for claiming the legality of the proposed Mischief Reef operation. In essence it is a compliance mechanism. But by implication, one might contend, that Congress has arguably ceded authority to the President to conduct operations that include hostilities, as long as the President is prepared to withdraw those forces within sixty days if Congress has not authorized the operation. An operation with a peaceful intent that is not intended to include hostilities, such as the proposed Mischief Reef operation, is by logical implication included within this ceded scope of authority. From a strict textual reading, the proposed operation may not be within the scope of the WPR at all; however, it may be prudent for the President to act consistent with it, nonetheless. To further explore the relevance of the WPR to this proposed operation, this Article will explore an executive branch analysis that articulated a basis for claiming that not all hostile operations can be considered hostilities subject to the

[111] *Id.* § 5(b).

[112] Following the decision in *INS v. Chadha*, 462 U.S. 919 (1983), the concurrent resolution method to force the President to withdraw forces in WPR § 5(c) (50 U.S.C. § 1544) was believed to constitute an unconstitutional legislative veto. Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1420 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1239–40 (1984). To remedy this perceived deficiency, Congress enacted section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (P.L. 98-164, 97 Stat. 1062-1063), which includes a reference to additional parallel supplemental procedure in "section 601(b) of the International Security Assistance and Arms Export Control Act of 1976."

temporal limitation under WPR Section 5(b), and will examine past WPR reporting for relevant insights they may reveal.

b. 'Not Hostilities' Analysis

Based on a review of U.S. involvement in Libya, it might be possible to argue that the WPR is not applicable, at all, to the proposed operation at Mischief Reef. In 2011, the U.S. Department of State Legal Adviser, Harold Koh, narrowed the applicability of the WPR by emphasizing in testimony to Congress that "hostilities" is not defined in the statute, by courts, or through any subsequent legislation.[113] Koh also stated that hostilities "is an ambiguous standard."[114] Given this ambiguity, Koh argued that historical practice suggests that in evaluating whether the WPR applies, one must consider the nature of the mission, exposure of U.S. Armed Forces to harm, risk of escalation, and military means employed as to whether the activity constitutes "hostilities," which trigger the WPR requirements.[115] At that time, Koh was specifically arguing that U.S. support to a United Nations Security Council-authorized international operation in Libya should not be constrained by the sixty-day automatic pullout provision.[116] The United States participated in this operation by conducting air-to-ground strikes, including such strikes by unmanned aerial vehicles, providing intelligence and logistics support, and suppressing enemy air defenses to enforce a no-fly zone.[117]

This framework by Koh is similar to the OLC framework discussed earlier but adds additional factors including potential exposure of U.S. Armed Forces to harm, risk of escalation, and military means employed—although, this is arguably similar to the 'scope of the mission' factor under OLC's framework. These frameworks serve different purposes. Under the OLC framework the argument is that the limited actions did not encroach upon Congress's authority to declare war because these were not actions that rose to the level of war in the constitutional sense. Under Koh's framework, the aim was to avoid the pull-out of forces requirement of the WPR by arguing that the activity does not constitute hostilities, which is the triggering condition of the WPR. These additional factors serve to narrow the range of activities that could be claimed to be outside of the WPR reach. In the Libya case, it supported the Executive's position that U.S. participation in the operation was lawful despite lacking affirmative authorization by Congress before the sixty-day time limit.

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[113] *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 10, 13 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Dep't of State) [hereinafter 2011 Koh Statement], https://bit.ly/3cmS4aS.
[114] *Id.* at 13.
[115] *Id.* at 14–15.
[116] *Id.*
[117] *Id.* at 16.

Applying Koh's "not hostilities" framework to this proposed peaceful visit operation to Mischief Reef, ironically, may necessitate compliance with the WPR unlike the participation in the form of kinetic support delivered to the operation in Libya. The factors that are like OLC's "not war in the constitutional sense" have been addressed previously in this Article and would reach a similar result here. Overall, those factors alone could be satisfied there and here, but with an increased modicum of caution that stems from uncertainty as to how China would respond to such an operation. Koh's "military means employed" factor might support an argument that this operation does not constitute hostilities. In this proposed option, even though military assets are employed, they are not being employed kinetically, unlike in the Libya example. The military assets, here, primarily would be used for the purpose of transport to conduct the visit to Mischief Reef, and personnel may or may not be armed with weapons to support personal self-defense.

It is the other two additional factors by Koh that increase the level of uncertainty and make it more challenging to argue that this operation is completely free from the WPR requirements. This is because U.S. forces would be very near Chinese personnel on a relatively small maritime feature in the middle of the South China Sea. On one hand, the risk of harm to those personnel is low because there is not a current state of hostilities, and the operation would be designed and intended to be peaceful. But on the other hand, it is unknown how China or the personnel on the ground might react to the visit. This highlights the interrelationship of Koh's additional factors in this context because mere presence may increase potential for the operation to unintentionally escalate.

This discussion reveals an arguably strange result. The U.S. participation involving kinetic activity during actual hostilities in Libya was "not hostilities" under the WPR to require the United States to cease participation after the sixty-day period elapsed, but an intended peaceful visit to Mischief Reef, where there are no actual hostilities occurring might necessitate WPR requirements based on Koh's factors because the increased risk to forces and potential for escalation.

It should be noted that Koh's argument was not that the WPR does not apply at all to the Libya operation; it "plays an important role in promoting interbranch dialogue and deliberation on these critical matters."[118] To that end, President Obama's administration filed a 48-hour report regarding United States participation in Libya "consistent with" the WPR.[119] Although the report did not

[118] *Id.* at 12.

[119] Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, 1 PUB. PAPERS 280 (Mar. 21, 2011), https://bit.ly/3b0MAlZ. Note the language about the report having been filed "consistent with" the WPR, which leaves open the question of whether it was actually "required" under the WPR.

articulate the categorical trigger under the WPR for the report, the War Powers Resolution Reporting Project[120] categorized the trigger as Section 4(a)(1) of the WPR, which requires reporting upon the introduction of armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[121] This is interesting because forces were not "introduced" into the territory in the strict meaning of the word. Along those lines and as noted in the prior part about the WPR in general, a report would likely be warranted in relation to the proposed Mischief Reef operation or at least similarly filed "consistent with" the WPR. Unlike the Libya example, though, this proposed operation is not intended to approach the 60-day pull-out requirement under the WPR, so it may not be the best comparative example. A review of prior reports submitted that are catalogued by the War Powers Resolution Reporting Project may help shed light on how the WPR applies to the proposed Mischief Reef operation.

c. Examples of WPR Reporting

At the time of publication, the War Powers Resolution Reporting Project database contains 108 reports.[122] The most relevant reports that are arguably similar, or at least as closely comparable to the operation proposed at Mischief Reef, are discussed below for each of the WPR report triggering categories. As this part reveals there are no clear comparable analogues as they largely pertain to operational contexts with actual conflict or hostilities occurring or are post-conflict situations with significant potential for continued hostilities.

(1) WPR Section 4(a)(1) Reports

Forty of the WPR reports were triggered at least in part by WPR Section 4(a)(1) based on actual or imminent hostilities.[123] Only two of these reports are arguably somewhat like the context of the proposed Mischief Reef operation. Both reports were made after the United States responded to a threat or to an actual attack on U.S. forces. Prior to the attacks, those forces were operating in a "pre-hostilities" scenario like the situation with respect to Mischief Reef. In this regard, it might be argued that a report would only be required if China attacked or threatened the U.S. personnel visiting Mischief Reef and if the United States

[120] *Report 20110321A,* REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (Mar. 21, 2011), https://bit.ly/3b3Rn61.
[121] WPR, *supra* note 105, § 4(a)(1).
[122] *48-Hour Report Database*, REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (July 21, 2022), https://bit.ly/3v8QWya.
[123] *48-Hour Report Database filtered by WPR Report Trigger*, REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (July 21, 2022), https://bit.ly/3OlRS9n. The actual reports typically do not cite to a specific WPR trigger; the categorization has been performed by the WPR Reporting Project. Additionally, the reports may be based on more than one trigger.

responded in self-defense. However, unlike the proposed Mischief Reef operation, there was arguably a higher level of tension between the United States and the respective countries, prior to the attacks as will be elaborated upon further below.

The first of the two reports is germane because it was made following attacks by Libya on U.S. forces in the eastern Mediterranean on March 24, 1986, while the U.S. Navy was conducting "a peaceful exercise as part of a global Freedom of Navigation program."[124] Although there were not actual hostilities preceding this operation, tensions between the United States and Libya were elevated given United States' suspicion that Libya's leader at the time, Muammar Qaddafi, was involved with, or at least supported, a plane hijacking and terrorist attacks in Rome, Italy, and Vienna, Austria, in 1985.[125] Additionally, the FONOP conducted sought to challenge an excessive maritime claim wherein Libya had drawn a straight line across much of the Gulf of Sidra claiming much of the waters inland from the line as an exclusive fishing zone. Gaddafi declared it the "Line of Death" and stated that crossing it would invite a military response.[126] The tensions between the United States and China are not comparably tense as this Libya example, nor has China articulated a threat should the United States encroach upon its purported claims.

The second report follows from a United States engagement with Iran as an act of self-defense after Iranian vessels had engaged in minelaying at night on September 21, 1987, in international waters of the Arabian Gulf near U.S. forces.[127] The United States deemed this a "direct threat to the safety" of U.S. warships and other U.S.-flag vessels and in response, U.S. forces conducted kinetic strikes in self-defense to disable the vessels.[128] Much like the Libya encounter above, this was the first reported engagement of hostilities between the United States and Iran and, as with the Libya example, there had been considerable tension between the United States and Iran leading up to this event.[129] The United States had supported Iraq during the Iran-Iraq war that was

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[124] Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the Gulf of Sidra Incident, 1 PUB. PAPERS 406 (Mar. 26, 1986), https://bit.ly/3IYqflJ.
[125] U.S. DEP'T OF JUST. NAT'L INST. FOR JUST, PUBLIC REPORT OF THE VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM at i, ii, 2, 4–6 (1986), https://bit.ly/3zqyljV; *Libyan Sanctions, President Reagan's Opening Statement, Jan. 7, 1986*, DEP'T. OF STATE BULLETIN, March 1986, at 36–37 (1986), https://bit.ly/3PLk2vn; Marian Nash Leich, *U.S. Practice*, 80 A.J.I.L. 612, 629 (1986).
[126] George C. Wilson, *U.S. Naval Forces to Cross Qaddafi's 'Line of Death' Soon*, WASH. POST, Mar. 21, 1986, https://wapo.st/3RViIYX.
[127] Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike in the Persian Gulf, 2 PUB. PAPERS 1074 (Sept. 24, 1987), https://bit.ly/3ojLtRx.
[128] *Id.*
[129] Bruce Reidel, *Lessons from America's First War with Iran*, BROOKINGS (Mar. 22, 2013), https://brook.gs/3zqyxQb.

ongoing at the time of this encounter.[130] Subsequent to this report through July 14, 1988, there were five additional reports related to Iran under the Section 4(a)(1) trigger that are no longer comparable to the Mischief Reef operation proposed here because of the increased level of tension and active hostility between the United States and Iran distinct from the current adversarial relationship with China.[131] As to the first report, the circumstances with respect to Iran then are not comparable to the conditions between the United States and China now.

Overall, these two reports reasonably support a conclusion that no report would be required for the mere execution of the operation proposed with respect to Mischief Reef but would be required if the United States took self-defense measures in response to aggressive action by China. These two reporting events are quite distinct because the preceding contexts between the United States and Libya and the United States and Iran were at much higher levels of hostility than the adversarial relationship that the United States is currently experiencing with China.

(2) WPR Section 4(a)(2) Reports

Fifty-seven of the WPR reports were triggered, at least in part, by WPR Section 4(a)(2) based on combat-equipped introductions of forces to a particular location.[132] Only one of these reports is arguably similar to the proposed Mischief Reef operation; the rest involve introduction of U.S. forces into hostile circumstances or post-conflict situations generally for limited purposes, such as rescuing U.S. persons, supporting conflict stabilization efforts, humanitarian purposes, or to provide advice or assistance to military personnel of various countries. In this regard, these reporting circumstances are so unlike the current context within which the operation at Mischief Reef would be conducted and, as a result, do not provide meaningful insights as to the reporting requirement for

[130] *Id.*

[131] Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike in the Persian Gulf, 2 PUB. PAPERS 1164 (Oct. 10, 1987), https://bit.ly/3J02bP2; Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States on the United States Reprisal Against Iran, 2 PUB. PAPERS 1212 (Oct. 20, 1987), https://bit.ly/3v9PpIm; Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States on the United States Military Strike in the Persian Gulf, 1 PUB. PAPERS 477 (Apr. 19, 1988), https://bit.ly/3zpiD8p; Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States on the Destruction of an Iranian Jetliner by the United States Navy Over the Persian Gulf, 2 PUB. PAPERS 920 (July 4, 1988), https://bit.ly/3J02E3K; and Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in the Persian Gulf, 2 PUB. PAPERS 963 (July 14, 1988), https://bit.ly/3cyHJca.

[132] *48-Hour Report Database filtered by WPR Report Trigger (Combat-equipped introduction)*, REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (July 21, 2022), https://bit.ly/3v8QWya.

this proposed operation. The one report that is arguably relevant pertains to a deployment of approximately ninety "U.S. armed forces personnel to Cameroon to conduct airborne intelligence, surveillance, reconnaissance [(ISR)] operations in the region."[133] In this regard, the forces were not introduced into a hostile context, would not be in proximity to hostilities, and were performing a supporting role (i.e., ISR), which is distinct from kinetic assistance. Although not clearly articulated, presumably these forces were, based on the category of reporting here, "equipped for combat." Overall, this historical report example does not provide a convincing basis for determining that reporting based on this category would be triggered by the proposed Mischief Reef operation.

(3) WPR Section 4(a)(3) Reports

There are twenty-one reports that were triggered, at least in part, by WPR Section 4(a)(3) based on an introduction of forces resulting "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[134] Among these reports, as in the prior category, they are largely dissimilar to the proposed Mischief Reef operation because they pertain to situations where there were active threats to U.S. citizens or property, were post-conflict or ongoing conflict scenarios where the threat of hostilities persisted, or involved support to hostile engagements in neighboring countries.

None of these reports provide an analogous basis upon which to argue that the operation at Mischief Reef would trigger this third reporting category under the WPR. The report examples are much too dissimilar and, as discussed in the overall discussion of the WPR, this category is for situations where the number of forces in a particular foreign country are being increased, which would not be the factual scenario with respect to the Mischief Reef operation.

(4) Unknown WPR Section Trigger Report

One of the WPR reports is categorized as "unknown" as to which WPR Section triggered the reporting requirement.[135] That report covered a deployment of approximately eighty U.S. Armed Forces to Chad to support the operation of ISR aircraft missions over northern Nigeria as part of an effort to resolve the

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[133] Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Cameroon, 2 PUB. PAPERS 1306 (Oct. 14, 2015), https://bit.ly/3aVaQ90.
[134] WPR, *supra* note 105, § 4(a)(3); *48-Hour Report Database filtered by WPR Report Trigger (Substantial enlargement)*, *48-Hour Report Database filtered by WPR Report Trigger*, REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (July 21, 2022), https://bit.ly/3v8QWya.
[135] *48-Hour Report Database filtered by WPR Report Trigger (Unknown)*, REISS CTR. ON L. & SEC.: WAR POWERS RESOL. REPORTING PROJ. (July 21, 2022), https://bit.ly/3v8QWya.

kidnapping of over 200 schoolgirls reported to have been kidnapped in Nigeria.[136] This report was likely categorized as "unknown" as to its trigger because although this situation could involve hostilities, the U.S. forces were not located in close geographic proximity to the kidnappers since they were in a neighboring country and were only participating in ISR support and not kinetic action of any kind.

Based on this report, one might argue that a report for the Mischief Reef operation is not required because the hostile context in a country neighboring Chad, the location of that deployment, is unlike the intended peaceful visit to Mischief Reef. But on the other hand, one could argue that the President was not required to file a report related to this deployment to Chad because it did not fit squarely within one of the reporting categories. Similarly, the Mischief Reef operation does not fit clearly into one of the reporting categories either, but a report might be appropriate based on the Chad example.

5. A Judicial Role in this Space?

Before turning to the international legal considerations surrounding this proposed operation, it is worth considering the possible role of the Judiciary as the third branch in the U.S. constitutional system designed to promote checks and balances on the exercise of government power to include military power.

One of the earliest U.S. Supreme Court cases addressing the President's Commander in Chief power is *Little v. Barreme*.[137] In that case, Congress authorized hostilities with France, but the Court held that the President exceeded his authority as Commander in Chief by ordering, through the Secretary of the Navy, an action that was contrary to the congressional authorization.[138] This determination is notable because it seems to squash any space for Presidential discretion as Commander in Chief for activity that was arguably consistent with the congressional authorization; the President had ordered the seizure of a merchant vessel departing *from* France, but Congress had only authorized seizure of such vessels heading *to* France.[139]

However, the Supreme Court in the more contemporary period has taken a hands-off approach noting that, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[140] In *Department of Navy v. Egan*, the Supreme Court noted that "courts traditionally

[136] Letter to Congressional Leaders on the Deployment of United States Armed Forces Personnel to Chad, 1 PUB. PAPERS 579 (May 21, 2014), https://bit.ly/3opHzXf.
[137] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).
[138] *Id.*
[139] *Id.* at 179.
[140] Haig v. Agee, 453 U.S. 280, 292 (1981).

have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[141] The reason for this reluctance stems from assertions by the Court of lack of competence because judges do not possess the requisite technical knowledge[142] about the subject matter in particular when it involves tactical decisions amidst an ongoing war.[143] It seems likely that this reluctance would hold if there were a challenge brought with respect to the proposed Mischief Reef operation. It is unlikely that courts would want to substitute their judgment for what is essentially an expression of foreign policy using military personnel and tactics.

A widely applied framework for analyzing presidential actions in the foreign affairs and military spheres in relation to congressional action or inaction is found in the Justice Jackson concurrence set out in *Youngstown Sheet & Tube Co. v. Sawyer*.[144] Jackson set out three categories as part of evaluating the constitutionality of an executive action. In the first category, the President's power is at its maximum if he is acting "pursuant to an express or implied authorization of Congress."[145] Second, the President is in a "zone of twilight" if he "acts in absence of either a congressional grant or denial of authority" as he must rely solely upon his independent powers.[146] Finally, the President's power is at its lowest ebb if he "takes measures incompatible with the expressed or implied will of Congress"; then he is equipped only with his constitutional powers minus any constitutional powers Congress has over the matter.[147]

Applying this framework to the proposed Mischief Reef operation, the President would likely be in the zone of twilight because there is no affirmative explicit authorization by Congress for the proposed activity and, assuming the earlier WPR analysis is correct, the President would not be acting contrary to the most relevant applicable statute. It might be argued that he is in the first category if it is implied from the WPR that whatever is not prohibited under that statute is authorized as long as it ends within sixty days or is otherwise authorized by Congress.

Ultimately, based on the legal landscape as it stands today, because there is a sufficient legal rationale for the President to authorize this operation under his constitutional authority and absent a situation where the President orders the

[141] Department of Navy v. Egan, 484 U.S. 518, 530 (1988).
[142] Gilligan v. Morgan, 413 U.S. 1, 8 (1973).
[143] Holtzman v. Schlesinger, 414 U.S. 1304, 1311 (1973).
[144] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
[145] *Id.*
[146] *Id.* at 637.
[147] *Id.*

operation in defiance of a statute, "conventional jurisdictional barriers [would likely] prevent judicial review" of this operation.[148]

6. Overall Assessment of U.S. Domestic Legal Considerations

The President could lawfully order the proposed operation at Mischief Reef pursuant to his constitutional authority as Commander in Chief and Chief Executive for foreign and military affairs. If history is a guide, such an operation would likely not be limited by Congress although it may draw critiques from certain members. It is debatable whether the WPR would be triggered by this operation, but at the same time, acting consistent with the WPR through consultation and reporting may be prudent particularly given the novelty of this proposed operation as something more than a traditional FONOP but less than a unilateral use of U.S. Armed Forces in hostilities. The next question is whether there are any international law limitations on an MSO.

B. International Law Considerations

One scholar has already asserted that a challenge to China's purported territorial sovereignty claim is legally permissible under international law.[149] However, that assertion is grounded in a different operational approach than an MSO as it asserts that "fly[ing] within 12 [nautical miles] or even directly 'over' the artificial islands" at Mischief Reef would be a lawful way to challenge China's sovereignty claim. Notably, this assertion was made in 2015 and grounds the analysis in concepts from UNCLOS that the Arbitral Tribunal in the Philippines-China case relied upon in reaching its decisions. That being said, flying over and landing on a territory are distinct activities and, as such, it is necessary to examine the legality of this visit operation in depth.

There are three legal frameworks commonly used to analyze the legality of military activities such as an MSO at Mischief Reef which include: (1) the use of force framework within Article 2(4) of the United Nations Charter, (2) the Internationally Wrongful Acts framework within the Articles of State Responsibility, and (3) commentary justifying actions that are "below the use of force threshold," "short of war," or in the "gray zone."

1. Use of Force

The primary rule regulating the resort to force is Article 2(4) of the United Nations Charter which states "[a]ll Members shall refrain in their

[148] Barron & Lederman, *supra* note 100, at 723.
[149] Ku, *supra* note 62.

international relations from the threat or use of force against the territorial integrity or political independence of any state, or in in any other manner inconsistent with the Purposes of the United Nations."[150] The Charter does not define "use of force" nor provide further elaboration on its component terms.[151] One legal note on the topic of "use of force" aptly recognizes that although the U.N. Charter and international treaties reference "use of force" frequently, "neither the documents themselves, nor any organ of the UN, nor any other international organization has articulated a clear definition."[152]

The International Court of Justice's (ICJ) jurisprudence has added some contours to the concept of what constitutes a "use of force." The *Nicaragua* case established the "scale and effects" test as a means of distinguishing between the U.N. Charter's reference to "armed attacks" under Article 51 and "use of force" under Article 2(4).[153] Under the test, only "the most grave forms of the use of force" can be characterized as an armed attack wherein "less grave forms" fail to qualify as such.[154] In *Nicaragua*, the ICJ noted that a third state's "provision of weapons or logistical or other support" to rebels in another state "may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."[155]

The "scale and effects" test is frequently applied in discussing the lawfulness of cyber operations, and doctrine asserts that such operations "that seriously injure[] or kill[] a number of persons or that cause[] significant damage to, or destruction of, property would satisfy the scale and effects requirement."[156]

In the *Oil Platforms* case, the ICJ added a requirement to the "armed attack" concept that an attacking state must possess "the specific intention of harming" the attacked state.[157] This intent requirement was a part of the court's reasoning that the United States lacked justification to destroy Iranian oil platforms "as a proportionate use of force in self-defence" in response to "mining,

[150] U.N. Charter art. 2, ¶ 4.
[151] Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349, 357 (2014), https://bit.ly/3Q2QBFp.
[152] Heidi K. Hubbard, Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 167 n.13 (1985).
[153] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).
[154] *Id*. ¶ 191.
[155] *Id*.
[156] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 341 (Michael N. Schmitt ed., 2017).
[157] Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 64 (Nov. 6).

by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life."[158]

Applying these ICJ concepts to the proposed Mischief Reef operation support the argument that it does not violate the "use of force" threshold. It could be designed and executed in such a manner that there would be virtually no possibility of intended or even unintended kinetic effects or injuries. Furthermore, because the United States would announce its visit with peaceful intent in advance of the operation, there could be no reasonable argument that the United States had a specific intent to harm China through this operation.

Other dominant themes characterizing "use of force" emphasize two possible definitions. Either the term holds its "'common sense' meaning—the use of armed or military force," refers to "armed force as distinguished from economic or political pressure," and "undoubtedly covers only armed or physical force;" or it can broadly include "any act by one state against another which violates international law."[159] One author settled on a working definition as "those cases in which a state uses armed, physical, or military force against another state or any of its nationals."[160]

One historical critique in this area raises concern over "whether the existing rules on the use of force are so vague and uncertain as to allow a state to offer a plausible legal justification for virtually any use of force it chooses to exercise."[161] But one of the prominent scholars on the law of armed conflict emphasizes that "the term 'force' in Article 2(4) must denote violence. It does not matter what specific means—kinetic or electronic—are used to bring it about, but the end result must be that violence occurs or is threatened."[162]

Another scholar provides a helpful explanation of "use of force" as a form of coercion, noting that a state's use of force "achieves its objectives through physical destruction. Concessions are extracted from an adversary by attacking and degrading its capabilities."[163]

The proposed activity contemplated in an MSO would not run afoul of the prohibition against the "use of force" because there is no contemplated intent to impose physical destruction or employ kinetic violence or other means to exact

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[158] *Id*. ¶ 77.
[159] Hubbard, *supra* note 152, at 167 n.13 (citations omitted).
[160] *Id.*
[161] Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1621 (1984), https://bit.ly/3d71t7q.
[162] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 88 (5th ed. 2011).
[163] Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INT'L L. & POL. 1, 94 (2019), https://bit.ly/3oCXX6S.

violence on anyone. Although the U.S. military (i.e., its armed forces) would be landing upon Mischief Reef, which might be problematic under some of the perspectives noted above, the landing is not envisioned as a violence-based or threat-based endeavor.

If the operation is executed by military personnel, there is potential that China could perceive it as a threatening situation. But this misperception could be mitigated through clear messaging to China, giving consideration about which personnel participate in the landing, determining whether personnel should be armed with weapons at all or what type of weapons landing personnel should carry, and considering what the defined rules of engagement for the operation should be. As an example of how the operation could be designed to reduce its "threat posture," the landing party could be composed of military personnel from the U.S. Army Corps of Engineers accompanied by an inter-agency team of personnel from the U.S. Government who may be similarly interested in visiting Mischief Reef as an engineering marvel to behold. This would have a different connotation than a group of U.S. Marines in full battle gear landing upon Mischief Reef. As such, there are ways this operation could be designed to decrease the potential for it to be perceived as inconsistent with the prohibition against the use of or threat of force.

Although an MSO is not a use of force, it could be considered an Article 2(4) "threat of force." A "threat of force" has been given less attention in legal literature but "[c]learly, a threat to use military action to coerce a state to make concessions [such as compelling another to relinquish territory] is forbidden."[164] Threats of force "are a bargaining tool that extracts concessions by intimidating an adversary and playing on its fears without inflicting physical damage."[165] In this sense, the prohibition seems much broader.

Professor Mohamed Helal examined the concept of coercion and sets out a continuum of threats that lists those activities considered "more threatening [to] include creating alliances and defense pacts, increasing defense spending, developing and testing new weapons, conducting military parades, military exercises, maneuvers, mobilizations, and troop movements, dispatching warships on port visits or 'freedom of navigation operations,' the articulation and publication of defense doctrines, like the National Security Strategy or the Nuclear Posture Review, and issuing bellicose statements from civilian officials or military commanders."[166] Despite labeling the above as "more serious," he also noted that "[n]one of these acts, however, are, *eo ipso*, unlawful."[167] He then

[164] Schacter, *supra* note 161, at 1625.
[165] Helal, *supra* note 163, at 94.
[166] *Id.* at 95 (citations omitted).
[167] *Id.*

highlights that what moves a threat further on the continuum to unlawful are those "statements or demonstrations of force by a state that communicates, with a sense of urgency, a specific demand to another state, and which promises the use of force in the case of noncompliance. Thus, threats of force are similar to ultimatums."[168]

The foregoing, as applied to an MSO, provides strong support for a claim that it would not constitute a threat of force. Undoubtedly, it is clear that landing a military force on another sovereign's territory without permission could qualify as an unlawful use or threat of force. But the context surrounding the proposed operation helps make the claim that the Article 2(4) prohibition of threats is not violated. If the territory being landed upon was definitively under the territorial sovereignty and physical control of China, then this proposed activity would be problematic under Article 2(4). But because the Arbitral Tribunal made clear that this feature is not subject to the territorial sovereignty of any state, it is therefore a feature that can be visited by any state. China cannot by its mere presence on the feature claim that any other state seeking to visit the feature is manifesting a threat to it or its interests.

Based on the discussion above, if the United States was landing as a means of communicating an ultimatum, such as "the United States rejects your presence and if you do not leave, we will expel you by force," that would violate Article 2(4). But the messaging associated with an MSO would be: "the United States is peacefully visiting a maritime feature in international waters that is not under the territorial sovereignty of any state, and while we are visiting perhaps we can take a tour to see 'all that you've done with the place' that the Arbitral Tribunal said violated several obligations owed to the Philippines under UNCLOS."

In a review of several territorial dispute cases before international tribunals, one scholar concludes that "to constitute an unlawful use of force under Article 2(4), the establishment of a military presence by a claimant in a disputed territory does not have to be violent but should involve coercion which makes it materially impossible for other claimants to restore the status quo ante in the disputed territory without risking human injury or damage to property."[169] This seems to describe China's activities. In contrast, an MSO does not contemplate a build-up of a military presence like China. And while China might perceive an MSO as a threat, there is a distinction between "threats" and "demonstrations of force."[170] At most this proposed operation at Mischief Reef is "muscle flexing"

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[168] *Id.* at 95–96 (citations omitted).
[169] Tomohiro Mikanagi, *Establishing a Military Presence in a Disputed Territory: Interpretation of Article 2(3) and (4) of the UN Charter*, 67 INT'L & COMP. L. Q. 1021–34 (2018), https://bit.ly/3zlGzIL.
[170] Helal, *supra* note 163, at 97.

and not a threat that the United States "will actually resort force." For these reasons, this operation is unlikely to exceed the Article 2(4) threshold.

2. Internationally Wrongful Acts

Another frequently referenced framework for analyzing the lawfulness of state activities is the concept of state responsibility for internationally wrongful acts. This framework was developed by the International Law Commission and provides a basis for states to assert that another state bears responsibility for an internationally wrongful act as contemplated in the Articles of State Responsibility, which could generate the right of states to take action in the form of counter-measures in response to the wrongful act.[171] Although this framework does not have the force of law like a multilateral treaty, its articles are largely considered to reflect customary international law. A number of the articles have been cited by the ICJ, and the U.N. General Assembly in a resolution "commend[ed] [the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[172] The articles define internationally wrongful acts in Article 2 as conduct that "(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[173] These two prongs will be discussed next.

a. Attribution under International Law

Chapter II of the Articles of State Responsibility sets forth the various theories of attribution, of which Article 4 is most applicable here. Article 4 states, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."[174] As applied to the proposed visit operation, attribution would easily be met. China would be able to identify the United States forces approaching and landing upon Mischief Reef and be able to rightfully claim that this was an act attributable to the United States.

b. Breach of International Obligation

The second prong of the Internationally Wrongful Act framework requires a showing that a state breached an obligation under international law. Some of these obligations exist as general principles of international law, such as sovereignty and non-intervention. This Article will examine non-intervention as

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[171] G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts 2001 (Jan. 28, 2002), https://bit.ly/3SfF3jO.
[172] *Id.*
[173] *Id.*
[174] *Id.* art. 4.

that framework is somewhat more developed than sovereignty and because, as a result of the Arbitral Tribunal's ruling, China has no lawful claim of sovereignty to Mischief Reef.[175] Legal obligations are also established through international conventions and treaties. This Article will examine UNCLOS as, arguably, the most applicable treaty for potentially imposing limits on the conduct of such a visit operation.

(1) Non-Intervention

An ICJ case is often cited for outlining the two elements of a prohibited intervention: (1) intrusions upon "matters in which each State is permitted, by the principle of State sovereignty, to decide freely," and (2) involve "methods of coercion."[176]

(a) Matter of the State

Discussions about the "matters" relevant to the first element often start with the Friendly Relations Declaration for the proposition that it is prohibited to prevent another State from exercising its "sovereign rights."[177] More specifically, "[e]very State has an inalienable right to choose its political, economic, social, and cultural systems . . . ."[178] Insight into what constitutes "sovereign rights" may be found in the ICJ's Advisory Opinion in the case of Nationality Decrees Issued in Tunis and Morocco. In that case, the Court emphasized the importance of a state's "domaine réservé," which are matters "solely within the domestic jurisdiction" of a State that "are not, in principle, regulated by international law."[179] A similar phrasing helpful in analyzing the first element is found in Article 2(7) of the U.N. Charter that states "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . ."[180]

Applying this first prong to an MSO at Mischief Reef does not appear to pose any legal concerns. Landing military forces on an artificial island occupied unlawfully by China does not interfere with China's exercise of its purely

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[175] *See* Louise Arimatsu & Michael N. Schmitt, *The Plea of Necessity: An Oft Overlooked Response Option to Hostile Cyber Operations*, 97 INT'L L. STUD. 1171, 1179 (2021) ("[T]here is no consensus on what effects amount to a violation of the State's sovereignty.").
[176] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 205 (June 27), https://bit.ly/3wk1H17.
[177] G.A. Res. 25/1, at 6 (Oct. 24, 1970), https://bit.ly/3PNxgs4.
[178] *Id.* at 7.
[179] Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 23–24 (Feb. 7), https://bit.ly/3bkxzvp (citing Nationality Decrees articulating the principle of sovereign rights).
[180] U.N. Charter, *supra* note 63, at 3.

domestic affairs. This is especially the case when advanced notice of the intent to peacefully visit is provided as a courtesy, rather than out of a sense of legal obligation. China does not have any legal authority to be conducting any domestic matters upon Mischief Reef anyway because it lacks legal claim to the maritime feature. If China definitively possessed territorial sovereignty over Mischief Reef, then a landing under this proposed scheme in opposition to protests by China might constitute a prohibited intervention.

The Philippines also does not possess territorial sovereignty over Mischief Reef. However, the Philippines does possess sovereign rights, and therefore may exercise some level of control over Mischief Reef, both because the feature is located within its EEZ and because Mischief Reef is an artificial island within its EEZ. As a result, the Philippines has jurisdiction to regulate Mischief Reef's operation and use. Without the Philippines' permission to use the reef, there is no clear answer as to whether a visit would constitute "use" under the "artificial islands" regime in UNCLOS. Mischief Reef is a paradox in that it is a low-tide elevation with no legal entitlements but, at the same time, is an artificial island that offers significant practical advantages to any State able to visit it. One way to overcome the ambiguity is by obtaining consent from the Philippines to conduct the MSO, which would then take the operation outside of the "prohibited intervention" construct altogether.[181]

(b) Involves "Methods of Coercion"

The discussion about coercion in the part above on "use of force" under Article 2(4) is also applicable here, particularly the arguments that undermine the claim that this visit operation is coercive. But, some additional discussion of other sources on coercion in the non-intervention context is provided here.

The Friendly Relations Declaration offers some insight into the concept of coercion within the non-intervention construct as it states "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it any advantages of any kind."[182] This suggests that a fairly broad range of activities can be done coercively. But, as one scholar notes, "not all policies and practices intended to alter State behavior amount to coercion. Indeed, the principal challenge in defining and understanding coercion is the need to distinguish between coercion, which is unlawful, and

[181] *See* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. OF INT'L L. 345 (2009).
[182] G.A. Res 25/1, *supra* note 177, at 7.

pressure and persuasion, which are lawful and indispensable tactics of diplomacy."[183]

The magnitude of the coercion might also be relevant, particularly "those [actions] that are intended to force a policy change in the target State."[184] One scholar offers three categories of coercive activity including coercive threat, coercive force, and coercive manipulation of the target state's decision-making.[185] A key marker for identifying coercion is identifying state actions that eliminate the ability of the other state to make a free and voluntary choice.[186]

Military action against another state, including support to a non-state group to take military or insurgent action, is often the paradigmatic example of coercive action.[187] However, another perspective contends that only "wars of aggression, armed attacks, uses of force, and threats of force [are] forms of military coercion."[188] That same scholar also offers examples of non-coercive military activities in noting that "demonstrations of force, such as acquiring and testing new weapons, constructing new military installations, and conducting troop movements and maneuvers, are military activities that States routinely use to generate pressure against other States."[189]

As applied to the Mischief Reef operation, the proposed peaceful visit is not an act of coercion as it is understood in this context. Because Mischief Reef is not eligible for being under the territorial sovereignty of any state, China cannot claim that a peaceful visit by the United States to a maritime feature where China's personnel are currently located is a coercive act by the United States forcing it to act contrary to its desires. The visit is not aimed at displacing China per se, but rather is an expression that the United States and any other state have just as much lawful right to visit Mischief Reef as China.

Additionally, the mere visit with peaceful intentions could arguably be done in a manner that is not coercive in the "use of force" context because it does not necessarily require analysis of the disruption to the state's authority over matters under its exclusive purview. In this regard, an MSO cannot possibly

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[183] Helal, *supra* note 163, at 8.
[184] Jamnejad & Wood, *supra* note 181, at 345.
[185] Steven Wheatley, *Foreign Interference in Elections Under the Non-Intervention Principle: We Need to Talk About 'Coercion'*, 31 DUKE J. COMP. & INT'L L. 161, 166 (2020), https://bit.ly/3vseMVU.
[186] Jamnejad & Wood, *supra* note 181, at 345.
[187] *See id.*
[188] Helal, *supra* note 163, at 4.
[189] *Id.* at 8.

interfere with China's authority because China does not have territorial sovereignty over the feature.

(2) Treaty-Based Breach (UNCLOS)

The most applicable treaty for analyzing the lawfulness of this visit operation is UNCLOS. There may be other relevant treaties, but this Article will only assess whether UNCLOS could make this visit to Mischief Reef legally problematic. One could argue that even if one of the provisions of UNCLOS does pose a problem, that problem is overcome by the fact that the United States is not a party to UNCLOS and thus not bound by its provisions. However, the United States has stated, and international courts and tribunals have opined, that many of the provisions of UNCLOS reflect customary international law.[190] For the sake of this Article, it will be assumed that a violation of these would constitute a breach of an international obligation. This Article will focus only on those provisions that are most applicable to an MSO. The fundamental question is: would this proposed visit operation constitute a breach of an international obligation reflected in UNCLOS? A review of the potentially applicable provisions of UNCLOS strongly suggests the visit would not constitute a breach.

Article 30 of UNCLOS obligates a warship to comply with the laws and regulations of the coastal state with respect to "passage through the territorial sea." This article of UNCLOS does not pose a problem for an MSO because Mischief Reef is not located in the territorial sea of any coastal state.

Article 56 of UNCLOS establishes the rights, jurisdiction, and duties of a coastal state with respect to its EEZ. It states that the coastal state has "sovereign rights for the purpose of exploring and exploiting . . . the natural resources, whether living or non-living" within its EEZ.[191] This proposed operation does not contemplate exploration or exploitation of such resources. This provision of UNCLOS also establishes the coastal state's jurisdiction over the "establishment and use of artificial islands, installations and structures"[192] within its EEZ which is a prelude to verbiage that appears in Article 60 of UNCLOS, discussed next.

Article 60 of UNCLOS prescribes rules pertaining to artificial islands, installations, and structures in the EEZ of a coastal state, and of relevance for this Article, Article 60 contains a requirement that other states must give notice prior to construction of such islands or installations. The Arbitral Tribunal held that China violated this provision because it failed to give prior notice to the

[190] *See generally* J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 OCEAN DEV. & INT'L L. 239 (2014).
[191] UNCLOS, *supra* note 34, art. 56.1.(a).
[192] *Id.* art. 56.1.(b)(i).

Philippines before constructing the artificial island at Mischief Reef. Other language within Article 60 is pertinent to the analysis of the proposed visit operation described in this Article. Because Mischief Reef is located in the Philippines' EEZ, the Philippines, as the cognizant coastal state, retains "the exclusive right . . . to authorize and regulate [the] use" of Mischief Reef.[193] As a result, one might argue that the Philippines' consent would be necessary before conducting the visit operation proposed herein.

However, it is unclear whether a mere "visit" as proposed in this Article constitutes "use" of an artificial island. One critique emphasizes that "the term 'artificial island' [itself] is not adequately defined" and, by implication, neither are adjacent operative terms, such as "use."[194] Another argument emphasizes the nexus between "use" and economic activity, scientific activity, or activity that interferes with the rights of the coastal state.[195] One characterization of "use" is a proposal by the Netherlands to construct an airport built on an artificial island outside of its territorial sea.[196] Perhaps the strongest argument against a consent requirement is found in the lawfulness of one state conducting military activities in another state's EEZ as permissible under Article 58 of UNCLOS, which recognizes the right of "other internationally lawful uses of the sea."[197] As such, this proposed visit operation could be characterized as a lawful use of a maritime feature that is outside of the territorial sovereignty of any state. Finally, it is unclear whether the Philippines has instituted any relevant use requirements or a regulatory regime governing the use of Mischief Reef.

Article 58 of UNCLOS articulates that all states enjoy:

> the freedoms referred to in article 87 of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.[198]

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[193] *Id.* art. 60.1.(a).
[194] Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 77, 115 (2012), https://bit.ly/3oD1EcK.
[195] *See* Tara Davenport, *Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis*, 24 CATH. U. J. L. & TECH. 57, 102 (2015), https://bit.ly/3vneCPu.
[196] *See* Imogen Saunders, *Artificial Islands and Territory in International Law*, 52 VAND. J. TRANSNAT'L L. 643, 680 (2019), https://bit.ly/3zgZggM.
[197] UNCLOS, *supra* note 34, at 44; *see also* Hyun-Soo Kim, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 80 NAVAL WAR C. INT'L LEGAL STUD. 257 (2006), https://bit.ly/3zKejAS.
[198] UNCLOS, *supra* note 34, art. 58.1.

As applied to the proposed visit operation, it is clearly lawful to sail as close as possible to Mischief Reef and fly over it. Additionally, the Arbitral Tribunal concluded that there can be no claim of territorial sovereignty over Mischief Reef by any state. UNCLOS is silent on the territorial rights states have over low-tide elevations that are outside of their territorial sea. However, the Arbitral Tribunal made clear that such features located in the EEZ are not subject to territorial sovereignty claims by any state. One scholar argues that because the ICJ has held that such maritime features cannot be appropriated, they are "out[side] of the ken of the law if they are located in exclusive economic zones."[199] It would be an absurd conclusion that it is lawful for a ship to navigate as close as possible to and an aircraft could fly over Mischief Reef, but a ship could not visit, and its personnel could not disembark upon it. Further, based on the decisions of the Arbitral Tribunal and the language of UNCLOS, it is unclear which state would have standing to challenge an MSO, and on what legal basis it could do so.

Article 77 of UNCLOS echoes some of the same economic rights under Article 56 but in relation to the continental shelf and features thereto, such as Mischief Reef. Article 78 makes clear that high seas freedoms apply to features that are located upon a state's continental shelf but that are outside of that state's territorial sea. As such, this provision poses no barrier to conducting a visit operation to Mischief Reef but provides no affirmative authority either because high seas freedoms are characterized in maritime navigation terms.

Article 88 of UNCLOS requires that use of the high seas be for peaceful purposes. This provision, as applied to the proposed visit operation, does not pose a barrier because the operation is intended to be peaceful and not pose a threat to any other state. In this regard, part of the advanced notification to China could specifically state that the landing upon and disembarking of personnel is being conducted consistent with the obligation under Article 88.

Overall, conducting the proposed visit operation to Mischief Reef does not seem to contravene an international obligation on the part of the United States. The most likely candidate is that the Philippines is owed notice of the proposed "use," and has the authority to control such use, of Mischief Reef. To this end, consent from the Philippines might further solidify the legality of an MSO, but it is uncertain if failure to secure it could be considered a breach of an international obligation.

[199] Roberto Lavalle, *The Rights of States over Low-tide Elevations: A Legal Analysis*, 29 INT'L J. MARINE & COASTAL L. 1 (2014).

3. Below the Use of Force Threshold, Short of War, and Gray Zone Constructs

The United States, relatively recently, has incorporated references to an evolving paradigm for justifying activities that do not trigger the U.N. Charter's Article 2(4), or that are clearly unlawful under the Internationally Wrongful Acts framework, into key strategic documents. The 2017 National Security Strategy referenced activities "below the threshold of military conflict[,]"[200] and the 2018 National Defense Strategy referenced "efforts short of armed conflict."[201] The only tagline from the heading of this section missing in these documents is specific reference to the "gray zone." However, a RAND study pulls all these headings' elements together in its definition:

> The gray zone is an operational space between peace and war, involving coercive actions to change the status quo below a threshold that, in most cases, would prompt a conventional military response, often by blurring the line between military and nonmilitary actions and attribution for events.[202]

The point here is that these terms are used somewhat interchangeably.

One commentator on the law of armed conflict counters this emerging paradigm noting that "[l]egally speaking, there are only two states of affairs in international relations—war and peace—with no undistributed middle ground."[203] More recently, a scholar focused on this contemporary framework contends that this framing "may prove to be of limited benefit for legal analysis" because these descriptive categories constitute a "situation where policy and strategic discourse has adopted a language that does not translate well into legal doctrine and *vice versa*."[204]

Another perspective contends that this category of activity is marked by deliberate warfare strategic designs that entail "use of violence to achieve political aims – while remaining below the traditional threshold of conventional military

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[200] EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2017), https://bit.ly/3bkVx9V.
[201] U.S. DEP'T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 2 (2018), https://bit.ly/3blFokE.
[202] LYLE J. MORRIS, ET AL., GAINING COMPETITIVE ADVANTAGE IN THE GRAY ZONE: RESPONSE OPTIONS FOR COERCIVE AGGRESSION BELOW THE THRESHOLD OF MAJOR WAR 8 (2019).
[203] DINSTEIN, *supra* note 162, at 15.
[204] Aurel Sari, *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats*, 33 CAMB. REV. INT'L AFFAIRS 846, 863 (2020).

conflict and open interstate war."[205] Examples of "gray zone" tactics include the Russian support of irregular forces that provided security to pave the way for Russia's annexation of Crimea as well as, apropos to this Article, China's use of fishing vessels to harass other vessels in the South China Sea.[206] Gray Zone tactics are about "challeng[ing] the status quo without resorting to war."[207]

Many more variations on these themes could be restated here as much has been written about this paradigm in recent years. The range of perspectives makes it helpful to categorize just about any activity as within its scope of permissible conduct. The value of these categories is not that they provide a source of lawful authorization to execute them but rather that they merely provide a means to describe the activities that are outside the realm of being classified as unlawful under other legal constructs such as the U.N. Charter Article 2(4) framework or the Internationally Wrongful Acts framework. There is also a palpable theme in the commentary that "gray zone" tactics are what the "others" (i.e., Russia, China, etc.) are doing.

The proposed visit operation, as already discussed, does not appear to violate the U.N. Charter Article 2(4) framework or the Internationally Wrongful Acts framework. As such it likely resides within the paradigm of gray zone activities, although it is distanced from the categorizations that emphasize covert or obscured attribution of the conduct in question because this visit operation is intended to be conducted openly and peacefully. Labeling an MSO as an activity under this framework does not provide any meaningful authority that justifies its legality but merely argues for a political categorization of the activity.

VII. CONCLUSION

This Article discussed how, despite a ruling by an international arbitral tribunal characterizing China's artificial island building activities upon Mischief Reef as unlawful and rejected China's maritime claims in relation to Mischief—and by implication its territorial sovereignty claims thereto—China has not accepted this decision. Traditional FONOPs by the United States around this maritime feature have also proven ineffective in altering China's status quo position. China's activity on Mischief Reef is but one of several aggressive actions by China throughout the South China Sea. If a legal determination that China has violated several of its obligations under UNCLOS has no meaningful impact on

[205] Corri Zoli, *The Changing Role of Law in Security Governance: Post-9/11 'Gray Zones' and Strategic Impacts*, 67 SYRACUSE L. REV. 613, 621 (2017), https://bit.ly/3cHfc42.
[206] *Id.*
[207] Van Jackson, *Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts Before War*, 70 NAVAL WAR C. REV. 39, 39 (2017), https://bit.ly/3PFARZ7.

China's presence and continued operations there, then perhaps there is a need for another form of challenge to China's presence.

One way to challenge China's presence and unlawful use of Mischief Reef could include the United States landing personnel on the feature with advanced notice of peaceful intent as an expanded form of FONOPs referred to in this Article. Absent a limitation by Congress on this proposed operation, the President has the domestic legal authority to order this visit operation. A review of the relevant international law frameworks presents no clear legal prohibition either.

An MSO leverages the judicially determined status of the feature as a low-tide elevation located on the continental shelf of the Philippines within the Philippines' EEZ and within international waters. As a result, it is not subject to the territorial sovereignty of any state. In other words, if Chinese personnel were not physically present on Mischief Reef, there would be no reason why a contingent of U.S. personnel could not land upon the feature. The same is true even with China's presence, but it changes the political calculus regarding such a visit.

Assessing the political calculus of whether this is a prudent operation is important, but it does not affect the legal analysis. China, in theory, could perceive this operation as a threat and invoke the legal right to self-defense, but such a claim could be undermined by a carefully designed operation to include, among several safeguards, advanced notice of peaceful intent to conduct the operation communicated to China and to the international community. The lawfulness of the MSO could be further enhanced by obtaining consent from the Philippines based on its sovereign rights jurisdiction to regulate the use of an artificial island such as Mischief Reef located within its EEZ.

Although an MSO may be a legally permissible activity, it would necessitate a marked shift in U.S. FONOP policy given that it goes beyond mere transiting of military assets. It would also be a departure from traditional FONOP policy if the Arbitral Tribunal had not ruled on the status of Mischief Reef because U.S. FONOP policy has traditionally not taken sides on disputed claims and instead advocated for a rules-based resolution. Now that the Arbitral Tribunal has resolved the disputed claim in favor of the Philippines, the concern about not taking sides prematurely is eliminated. As such, an MSO seeks to uphold the validity of the tribunal's decision by visiting a maritime feature, which, because of its status as articulated by the tribunal, any state may lawfully visit.

Additionally, even though as contemplated, this operation would be conducted with overt peaceful intent, there is uncertainty as to how China will

respond and, as such, there is an increased risk of conflict escalation. For this reason, before deciding upon this course of action, it would be prudent for it to be authorized not solely by the President, but would benefit from consultation with Congress as contemplated in the War Powers Resolution, and would ideally be executed under express approval of Congress, manifesting a shared exercise of foreign affairs power.

THE RELATIONSHIP BETWEEN 10 U.S.C. § 914(a) AND AN UNLOADED FIREARM: HOW THE CHANGE TO THE DEFINITION OF "LIKELY TO PRODUCE" HAS LEFT THIS QUESTION UNANSWERED

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The Manual for Courts-Martial historically has defined "likely to produce" death or grievous bodily injury to exclude conduct with an unloaded firearm. This longstanding definition was removed following the amendments to the Uniform Code of Military Justice in the Military Justice Act of 2016. This Article tracks those changes through the case of Seaman Williams, who was charged with violating 10 U.S.C. § 914(a), reckless endangerment. This Article examines the text, history, and context of section 914(a) to determine how cases involving unloaded firearms should be analyzed. This Article also provides a survey of other jurisdictions with a statute similar to section 914(a) and a second survey of jurisdictions that have analyzed this issue in a collateral context. The text, history, context, and persuasive authority support the conclusion that an unloaded firearm could be likely to produce death or grievous bodily injury and that these cases should be analyzed by examining the totality of the circumstances. Ultimately, Congress and the President should amend the definition to expressly permit prosecutions for cases involving unloaded firearms.

I. INTRODUCTION

Seaman (SN) Williams was charged with violating 10 U.S.C. § 914(a),[1] reckless endangerment, for dry firing a pistol at Hospital Corpsman Third Class (HM3) Michael Vincent Deleon. He was taken to a special court-martial. After the

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[1] 10 U.S.C. § 914(a). Hereafter referred to as "section 914(a)."

presentation of the Government's case, SN Williams moved for a directed verdict arguing that the Government failed to put forth any evidence that the conduct was likely to produce death or grievous bodily injury because the firearm in question was not loaded. The military judge denied SN Williams' motion and allowed the offense to be presented to the members. SN Williams was acquitted of reckless endangerment but was convicted of dereliction of duty for violating the weapons safety rules and disorderly conduct.[2] The question presented in this Article is whether, as a matter of law, an unloaded firearm can be likely to produce death or grievous bodily harm as required in section 914(a). Asked another way, can dry firing an unloaded weapon create a substantial risk of death or grievous bodily harm to others? An analysis of the statute's text, history, context, as well as persuasive authorities from other jurisdictions, resolves the question in the affirmative: an unloaded firearm could be likely to produce death or grievous bodily harm. Further analysis demonstrates that additional guidance from Congress and the President would be beneficial in analyzing section 914(a) under this set of circumstances.

This Article starts by examining the plain text of section 914(a) to include a brief analysis of what civilian jurisdictions with similar statutes have said concerning the plain language of those statutes. The Article next goes through the history of section 914(a), followed by a review of the case law concerning unloaded firearms within the military justice system. The Article then analyzes the statutory context and framework, and provides a more in-depth review of persuasive authority. The Article concludes by applying the above detailed analysis to the facts of SN Williams' case and providing recommended amendments to section 914(a).

II. BACKGROUND FACTS

HM3 Deleon attended a party with five other Sailors aboard Marine Corps Air Ground Combat Center in Twentynine Palms, California.[3] The group consumed alcohol, and, at one point in the evening, the homeowner retrieved his two handguns, unloaded them, and passed them amongst the group. Ammunition was present in the room. The group held the firearms and pointed them at the wall. One sailor, SN Williams, cycled the pistol and dry fired it at HM3 Deleon and again at himself. The weapons were returned to the homeowner, and one of them was reloaded and placed into his waistband. As the night continued on, the group drank more alcohol, ate dinner, and played drinking games. At one point in the

[2] U.S. MARINE CORPS, GENERAL AND SPECIAL COURT-MARTIAL DISPOSITIONS FOR JUNE 2021 (2021), https://bit.ly/3zFe4Xz.

[3] HM3 Michael Deleon was 30 years old at the time of his death. He was survived by his mother, father, and brother. HM3 Deleon was a Corpsman with 3d Battalion, 11th Marines. *See* U. S. Navy Biography, JUSTICE FOR HM3 MICHAEL DELEON, http://bit.ly/3sWqciQ. The author was one of the military prosecutors assigned to the case on behalf of the Convening Authority.

night, the pistols were re-introduced. The homeowner had the loaded pistol, and SN Williams had the unloaded pistol. SN Williams again dry fired the unloaded weapon at HM3 Deleon. The homeowner, a short time after, pointed the loaded firearm at HM3 Deleon and shot and killed him. When SN Williams was interviewed by the Naval Criminal Investigative Service, he stated that he dry fired the weapon at HM3 Deleon immediately prior to him being shot. SN Williams was charged with reckless endangerment and dereliction of duty for dry firing the weapon at HM3 Deleon. He was also charged with disorderly conduct, in part, for handling a firearm while under the influence of alcohol.[4]

III. ANALYSIS OF SECTION 914(a)

The starting point for a question of statutory interpretation is the plain language of the statute.[5] Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context."[6] "If a statute is clear and unambiguous—that is, susceptible to only one interpretation—[courts] use its plain meaning and apply it as written."[7] If a statute is reasonably susceptible to more than one interpretation, courts look to "a number of factors that provide a framework for engaging in statutory interpretation" including "the contemporaneous history of the statute; the contemporaneous interpretation of the statute; and subsequent legislative action or inaction regarding the statute."[8] Analysis of civilian case law on point may be persuasive.[9]

A. Analysis of Section 914(a)'s Text

To satisfy the elements of section 914(a), the defendant must commit conduct that "(1) is wrongful and reckless or is wanton; and (2) is likely to produce death or grievous bodily harm to another person."[10] The statute does not define the phrase "likely to produce."[11] However, the President defines the phrase as follows:

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[4] The dereliction of duty offense also encompassed dry firing the weapon at himself, and the disorderly conduct offense included the dry firing and his post-incident conduct. This Article is not a criticism of the members' decision to acquit SN Williams of violating section 914(a). Rather, its focus is to analyze the change in section 914(a)'s definition of "likely to produce" and determine how these types of cases should be handled in the future.

[5] Mansell v. Mansell, 490 U.S. 581, 588 (1989); *see also* United States v. Schmidt, No. 21-0004, 2022 CAAF LEXIS 139, at *12 (C.A.A.F. Feb. 11, 2022).

[6] United States v. Schmidt, 80 M.J. 586, 595 (N-M. Ct. Crim. App. 2020) (quoting United States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016)).

[7] *Id*. (citing United States v. Kohlbek, 78 M.J. 326, 331 (C.A.A.F. 2019); United States v. Clark, 62 M.J. 195, 198 (C.A.A.F. 2005)).

[8] *Id.* (internal quotation marks omitted) (citing United States v. Tardif, 57 M.J. 219, 226 (C.A.A.F. 2002) (Crawford, C.J., dissenting)).

[9] United States v. Alkazahg, 81 M.J. 764, 772–73 (N-M. Ct. Crim. App. 2021).

[10] 10 U.S.C. § 914(a).

[11] *See id.*

"[w]hen the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is likely to produce that result."[12] While courts are not "bound by the President's interpretation of the elements of substantive offenses[,] . . . where the President unambiguously gives an accused greater rights than those conveyed by higher sources, [courts] should abide by that decision unless it clearly contradicts the express language of the Code."[13]

In *United States v. Davis*, an analogous setting, the Court of Appeals for the Armed Forces (CAAF) held that 10 U.S.C. § 928, aggravated assault, was "not clear" with regard to unloaded firearms when it came to the statute's requirement of a "deadly weapon" or "means or force *likely to produce* death or grievous bodily harm."[14] The appellant in *Davis* was charged with aggravated assault with a dangerous weapon for pointing an unloaded pistol at the victim's head while making various threats.[15] The statute at issue did not define dangerous weapon or "means or force likely to produce death or grievous bodily harm."[16] CAAF concluded that it was "not clear from either the plain meaning of the statute or its legislative history that an unloaded weapon qualifies as a dangerous weapon under the statute."[17] The court ultimately deferred to the President's interpretation that an unloaded firearm, when not used as a bludgeon, did not constitute a dangerous weapon.[18]

Following *Davis*, courts in the military justice system have interpreted "likely to produce" as requiring "two prongs: (1) the risk of harm and (2) the magnitude of the harm."[19] Regarding the first prong, CAAF has explained that "the word 'likely' is not a term of art or an arcane article of the law. Rather, it is used in everyday life with great frequency and its meaning is not difficult to grasp."[20] "[W]hether death or grievous bodily harm is a 'likely' result of an accused's conduct [within the meaning of reckless endangerment] is based on the trier of facts' commonsense, everyday understanding of that term as applied to the totality of the circumstances."[21] "The test for the second prong . . . is whether death or grievous bodily harm was a natural and probable consequence."[22] "[T]he

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 52c(1)(e) (2019) [hereinafter 2019 MCM].
[13] United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998).
[14] *See id.* at 485–86 (emphasis added).
[15] *Id.* at 485.
[16] *Id.* at 486.
[17] *Id.*
[18] *Id*. at 486–87.
[19] United States v. Dacus, 66 M.J. 235, 238 (C.A.A.F. 2008) (quoting United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998)).
[20] United States v. Herrmann, 76 M.J. 304, 308 (C.A.A.F. 2017).
[21] *Id.*
[22] *Dacus*, 66 M.J. at 238 (quoting *Weatherspoon*, 49 M.J. at 212).

consequence of death or grievous bodily harm must be at least probable and not just possible."[23]

CAAF noted in *United States v. Gutierrez* that the appellant's likelihood of transmitting HIV to the named victim was "almost zero" and thus was not "likely to produce" within the meaning of aggravated assault.[24] The court in *Gutierrez* explained that "it is not the weapon that must likely cause great harm, but rather the manner in which it is used must be likely to cause the resulting harm."[25] The court's holding in *Gutierrez* expressly rejected previous interpretations of "likely to produce" and "was intended as a course correction where a minimalist approach regarding what constitute[d] 'likely' had crept into [the court's] jurisprudence in HIV cases."[26] Importantly, the court did not create a bright line rule prohibiting the charging of HIV cases under the aggravated assault statute, which left the door open to bring such cases where the statistical likelihood of grievous bodily harm was at least probable.[27]

The appellant in *United States v. Herrmann* was convicted of reckless endangerment for failing to inspect parachutes, as required by his position, and certifying them as flight worthy.[28] The appellant did not inspect several parachutes and placed them into the "ready-for-issue" cage.[29] CAAF affirmed his conviction given that the parachutes were "subject to distribution to paratroopers during the next 365-day cycle" and some of the parachutes were not airworthy.[30] CAAF held that the appellant's failure to inspect parachutes was legally sufficient to support a conviction of reckless endangerment in that it was likely to produce death or grievous bodily harm based on "the totality of the circumstances."[31]

In *United States v. Banks*, the Navy-Marine Corps Court of Criminal Appeals held that the appellant's conduct of waiving a loaded pistol in a crowded room was "likely to produce" death or grievous bodily harm even though, at his guilty plea hearing, the appellant did not admit that a round was chambered.[32] The

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[23] *Id.* at 239.
[24] United States v. Gutierrez, 74 M.J. 61, 66–67 (C.A.A.F. 2015).
[25] *Id.* at 65 (quoting Ari E. Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 591 (2011)).
[26] *Herrmann*, 76 M.J. at 307.
[27] *See Gutierrez,* 74 M.J. at 67–68.
[28] *Herrmann*, 76 M.J. at 305–06.
[29] *Id.* at 306.
[30] *Id.* at 305–06.
[31] *Id.* at 308.
[32] United States v. Banks, No. NMCM 200201124, 2003 CCA LEXIS 144, at *3–4, *9–10 (N-M. Ct. Crim. App. June 20, 2003) (assuming that a round was not chambered for the sake of its analysis even though a round was chambered when the firearm was recovered by law enforcement).

Air Force Court of Criminal Appeals reached the same conclusion under similar facts in *United States v. Orland*.[33]

The text of section 914(a) does not specifically answer whether an unloaded firearm could be "likely to produce death or grievous bodily harm to another person." While an unloaded firearm in and of itself cannot produce death or grievous bodily harm, the act of pointing it at another and the circumstances surrounding that act may increase the likelihood that death or grievous bodily harm could occur. Said another way, creating a bright line rule that an unloaded firearm could not create a likelihood of death or grievous bodily harm to another imposes an additional requirement that is not found in the statute's text. If you asked a service member why the weapons safety rules exist, they would likely tell you that the purpose of the rules is to prevent someone from being seriously injured or killed. To illustrate this point further, if you asked an ordinary person, "are you likely to suffer a serious injury if someone pointed an unloaded weapon at you?" The answer would probably be "no." However, the answer may be in the affirmative after considering additional factors such as the consumption of alcohol or controlled substances, the presence of ammunition, the presence of a separate loaded weapon, and the act of racking the weapon or dry firing. Essentially, the risk of injury or even death moves from possible to probable even though the nature of the weapon did not change.

B. Overview of Persuasive Authority as it Relates to the Text of Section 914(a)

A majority of states have a statute similar to section 914(a), and a review of the cases interpreting those statutes reveals a split of interpretation with regards to unloaded firearms. In *Jones v. Commonwealth*, the Court of Appeals of Virginia briefly commented on the statute's internal conflict concerning unloaded firearms.[34] The Virginia Statute, Va. Code Ann. § 18.2-56.1 (2014), had a similar requirement to section 914(a), stating that it "shall be unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person."[35] The court in *Jones* stated, "[a]s a general proposition, an inoperable firearm will not endanger the life, limb, or property of another," but the court noted that the statute "simply requires that the firearm be handled in a reckless manner 'so as to endanger the life, limb or property of any person.'"[36] The court in *Jones*

[33] United States v. Orland, No. ACM 33890, 2001 CCA LEXIS 188, at *8 (A.F. Ct. Crim. App. June 28, 2001) ("We hold that a weapon is loaded, notwithstanding the absence of a round in the chamber, provided ammunition is in the weapon.").
[34] Jones v. Commonwealth, 777 S.E.2d 229, 231 n.2 (Va. Ct. App. 2015).
[35] *Id.* at 277.
[36] *Id.* at 278 n.2.

was not asked to directly answer the issue and provided the foregoing analysis in a footnote.[37]

In addition to the analysis provided by the Court of Appeals of Virginia in *Jones*, there exists a split in authority interpreting similar statutes in numerous other jurisdictions. Of note, there is no federal offense equivalent to section 914(a).[38] However, thirty-one states and two territories have a statute that targets similar conduct.[39] Most statutes are phrased differently than section 914(a), but all generally target the same conduct. For example, Alaska's reckless endangerment statute provides that the offense is committed "if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."[40] Similarly, the Indiana criminal recklessness statute states: "A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness."[41] New Hampshire's reckless conduct statute is framed more broadly stating that "a person is guilty of reckless conduct if he recklessly engages in conduct which places *or may* place another in danger of serious bodily injury."[42] The Tennessee and Vermont statutes also prohibit conduct that "places *or may* place" another person in imminent danger of death or serious bodily injury.[43] Some statutes explicitly state that the crime is committed even if the firearm is unloaded.[44] None of the statutes use the phrase "likely to produce;" rather, all of them criminalize conduct that creates a "substantial risk of serious injury or death,"

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[37] *Id.*
[38] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART 1: UCMJ RECOMMENDATIONS 845 (2015) [hereinafter MJRG], https://bit.ly/3fyrhuo.
[39] *See* ALA. CODE § 13A-6-24 (LexisNexis 1977); ALASKA STAT. § 11.41.250 (1978); ARIZ. REV. STAT. § 13-1201 (LexisNexis 1977); COLO. REV. STAT. § 18-3-208 (2022); CONN. GEN. STAT. § 53a-63 (1969); 11 DEL. CODE ANN. tit. 11 § 604 (1953); GA. CODE ANN. § 16-5-60 (2003); 9 GUAM CODE ANN. § 19.40 (1968); HAW. REV. STAT. ANN. § 707-714 (LexisNexis 2006); 720 ILL. COMP. STAT. ANN. 5/12-5 (2011); IND. CODE ANN. § 35-42-2-2 (LexisNexis 2019); KAN. STAT. ANN. § 21-5429 (2012); KY. REV. STAT. ANN. § 508.060 (LexisNexis 1975); MD. CODE ANN., CRIM. LAW § 3-204 (LexisNexis 2003); MO. REV. STAT. § 565.056 (2017); MONT. CODE ANN. § 45-5-207 (2022); N.H. REV. STAT. ANN. § 631:3 (LexisNexis 2021); N.J. REV. STAT. § 2C:12-2 (Repealed in 2015); N.Y. PENAL LAW § 120.20 (LexisNexis 1967); N.D. CENT. CODE § 12.1-17-03 (1973); OKLA. STAT. tit. 21, § 1289.11 (2012); OR. REV. STAT. § 163.195 (1971); 18 PA. CONS. STAT. § 2705 (1972); TENN. CODE ANN. § 39-13-103 (2021); TEX. PENAL CODE ANN. § 22.05 (LexisNexis 1994); UTAH CODE ANN. § 76-5-112 (LexisNexis 2022); VT. STAT. ANN. tit. 13, § 1025 (1999); V.I. CODE ANN. tit. 14, § 625 (1994); VA. CODE ANN. § 18.2-56.1 (2020); WASH. REV. CODE ANN. § 9A.36.050 (LexisNexis 1997); W. VA. CODE ANN. § 61-7-12 (LexisNexis 1994); WIS. STAT. § 941.30 (2001); WYO. STAT. ANN. § 6-2-504 (2008).
[40] ALASKA STAT. § 11.41.250 (1978).
[41] IND. CODE ANN. § 35-42-2-2 (LexisNexis 2019).
[42] N.H. REV. STAT. ANN. § 631:3 (LexisNexis 2021) (emphasis added).
[43] TENN. CODE ANN. § 39-13-103 (2021); VT. STAT. ANN. tit. 13, § 1025 (1999) (emphasis added).
[44] *See* VT. STAT. ANN. tit. 13, § 1025 (1999); WYO. STAT. ANN. § 6-2-504 (2008); TEX. PENAL CODE ANN. § 22.05 (LexisNexis 1994).

which mirrors section 914(a)'s stated purpose.[45] There is no indication that the two phrases are interpreted differently.

Seventeen of the thirty-three jurisdictions that have a statute that criminalizes the same or similar type of conduct have a written opinion commenting on whether an unloaded firearm could be likely to produce death or grievous bodily harm.[46] The remaining fourteen states and two territories have not been presented with the issue. As Table 1 illustrates, nine jurisdictions held that an unloaded weapon could create a substantial risk of serious bodily injury or death.[47] Five jurisdictions held that an unloaded weapon could not create a substantial risk of serious bodily injury or death.[48] Three of the jurisdictions—Arizona, Virginia, and Wisconsin—had unclear or contradictory opinions on the issue.[49]

[45] *See* N.D. CENT. CODE § 12.1-17-03 (1973); TEX. PENAL CODE ANN. § 22.05 (LexisNexis 1994); VT. STAT. ANN. tit. 13, § 1025 (1999); W. VA. CODE ANN. § 61-7-12 (LexisNexis 1994); WYO. STAT. ANN. § 6-2-504 (2008).

[46] *See* Cobb v. State, 495 So.2d 701 (Ala. Crim. App. 1984); Andreasyan v. State, No. A-10342, 2010 Alas. App. LEXIS 86 (July 28, 2010); State v. Flynt, 13 P.3d 1209 (Ariz. Ct. App. 2000); D.B. v. State (*In re* D.B.), 658 N.E.2d 595 (Ind. 1995); J.B. v. State, No. 49A02-0908-JV-717, 2010 Ind. App. Unpub. LEXIS 170 (Feb 15, 2010); Towe v. Commonwealth, No. 2006-SC-000644-MR, 2007 Ky.Unpub. LEXIS 67 (Aug 23, 2007); Key v. Commonwealth, 840 S.W.2d 827 (Ky. Ct. App. 1992); Thompson v. State, 145 A.3d 105 (Md. Ct. Spec. App. 2016); People v. Madehere, 565 N.Y.S.2d 984 (N.Y. Crim. Ct. 1991); State v. Meier, 422 N.W.2d 381 (N.D. 1988); Witty v. State, 710 P.2d 121 (Okla. Crim. App. 1985); Commonwealth v. Trowbridge, 395 A.2d 1337 (Pa. Super. Ct. 1978); State v. McGouey, 229 S.W.3d 668 (Tenn. 2007); Garcia-Morales v. State, Nos. 07-19-00267-CR, 07-19-00268-CR, 02-19-00269-CR, 2021 Tex. App. LEXIS 4924 (Tex. Crim. App. 7th Cir. June 21, 2021); State v. Messier, 885 A.2d 1193 (Vt. 2005); Jones v. Commonwealth, 777 S.E.2d 229 (Va. Ct. App. 2015); State v. Hulbert, 544 S.E.2d 919 (W. Va. 2001); *see also* United States v. Laudermilt, 576 F. App'x 177 (4th Cir. 2014); State v. Riker, 864 N.W.2d 120 (Wis. Ct. App. 2015); *In re* Interests of ALJ, 836 P.2d 307 (Wyo. 1992).

[47] *See Andreasyan*, 2010 Alas. App. LEXIS 86; *In re* D.B., 658 N.E. 2d 595; *Key*, 840 S.W.2d. 827; *Meier*, 422 N.W.2d 381; *McGouey*, 229 S.W.3d 668; *Garcia-Morales*, 2021 Tex. App. LEXIS 4924; *Messier*, 885 A.2d 1193; *Hulbert*, 544 S.E.2d 919; *see also Laudermilt*, 576 F. App'x 177; *In re* Interests of ALJ, 836 P.2d 307.

[48] *See Cobb*, 495 So.2d 701; *Thompson*, 145 A.3d 105; *Madehere*, 565 N.Y.S.2d 984; *Witty*, 710 P.2d 121; *Trowbridge*, 395 A.2d 1337.

[49] *See Flynt*, 13 P.3d 1209; *Jones*, 777 S.E.2d 229; Delaney v. State, 277 N.W.2d 333 (Wis. Ct. App. 1979); *Riker*, 864 N.W.2d 120.

Category	**Jurisdiction**
Jurisdictions with an offense similar to section 914(a)	Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming
Jurisdictions that have held that an unloaded firearm **could** create a substantial risk of death or serious bodily injury **within the reckless endangerment context**	Alaska, Indiana, Kentucky, North Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming
Jurisdictions that have held that an unloaded firearm **could not** create a substantial risk of death or serious bodily injury **within the reckless endangerment context**	Alabama, Maryland, New York, Oklahoma, and Pennsylvania
Jurisdictions with unclear opinions on the issue	Arizona, Virginia, and Wisconsin

Table 1.

In *State v. Flynt*, the Arizona Court of Appeals issued an opinion analyzing the state's aggravated assault statute for an appellant who was convicted, by means of insanity, of aggravated assault against a minor.[50] The appellant argued that he was entitled to either release or civil commitment proceedings because his act of pointing an unloaded firearm did not qualify him to be committed to the psychiatric security review board.[51] "The only issue raised in this appeal is whether the phrase 'a substantial threat of death or physical injury' includes pointing an unloaded gun at another person."[52] In its analysis, the court compared the aggravated assault statute with the state's reckless endangerment statute and stated that the reckless endangerment statute required actual harm that an unloaded weapon did not possess.[53] The court nonetheless rejected appellant's argument given that the statutory framework regarding sentencing was broader and that the

[50] *Flynt*, 13 P.3d at 1212–13.
[51] *Id.*
[52] *Id.* at 1210.
[53] *Id.* at 1212–13.

legislature defined deadly weapon to include an "unloaded" firearm.[54] This decision was not included in the calculation above given that the Arizona Court of Criminal Appeals was not directly analyzing the issue. Moreover, it is unclear whether the determination, which could reasonably be categorized as *dicta*, would be binding on subsequent decisions.

The Wisconsin Court of Appeals has issued contradictory opinions on the subject. In *Delaney v. State*, the court reversed appellant's conviction for reckless endangerment because there was no evidence that the weapon was loaded.[55] The appellant in *State v. Mary C.Z.*, was convicted of first degree reckless endangerment for pointing an unloaded weapon at another.[56] On appeal, the government conceded that the conviction was improper, and the court declined to craft a "substantive argument" otherwise.[57] Conversely, and most recently, in *State v. Riker*, the court affirmed appellant's conviction of first degree reckless endangerment for his conduct of pointing an unloaded shotgun at his wife and children and pulling the trigger.[58] In the end, the *Riker* court stated it had "no trouble" affirming the jury's findings.[59] This holding was not included in the above calculation because the court did not cite or address *Delaney* or *Mary C.Z.* but otherwise affirmed appellant's conviction because an unloaded firearm met the state's definition of a deadly weapon.[60]

While CAAF has recently defined "likely to produce," this split of interpretation amongst civilian jurisdictions with a statute similar to section 914(a) could indicate that the text alone does not clearly address the relationship between unloaded firearms and the statute's requirement of "likely to produce death or grievous bodily injury." Absent clear language, the next touchpoint for interpreting the statute, and thus Congress's intent, is the history and context of section 914(a).

C. Analysis of the History of Section 914(a)

Courts assume that Congress is aware of existing law when it passes legislation and thus, courts "must take into account [the] contemporary legal context at the time the statute was passed."[61] When Congress "keeps one piece of statutory text while deleting another, [courts] generally 'have no trouble

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[54] *Id.*
[55] *See* Delaney v. State, 277 N.W.2d 333 (Wis. Ct. App. 1979).
[56] *See* State v. Mary C.Z., 683 N.W.2d 94 (Wis. Ct. App. 2004).
[57] *Id.* at 103.
[58] State v. Riker, 864 N.W.2d 120, 124 (Wis. Ct. App. 2015).
[59] *Id.* at 125.
[60] *Id.* at 123–25.
[61] United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (quoting Cannon v. University of Chicago, 441 U.S. 677, 699 (1979)); *see also* Ryan v. Gonzales, 568 U.S. 57, 66 (2013) (citation omitted) (courts "assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

concluding that' it does so with a purpose."[62] Applying those principles to Congress' amendments to section 914(a) and subsequently the President's interpretation of the statute demonstrates that section 914(a) should be interpreted broadly, specifically with regard to unloaded firearms, to allow for such cases to be analyzed by the totality of the circumstances.

Reckless endangerment is a relatively new offense in the UCMJ. The President first created reckless endangerment as an offense by executive order in 1999, including the offense in the General Article, Article 134.[63] The President originally defined the elements as follows:

> (1) That the accused did engage in conduct;
> (2) That the conduct was wrongful and reckless or wanton;
> (3) That the conduct was likely to produce death or grievous bodily harm to another person;
> (4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[64]

The original definition of "likely to produce" was the exact same as in section 914(a), except that the original definition cited the definition for "dangerous weapon" found in aggravated assault. This definition explicitly stated "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded."[65] Essentially, the definition of "likely to produce," in this version of the offense, was interpreted by the President to not include unloaded firearms. The President explained that he created the offense in order "to prohibit and therefore deter reckless or wanton conduct which wrongfully creates a substantial risk of death or serious injury to others."[66] The explanation also stated that the offense was new and was "based on *United States v. Woods*" and a similar Maryland criminal statute.[67]

The appellant in *Woods* was charged with a novel specification of Article 134 for engaging in sexual intercourse with a fellow sailor despite having a potentially deadly sexually transmitted virus and being counseled that such conduct could infect others.[68] The trial judge dismissed the charge for failing to

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[62] Stokeling v. United States, 139 S. Ct. 544, 561 (2019) (Sotomayor, J., dissenting) (quoting Director of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 324 (2001)).
[63] Executive Order 55119, Fed. Reg. Vol. 64, No. 196; MJRG, *supra* note 38, at 845.
[64] Executive Order 55119, Fed. Reg. Vol. 64, No. 196.
[65] *Id.*
[66] *Id.*
[67] *Id.* (citing United States v. Woods, 28 M.J. 318 (C.M.A. 1989); MD. ANN. CODE ART. 27 § 120).
[68] *Woods*, 28 M.J. at 318–19.

allege words of criminality, but that decision was reversed following the Government's interlocutory appeal.[69] The court held that if the allegations were proven, "a factfinder could properly find that the conduct was 'palpably and directly prejudicial to good order and discipline of the service.'"[70] The court noted that the criminality of the offense was engaging in an act so "inherently dangerous" that it was likely to lead to "death or great bodily harm."[71]

The Maryland statute referenced in the explanation of the original reckless endangerment offense stated as follows:

> (a) Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.[72]

This statute was amended effective October 1, 2003.[73] Prior to being amended, and prior to being referenced in the implementing executive order, the Maryland Court of Appeals and the Maryland Court of Special Appeals analyzed the statute with regard to firearms.[74] Of note, the statute was not analyzed with regard to unloaded firearms.

The Maryland statute was first challenged by the appellant in *Minor v. State*.[75] The appellant provided a loaded shotgun to his brother after his brother consumed alcohol and controlled substances; then the appellant dared him to play Russian roulette.[76] The safety was off.[77] The brother then shot and killed himself.[78] The Maryland Court of Appeals stated that "[t]he test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish."[79] The court subsequently affirmed appellant's conviction for reckless endangerment.[80]

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[69] *Id.* at 319.
[70] *Id*. (quoting United States v. Sadinsky, 34 C.M.R. 343, 346 (C.M.A. 1964)).
[71] *Id.* at 320.
[72] Minor v. State, 85 Md. App. 305, 313–14 (Md. Ct. Spec. App. 1991) (citing MD. CODE ANN., CRIM. art. 27 § 120 (Supp. 1990) (repealed 2003)), *aff'd*, 605 A.2d 138 (Md. 1992).
[73] *See* MD. CRIM. LAW CODE ANN. § 3-204.
[74] *See* Boyer v. State, 107 Md. App. 32, 38–42 (Md. Ct. Spec. App. 1995).
[75] *See* Minor v. State, 605 A.2d 138 (Md. 1992).
[76] *Id.* at 139.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 141.
[80] *Id.* at 142.

A subsequent challenge came from the appellant in *Boyer v. State*.[81] The appellant had been drinking and allegedly assaulted his wife.[82] When law enforcement arrived at the home, appellant placed a loaded firearm, with the safety off, underneath the sheet of his bed near his eleven-month-old daughter.[83] Appellant did not initially cooperate with law enforcement but eventually was taken into custody.[84] When the officers removed the bedsheet, they found the firearm pointed in their direction.[85] Law enforcement found additional loaded magazines underneath the pillow.[86] Appellant argued that the "mere presence of [his] gun under the bed sheets, without more, does not rise to the requisite level of conduct required for a showing of reckless endangerment."[87] The Maryland Court of Special Appeals disagreed and held that while he did not have physical contact with the firearm, it was loaded, under his proximate control, and pointed at officers.[88] The court noted that "Maryland's reckless endangerment statute is aimed at deterring the commission of *potentially harmful conduct* before an injury or death occurs."[89] Whether an accused's conduct, which created the substantial risk, was reckless under the Maryland statute "is a matter for objective determination, to be made by the trier of fact from all the evidentiary circumstances in the case."[90]

In 2015, the Military Justice Review Group (MJRG) recommended creating a single reckless endangerment offense that merged several offenses, including the Article 134 offense of reckless endangerment, as well as the offenses of carrying a concealed weapon, discharging a firearm, and dueling.[91] The statute was subsequently enacted by Congress as an enumerated offense: 10 U.S.C. § 914 or Article 114 in the Military Justice Act of 2016 (MJ16). The MJRG's recommendations are particularly important given that Congress adopted the proposed changes and section 914(a) remained unchanged during the legislative process.[92] The newly enacted section 914(a) removed the terminal element, which required the Government to prove that the conduct was prejudicial to good order

[81] *See* Boyer v. State, 107 Md. App. 32, 36 (Ct. Spec. App. 1995).
[82] *Id.* at 37, 41.
[83] *Id.*
[84] *Id.* at 37–38, 41.
[85] *Id.* at 38, 41.
[86] *Id.*
[87] *Id.* at 41.
[88] *Id.* at 42.
[89] *Id.* at 39 (quoting State v. Albrecht, 649 A.2d 336, 348 (Md. 1994) (emphasis added)).
[90] *Id.* (quoting Minor v. State, 605 A.2d 138, 141 (Md. 1992)).
[91] MJRG, *supra* note 38, at 850.
[92] *Compare id.* at 842–43, *with* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5426, 130 Stat. 2000, 2948 (2016), https://bit.ly/3zGIcl7.

and discipline or was service discrediting.[93] Importantly, after MJ16 was enacted, the President amended the definition of "dangerous weapon" for aggravated assault, removing the sentence/guidance concerning unloaded firearms.[94] The President also amended the definition of "likely to produce" in section 914(a) and eliminated any reference to unloaded firearms.[95]

Appendix 17 of the Manual for Courts-Martial (MCM) provides additional analysis for the UCMJ Articles.[96] Appendix 17 did not address the President's change to the definition of "likely to produce" in section 914(a)[97] and only briefly commented on the change in the "dangerous weapon" definition in the aggravated assault context, stating that the definition "focuses attention on the nature of the weapon involved and the accused's intent to commit any bodily harm."[98] Nonetheless, the Appendix 17 analysis did not comment on the President's removal of the reference.[99] Similarly, the MJRG did not comment on or propose a change to the definitions within the MCM.[100]

The history and origin of section 914(a) indicates that unloaded firearms could be "likely to produce" death or grievous bodily harm. The main limiting principle of the original reckless endangerment offense was the President's definition wherein he interpreted "likely to produce" to exclude conduct with an unloaded firearm. The removal of that portion of the definition indicates a change in interpretation wherein an unloaded firearm could be "likely to produce." Unfortunately, the MJRG did not publish part II of its report, which was supposed to focus on "implementing rules and guidance in the Manual for Courts-Martial for all UCMJ articles."[101] Additionally, the President did not explain this change of interpretation. Despite the lack of explanation, the act of removing the reference to unloaded firearms in the definition of "likely to produce" is indicative of how the offense should be analyzed.

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[93] MJRG, *supra* note 38, at 843 ("Accordingly, these offenses do not need to rely upon the 'terminal element' of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality."). *Compare* 10 U.S.C. § 914(a), *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 100a (2016) [hereinafter 2016 MCM], https://bit.ly/3WtOGxu.

[94] *Compare* 2019 MCM, *supra* note 12, pt. IV ¶ 77c(5)(a)(iii), *with* 2016 MCM, *supra* note 93, pt. IV ¶ 54c(4)(a)(ii).

[95] 10 U.S.C. § 914(a).

[96] 2019 MCM, *supra* note 12, app. 17.

[97] *See id.* app. 17, ¶ 52.

[98] *Id.* app. 17, ¶ 77 ("To qualify as a dangerous weapon, it is sufficient that 'an instrument [is] capable of inflicting death of serious bodily injury.' United States v. Sturgis, 48 F.3d 784, 787 (4th Cir. 1995); *see also* United States v. Bey, 667 F.2d 7, 11 (5th Cir. 1982) (citation and internal quotation omitted) ('[w]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to endanger life or inflict great bodily harm.')").

[99] 2019 MCM, *supra* note 12, app. 17, ¶ 52.

[100] MJRG, *supra* note 38, at 841–50.

[101] *Id.* at 483.

Even setting that argument aside, focusing solely on the purpose and basis for the statute indicates that "likely to produce" should be interpreted broadly based on "all of the evidentiary circumstances."[102] The stated purpose of the statute is to prevent and "*deter*" reckless conduct.[103] The statute was based, in part, on a military justice case wherein a servicemember could have infected another with a deadly virus. The Maryland statute that the original offense was modeled after was interpreted broadly by Maryland appellate courts to impose criminal liability on individuals that did not directly, physically control a loaded firearm. Moreover, the Maryland Court of Special Appeals held that the statute was aimed at deterring "*potentially harmful conduct* before an injury or death occur[ed]."[104] From this foundation, it is reasonable to conclude that mishandling an unloaded firearm could be conduct that section 914(a) was originally aimed at deterring. This foundation also tacitly rejects the application of a bright-line rule; rather, absent guidance from either Congress or the President, panels at a court-martial and reviewing courts should independently evaluate the totality of the circumstances of each case.

D. Analysis of the Case Law Relating to Unloaded Firearms Within the Military Judicial System

Given that the definition of "dangerous weapon" was previously referenced in the original reckless endangerment offense and given that the President's removal of the reference is a helpful tool in interpretation, it is useful to examine the definition's history. This is especially so because Congress and the President are presumed to know the law and its interpretations when enacting subsequent amendments. This issue of whether an unloaded firearm constituted a dangerous weapon or was "likely to produce" death or grievous bodily injury, was litigated in the military justice system following the Supreme Court's decision in *McLaughlin v. United States*.[105] These challenges were made despite an explicit definition in the MCM that dated back to 1951, which stated that an unloaded firearm could not be "likely to produce" death or grievous bodily harm.[106] By

[102] Boyer v. State, 107 Md. App. 32, 39 (Md. Ct. Spec. App. 1995) (citing Minor v. State, 605 A.2d 138, 141 (Md. 1992)).
[103] 1999 Amendments to the Manual for Courts-Martial, United States, 64 Fed. Reg. 55115, 55119 (Oct. 12, 1999) (emphasis added), https://bit.ly/3WlfDUd.
[104] *Boyer*, 107 Md. App. at 39 (emphasis added) (citing State v. Albrecht, 336 Md. 475, 500–01 (Md. 1994)).
[105] McLaughlin v. United States, 476 U.S. 16 (1986); *see infra* text accompanying notes 116–29.
[106] United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 54c(4)(a)(ii) (1995)); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 207b(1)(1951) [hereinafter 1951 MCM], https://bit.ly/3Nx6bJk; MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 207c(1) (1969) [hereinafter 1969 MCM], https://bit.ly/3Dvy0NG; MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 54c(4)(a)(ii) (1984) [hereinafter 1984 MCM], https://bit.ly/3U8BXyY.

declining to expressly include the sentence stating that an unloaded firearm did not constitute a dangerous weapon, the 2019 version of the MCM ended its explicit interpretation spanning over seventy years.[107] There were several divided opinions on the issue wherein, as stated previously, CAAF ultimately deferred to the President's definition.

In *McLaughlin*, the U.S. Supreme Court unanimously held that an unloaded handgun constituted a "dangerous weapon" within the meaning of the federal bank robbery statute.[108] The relevant portion of the bank robbery statute stated, "[w]hoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or *puts in jeopardy the life of any person by the use of a dangerous weapon or device*, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."[109] The Court provided three reasons that were "independently sufficient" to support its holding.[110] First, "a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place."[111] The second reason the Court provided was that the display of a firearm "instills fear in the average citizen" and "creates an immediate danger that a violent response will ensue."[112] Lastly, the Court held that a firearm could "cause harm when used as a bludgeon."[113] Accordingly, the Court affirmed the opinion of the Court of Appeals.[114] Following *McLaughlin*, courts in the military justice system were asked to decide whether an unloaded firearm constituted a deadly weapon even though the President's definition, prior to MJ16, expressly indicated that it did not.

The first court in the military justice system to address the challenge to the President's definition came in *United States v. Sullivan*, where one panel of the Army Court of Criminal Appeals "departed from a long line of Army decisions and declared" that the President's interpretation of the statute was not valid.[115] The court in *Sullivan* applied the rationale of the U.S. Supreme Court in *McLaughlin*.[116] Subsequently, a separate panel of the Army Court of Criminal Appeals declined to follow *Sullivan*, and the same court in *United States v. Turner*, sitting *en banc*,

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[107] *Compare* 2019 MCM, *supra* note 12, pt. IV ¶ 77c(5)(a)(iii), *with* 2016 MCM, *supra* note 93, pt. IV, ¶ 54c(4)(a)(ii), *and* 1951 MCM, *supra* note 106, ¶ 207b(1).
[108] *McLaughlin*, 476 U.S. at 17–18.
[109] *Id.* at 17 n.1 (emphasis added) (citing 18 U.S.C. § 2113(d)).
[110] *Id.* at 17.
[111] *Id*.
[112] *Id.* at 17–18.
[113] *Id.* at 18.
[114] *Id.*
[115] United States v. Davis, 45 M.J. 681, 682 (N-M. Ct. Crim. App. 1997) (citing United States v. Sullivan, 36 M.J. 574 (A.C.M.R. 1992)).
[116] *Sullivan*, 36 M.J. at 577.

expressly overruled *Sullivan* holding that "under no conceivable circumstances is an unloaded pistol capable of inflicting any bodily harm, unless it is used as a missile or a bludgeon."[117] The court noted that it was "equally convinced that the policy concerns voiced in *Sullivan* are, indeed, meritorious."[118]

The decision in *Turner* was not unanimous. In his opinion concurring in part and dissenting in part, Judge Johnston noted that "[e]very soldier learns from basic training onward to treat firearms as dangerous weapons whether they are loaded or not" and that under the majority's view "an unloaded rifle or pistol is 'dangerous' for virtually all purposes in the military except when it is proffered as a firearm during an offer-battery type assault!"[119] Judge Johnston perceived additional flaws in the majority's reasoning. First, according to Judge Johnston, the plain text of the aggravated assault statute did not limit dangerous weapons to loaded firearms.[120] Second, creating such a bright line rule "ignore[d] the facts and circumstances surrounding the use of the [firearm]."[121] For example, the appellant in *Turner* had three loaded magazines and a box of ammunition within arm's reach when he pointed the weapon at the victim.[122] Judge Johnston further argued that the court overstepped its bounds by failing to "analyze th[e] case in accordance with the standard of review for guilty pleas" wherein the appellant specifically acknowledged that his conduct was likely to cause grievous bodily harm.[123] Lastly, according to Judge Johnston, the majority failed to reconcile their interpretation with the Supreme Court's opinion in *McLaughlin*.[124] Judge Modridge, writing separately in dissent, argued that the adoption of such a definition was "contrary to common sense and common understanding and different than is used in any other situation in the military. We are taught from the first day of active duty that guns are dangerous."[125]

In *United States v. Davis*, the Navy-Marine Corps Court of Criminal Appeals, sitting *en banc*, was presented with the same issue.[126] The appellant in *Davis* took part in an instance of hazing—the victim was bound and physically assaulted when the appellant pointed an unloaded pistol at his head and indicated that he should kill him.[127] The appellant pled guilty to simple assault, but the

[117] United States v. Turner, 42 M.J. 689, 691 (A. Ct. Crim. App. 1995) (citing United States v. Smith, 4 C.M.A. 41, 47 (C.A.A.F. 1954)).
[118] *Id.*
[119] *Id.* at 692 (Johnston, J., concurring in part and dissenting in part).
[120] *Id.*
[121] *Id.* at 693.
[122] *Id.* at 693–94.
[123] *Id.*
[124] *Id.* at 694.
[125] *Id.* at 695 (Mogridge, J., dissenting).
[126] United States v. Davis, 45 M.J. 681, 681–82 (N-M. Ct. Crim. App. 1997).
[127] *Id.*

Government went forward on the offense of aggravated assault.[128] In its analysis, the court in *Davis* noted that "an unloaded firearm is a dangerous weapon in a prosecution for carrying a concealed weapon in violation of Article 134."[129] The court also highlighted its previous reliance on *McLaughlin* in the court's opinion in *United States v. Palmer*, wherein the court held that "an unloaded firearm is a dangerous weapon as that term is used in a general regulation prohibiting the wrongful possession of such an object."[130] The court relied on its "independent responsibility to interpret the elements of [UCMJ] offenses."[131] The court followed the reasoning of the U.S. Supreme Court in *McLaughlin* and disregarded the "inconsistent Manual language."[132] It held that an unloaded firearm constituted a dangerous weapon.[133]

Three judges dissented from the majority's opinion in *Davis*.[134] The dissent argued that the "majority has . . . engaged in a process of result-oriented wishful thinking, blurring the distinction between what the law perhaps should be and what the law, in fact, is."[135] The dissent argued that *McLaughlin* was narrowly construed to the "meaning of 18 U.S.C. § 2113(d)" and that the majority departed from the history and context of aggravated assault.[136] According to the dissent, aggravated assault can be traced back to the seminal case *United States v. Price*, wherein the Ninth Circuit Court of Appeals held that "an unloaded firearm, when merely pointed at someone, is not a dangerous weapon when the charge is assault with a dangerous weapon."[137] The primary inquiry should be on "the use of an object and its resultant actual capability to inflict great harm."[138] The dissent argued that the majority improperly "dismiss[ed]" the President's interpretation, which was "persuasive evidence of what the law is in the military at a particular point in time."[139] Essentially, the President provided an accurate "statement[ ] or restatement[ ] of the law" and to conclude otherwise "would be to conclude that those parts of the MCM are useless and meaningless or that all of our predecessors who helped draft those provisions were uninformed."[140]

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[128] *Id.*
[129] *Id.* at 683 (citing United States v. Booker, 37 M.J. 1114 (N.M.C.M.R. 1993), *aff'd*, 42 M.J. 267 (C.A.A.F. 1995)).
[130] *Id.* at 684 (citing United States v. Palmer, 41 M.J. 747 (N-M. Ct. Crim. App. 1994)).
[131] *Id.* at 685.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 687.
[135] *Davis*, 45 M.J. at 681.
[136] *Id.* at 688.
[137] *Id.* at 689 (citing Price v. United States, 156 F. 950, 951 (9th Cir. 1907)).
[138] *Id.*
[139] *Id.* at 690.
[140] *Id*.

Judge Oliver wrote a separate concurring opinion, which highlighted three additional points.[141] First, directly addressing the dissent, Judge Oliver noted that this issue had not been directly decided by a superior court and that it was the court's "responsibility to determine what the law is."[142] Secondly, he was "unwilling to conclude that the vagaries of military jurisprudence mandate that we [as an armed force], must treat unloaded weapons as dangerous for virtually all purposes except when proffered as a firearm during an offer-battery type assault."[143] To this point, Judge Oliver highlighted that the "military maxim is: Never point a weapon at someone unless you intend to shoot him."[144] Lastly, Judge Oliver criticized the dissent for its reliance on *Price v. United States*; in his opinion, *McLaughlin* provided sufficient basis to depart from the nonbinding decision of the Ninth Circuit.[145]

The issue was ultimately resolved by CAAF in *Davis*, wherein the court held that an unloaded firearm did not constitute a dangerous weapon within the context of aggravated assault.[146] As discussed above, CAAF noted that the legislative history and the text of the statute were "not clear" on the issue.[147] While the court was not "bound by the President's interpretation of the elements of substantive offenses," it noted that "where the President unambiguously gives an accused greater rights than those conveyed by higher sources" the court should abide by that decision "unless it clearly contradicts the express language of the Code."[148] The court held that there was "no indication that the President's explanation of aggravated assault contradicts the Code in any way[,]" and there was no indication "that Congress intended some other construction of aggravated assault."[149] The court noted that Congress and the President could "change[ ] this concept at any time if [they] disagreed."[150]

Judge Sullivan dissented from the majority, arguing that the President's interpretation of dangerous weapon, in light of the Supreme Court's opinion in *McLaughlin*, was "inconsistent with Article 128 and infringe[d] on Congress' substantive criminal law-making powers under Article I, § 8, Clause 14, of the United States Constitution."[151] In his opinion, "Congress clearly intended this statute to prevent assaults by Service Members using weapons that are actually

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[141] *Id.*
[142] *Id.*
[143] *Id.* at 686 (internal quotations omitted) (quoting United States v. Turner, 42 M.J. 689, 692 (A. Ct. Crim. App. 1995) (Johnston, J., dissenting)).
[144] *Davis*, 45 M.J. at 686.
[145] *Id.* at 686–87.
[146] United States v. Davis, 47 M.J. 484, 484–85 (C.A.A.F. 1998).
[147] *Id*. at 486.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.* at 487–88 (Sullivan, J., dissenting).

dangerous or which are reasonably perceived to be dangerous."[152] Similar to the previously discussed dissents, Judge Sullivan noted that "the first rule of combat-weapon handling is that *all guns are to be treated as loaded weapons*."[153] Judge Sullivan stated that the majority's analysis ignored "common sense, the Supreme Court, and a statute of Congress."[154]

Important in the analysis of the history of this litigation is what CAAF said or did not say in *Davis* in relation to unloaded firearms. CAAF could have adopted the reasoning of the Army Court of Criminal Appeals in *Turner* and the dissent in the Navy-Marine Court of Criminal Appeals in *Davis* and held that "under no conceivable circumstances is an unloaded pistol capable of inflicting any bodily harm," but, when given the opportunity, CAAF declined.[155] In fact, CAAF favorably referenced the Supreme Court's reasoning in *McLaughlin* and several other civilian jurisdictions but ultimately held that it was bound by the President's interpretation because it "unambiguously [gave] an accused greater rights than those conveyed by [the text of the statute]."[156] This is why the President's action with regard to the definition of section 914(a) is an important touchstone for interpretation. If CAAF adopted the reasoning of *Turner*, then the President's action would be less impactful because it would mean that the President's definition was not given any deference and the Court solely relied on its independent interpretation of the statute. Said another way, the definition itself would be superfluous or merely a restatement of the law because the answer was found from the text of the statute.

CAAF invited Congress and the President to change its holding in *Davis* if they disagreed, and the invitation was accepted by enacting and subsequently interpreting section 914(a). The President is presumed to know the contentious history of the issue within the military justice system, and he is presumed to be aware that CAAF deferred to his definition in *Davis* in deciding the issue.[157] The departure from the long-standing precedent of holding that an unloaded firearm does not constitute a dangerous weapon provides significant support for the interpretation of section 914(a) that an unloaded firearm could be likely to produce death or grievous bodily harm.

E. Analysis of the Context of Section 914(a)

Interpreting section 914(a) to allow for prosecutions involving unloaded firearms fits within the statutory framework of section 914 as a whole and the

[152] *Id.* at 488.
[153] *Id.* at 489 (emphasis in original).
[154] *Id.*
[155] United States v. Turner, 42 M.J. 689, 691 (A. Ct. Crim. App. 1995).
[156] *Davis*, 47 M.J. at 486–87.
[157] United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

remaining offenses within the UCMJ. Statutes are not read in a vacuum but, rather, in the context of other statutes.[158] "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[159] "The meaning of a statement often turns on the context in which it is made, and that is no less true of statutory language."[160] Courts "typically seek[ ] to harmonize independent provisions of a statute."[161] "The UCMJ is, after all, a 'uniform code,' one that reformed and modernized the old system of military justice 'from top to bottom.'"[162]

MJ16 created section 914 as a separate class of offenses aimed at deterring potentially dangerous conduct.[163] Included in this class of offenses are reckless endangerment, dueling, discharging a firearm, and carrying a concealed weapon.[164] This group of offenses migrated from Article 134 and merged with the dueling statute originally in section 914.[165] The MJRG's sectional analysis explained that "[t]he wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law" and that this group of offenses does not need to rely on the terminal element required of Article 134.[166] As the Army Court of Military Review stated in *United States v. Smith*, "the reason for making possession of a concealed weapon a crime is for 'preventative purposes.'"[167] In fact, the offense of carrying a concealed weapon, section 914(d), has historically been interpreted to include the possession of an unloaded firearm.[168] It is generally accepted that members of the armed forces are trained on the potential dangers of firearms mishandling. The first "universal" weapons safety rule instructs service members to treat "every weapon as if it were loaded," and secondly, to "never point a weapon at anything you do not intend to shoot."[169] Given this fundamental

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[158] Andrews v. Warden, 958 F.3d 1072, 1081 (11th Cir. 2020) ("The President, like Congress, is presumed to know the law and to speak in terminology that subordinate officials would understand.").
[159] United States v. McDonald, 78 M.J. 378, 380 (C.A.A.F. 2019).
[160] United States v. Briggs, 141 S. Ct. 467, 470 (2020).
[161] *Kelly*, 77 M.J. at 407 (citing United States v. Christian, 63 M.J. 205, 208 (C.A.A.F. 2006)).
[162] *Briggs*, 141 S. Ct. at 470 (quoting Burns v. Wilson, 346 U.S. 137, 141 (1953)).
[163] 10 U.S.C. § 914; *see also* MJRG, *supra* note 38, at 843.
[164] MJRG, *supra* note 38, at 842–43.
[165] *Id.*
[166] *Id.* at 843.
[167] United States v. Smith, 36 M.J. 838, 839 (A.C.M.R. 1993) (quoting United States v. Thompson, 14 C.M.R. 38, 42 (C.M.A. 1954)).
[168] United States v. Trainor, No. 95 00785, 1996 CCA LEXIS 491, at *7–8 (N-M. Ct. Crim. App. July 18, 1996).
[169] U.S. DEP'T OF NAVY, OPNAVINST 3591.1G, SMALL ARMS TRAINING AND QUALIFICATION 4-1 (1 June 2021) ("Universal Safety Rules. The four safety rules . . . are the foundation for responsible weapons handling. These rules must be observed at all times, whether in training or in combat. Rule 1: Treat every weapon as if it were loaded . . . Rule 2: Never point a weapon at anything you do not intend to shoot . . . . Rule 3: Keep your finger straight and off the trigger until ready to fire . . . Rule 4: Keep weapon on 'safe' until you intend to fire.") (emphasis omitted); s*ee also* Marine Corps Administrative

knowledge and the preventative purpose of section 914 as a whole, it is reasonable to conclude that Congress wanted section 914(a) to be interpreted broadly, because it merged these preventative offenses into a single section.

Moreover, this interpretation does not offend or void any other section of the UCMJ. The most analogous offense for this type of misconduct (i.e., pointing a firearm at another) is assault. Section 914(a) is worded more broadly than simple assault and aggravated assault to encompass actions that pose a substantial risk of death or grievous bodily injury outside of the firearms context (i.e., certifying a faulty parachute for use). Simple assault and aggravated assault both require the victim to have an apprehension of immediate bodily harm, which section 914(a) does not require. The facts surrounding HM3 Deleon's tragic death illustrate the difference between the assault offenses and section 914(a). HM3 Deleon was present at a party where SN Williams and the homeowner were racking and dry firing the weapons at each other and at HM3 Deleon. There was no evidence to suggest that HM3 Deleon had a fear of imminent harm despite the dangerous conduct. The absence of apprehension does not automatically mean the conduct was not reckless or that it was not likely to produce death or grievous bodily harm; thus, it is chargeable under section 914(a) instead of assault.

An analysis of the maximum punishments illustrates how section 914(a) fits within the framework of the MCM. If apprehension of imminent harm is established, then an accused is subject to a charge of assault or aggravated assault and is also exposed to a greater maximum punishment (three years of confinement for simple assault with an unloaded firearm) than section 914(a) (one year of confinement).[170] The greater maximum punishment is warranted given that there is both (1) an actual danger of harm and (2) the apprehension of harm, whereas section 914(a) only has actual danger. Holding that an unloaded firearm could not create actual harm, essentially limiting section 914(a) to only loaded firearms, would lead to an inapposite result, as Table 2 illustrates.

Message, 176/14, R 031603Z Apr 14, Commandant, Marine Corps, subject: Interim Guidance for Privately Owned Firearms Policy Aboard Marine Corps Installations ("Marines are expected to handle privately owned firearms with the same level of safety and professionalism that is required when handling their individual T/O weapons.").

[170] *See* 2019 MCM, *supra* note 12, app. 12.

Simple assault	No likelihood of death or grievous bodily injury	Apprehension of harm	Maximum of 3 years of confinement
Section 914(a)	Actual likelihood of death or grievous bodily injury	No apprehension or fear	Maximum of 1 year of confinement

Table 2.

Essentially, taking that interpretation to its logical conclusion, the fear of bodily injury could be punished more harshly than an actual threat to life. Thus, to hold that an unloaded firearm could not create actual harm would disrupt the consistency within the MCM.

F. Analysis of State Court Interpretations of Statutes Similar to Section 914(a)

Section 914(a) was based on a state law offense and resembles many state statutes.[171] "These state codes, and the state cases construing them, are a potentially fruitful source of interpretative material to aid in fleshing out the military offense of reckless endangerment."[172] As Table 1 illustrates, a majority of jurisdictions within the United States (thirty-one states and two territories) have a statute similar to section 914(a). Fourteen jurisdictions have issued an opinion directly analyzing whether an unloaded firearm could be likely to produce death or grievous bodily harm, with nine holding in the affirmative and five answering the question in the negative.

The natural starting place in the analysis for the group of jurisdictions that held that an unloaded firearm could be likely to produce death or grievous bodily harm was the text of the statutes.[173] This group of jurisdictions determined that the act of aiming a firearm at another person "created a risk of bodily injury."[174]

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[171] DAVID S. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 5.47 (2021).
[172] *Id.*
[173] State v. Hulbert, 544 S.E.2d 919, 930 (W. Va. 2001) ("[T]he language of the statute is what controls our decision."); *see also* State v. Messier, 885 A.2d 1193, 1196 (Vt. 2005) (holding that a subsequent amendment to the statute made clear that an unloaded weapon was sufficient to obtain a conviction); State v. Meier, 422 N.W.2d 381, 383–84 (N.D. 1988).
[174] Jones v. State, No. 79A02-0605-CR-403, 2007 Ind. App. Unpub. LEXIS 1405, at *12 (Apr. 13, 2007); Andreasyan v. State, No. A-10342, 2010 Alas. App. LEXIS 86, at *9–11 (July 28, 2010) (holding that Appellant's conduct of fleeing from police, waiving a handgun in a residential neighborhood, and subsequently abandoning the handgun in the neighborhood created circumstances that risked the safety of others).

Tennessee, Texas, and Vermont's legislatures determined that an unloaded firearm was a dangerous weapon in this context *per se*.[175] The appellant in *In re Interests of ALJ* argued that his conduct of pointing an unloaded firearm at another did not actually endanger the other person; however, the Supreme Court of Wyoming disagreed and held that "an unloaded gun pointed at another creates a dangerous situation. The unknown and frequently violent reactions of persons having guns pointed at them, unloaded or not, create an obvious danger."[176] The Supreme Court of Wyoming noted that "[m]any people are killed each year with guns which the handlers knew were unloaded" and there is "[n]othing . . . odd in protecting against the potential harm which exists any time a person points a gun at another."[177] The Supreme Court of North Dakota similarly reasoned that while "it is impossible to harm someone by pointing a rifle which is later [found] to be unloaded . . . by pointing the rifle the defendant disregarded a risk to human life by creating a potential for harm because the rifle could have been loaded."[178] The Kentucky Court of Appeals summarized the state of the law regarding its wanton endangerment statute by stating that the "pointing of [a] weapon at another person is sufficient evidence to support the charge of wanton engagement" and "whether loaded or unloaded (provided there is reason to believe the gun may be loaded) at any person constitutes conduct that 'creates a substantial danger of death or serious physical injury to another person.'"[179]

The group of courts that held that an unloaded firearm could not produce serious bodily injury or death almost universally determined that the issue was resolved by the text of the statute.[180] One of the leading and most cited cases within this group of opinions was *Commonwealth v. Trowbridge*.[181] The Appellant in *Trowbridge* pointed an unloaded BB gun at police officers and was convicted for recklessly endangering another person.[182] The court reversed her conviction and held that "[d]anger, and not merely the apprehension of danger, must be created."[183] In addition to the text of the statute, the court looked at the legislative history wherein the legislature based the text of the statute on the Model Penal Code version but removed the clause that expressly criminalized pointing an unloaded weapon at another—the court held that by removing that portion from

[175] *Messier*, 885 A.2d at 1193; State v. McGouey, 229 S.W.3d 668, 672 (Tenn. 2007); Garcia-Morales v. State, Nos. 07-19-00267-CR, 07-19-00268-CR, 02-19-00269-CR, 2021 Tex. App. LEXIS 4924, at *9 (Tex. Crim. App. 7th Cir. June 21, 2021).
[176] *In re* Interests of ALJ, 836 P.2d 307, 310 (Wyo. 1992).
[177] *Id.*
[178] *Meier*, 422 N.W.2d at 384.
[179] Key v. Commonwealth, 840 S.W.2d 827, 829 (Ky. Ct. App. 1992) (quoting KY. REV. STAT. ANN. § 508.060 (LexisNexis 1975)).
[180] Cobb v. State, 495 So.2d 701, 703 (Ala. Crim. App. 1984); Witty v. State, 710 P.2d 121, 122–23 (Okla. Crim. App. 1985); Commonwealth v. Trowbridge, 395 A.2d 1337, 1340 (Pa. Super. Ct. 1978).
[181] *Trowbridge,* 395 A.2d at 1338.
[182] *Id.* at 1339.
[183] *Id.* at 1340–41.

the Model Penal Code's version, the legislature intended only to criminalize instances where actual danger was created.[184] The Court of Criminal Appeals of Alabama reversed a conviction for reckless endangerment with an unloaded firearm primarily relying on the "actual danger" requirement stated in *Trowbridge*.[185]

While the Oklahoma Court of Criminal Appeals determined that it was "impossible" to create a risk of great bodily harm with an unloaded firearm, the court noted that it was "with great reservation that we make such a holding [because] [a]s we have stated in prior cases, the law requires a greater degree of care in the handling of a deadly weapon."[186] The Court of Special Appeals of Maryland in *Thompson v. State* affirmed the appellant's conviction of reckless endangerment despite no direct evidence that the weapon was loaded.[187] The appellant pointed a shotgun at the victim's head, racked it, and threatened to "blow [her] m'fing brains out."[188] The responding officers did not seize the weapon in question.[189] The court reasoned that "a rational trier of fact could have concluded that the double-barrel shotgun appellant aimed at [the victim] was loaded and operable" because the victim testified that appellant racked the weapon and that she previously found shotgun shells in appellant's shaving kit.[190]

While it is important to identify the number of jurisdictions supporting a particular interpretation, it is also important to look at the level of court that issued the opinion. The question is not completely answered until either the legislature or the highest court in the jurisdiction answers it.[191] This endeavor is made more difficult given that statutes similar to section 914(a) are often misdemeanor offenses, which greatly diminishes the likelihood that there would be an appeal.[192] Seven of the nine courts that held that an unloaded firearm could be likely to produce death or grievous bodily harm were the highest courts in their

[184] *Id.*; *see also* Commonwealth v. Gouse, 429 A.2d 1129, 1130 (Pa. Super. Ct. 1981) (overturning Appellant's reckless endangerment conviction because the state failed to prove that the shotgun pointed at another was loaded).
[185] *Cobb*, 495 So. 2d. at 704.
[186] Witty v. State, 710 P.2d 121, 123 (Okla. Crim. App. 1985).
[187] Thompson v. State, 145 A.3d 105, 122 (Md. Ct. Spec. App. 2016).
[188] *Id.* at 110.
[189] *Id.* at 111.
[190] *Id.* at 112.
[191] *See supra* text accompanying notes 7–10.
[192] *See* Nancy J. King & Michael Heise, *Article: Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019) ("Comparing this appeals rate with a conservative estimate of the number of convictions from misdemeanor filings in 2010 produces a ratio of about eight appeals for every ten thousand misdemeanor convictions in state trial courts, or one in 1250.").

jurisdiction.[193] Two of the opinions were issued by intermediate appellate courts.[194] None of the five courts that held that an unloaded firearm could not be likely to produce death or grievous bodily harm within the reckless endangerment context were the highest court in the state; four were from intermediate appellate courts and one was from a New York District Court.[195] While the New York District Court opinion constitutes persuasive authority, the weight given to it cannot be valued the same as an opinion from the Supreme Court of a jurisdiction even though this particular opinion was cited positively by an appellate court in a collateral context.[196]

This issue is far from settled in the state law context, but a review of the current landscape shows that a majority of jurisdictions with a similar statute to section 914(a) hold that an unloaded firearm could be likely to produce death or grievous bodily harm. The jurisdictions that hold otherwise primarily create a bright line rule that focuses on one single fact: whether the firearm was loaded. This group of states justify their result based on the statute's language; however, as stated above, the large split in the interpretation of nearly identical statutes is a strong indication that the statutes may be more ambiguous than previously believed. Moreover, applying the logic of *Trowbridge*, the leading case in the minority, leads to the conclusion that an unloaded firearm could be likely to produce death or grievous bodily harm regarding section 914(a). The court in *Trowbridge* cited the legislature's removal of certain portions of the Model Penal Code as evidence of the legislature's intent. Applied here, the President's removal of the portion of section 914(a)'s definition concerning unloaded firearms is indicative of his intent to broadly interpret section 914(a)—the same logic of *Trowbridge*, but an opposite result.

G. Analysis of State Court Interpretations of a Similar Question in Collateral Contexts

The question of whether an unloaded firearm could be likely to produce death or grievous bodily harm is not limited to reckless endangerment statutes. A review of the jurisdictions that have decided this issue in a collateral context

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[193] *See* D.B. v. State (*In re* D.B.), 658 N.E.2d 595 (Ind. 1995); Towe v. Commonwealth, No. 2006-SC-000644-MR, 2007 Ky. Unpub. LEXIS 67 (Aug. 23, 2007); State v. Meier, 422 N.W.2d 381 (N.D. 1988); State v. McGouey, 229 S.W.3d 668 (Tenn. 2007); State v. Messier, 885 A.2d 1193 (Vt. 2005); State v. Hulbert, 544 S.E.2d 919 (W. Va. 2001); *In re* Interests of ALJ, 836 P.2d 307 (Wyo. 1992).

[194] *See* Andreasyan v. State, No. A-10342, 2010 Alas. App. LEXIS 86 July 28, 2010); Garcia-Morales v. State, Nos. 07-19-00267-CR, 07-19-00268-CR, 02-19-00269-CR, 2021 Tex. App. LEXIS 4924 (Tex. Crim. App. 7th Cir. June 21, 2021).

[195] *See* Witty v. State, 710 P.2d 121 (Okla. Crim. App. 1985); Commonwealth v. Trowbridge, 395 A.2d 1337 (Pa. Super. Ct. 1978); Cobb v. State, 495 So.2d 701 (Ala. Crim. App. 1984); Thompson v. State, 145 A.3d 105 (Md. Ct. Spec. App. 2016); People v. Madehere, 565 N.Y.S.2d 984 (N.Y. Crim. Ct. 1991).

[196] People v. Wilson, 252 A.D.2d 241, 246 (N.Y. App. Div. 1998).

provides additional persuasive authority. Twenty states have analyzed this issue in contexts other than reckless endangerment (e.g., aggravated assault, bank robbery, assault against a police officer). Seventeen of the twenty states that have analyzed this issue in a different context have held that an unloaded weapon could be likely to produce death or grievous bodily harm.[197] Two of the twenty states—Colorado and North Carolina—held that it could not.[198] The remaining state, Illinois, held that an unloaded firearm could meet the statutory requirement for robbery, but the fact that the firearm was unloaded could lead to a lesser sentence.[199]

Category	**Jurisdiction**
Jurisdictions that have held that an unloaded firearm **could** be likely to produce death or grievous bodily harm **outside of the reckless endangerment context**	Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Rhode Island, South Dakota, Utah, and Washington.
Jurisdiction(s) that have held that an unloaded firearm **could not** be likely to produce death or grievous bodily harm **outside of the reckless endangerment context**	Colorado and North Carolina
Jurisdictions with unclear opinions on the issue	Illinois

Table 3.

This persuasive authority is even further removed from the ultimate issue concerning section 914(a). However, this overview of interpretations in collateral contexts provides some additional support for the conclusion that an unloaded firearm could create a substantial risk of death or bodily harm. Of note, many states answered the question explicitly by statute and defined the term "deadly weapon"

[197] *See* Jones v. State, 710 S.E.2d 127 (Ga. 2011); State v. Herrera, 629 P.2d 626 (Haw. 1981); State v. Donk, 181 P.3d 508 (Idaho Ct. App. 2007); People v. Greer, 368 N.E.2d 996 (Ill. App. Ct. 1977); State v. Prince, 605 P.2d 563 (Kan. 1980); State v. Landrieu, 274 So.3d 661 (La. Ct. App. 2019); Commonwealth v. Buttimer, 128 N.E.3d 74 (Mass. 2019); State v. Ott, 189 N.W.2d 377 (Minn. 1971); Wilson v. State, 395 So.2d 957 (Miss. 1981); State v. Unverzagt, 721 S.W.2d 786 (Mo. Ct. App. 1986); State v. Hatt, 740 A.2d 1037 (N.H. 1999); State v. Bill, 476 A.2d 813 (N.J. 1984); State v. Tate, 377 N.E.2d 778 (Ohio 1978); State v. Jackson, 752 A.2d 5 (R.I. 2000); State v. Schumacher, 956 N.W.2d 427 (S.D. 2021); Orem City v. Hansen, No. 20070268-CA, 2008 Utah App. LEXIS 311 (Aug. 28, 2008); State v. Valdez, No. 17475-1-III, 2000 Wash. App. LEXIS 457 (Mar. 23, 2000).

[198] State v. Martin, 786 S.E.2d 426, 430 (N.C. Ct. App. 2016); Montez v. People, 269 P.3d 1228, 1231 (Colo. 2012).

[199] *Greer*, 368 N.E.2d at 1001.

to include unloaded firearms, which tends to show how Congress and the President can and should provide guidance on the issue.[200]

IV. APPLICATION OF THE LAW TO THE FACTS OF SN WILLIAMS' CASE

After a review of the text of section 914(a), along with the statute's history and context as well as persuasive authority from state courts, it is clear that the military judge in SN Williams' case did not err in holding that an unloaded firearm could be likely to produce death or grievous bodily harm. CAAF's recent holdings that interpret the term "likely to produce" demonstrate that the question should be evaluated by a review of the totality of the circumstances. The statute is in a category of offenses aimed at deterring dangerous conduct. Moreover, the statute that formed the basis for section 914(a) was interpreted under "all the evidentiary circumstances of the case."[201] A majority of jurisdictions that have similar statutes to section 914(a) permit the prosecution of cases with unloaded firearms.[202] A majority of states that have analyzed this issue in a collateral context have determined, by either statute or statutory interpretation, that an unloaded firearm constitutes a deadly weapon and is thus likely to produce death or grievous bodily harm.[203]

As Judge Johnston stated in his separate opinion in *Turner*, and as a number of state jurisdictions have held, a bright line rule that simply bars prosecution for section 914(a) for reckless use of an unloaded firearm does not adequately address the nuances regarding the inherent danger firearms pose, and this case is illustrative of that point. It goes against basic firearms knowledge and training and "common sense" to point—let alone dry fire—a firearm at another person. While the likelihood of death or grievous bodily harm may be "almost zero" solely with an unloaded firearm, the circumstances surrounding the use of the firearms, in this case, increased the likelihood of death or grievous bodily harm. Analogizing the case to the statistical realm of the HIV cases, it could be argued that the likelihood of death or grievous bodily harm in this case was at least fifty percent given that there were two firearms being handled on the evening in question—one of which was loaded. The likelihood of harm and the magnitude of probable harm is evidenced by HM3 Deleon's tragic death immediately following SN Williams' conduct. The likelihood of a firearms mishap, the consequences of which cost HM3 Deleon his life, are greatly increased when you factor in alcohol,

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[200] *See Donk*, 181 P.3d 508 (citing IDAHO CODE § 18-905); Ott, 189 N.W.2d 377 (citing MINN. STAT. § 609.02); *Unverzagt*, 721 S.W.2d at 788 (citing MO. REV. ANN. § 556.0621), *Hatt*, 740 A.2d at 1037; *Bill*, 476 A.2d at 815; *see also* State v. Herbert, No. A-5556-17T4, 2020 N.J. Super. Unpub. LEXIS 2434, at *39 (Dec. 18, 2020) (citing N.J. STAT. ANN. § 2C:39-1); *Tate*, 377 N.E.2d at 778 (citing OR. REV. ANN. § 2923.11).

[201] Minor v. State, 605 A.2d 138, 141 (Md. 1992).

[202] *See supra* text accompanying notes 39–45.

[203] *See supra* text accompanying notes 46–49.

ammunition, and dry firing the weapon. The fact that HM3 Deleon lost his life in this sequence of events underscores the importance of interpreting and applying section 914(a) as a preventative statute.

V. RECOMMENDED AMENDMENTS TO SECTION 914

This case and the analysis of the persuasive authority highlights the need for Congressional and Presidential action to provide guidance on the subject. While the foregoing analysis shows that an unloaded firearm could be likely to produce death or grievous bodily harm, the issue would be made clearer with a definition from Congress or the President. Since the Court is not bound by the President's interpretation of a statute, the preferable solution is for Congress to amend section 914. Servicemen and women are expected to abide by universal weapons safety rules, which are in place to prevent serious injury or death.[204] As Judge Johnston, Judge Modridge, and Judge Oliver aptly highlighted in their dissents, it would be inconsistent and contrary to common sense to consider firearms as deadly weapons in all situations in the military except when pointed at another person under section 914(a).[205] Moreover, the U.S. Supreme Court noted firearms are "characteristically dangerous" and "the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous . . . ."[206]

Congress should also define the terms "likely to produce" and "dangerous weapon" to include an unloaded firearm because of the preventative purpose of section 914 as a whole, given the practical difficulties in proving that a weapon was loaded at a particular point in time. The Supreme Court of Wyoming noted that "[m]any people are killed each year with guns which the handlers *knew* were unloaded,"[207] and a brief review of military cases further illustrates this point. In 1953, the Army Board of Review noted that there "are many cases . . . where the facts showed the accused pointed a pistol at another supposing it to be unloaded."[208] The appellant in *United States v. Behren* shot a fellow Airman in the knee resulting in serious injuries.[209] The appellant "thought the weapon was unloaded. He was wrong."[210] Defining "likely to produce" and "dangerous weapon" within section 914 to include unloaded firearms would align with the historical purpose of the offense. Even courts that have held an unloaded firearm was not "likely to produce" death or grievous bodily harm were nonetheless

[204] United States v. Turner, 42 M.J. 689, 692 (A. Ct. Crim. App. 1995).
[205] *See supra* text accompanying notes 119–25.
[206] McLaughlin v. United States, 476 U.S. 16, 17 (1986).
[207] *In re* Interests of ALJ, 836 P.2d 307, 310–11 (Wyo. 1992) (emphasis in original).
[208] United States v. Ballard, 11 C.M.R. 454, 456 (A.B.R. 1953).
[209] United States v. Behren, No. ACM 37657, 2012 CCA LEXIS 159, at *2 (A.F. Ct. Crim. App. 2012).
[210] *Id.*

"equally convinced [of] the policy concerns" surrounding the inherent dangers of unloaded firearms.

There are also practical considerations with adopting this type of definition. For example, a review of these types of cases shows that, in some instances, only the handler of the firearm is aware of its true condition,[211] and there are difficulties in recovering the firearm in question,[212] if it is recovered at all.[213] If section 914(a) remained unchanged and was later interpreted to require a loaded weapon, prosecutors would have to use alternative and less clear theories of liability, such as dereliction of duty or disorderly conduct.[214] The problem with using these offenses is that the language of the offense, the definitions, and the instructions do not directly address this type of conduct.[215] Charging offenses that do not directly address a specific type of conduct create notice issues and risk an improper conviction or acquittal.[216] Lastly, these alternate offenses—dereliction of duty and disorderly conduct—have lower maximum sentences than section 914(a).[217]

Three state statutes provide examples for how section 914(a) could be amended to make this issue clear. Vermont's reckless endangerment statute includes the following: "Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not

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[211] Thompson v. State, 145 A.3d 105, 110 (Md. Ct. Spec. App. 2016); State v. Riker, 864 N.W.2d 120, 124 (Wis. Ct. App. 2015) ("Perhaps Riker knew for certain that the gun was not loaded . . . .").

[212] *See also* United States v. Banks, No. NMCM 200201124, 2003 CCA LEXIS 144, at *3–4 (N-M. Ct. Crim. App. June 20, 2003) (law enforcement seized the weapon later at a different location); J.B. v. State, No. 49A02-0908-JV-717, 2010 Ind. App. Unpub. LEXIS 170, at *5–6 (Feb 15, 2010) (appellant challenged his conviction because there was "no evidence of a gun" because it was not recovered.); *Riker*, 864 N.W.2d at 123 ("There was testimony that the gun was not loaded when police recovered it . . . [but] [t]he police did not recover the gun, however, until the new tenant found it hidden behind the furnace.").

[213] Andreasyan v. State, No. A-10342, 2010 Alas. App. LEXIS 86, at *3–4 (July 28, 2010) (describing how appellant ran from law enforcement through a neighborhood with a firearm, he was subsequently apprehended but "[t]he police never found the gun."); *Thompson*, 145 A.3d at 111 (where the actual weapon used was not recovered).

[214] *See* 10 U.S.C. §§ 892, 934.

[215] *Id*.

[216] United States v. Williams, No. NMCCA 200101854, 2005 CCA LEXIS 289, at *5–7 (N-M. Ct. Crim. App. Sep. 14, 2005) (finding that appellant's conviction of dereliction of duty for improperly using an administrative system was factually insufficient); *see also* United States v. Taylor, 61 M.J. 640, 641–42 (C.G. Ct. Crim. App. 2005) (finding that appellant's conviction for dereliction of duty for willfully failing to use his Government Travel Card for only official government travel was factually insufficient); United States v. Harcrow, No. 200300913, 2005 CCA LEXIS 159, at *8–9 (N-M. Ct. Crim. App. May 16, 2005) (finding that appellant's conviction of disorderly conduct for pulling the fire alarm did "not fully support the" conviction).

[217] *See* 2019 MCM, *supra* note 12, app. 12. The maximum punishment for willful dereliction of duty is six months of confinement, reduction to E-1, a bad conduct discharge, and total forfeitures. The maximum punishment for disorderly conduct is four months of confinement, reduction to E-1, and 2/3 forfeitures for four months.

the actor believed the firearm to be loaded, and whether or not the firearm actually was loaded."[218] Wyoming's statute states that "[a]ny person who knowingly points a firearm at or in the direction of another, whether or not the person believes the firearm is loaded, is guilty of reckless endangering . . ."[219] Texas' "deadly conduct" statute states that "[r]ecklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded, and whether or not the firearm actually was loaded."[220] Vermont's additional language is the most direct because it includes the phrase "and whether or not the firearm actually was loaded." The Texas and Wyoming statutes stop at the accused's state of mind with regard to the firearm and fail to directly state that the offense is committed with an unloaded firearm.

Simply amending section 914(a) to include the language in Vermont's statute would ignore the broader statutory context, specifically concerning sections 914(a) and 914(d) (carrying a concealed weapon). Given that both offenses are in the same statute, section 914 should be amended to include the following subsection:

> (e) For purposes of sections (a) and (d), a firearm is presumed to be "likely to produce death or grievous bodily harm" and a "dangerous weapon" whether or not the firearm was loaded and whether or not the accused believed the firearm to be loaded.

This amendment codifies the longstanding interpretation that an unloaded firearm is a dangerous weapon within the meaning of section 914(d) and, more importantly, clearly defines "likely to produce" with regards to unloaded firearms.

Absent Congressional action, the President should amend the definition of "likely to produce" within the MCM. This amendment to the definition should not be as broad as the forgoing proposal; reviewing courts are not bound by the President's interpretation and it could be susceptible to unnecessary scrutiny or appellate review. Said another way, the President lacks the power in this context to make a wholesale change to the definition, especially since the change is not expanding the rights of an accused. The President should amend the definition of "likely to produce" to include the following sentence:

> [A]n unloaded firearm can be 'likely to produce' death or grievous bodily injury so long as it was handled in such a

[218] VT. STAT. ANN. TIT. 13, § 1025.
[219] WYO. STAT. ANN. § 6-2-504.
[220] TEX. PENAL CODE ANN. § 22.05.

> manner in which death or grievous bodily injury was a probable result based on the totality of the circumstances.

This aligns the definition with the current state of the law and is necessary because it specifically authorizes prosecution pursuant to section 914(a) for cases involving unloaded firearms.[221]

This conduct may not be prosecuted in future cases pursuant to section 914(a) without additional guidance. The proposed amendments bring the UCMJ in line with a majority of state jurisdictions and aligns section 914(a) with the military's training and common understanding regarding firearms. As the Oklahoma Court of Criminal Appeals stated, firearms require a "greater degree of care," and the mishandling such firearms often results in tragedy. The prosecution of those responsible for their misconduct on the night of HM3 Deleon's death revealed this new question in the law—Congress and the President should answer it.

[221] This definition is silent with regard to section 914(d) given that it is already addressed within the MCM. *See* 2019 MCM, *supra* note 12, pt. IV ¶ 52c(4)(b).

FIGHTING DEEP FAKES: THE INADEQUACY OF CURRENT LAW FOR THE FUTURE WAR

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When the Tallinn Manual on the International Law Applicable to Cyber Operations was updated to Version 2.0 in 2017, it attempted to apply the existing international legal frameworks of jus ad bellum *and* jus in bello *to operations occurring in cyberspace. Despite this significant effort, international law remains inadequate to address emerging threats posed by disinformation launched into cyberspace. Over the past 20 years, social media and other internet-based information sharing platforms have revolutionized information warfare. Using these platforms, state actors have been able to introduce disinformation with the capability to infiltrate the minds of decision-makers and compel individuals to kinetic action.*

Within this context of information warfare, one of the newest weapons is the "deep fake"—the ability to leverage machine learning and artificial intelligence to create realistic false video representations of anyone or anything. Deep fakes have the potential to spark kinetic reactions from individuals or governments without firing a single shot or using any form of "force" as that term is generally understood under international law. Introducing deep fakes into the complex algorithm-driven landscape of social media—where what one sees is based significantly on one's preexisting biases—has the potential to amplify these impacts exponentially.

This Article looks at how deep fakes are created and their capacity for kinetic harm, particularly when coupled with the capacity of twenty-first century information sharing capabilities, while identifying probable uses and their likely effects. After that, it assesses the adequacy of the jus ad bellum *and other*

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international legal frameworks, concluding that the existing legal paradigm—in particular, its broad-reaching requirement of state attribution—is inadequate to defend against attacks using deep fake technology. This Article resolves by recognizing the need for a multifaceted approach to this problem, including reconsideration of how we apply the notion of self-defense to information warfare.

I. INTRODUCTION

In an age where disinformation campaigns have become the newest form of information warfare, deep fake technology is one of the newest weapons. Because "seeing is believing," deep fake technology has the capacity to alter the "reality" against which critical decisions are evaluated and executed. Social media algorithms that reward virality further exacerbate the issue, as users are targeted with information that confirms pre-existing biases, and "alternate facts" supplant actual truth.

Information warfare is not new, but the technology it employs has changed significantly since the rules governing state conduct were drafted in the mid-twentieth century. Further, viral information campaigns have increasingly led to kinetic impacts (e.g., use of social media to intimidate adversaries and recruit fighters by the Islamic State of Iraq and Syria (ISIS), Russia's use of social media during the 2014 invasion of Ukraine, as well as real world reactions to online disinformation like "Pizzagate"),[1] demonstrating that it is not just a war of words. Deep fake technology has the capacity to change the face of warfare, but the current legal framework is rooted in archaic concepts of warfare conducted by states with conventional weapons. In contrast, twenty-first century adversaries are increasingly using cyber and information operations to exact the same effects while avoiding the use of kinetic weapons altogether, and they frequently find success in doing so through the use (or exploitation) of proxies and non-state actors with few (if any) ties to official state organs.

This new environment presents significant challenges to states looking to defend themselves against the threats posed by deep fakes and other information and cyber weapons. As discussed herein, the existing framework for the resort to force in self-defense under the *jus ad bellum* presents significant hurdles to defending against deep fake "attacks" by other states, and holding individuals personally accountable is equally challenging for similar reasons.

This Article will profile the use of deep fake technology as a tool of information (and kinetic) warfare and analyze the adequacy of the *jus ad bellum* and other principles of international law for fighting the (dis)information war.

[1] *See generally* P. W. SINGER & EMERSON T. BROOKING, LIKE WAR: THE WEAPONIZATION OF SOCIAL MEDIA (2018).

Ultimately, this Article concludes that the existing legal paradigm is ill-suited and inadequate to address this emerging threat, and proper state response will require a multi-faceted approach to ensure actors are properly prepared to identify deep fakes and disinformation before they are capable of inciting kinetic violence.

II. WHAT ARE DEEP FAKES?

Combining the terms "deep learning" and "fake,"[2] the portmanteau "deep fake" was originally used to describe the practice by pornographers of interposing the faces of celebrities into sex videos, but has been more recently adopted to encompass the spectrum of "hyper-realistic digital falsification of images, video, and audio."[3] Deep fake technology can be used to modify existing media or used to create completely new images and video.[4] As the technology to create deep fakes has improved, it has also become much more accessible to those with only an average level of digital sophistication. This diffusion of the technology makes deep fakes particularly ripe for abuse by anyone looking to spread disinformation, whether for fun, profit, or strategic gain. When launched into the global network of social media platforms, this convincing form of disinformation has the capacity to spread like wildfire, propelled by algorithms designed to promote viral content and capitalize on user bias.[5]

In recent years, the use of deep fakes has begun to emerge from the shadows, but has done so without a commensurate understanding of the technology and how to spot it (or perhaps, a desire to care in the first place).[6] Demonstrating how pernicious deep fake technology can be is the very basic case of the viral proliferation of a doctored photo and animation of Emma González, a high school student who survived the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida.[7] Ms. González had originally been filmed tearing up a large paper shooting target as part of a piece by Teen Vogue magazine. Subsequent to the video's release, however, still shots and a correlated animation were doctored to depict Ms. González ripping up a copy of the U.S. Constitution, giving visual support to a false narrative that those speaking out in favor of gun control after the Parkland shooting were trampling on the Second Amendment. Both the photo and the animation went viral (despite the obviously

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[2] Jack Langa, *Deepfakes, Real Consequences: Crafting Legislation to Combat Threats Posed by Deepfakes*, 101 B.U. L. REV. 761, 763 (2021).
[3] Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1754 (2019).
[4] *Id.* at 1758.
[5] *See generally id.*
[6] *See* Langa, *supra* note 2; Chesney & Citron, *supra* note 3.
[7] Alex Horton, *A Fake Photo of Emma González Went Viral on the Far Right, Where Parkland Teens are Villains*, WASH. POST (Mar. 26, 2018), https://wapo.st/3RSCcMo; Chesney & Citron, *supra* note 3, at 1755–56.

fake quality of the latter), inflaming the gun debate and maligning Ms. González and the other Parkland victims.[8]

Fortunately, this example was preceded by proliferation of the original image and video, limiting its impact.[9] But the fact that it had any impact at all, despite the fact that many people had already seen the original photo or video, demonstrates the dangerous capacity of disinformation spread through visual media. Moreover, because the doctored images of Emma González were created using basic photoshop tools instead of complex algorithms, they were not even technically considered "deep fakes." As explained herein, real deep fakes have the capacity to create content that will truly deceive the observer into believing that what they are seeing is true, making these tools a powerful weapon in the information war, particularly as the technology improves and becomes more accessible.

A. How Technology Enables the Development and Proliferation of Deep Fakes

Deep fakes are made possible by advances in machine learning (ML) and artificial intelligence (AI). Specifically, deep fakes employ algorithms known as "neural networks" which learn to infer rules and replicate patterns from large data sets.[10] These algorithms are then paired together in "generative adversarial networks," where one algorithm (the "generator") creates content based on existing data (e.g., real pictures or videos of the subject of the content) while the second algorithm (the "discriminator") attempts to spot the real from the fake.[11] The algorithms work together to learn what looks real, resulting in the ability to rapidly develop increasingly realistic content.[12]

Unlike what has historically been required to employ earlier cyberspace weapons, such as viruses, malware, the technology used to create deep fakes is already accessible to the average user, and the knowhow to employ it is a simple YouTube video tutorial away.[13] Despite this ease of access, however, deep fake technology would not be so concerning if it was difficult to distribute the doctored videos to large numbers of viewers. If only a handful of people see a fake video,

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[8] Chesney & Citron, *supra* note 3, at 1757.
[9] *Id.* at 1756.
[10] Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics*, FOREIGN AFF. (Jan/Feb 2019), https://fam.ag/3Mmghfm.
[11] *Id.*
[12] *Id.*
[13] *Id.*; *see also* 2d3d.ai, *Fake Anything: 'The Art of Deep Learning – Deep-Fakes, GANs, Digital Art and a Live Hands-On Session*, YOUTUBE (June 25, 2020), https://bit.ly/3Co1E6Y; Cinnecom.net, *DEEPFAKE Tutorial: A Beginners Guide (using DeepFace Lab),* YOUTUBE (Dec. 10, 2019), https://bit.ly/3rP97a0.

it is hard to imagine a significant impact on domestic discourse or international relations. But in the era of social media platforms like Facebook, Twitter, Instagram, and—most relevant recently—TikTok, every user has the capacity to create and share content with people on the other side of the globe and everywhere in between.[14] Social media platform technology then amplifies these voices through the use of algorithms that promote content based on its virality, rather than its truth.[15] No longer is content curated by a few trusted media outlets; everyone is now a reporter, and recipients of the "news" distributed via this new model are plagued by multiple factors limiting their ability and/or desire to distinguish the real from the fake.[16]

As outlined by Bobby Chesney and Danielle Citron in their discussions of deep fakes, there are three distinct cognitive phenomena at work that amplify the impact of deep fakes in the social media realm.[17] These are: the "information cascade" dynamic, human attention to negative and novel information, and filter bubbles.[18] These three phenomena are explained in detail in the authors' article on deep fakes, but a summary here is useful to understanding how deep fakes might have an outsize effect on behavior in the era of social media.

The "information cascade" dynamic describes the phenomenon whereby people stop paying attention to their own information, instead accepting as true the information shared by others, particularly those in their circles.[19] Regardless of the credibility of the initial claim, the more a piece of information is shared, the more credibility it gains—to the point of being able to override a person's own direct understanding of the information after a certain point.[20]

Second, people have a natural proclivity to be attracted to negative and novel information.[21] In fact, a recent study indicates that human users (i.e., not bots) are more likely to spread falsehoods than truths and falsehoods reach people ten times faster than accurate stories.[22] At the same time, Facebook has been reported to use an algorithm that promotes negative information at a significantly

[14] Chesney & Citron, *supra* note 3, at 1764; *see also*, Horton, *supra* note 7 (describing how the doctored photo of Emma González was shared with a quarter million followers in one retweet by Adam Baldwin).
[15] SINGER & BROOKING, *supra* note 1, at 119–27.
[16] *See generally* Chesney & Citron, *supra* note 3; SINGER & BROOKING, *supra* note 1.
[17] Chesney & Citron, *supra* note 3, at 1765–68.
[18] *Id.* at 1765.
[19] *Id.*
[20] *Id.* (citing DAVID EASLEY & JON KLEINBERG, NETWORKS, CROWDS, AND MARKETS: REASONING ABOUT A HIGHLY CONNECTED WORLD (2010); CASS SUNSTEIN, REPUBLIC.COM 2.0 (2007)).
[21] *Id.* at 1766.
[22] Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News,* ATLANTIC (Mar. 8, 2018), https://bit.ly/3TdiOed; Soroush Vosoughi, Deb Roy, & Sinan Aral, *The Spread of Truth and False News Online*, SCIENCE, Vol. 359, pp. 1146–51 (Mar. 9, 2018).

higher rate than positive information.[23] In this kind of environment, it is not hard to imagine the kind of impact that deep fakes spreading negative disinformation could have.

Finally, "filter bubbles" complete the trifecta of phenomena that promote the proliferation of false media. People naturally tend to surround themselves with like-minded individuals, as well as information that confirms their own beliefs.[24] This behavior is amplified on social media, where algorithms are designed to show users what others in their bubbles have endorsed by "liking" or sharing.[25] The algorithms also are designed to boost content the more it gets shared (i.e., the more viral it becomes, the more likely a user is to find it in their newsfeed).[26]

When information that speaks to a person's bias is shared with them by like-minded friends (or it is shown to be something a friend has endorsed), the filter bubble phenomenon combines with the information cascade dynamic. Add negative or novel information into the mix, and what is created is an environment that is ripe for the rapid proliferation of deep fakes and other disinformation.[27] The speed with which information proliferates also compounds the potential impact of deep fakes. While it may be possible to combat the fake video with truthful depictions, many times the damage is beyond repair by the time one even knows it is there.[28]

Finally, regardless of the content, social media has an increasing ability to impact real world behavior. Providing the ability to reach mass audiences virtually instantaneously, social media gives users an ability to incite real world action in a way not previously provided by traditional media sources.[29] One of the most striking examples of social media's power can be seen by looking at the dawn of the Arab Spring, where the video of a Tunisian man's self-immolation went viral and sparked multiple revolutions across the Arab world.[30] In the future, through the use of convincing deep fakes and other disinformation, the man would not even have to exist—much less set himself on fire—to compel dissidents to violence and political upheaval.

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[23] Keach Hagey & Jeff Horowitz, *Facebook Tried to Make its Platform a Healthier Place. It Got Angrier Instead*, WALL ST. J. (Sept. 15, 2021), https://on.wsj.com/3MltPYI.
[24] Chesney & Citron, *supra* note 3, at 1768.
[25] *Id.*
[26] *Id; see also* SINGER & BROOKING, *supra* note 1, at 119–27.
[27] Chesney & Citron, *supra* note 3, at 1768.
[28] *Id*. at 1772.
[29] SINGER & BROOKING, *supra* note 1, at 11–16.
[30] *Id.* at 84–85.

B. Deep Fakes and Information Warfare

Recognizing its potential for weaponized use, it is clear that deep fake technology represents a national security threat.[31] The use of (dis)information as an instrumentality of war is not new, but "cyberspace presents a force multiplier for [information warfare] activities."[32] And if cyberspace generally presents a force multiplier, social media only makes it worse.

Information warfare is conceptualized as "a strategy for the use and management of information to pursue a competitive advantage."[33] The use of information operations generally supports a parallel use of kinetic operations, and as of 2016, had been used by state and non-state actors to "exploit, disrupt, and disable command and control systems and other critical infrastructure; to disseminate propaganda and disinformation; to foster internal dissent; to recruit and solicit financing; and to promote legitimacy for their actions while discrediting the legitimacy of others."[34] Six years is an eternity for the development of new cyber capabilities, and as such, the threat has evolved even further since the Department of Defense last published its strategy for operations in the information environment.

It is becoming apparent that competition and conflict in the twenty-first century is less about kinetic firepower and more about "those [who are] able to shape the story lines that frame our understanding, to provoke the responses that impel us to action, to connect with us at the most personal level, to build a sense of fellowship, and to organize to do it all on a global scale, again and again."[35] As an example, ISIS was able to quickly overtake Mosul due in significant part to the fact that they used social media to spread videos that instilled fear and panic among the Iraqi forces defending the city, such that many of those forces fled before ISIS even arrived.[36] ISIS is particularly good at using information as a weapon—summarizing its effect in their own propaganda handbook with "[m]edia weapons [can] actually be more potent than atomic bombs."[37]—but they are not the only ones who are mastering the information warfare space in the twenty-first century. Russia's use of information warfare is prolific, whether to intimidate Ukrainian forces in advance of the invasion of the Crimean Peninsula

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[31] KELLY M. SAYLER & LAURIE A. HARRIS, CONG. RSCH. SERV., IF11333, DEEP FAKES AND NATIONAL SECURITY (2021).
[32] CATHERINE A. THEOHARY, CONG. RSCH. SERV., IF10771, DEFENSE PRIMER: INFORMATION OPERATIONS (2020).
[33] *Id.*
[34] Sec'y Ashton Carter, *Foreword to the* DEP'T OF DEF., STRATEGY FOR OPERATIONS IN THE INFORMATION ENVIRONMENT (June 2016).
[35] SINGER & BROOKING, *supra* note 1, at 21.
[36] *Id.* at 4–7.
[37] *Id.* at 148.

in 2014, to influence the 2016 U.S. Presidential election, or as part of its 2022 invasion of Ukraine.[38] And while Russia is probably leading the world in its use of disinformation tools, media manipulation is one of the "Three Warfares" employed by the People's Republic of China (PRC) to achieve national objectives with little to no kinetic engagement.[39]

When considering the potential use of deep fakes, the notable thing about ISIS's success in the information space is that it did not require access to sophisticated technology, education, or skills to mount a traditional cyberattack against opposing networks, infrastructure, or anything else. ISIS did not need to hack the network; all it needed to do was hack the information on it and let social media and its users do the rest.[40] Taking this behavior to the next level in its campaign to interfere with the 2016 U.S. Presidential election, Russia employed the use of bots to create content and amplify the reach of existing content, but the premise was the same.[41] This concept is key to understanding how deep fakes and other disinformation can impact the battlespace. There is no longer the need for sophisticated hacking technology or experience; as long as one understands how to manipulate social media, adversaries can rely on the consumers of their information to do the rest of the harm.

Historically, video has been a useful tool in the fight against information and disinformation operations. The notion that "seeing is believing" underscores the utility of video to verify events, as well as hold accountable the actors involved. Police body cameras are one of the latest examples of how we rely on video more so than any other media to document the "truth." We have grown accustomed to the notion that still pictures may be doctored, and the concept of "fake news" has solidified the belief that print media can be biased, if not outright untruthful. But we have yet to apply this skepticism to video media because the technology to effectively manipulate it has only existed for a short time. As deep fake technology improves, the ability to tell the difference between real and manipulated content may disappear altogether, making it particularly useful to propagandists and disinformation peddlers.

Deep fakes present a second threat to the truth in that they have the capacity to present a scapegoat for individuals who have been caught on camera doing bad things. In an era where deep fakes have become ubiquitous, such an

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[38] *Id.* at 9; Jessica Brandt & Adrianna Pita, *How is Russia Conducting Cyber and Information Warfare in Ukraine?* BROOKINGS, THE CURRENT PODCAST (Mar. 3, 2022), https://brook.gs/3el4Wja.
[39] Doug Livermore, *China's Three Warfares' In Theory and Practice in the South China Sea*, GEO. SEC. STUD. REV. (Mar. 25, 2018), https://bit.ly/3TgvocL.
[40] SINGER & BROOKING, *supra* note 1, at 8.
[41] *Id.* at 142–45. In discussing Russia's use of botnet armies, the authors quote Samuel Woolley, a researcher at Oxford, who observed that "[t]he goal here is not to hack computational systems but to hack free speech and to hack public opinion." *Id.*

individual might claim that the video is a fake, rather than having to deal with the repercussions of whatever bad behavior was caught on video.[42] In this way, deep fakes have the capacity to completely undermine any ability the public may have to tell truth from fiction in any scenario that is not taking place in their own presence.

C. Use (Real and Potential) of Deep Fakes in Information Warfare

There are already multiple examples of using deep fake technology to harass individuals, leading to personal and professional harm.[43] One of the earliest examples of using the technology to harm individuals was through the use of deep fakes to sexually exploit and harass individuals by swapping their faces, voices, and bodies into real pornography, causing both reputational harm and psychological damage.[44] It is not hard to imagine how deep fakes used in this manner, or in any other way that depicts bad behavior, could also be used to sabotage, or hold hostage, the reputations of individuals or organizations. Beyond these specific harms, however, the potential harm to society—its democratic discourse, civility, and assessment of the "truth," as well as concrete harms of violence—demonstrates that deep fakes also present a threat to national security.[45]

The potential for nefarious use of deep fakes is almost limitless. Below, the Article will examine four distinct possible uses of the technology that could threaten national security. The Article begins with a short analysis of the potential for use of deep fake technology to interfere with domestic elections, but then moves on to three ways in which deep fake technology may be used to incite violence or kinetic attack in order to demonstrate both their power as weapons of war and the inadequacy of United States self-defense options against them.

Many of these actions could be taken in concert, as part of a larger strategic effort to use information to sow political discord, undermine popular opinion, or incite violence within an adversary state.[46] While contemporary information operations rely on the use of internet platforms, it is important to note that unlike traditional cyberattacks, the true impact of disinformation fueled by deep fake technology is realized only if there is a susceptible audience who then acts upon the information it receives.[47] This becomes a critical point when it comes to attribution and state responsibility for the behavior that results from

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[42] Chesney & Citron, *supra* note 3, at 1785.
[43] *Id*. at 1755–58, 1771–75.
[44] *Id*. at 1772–73.
[45] *Id*. at 1776–85; SAYLER & HARRIS, *supra* note 31.
[46] *See*, *e.g.,* Robin Geiss & Henning Lahmann, *Working Papers: Protecting the Glob. Info. Space in Times of Armed Conflict* (The Geneva Acad. of Int'l Humanitarian L. & Hum. Rts., Working Paper, Feb. 2021), https://bit.ly/3Cq7kgz.
[47] *See id.* at 6–7.

viewing the deep fake that was created and subsequently distributed by one or many different individuals, most of whom are unlikely to have clear ties to a state organization.

III. HURDLES TO STATE ACTION IN RESPONSE TO WEAPONIZED DEEP FAKES

Recognizing the potential dangers of deep fakes is only the first step. The more critical analysis is how existing law and norms shape what can be done in response to an "attack" using this new weapon. The second half of this Article will thus focus on how international law can be applied to weaponized disinformation, and whether the existing legal framework is sufficient to allow a state to respond to and deter deep fake "attacks." Does the *jus ad bellum* adequately address the weaponization of information as a tool of national power, or does its focus on kinetic attack limit its utility to respond to twenty-first century threats?[48]

A. The Existing Legal Framework

First, it is useful to conduct a brief review of the applicable international law. In 1945, the adoption of the U.N. Charter codified the customary international law principle of *jus ad bellum*. The Charter starts with the notion that all sovereign states are equal, and it protects each state from the use (or threat of use) of force against its territorial integrity or political independence by another state.[49] The Charter authorizes the use of force in two limited circumstances: in self-defense against an (or in anticipation of an imminent) armed attack,[50] or when

[48] As the focus of this Article is on the applicability of international law to defend against kinetic attacks compelled by deep fakes, the applicability of international humanitarian law, while important to the debate on how to respond to deep fake disinformation in the context of an armed conflict, is beyond the scope of the present analysis. Similarly, the Article will not spend time discussing the applicability of domestic law enforcement mechanisms that may be used to combat the use of deep fakes by American citizens. Such a discussion opens the door to debates over constitutional rights, privacy laws, and the overlapping roles of domestic law enforcement agencies, each of which merits its own thorough examination.

[49] U.N. Charter art. 2.

[50] U.N. Charter art. 51; *see also* JOHN BASSETT MOORE, DIG. OF INT'L L. Vol. II 24–30, 409–14, Vol. VI 261–62, Vol. VII 919–20 (1906), *reprinted in The Caroline*, in 4 TREATIES & OTHER INT'L ACTS OF THE U.S.A. 1836–46 (Hunter Miller ed., Gov't Printing Office 1934) [hereinafter *Caroline*], https://bit.ly/3EtMEXM; Elizabeth Wilmshurst, *Principles of Int'l L. on the Use of Force by States in Self-Defence* 5–6 (Chatham House ILP WP 05/01, 2005), *reprinted in* Elizabeth Wilmshurst, *The Chatham House Principles of Int'l L. on the Use of Fore in Self-Defence,* 55 INT'L. & COMPAR. L. Q. 963, 965 (2006) [hereinafter *Chatham House*]. Distinct from the prevailing international opinion, which differentiates between an unlawful use of force and an armed attack, the United States considers an armed attack to be any unlawful use of force under Article 2(4). *See* Ryan Goodman, *Cyber Operations and the U.S. Definition of "Armed Attack"*, JUST SEC. (Mar. 8, 2018), https://bit.ly/3Cx4Pt8.

sanctioned by the U.N. Security Council to restore international peace and security in response to a threat to the peace, breach of the peace, or act of aggression.[51] Short of the authorized use of force, the principle of the sovereign equality of all states prohibits unlawful intervention into another state by one state in the exercise of its sovereign rights.[52] Appropriate responses to unlawful intervention include the use of retorsion and/or countermeasures. Retorsion is the use of lawful means to challenge unlawful behavior (e.g., economic sanctions, diplomatic pressure, etc.),[53] whereas countermeasures are the limited use of unlawful means by one state to stop the unlawful behavior of another state.[54]

Even if a state suffers an armed attack, however, it is not free to utilize an uninhibited use of force against the offending state. By recognizing the "inherent right to self-defense," Article 51 of the U.N. Charter adopts the customary international law principles of necessity and proportionality under the *jus ad bellum*.[55] Pursuant to these requirements, a use of force in self-defense must be necessary to prevent further unlawful activity or use of force by the offending party, and such force must be proportionate to the threat from the offending party.[56] If an attack has not yet occurred, the use of force may only be used to defend against the threat of an attack that is imminent.[57]

These general principles of international law are applied to cyberspace by the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (hereinafter "Tallinn 2.0"). Disinformation is not limited to cyberspace, but as contemporary information operations are particularly powerful when launched from and into online information platforms, Tallinn 2.0 provides relevant analysis for appropriate response.

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[51] U.N. Charter art. 42.

[52] *See* G.A. RES. 2131 (XX) (Dec. 21, 1965), https://bit.ly/3RRq6Dq; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 176, 188–92 (June 27*)* [hereinafter Nicaragua], https://bit.ly/3CPwNS4.

[53] *Retorsion*, THE NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, Cyberlaw Toolkit, https://bit.ly/3Mp67ef (June 22, 2022, 2:12 PM); *see also* Off. Compendium of Voluntary Nat'l Contributions on the Subject of How Int'l Law Applies to the Use of Info. and Commc'n Tech. by States Submitted by Participating Governmental Experts in the Grp. of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of Int'l Sec. Established Pursuant to General Assembly Resolution 73/266, U.N. DOC. A/76/136, at 8, 10 (July 13, 2021), https://bit.ly/3fNvCcH.

[54] Int'l Law. Comm'n, Rep on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 27, 30 (2001) [hereinafter Draft Articles], https://bit.ly/3EE6qQx. Tallinn 2.0 also makes it clear that countermeasures may not be taken in anticipation of an attack, nor to prevent unlawful intervention (for example, use of social media to incite violence in another country). *See* TALLINN MANUAL 2.0 ON THE INT'L LAW APPLICABLE TO CYBER OPERATIONS Rule 21 ¶ 5, Rule 72 (Michael N. Schmitt, ed. 2017) [hereinafter TALLINN 2.0].

[55] Nicaragua, *supra* note 52, ¶ 176.

[56] TALLINN 2.0, *supra* note 54, Rule 72.

[57] *Chatham House*, *supra* note 50, at 4–5; *see Caroline*, *supra* note 50.

Tallinn 2.0 is not a treaty and does not have the force of law. Rather, it is the effort of an international group of experts to identify the law as it currently exists (*lex lata*) as demonstrated through state practice.[58] Through this process, Tallinn 2.0 attempts to assess how applicable the existing international law framework is to the new problems posed by cyber operations and warfare, as well as where there is agreement and disagreement about appropriate application of existing paradigms.[59]

As a starting point, Tallinn 2.0 asserts that international law applies in the digital domain and adopts the same prohibitions on unlawful intervention and the use of force present in existing international law and codified by the U.N. Charter.[60] Recognizing that cyberspace offers a wealth of opportunities for meddling in the internal or external affairs of another state, Tallinn 2.0 makes it clear that the rule against unlawful intervention applies only to *coercive* intervention between state actors or agents thereof.[61]

Next, Tallinn 2.0 applies the "scale and effects" test first introduced by the International Court of Justice (ICJ) in *Nicaragua* to assess whether a cyber operation qualifies as an armed attack.[62] What amounts to an armed attack under this standard is not clear, however, and Tallinn 2.0 only indicates that it must be "grave."[63] The clearest case of a cyberattack amounting to an armed attack is where it "seriously injures or kills a number of persons or . . . causes significant damage to, or destruction of, property."[64] Short of this clear threshold, there is significant debate over what kinds of scale and effects are enough to meet the standard.[65]

Interestingly, Tallinn 2.0 includes in its discussion of the definition of "cyberattack" the idea that the "effects" should be considered in the context of the consequences of the act, rather than just the act itself. In other words, if a cyber operation causes violence or destruction, it amounts to a cyberattack, even if the actual operation was not inherently violent.[66] Moreover, the International Group

[58] TALLINN 2.0, *supra* note 54, at 2–3.
[59] *Id.* at 3–4.
[60] *Id.* Rule 66, Rule 68.
[61] *Id.* Rule 66.
[62] *Id.* Rule 69, Rule 71 ⁋ 7; Nicaragua, *supra* note 52, ⁋ 195.
[63] TALLINN 2.0, *supra* note 54, Rule 71 ⁋ 7.
[64] *Id*. Rule 71 ⁋ 8.
[65] *See generally id.* Rule 71. It should also be noted that the International Group of Experts responsible for the Tallinn Manual 2.0 take the position that there may be unlawful uses of force under Article 2(4) of the U.N. Charter that do not rise to the level of an armed attack. In other words, all armed attacks are unlawful uses of force, but not all unlawful uses of force are armed attacks. The United States does not subscribe to this position, but rather, considers all unlawful uses of force to constitute armed attacks giving rise to the right of self-defense under Article 51. *See* Goodman, *supra* note 50.
[66] TALLINN 2.0, *supra* note 54, Rule 92 ⁋ 3.

of Experts who drafted Tallinn 2.0 observed: "a cyber operation might not result in the requisite harm to the object of the operation, but cause foreseeable collateral damage at the level set forth in this Rule. Such an operation amounts to an attack."[67] Although this discussion appears within the part of Tallinn 2.0 that discusses the law of cyber armed conflict (i.e., the application of *jus in bello* to cyber operations), the focus on the consequences of the act, rather than the act itself, reflects the same analytical framework as the "scale and effects" test rule proposed in the discussion of the right to self-defense. This discussion might open the door to consider the consequences of a deep fake or other disinformation promulgated in cyberspace in determining whether it meets the threshold for an armed attack.[68]

Meeting the definition of "armed attack" is just the first step. Even if a deep fake "attack" could meet the "scale and effects" threshold, the problems of proper attribution and imminence—as well as necessity and proportionality—remain. As an international legal framework, the *jus ad bellum* governs only the resort to force between state actors, allowing states to take action only against unlawful behavior that has been properly attributed to other *states*.[69] This is no different in the cyber context, as Tallinn 2.0 identifies.[70] As discussed further here, attributing the development or launching of deep fakes for nefarious purposes to a state actor is a significant hurdle under the existing standards for state responsibility. However, even if attribution is possible (or becomes so with future technological advances), nothing in the *jus ad bellum*/Article 51 framework, even as interpreted by Tallinn 2.0, adequately addresses the threats posed by "lone wolf" actors developing and launching deep fakes without state backing, even if such deep fakes could result in injury, death, damage, or destruction commensurate with an armed attack.

B. Appropriate Responses Under International Law—The "What"

This basic review of legal authorities reveals how the authority to respond to the use of deep fakes in the disinformation war will depend on how

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[67] *Id.* Rule 92 ⁋ 15.

[68] Interestingly, the commentary to Rule 92 goes pretty far down the road of what constitutes an effect of a targeted cyber operation to include any "reasonably foreseeable consequential damage, destruction, injury, or death." *Id.* Rule 92 ⁋ 5. It also explains that attacks against data systems qualify as attacks against persons or objects under the Rule if there is injury or death to individuals or damage or destruction of property, if such injury, death, damage, or destruction was a reasonably foreseeable consequence of the data attack. It also includes "serious illness" and "severe mental suffering" tantamount to injury, concluding that terror thus qualifies as an "injury" under this Rule. *Id.* Rule 92 ⁋⁋ 5–6, 8.

[69] *See* U.N. Charter art. 51; *see generally* Draft Articles, *supra* note 54, at 38–54 (Chapter II: Attribution of Conduct to a State).

[70] *See, e.g.*, TALLINN 2.0, *supra* note 54, Rule 20 (discussing countermeasures), Rule 68 ⁋ 5 (discussing the use of force), Rule 71 ⁋ 18 (discussing the right of self-defense in response to an armed attack).

such use is categorized under international law. If deep fakes and disinformation are used merely to meddle or interfere with certain processes or institutions within another country, such action might be considered an unlawful violation of that state's sovereignty, but not give rise to any significant recourse for the aggrieved state beyond retorsion. If the behavior goes further and intervenes in the domestic affairs of the state, it may violate the prohibition on unlawful intervention, potentially authorizing the use of countermeasures. However, this would be the case only if the offense is properly attributed to a state and the other requirements for employing countermeasures are followed. Finally, if a disinformation operation produces tangible effects that compare to the effects of a kinetic attack, it may be considered to be an unlawful use of force or even an armed attack, but response options are still constrained by the need to attribute the action to the right actor and to meet the requirements of necessity and proportionality.

Applying this legal framework to concrete examples begins to demonstrate how ill-suited it is to the problem of deep fakes. In a very basic (but very likely) scenario, deep fakes could easily be employed as a tool of election interference. Recognizing that election interference would likely never result in the impact required to be considered an armed attack, the analysis shifts to the gray area between peace and conflict in which *most* information operations occur. At this point, the question becomes whether it is merely a violation of sovereignty, unlawful intervention, or both. Sovereignty can be violated both physically, by infringement into a state's sovereign territory, or by interference in an inherently governmental function.[71] Violating the principle of non-intervention requires coercion of the internal processes of a sovereign state.[72] Given the significant role of free elections in a democratic republic, election interference is most appropriately categorized as an unlawful intervention in a state's sovereign process. The victim state's recourse to an unlawful intervention in its domestic affairs is limited to acts of retorsion or, if the unlawful activity is ongoing, countermeasures to induce the offending state to stop. As explained below, state attribution for any cyberspace-based behavior becomes a significant hurdle, even for these "below the threshold" responses.[73]

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[71] Some states (including the United States) do not recognize sovereignty as a unique threshold in international law, but rather, as a principle underlying all other international norms. *See* Sean Watts & Theodore Richard, *Baseline Territorial Sovereignty and Cyberspace*, 22 LEWIS & CLARK L. REV. 771, 829 (2018) (quoting a 2017 statement by Department of Defense General Counsel, Jennifer M. O'Connor: "there is insufficient evidence of state practice or *opinio juris* to support the assertion that sovereignty acts as a binding legal norm, proscribing cyber actions by one State that result in effects occurring on the infrastructure located in another State, or that are manifest in another State.").

[72] Nicaragua, *supra* note 52, ⁋ 186; *see also* TALLINN 2.0, *supra* note 54, Rule 4 ⁋ 22.

[73] Although outside the scope of this Article, there is significant debate over appropriate measures in response to cyberattacks, given what some consider to be an ill-fitting legal framework for cyberspace. For example, some argue that requiring state attribution before undertaking countermeasures can hinder defensive operations in what are usually very time-constrained scenarios.

To analyze whether the current legal framework adequately addresses the use of deep fakes that *could* produce kinetic effects, the Article considers three possible scenarios:

- *A video depicting U.S. soldiers murdering innocent civilians in a war zone, leading to waves of violence, counterattacks, and disruption of peace efforts.*

- *A video depicting U.S. preparation for a strike against nuclear sites in North Korea, leading North Korea to prepare a strike on the United States under the guise of anticipatory self-defense, resulting in mass panic and the potential for significant loss of American lives.*

- *A Russian-launched video of the U.S. President formally recognizing Taiwan as an independent state as a way to draw the United States into greater conflict with the PRC and diverting U.S. attention from Russia's invasion of Ukraine.*

It is conceivable that these scenarios could produce impacts on a similar scale and produce similar effects as a kinetic operation.[74] The scenario of a deep fake depicting U.S. troops murdering civilians—a war crime—has the capacity to result in significant loss of both military and civilian lives in the conflict zone as a result of retaliatory attacks. It also has the potential to cause devastating political and diplomatic damage against the United States, resulting in disruption to peace efforts, damage to allied relationships, and diminished legitimacy of the United States in the international legal order.

Further, if the fake video depiction of the United States preparing a strike against the Democratic People's Republic of Korea (DPRK) induces President Kim Jong-un to prepare a strike in anticipatory self-defense, the impact could be truly grave. That tensions between the United States and the DPRK are as strained as they are might lead Kim and others to more readily believe the fake, as it speaks to their own biases vis-à-vis an adversary (and could also provide easy justification to mount a peremptory strike).

An even more likely use of a deep fake is by one adversary to distract the United States by embroiling it in a different conflict. Based on Russia's prolific and influential use of disinformation thus far, it is easily conceivable that they might use a deep fake to draw U.S. attention towards a conflict with China by depicting a formal recognition of Taiwan, which would enrage Beijing and

[74] TALLINN 2.0, *supra* note 54, Rule 71.

likely lead it to increase its military aggression against the United States and Taiwan. The reaction to Nancy Pelosi's recent visit to Taiwan suggests just how sensitive the PRC is on this issue,[75] and a convincing deep fake may be all it would take to push Beijing over the edge to military action.

The United States has the authority under Article 51 to defend itself from attacks by state actors (as well as non-state actors like ISIS, albeit under a potentially different analysis),[76] and this right extends to anticipatory self-defense in cases in which an armed attack is imminent,[77] as well as collective self-defense of other *states* under Article 51. Therefore, the United States could definitely respond to, and most likely preempt, an armed attack by the DPRK or ISIS, assuming it had adequate intelligence to support the necessity and proportionality requirements under the *jus ad bellum* as the imminence of an attack. Similarly, U.S. troops have the right to protect themselves against armed attacks in a war zone under either the principles of *jus in bello* (assuming there is an ongoing armed conflict) or the *jus ad bellum* if hostilities have officially concluded. Preventing a significant impact in any of these scenarios presupposes that the United States will have adequate intelligence to recognize the threat before the actors engage. Still, part of that intelligence picture could be the existence of the deep fake overlaid with other factors that would compel states or non-state actors to engage (e.g., political temperatures, previous statements, the potential effect on expected audience, etc.). But what happens when the deep fake changes the intelligence picture completely? What if Russia releases the "Taiwan recognition" deep fake only to targeted networks within China, such that it changes Beijing's calculus before the United States recognizes what has happened and after it is too late to correct the damage?

To respond in self-defense to the initial creation or dissemination of the deep fake would be ideal, but this is a much more complicated question. It is easy to see how deep fakes could easily be employed as the spark necessary to ignite a powder keg of violence and other kinetic activity (as with the Tunisian man who sparked the Arab Spring). But the deep fake itself does not meet the scale and effects of a kinetic attack; it is just a video. Somewhat analogous to the proximate cause analysis in American tort law, where several actors are involved, the question is whose action was most directly responsible for the resulting damage. The present question similarly becomes: was the deep fake the proximate case of the violence? In other words, in the context of the discussion in Tallinn 2.0, is the

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[75] Paul Mozur, Amy Chang Chien, John Liu, & Chris Buckley, *Taiwan Greets Pelosi Warmly, as China Responds with Threats of Reprisal,* N.Y. TIMES (Aug. 3, 2022), https://nyti.ms/3ywoTue.

[76] *See* Terry D. Gill & Kinga Tibori-Szabó, *Twelve Key Questions on Self-Defense against Non-State Actors,* 95 INT'L. L. STUD. 467 (2019); Nicholas Tsagourias, *Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN J. INT'L. L. 801 (2016).

[77] *Caroline*, *supra* note 50; *Chatham House*, *supra* note 50.

violence both a "grave" and "foreseeable" consequence of the deep fake? In all of the examples outlined above, the resulting death and destruction presumably come at the hands of third parties. Without the deep fake, the violence may not have occurred; however, without the third parties, the violence would likely not have occurred (or would have likely not occurred *at that moment*).

Moreover, when an armed attack has not yet occurred, the existing legal framework requires an attack to be imminent.[78] Speculation that an attack may occur as the result of certain behavior is not enough, and neither force nor countermeasures may be used to prevent future attacks.[79] As such, without more (e.g., additional action by the third-party actor demonstrating an imminent threat), satisfying the imminence requirement is likely to be a significant hurdle to fighting the use of deep fakes before they result in kinetic violence.

C. Appropriate Targets for Response Under International Law—The "Who"

Even if there might be a scenario in which a deep fake may on its own constitute an imminent threat (perhaps with enough intel supporting the notion that the deep fake will incite specific violence), another significant hurdle is the proper attribution of the deep fake. Attribution is a problem with any cyber operation,[80] but it is magnified with disinformation operations because the creator of the deep fake or other information "weapon" may not be the one who eventually uses it, and as discussed above, a third (or fourth) party usually produces the kinetic effects contemplated under Tallinn 2.0. Without clear attribution, the requirements of necessity and proportionality under *jus ad bellum* cannot be satisfied.[81] Further, suppose the act cannot be attributed to a particular state. In that case, responding with force to non-state actors runs the risk of violating the sovereignty of the state in which they are based, rendering the aggrieved party now the offending party.[82]

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[78] *Caroline*, *supra* note 50.
[79] *Chatham House*, *supra* note 50, at 965.
[80] *See* TALLINN 2.0, *supra* note 54, Rule 71.
[81] The analysis of these two critical requirements also becomes more complex in the context of deep fakes. The principle of necessity dictates that a state may use only the force necessary to stop an ongoing attack or prevent an imminent attack. Once the attack is complete, force is no longer authorized under *jus ad bellum*. The use of deep fakes introduces a myriad of questions to this analysis: What actually constitutes the "attack"—the dissemination of the deep fake or its receipt by a violent/ready actor? How do we know when the "attack" is complete? How can we assess whether the ultimate "effect" is complete? Similarly, standard considerations of what constitutes a proportionate response fail to address the actions of a party that is at least one degree of separation removed from the violent actor(s).
[82] *See* TALLINN 2.0, *supra* note 54, Rule 71 ¶ 25; *see also* Tsagourias, *supra* note 76.

The technical obstacles to attribution alone are significant, but a complete survey of the capabilities required to pinpoint specific actors in cyberspace is beyond the scope of this Article. For the present purpose, the Article will assume that it is possible to determine a deep fake's point of entry into cyberspace. If it is not already, it will soon be possible to determine who created the deep fake through analysis of digital signatures or other unique identifiers.[83] Beyond the technical hurdles, attribution also commonly requires the revelation of one's own cyber capabilities, the absence of which risks delegitimizing any responsive action due to a lack of sufficient evidence.[84] Proper attribution is a complex problem that "requires input from a range of actors and sources, including technical forensics, human intelligence, signals intelligence, history, and diplomatic relations."[85] Assuming identification is possible and desirable, however, the bad behavior must still be attributed to a state before the United States can act under existing international law.[86]

Tallinn 2.0 articulates that a "State bears international responsibility for a cyber-related act that is attributed to the State and that constitutes a breach of international legal obligation."[87] The conduct of non-state actors will only be considered an act of a state, however, if the "person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[88] This standard comes from customary international law and was first articulated in the *Nicaragua* case, wherein the ICJ found that, despite significant help, the Contras were not under the control of the United States such that they could be considered to be acting on its behalf.[89] In referring to the ICJ's decision in *Nicaragua*, the International Group of Experts noted,

> A State's general support for or encouragement of a non-State actor or its cyber operations is insufficient to establish attribution. In particular, "effective control" does not involve a State merely supplementing a non-State actor's cyber activities or assuming responsibility for performing a particular function.

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[83] Note, however, that this is not guaranteed, in that hackers and cyber criminals are always finding ways to stay ahead of detection, and that attacks launched from within the United States also face Fourth Amendment hurdles to tracking and tracing. *See* William Banks, *Cyber Attribution and State Responsibility*, 97 INT'L. L. STUD. 1039, 1053 (2021).
[84] *Id.* at 1042–43.
[85] *Id.* at 1052.
[86] *See* TALLINN 2.0, *supra* note 54, Rule 33 ¶ 2 ("The [International Group of Experts] agreed that cyber operations conducted by non-State actors that are not attributable to States (Rules 15 and 17) do not violate the sovereignty of the State into which they are launched (Rule 4), constitute intervention (Rule 66), or amount to a use of force (Rule 68) because these breaches can be committed only by States.").
[87] *Id*. at Rule 14.
[88] Draft Articles, *supra* note 54, art. 8; TALLINN 2.0, *supra* note 54, Rule 17.
[89] Nicaragua, *supra* note 52, ¶ 109.

> For example, the provision of malware by a State to a non-State actor does not amount, without more, to effective control over operations conducted by the group using that malware.[90]

Establishing the relationship between the state and the non-state actors operating in cyberspace requires significant intelligence (and potentially the revelation of methods), making it just as challenging as the technical attribution in the first place.

This discussion highlights how difficult it is to apply the existing legal framework of *jus ad bellum* self-defense to the threat of weaponized disinformation. To date, international legal scholars have accepted (or have been forced to accept) the notion that norms established decades before the digital world was envisioned can still be used in the cyber frontier. In certain circumstances, the existing framework can help limit state action in what might otherwise be a limitless escalation of cyber operations with potentially devastating effects. However, as deep fake technology evolves and becomes more appealing to our adversaries, state actors will be forced to move past the traditional perspective of information operations as a passive tactic attendant to kinetic operations and treat its weaponization like we do other weapons. Without reconsidering how to apply international law and norms in the cyber disinformation context, weaponized deep fakes will become increasingly popular, and state actor accountability will remain elusive.

IV. INDIVIDUAL ACCOUNTABILITY FOR DEEP FAKES UNDER INTERNATIONAL LAW

Without a good avenue to state responsibility, it may be tempting to suggest that this problem can be addressed by holding accountable the individuals responsible for creating or introducing the deep fake. Ultimately, deep fakes are created by people, and those people are arguably the most culpable for a deep fake designed to incite violence or compel attack. While there *is* some precedent for holding those who have incited others to grave violence accountable for their actions, the threshold for such is significant enough that accountability for most individual creators is likely to remain elusive under existing laws and norms.

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[90] TALLINN 2.0, *supra* note 54, Rule 17 ¶ 8. There is one caveat to this rule, in that the "rules of attribution . . . have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects." Draft Articles, *supra* note 54, at ch. II, para. 4. Tallinn 2.0 carves out a similar exception, stating, "[i]n some cases, the failure of a State to terminate cyber operations conducted by non-State actors on its territory will constitute a breach of the requirement to exercise due diligence." TALLINN 2.0, *supra* note 54, Rule 33 ¶ 3.

A threshold issue for individual accountability—whether under international or domestic law—is that the creation of deep fakes is likely protected by the right to freedom of expression under international human rights law. Freedom of speech and expression is protected by the International Covenant on Civil and Political Rights (ICCPR), the provisions of which are incorporated into the domestic law of state parties.[91] Though this freedom is not unfettered—Article 20 of the ICCPR prohibits propaganda for war or "advocacy of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence"[92]—overcoming the presumption of protected speech can be difficult. Additionally, because the ICCPR lacks a robust direct enforcement mechanism, the best enforcement of its provisions comes from either domestic laws[93] or through the decisions of regional courts like the European Court of Human Rights.[94] In these cases, any law in support of Article 20 of the ICCPR must be carefully balanced against the right to freedom of expression, for which the U.N. Office of the High Commissioner for Human Rights has adopted a six-part test.[95] Known as the Rabat Plan of Action, the test considers the following: (1) the context of the statement (particularly social and political at the time); (2) the speaker's position or status; (3) whether there is intent to incite the audience against a target group (noting that negligence and recklessness are not enough); (4) content and form of the statement; (5) extent of its dissemination; and (6) likelihood of harm, including imminence. The extensiveness of the Rabat Plan of Action reflects similar considerations as those required under the self-defense analysis (i.e., imminence and identity of the speaker), but adds other requirements to consider context and intent, suggesting that challenges to deep fakes under human rights law could be just as problematic as they are under the *jus ad bellum*.

An alternative paradigm used to challenge inciting language can be found in the Media Case that was tried before the International Criminal Tribunal for Rwanda (ICTR).[96] In that case, three members of the Rwandan news media

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[91] G.A. Res 2200A (XXI), International Covenant on Civil and Political Rights, art. 19 (Dec. 16, 1966).
[92] *Id.* art. 20.
[93] *Id.* art. 2.
[94] *See* Surek & Özdemir v. Turkey, Apps No. 23927/94, 24277/94, Eur. Ct. H.R. (1999). The "court found that the conviction of a publisher for mere publication of an interview with a member of a criminal organisation was an unjustified restriction of the right to freedom of expression. In evaluating the necessity of the interference, it had particular regard for the context in which the statements were published. The court found that the published text as a whole could not be considered to incite violence or hatred. The expressions that were used showed a strong resistance against the government, raising concerns for authorities, but it was not inciting violence, since the purpose of the interview was to provide newsworthy content. This shows that there must be a certain illegitimate purpose to incite violence, which should be distinguished from any legitimate purpose." Mari Sewell, *The Use And Abuse Of Online Platforms: What Happens To Freedom Of Expression When The Internet Is Used As A Tool To Incite Violence?*, HUM. RTS. PULSE (July 1, 2021), https://bit.ly/3VeUvhX.
[95] *OHCHR and Freedom of Expression vs. Incitement to Hatred: the Rabat Plan of Action*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS., https://bit.ly/3EyWAz3.
[96] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, 2003 (Dec. 3, 2003).

were convicted of inciting genocide through their radio and print comments during the 1994 genocide in Rwanda. In its judgment, the ICTR trial court found that "direct and public incitement to commit genocide" under Article 2(3) of the ICTR Statute was an inchoate offense under the Genocide Convention but stated that instigation "incurs criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute."[97] The court also articulated that there needed to be more than a vague or indirect suggestion to be guilty of "direct and public incitement to commit genocide," requiring a direct appeal to commit the act.[98] In other words, the defendants would not have been found guilty for mere hate speech that did not directly call for the commission of genocide. Finally, and most relevant to the present discussion, the court considered whether "the persons for whom the message was intended immediately grasped the implication thereof," suggesting that how communications are received is germane to how those sending them can be held responsible.

These examples provide insight into how we might be able to deter deep fake creation and dissemination using legal remedies beyond the *jus ad bellum*. However, each of these paradigms will only produce accountability after the damage has been done, and again, only if it is possible to attribute the ultimate violence to a particular party. Neither the human rights nor the criminal law paradigm offers a means to preempt the bad behavior or act in anticipation of violence and kinetic impact. Further, the Rabat Plan of Action and the ICTR Media Case demonstrate the depth and scope of factors that must be satisfied before the right to free speech is overcome. Therefore, while there are other avenues by which to pursue, and thereby perhaps deter, the creation of deep fakes, it is likely that only the most obvious and egregious actors will be held liable under these frameworks. By the time these avenues may be pursued, *after* the damage has been done, the *jus ad bellum* has also regained its usefulness in response to a kinetic attack.

V. CONCLUSION

Deep fakes present a critical challenge in the new information war. More pernicious than any mode of information operations to date, deep fakes have the capacity to rewrite the facts upon which critical national security decisions are based. Further, social media acts as an accelerant, spreading disinformation faster than truth across the globe in minutes. It is conceivable that by merely hijacking the information, United States' adversaries would no longer need to hijack our networks or use kinetic means. Rather, by simply planting disinformation in the

[97] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Appeals Judgement, at para. 678 (Nov. 28, 2007).
[98] *Id.* at para. 692.

fertile soil of social media, bad actors can induce others to do the dirty work with just a few clicks.

Combatting this new tool will be an ongoing challenge. Despite the potentially grave effects induced by a deep fake, justifying the use of force under the *jus ad bellum* in response to creating and disseminating a deep fake is difficult, perhaps prohibitively so. To be sure, force is always authorized in self-defense in response to actual kinetic effects, but getting ahead of the ball by targeting those responsible for the deep fake that incited the violent response is fraught with significant challenges, including imminence concerns, appropriate attribution, and assigning state responsibility. Without the ability to satisfy these legal threshold matters, challenging deep fakes will most likely remain in the gray zone of operations where we currently find most cyber operations (e.g., "hacking back," covert action, etc.). Further, international legal paradigms that offer other ways to address the issue are likely only appropriate in the most severe cases, as any prosecution of deep fake creation must be balanced against strong domestic and international protections for the freedom of speech and expression.

As deep fake technology becomes more accessible, their use and distribution via social media will likely become more frequent, and the resulting disinformation likely be more ubiquitous. This will continue to present significant challenges to ensuring that national security decisions are made on good facts. Existing legal paradigms are not well-suited to this twenty-first-century challenge. If and when they are used as an instrument of war (not just the information war, but as incitement to actual violence), deep fakes will remain a threat that can inflict significant damage that states cannot properly prevent under existing legal norms. As we have seen with other aspects of cybersecurity, the most effective approach to challenging deep fakes will likely require a multifaceted approach using more than just legal tools, including investment in technology capable of identifying fake media and civic campaigns to foster information awareness among both leaders and citizens. Ultimately, we will need to ensure operators and decision-makers remain vigilant information consumers, because seeing is no longer believing. Without a more adaptive legal framework at our disposal, we can only play defense.

RETHINKING DEPARTMENT OF VETERANS AFFAIRS DEFERENCE TO SERVICE DEPARTMENT LINE OF DUTY DETERMINATIONS: HOW DO THE VARIATIONS IN LINE OF DUTY REGULATIONS COST SERVICE MEMBERS, AND HOW CAN THE SYSTEM BE IMPROVED?

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This Note examines the discrepancies in Line of Duty (LOD) regulations between the Army, Navy and Marine Corps, Air Force, and Coast Guard. The inconsistencies, and the likelihood that commanders do not know that LOD determinations are binding on the Department of Veterans Affairs (VA), combine to disadvantage service members and may result in an undeserved denial of future benefits. The major discrepancies between branches are: (1) obscurity in when LOD investigations are required; (2) differences in evidentiary standards to refute favorable presumptions; (3) limits on the rights of service members resulting from poor explanation of rights and inconsistencies between the branches; and (4) inadequacies in the branches' explanations of the VA's handling of service department LOD determinations. Despite these issues, service department LOD determinations are binding on the VA. This cannot continue; service members should not be disadvantaged when applying for VA benefits simply because they served in the Army instead of the Navy, for example. Therefore, to ensure equality, this Note proposes that LOD regulations should be revised to be consistent across all branches.

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I. INTRODUCTION

For any military leader, initiating and conducting line of duty (LOD) investigations is a part of leading Soldiers, Sailors, Marines, Airmen, or Coast Guardsmen. While commanders may become familiar with the LOD regulations for their specific military branch, most are unaware of how these service regulations compare to other branches or the long-term ramifications and uses of LOD investigations and the LOD determinations made therein. Specifically, commanders should be informed that their LOD determinations are binding on the VA, so that they are not inadvertently failing those who they lead.

This Note first seeks to compare the line of duty regulations of the Army, Navy and Marine Corps, Air Force, and Coast Guard. This leads to an inevitable discussion of the problems that arise out of the discrepancies between the branches, including the differences as to when LOD determinations are required, variances in evidentiary standards needed to rebut favorable presumptions, and conflicts regarding the exclusion of evidence taken in violation of required warnings. Next, the Note introduces the statutory basis for binding the Department of Veterans Affairs (VA) to decisions made by the service departments regarding LOD determinations. Then, it explores the court decisions that solidify the VA's deference to service department decisions. Despite case law supporting that service departments are in the best position to make these calls, the inconsistencies in regulations are getting in the way of proper execution, so this Note proposes revising LOD regulations across all branches to ensure that service members have the best chance at receiving the VA benefits they earned.

II. LINE OF DUTY INVESTIGATION REGULATIONS COMPARED: DISCREPANCIES AND CONSEQUENTIAL ISSUES

As anyone familiar with military regulations may expect, guidance regarding LOD investigations, LOD determinations, and when the investigations and determinations are required varies between military branches. This part explores those differences and compares the various instructions of the respective military branches. Each subpart addresses how the regulations vary between the Army, Navy and Marine Corps, Air Force, and Coast Guard. The National Guard falls under the Army for the purposes of regulations, but specific concerns relating to the National Guard are also addressed when relevant to the discussion. This Part points out the consequential issues that arise from the discrepancies, including ways in which members of certain branches are advantaged over members of other branches.

A. The Sources Explored

The Army's regulation for LOD investigations and determinations is found within Army Regulation (AR) 600-8-4, titled Line of Duty Policy, Procedures, and Investigations.[1] It was most recently updated and published on November 12, 2020.[2] AR 600-8-4 also applies to the National Guard, and there are specific provisions for reservists throughout the regulation that only apply to Soldiers in the National Guard.[3] The Navy and Marine Corps fall under the same authority for LOD investigations; the guidance is found in the Manual of the Judge Advocate General ("JAGMAN"), under Part E: Line of Duty/Misconduct.[4] It was most recently updated and published on January 15, 2021.[5] For clarity, throughout the Note the JAGMAN will be referred to as "Navy regulation," but it also governs Marine Corps personnel. The Air Force's guidance for LOD investigations is found under Air Force Instruction 36-2910, titled Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay.[6] It was most recently updated and published on September 3, 2021.[7] The Coast Guard's instruction for LOD investigations is found in Commandant Instruction M5830.1A, the Administrative Investigations Manual. Specifically, the guidance is found in Chapter 7, Investigation of Disease, Injury, or Death.[8] The manual was most recently updated and published on September 7, 2007.[9]

B. When Line of Duty Investigations are Required

AR 600-8-4 delineates that a LOD investigation is required for both active and reserve Soldiers if the Soldier loses more than 24 hours of duty time and (1) the injury, illness, or disease is determined by a physician, physician assistant, or nurse practitioner to be of "lasting significance"; (2) there is a likelihood for permanent disability to result; or (3) a reserve component Soldier requires follow-on care.[10] Out of all the branches' respective regulations, only the

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[1] U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (12 Nov. 2020) [hereinafter AR 600-8-4].
[2] *Id.*
[3] *Id.*
[4] U.S. DEP'T OF NAVY, JAGINST 5800.7G, MANUAL OF THE JUDGE ADVOCATE GENERAL pt. E (15 Jan. 2021) [hereinafter JAGMAN].
[5] *Id.*
[6] U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (LOD) DETERMINATION, MEDICAL CONTINUATION (MEDCON), AND INCAPACITATION (INCAP) PAY Ch. 7 (3 Sep. 2021) [hereinafter AFI 36-2910].
[7] *Id.*
[8] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 5830.1A, ADMINISTRATIVE INVESTIGATIONS MANUAL (7 Sep. 2007) [hereinafter COMDTINST M5830.1A].
[9] *Id*.
[10] AR 600-8-4, *supra* note 1, ¶ 2-2.

Army regulation requires that a medical professional determine the injury is of "lasting significance." However, the Army regulation does not explain what constitutes an injury of "lasting significance."[11] The only possible clarification is in section 5-4 of AR 600-8-4, but this section is specific to National Guard and Reserves.[12] This specification is vague and introduces an element of confusion when Army Commanders and medical personnel decide whether a LOD determination must be completed.[13] Major Aaron Lancaster identifies this confusion and specifically calls out the Army's lack of clear guidance as to whether hospitalization and outpatient facility treatment counts towards the 24-hour requirement in his article *Line of Duty Investigations: Battered, Broken and in Need of Reform*.[14] The regulation goes on to state that a LOD investigation must be conducted "[i]n all other cases of injury, illness, disease, or death, except minor injuries that will not result in permanent disability (for example, sprain, contusion, or minor fracture)."[15] Once again, this is a vague statement because a minor fracture could potentially result in permanent disability; it is not clear where the line is to be drawn when deciding whether or not to perform a LOD investigation.

The Navy regulation is broadly similar to the Army regulation and specifies that a LOD investigation is required when a Sailor or Marine incurs an injury or disease that results in the physical inability to perform duty for more than 24 hours or may result in a permanent disability.[16] In contrast to the Army regulation, the Navy regulation contains a specific clause that the member's inability to perform duty for a period exceeding 24 hours is "distinguished from a period of hospitalization for evaluation or observation."[17] This certainly resolves the issues raised above and specifically called out by Major Lancaster's article.[18] Navy guidance also includes specific language that requires a LOD determination in any case when an active duty servicemember dies.[19] Overall, the JAGMAN section on LODs is clearer than AR 600-8-4.

The Air Force instruction requires LOD investigations in specific and enumerated instances.[20] The Air Force recently updated their instruction in

[11] *Id.*
[12] *Id.* ¶ 5-4 ("LOD determinations for injury, illness, or disease that have no lasting effect, defined as not requiring follow-on care ultimately affecting a Soldier's overall health or career, will not be accepted in accordance with paragraph 2–2(a)(1).").
[13] *See* Aaron L. Lancaster, *Line of Duty Investigations: Battered Broken and In Need of Reform*, 225 MIL. L. REV. 597, 603 (2017) (discussing the lack of further guidance regarding what is meant by "no lasting significance").
[14] *Id.* at 604.
[15] AR 600-8-4, *supra* note 1, ¶ 2-2.
[16] JAGMAN, *supra* note 4, § 0212.
[17] *Id.*
[18] Lancaster, *supra* note 13, at 604.
[19] JAGMAN, *supra* note 4, § 0212.
[20] AFI 36-2910, *supra* note 6, ¶ 1.6.

September 2021, and in doing so, significantly modified the LOD determination verbiage.[21] One of the significant modifications was the removal of the 24-hour requirement, which is present in the Navy and Army's respective regulations.[22] Instead, the Air Force implemented a series of specific instances when a LOD investigation and determination must be initiated: (1) death of a member; (2) injury illness or disease, involving alcohol or other drugs; (3) self-inflicted injury; (4) illness, injury or disease possibly incurred during a period of unauthorized absence; (5) injury or illness, disease or death possibly incurred during a course of conduct for which charges have been preferred under the Uniform Code of Military Justice (UCMJ); (6) injury, disease, or medical condition that may be due to the servicemember's intentional misconduct or willful negligence, such as a motor vehicle accident; (7) injury involving likelihood of a permanent disability.[23] For Air Force Reserves, in addition to the above listed situations, there are a few other considerations enumerated in the instruction.[24] Despite appearing to be clearer than the 24-hour requirement, there is still no explanation for what "permanent disability" entails. The Air Force instruction only addressed what could possibly constitute an injury without the likelihood of permanent injury in section 3.2 of the instruction, which says, "[t]he injury or illness is simple, such as a sprain, contusion or minor fracture, and is not likely to result in permanent disability."[25] But, as pointed out before, there is no legal or medical definition for a minor fracture within the Air Force's guidelines. Further, there is no guarantee that a minor fracture would not cause permanent disability.

The Coast Guard regulation follows the same common requirements as both the Army and Navy. A LOD determination must be made for a Coast Guard member (1) who has a disease or injury that results in death of the active duty member; (2) who is unable to perform duties for a 24-hour period (distinguished from a period of hospitalization for evaluation or observation); (3) for whom there exists a likelihood of temporary or permanent disability that may entitle the member to disability benefits; or (4) who is a reserve member and receives medical treatment (regardless of the ability to perform military duties).[26] Similar to the other branches, there remains vagueness regarding what constitutes a temporary or permanent disability. Particularly, the Coast Guard regulation does

[21] *Id*. at 2.
[22] *Id*. ¶ 1.6. The prior version of AFI 36-2910 was published on October 8, 2015, and required a LOD determination if a member was unable to perform their duties for more than 24 hours. There was also a clause that stated that an investigation must be completed whether the member is hospitalized or not, but there was no clarity as to whether periods of hospitalization count towards the 24-hour requirement. U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (LOD) DETERMINATION, MEDICAL CONTINUATION (MEDCON), AND INCAPACITATION (INCAP) PAY Ch. 1, ¶ 1.6.2 (8 Oct. 2015).
[23] AFI 36-2910, *supra* note 6, ¶ 1.6.
[24] *Id.*
[25] *Id.* ¶ 3.2.1.2.4.
[26] COMDTINST M5830.1A, *supra* note 8, at 7-3.

not elaborate on what *types of disabilities* may entitle the member to disability benefits; there is, however, some clarity on what *types of benefits* the member may be entitled to, as the Coast Guard regulation details how a LOD determination may be used.[27]

Broadly, all the branches' respective regulations fail to delineate what constitutes a likelihood for temporary or permanent disability. Army and Air Force regulations include minor fractures and sprains as examples of what are considered unlikely to result in permanent disability.[28] However, minor fractures and sprains may have lasting impacts and, therefore, could be a poor example of what constitutes a temporary disability. LOD regulations are written for military commanders, command legal officers, and administrative personnel.[29] By providing such vague guidance as to when LOD investigations are required, commanding officers are left guessing as to when an investigation must be initiated. This uncertainty and the variance in regulations may have serious consequences for VA benefit eligibility.

C. Presumptions and Evidentiary Standards

Every branch delineates that a servicemember's injury or illness is presumed to have occurred in the line of duty (ILD) and not due to their own misconduct unless rebutted by the evidence,[30] but the standard of proof needed to rebut this presumption varies amongst the branches. Most strikingly, the Army regulation only requires a preponderance of the evidence standard, while Navy, Air Force, and Coast Guard regulations require a clear and convincing evidence standard. Thus, Navy, Air Force, and Coast Guard personnel will more often be found in the line of duty than Army personnel, because clear and convincing evidence is a more difficult standard to meet.

Despite this important difference, the branches' respective regulations have some similarities for presumptions and evidentiary standards. All of the branches' respective regulations specify that misconduct only includes intentionally incurred injuries or illnesses, or injuries incurred as the result of willful neglect or gross negligence.[31] Similarly, all clarify that simple negligence

[27] *Id.* at 7-1.
[28] AR 600-8-4, *supra* note 1, ¶ 2-2; AFI 36-2910, *supra* note 6, ¶ 3.2.1.2.4.
[29] *See* AR 600-8-4, *supra* note 1, ¶ 1-1; JAGMAN, *supra* note 4, § 0223; AFI 36-2910, *supra* note 6, ¶¶ 2.2–2.3; COMDTINST M5830.1A, *supra* note 8, at 7-6.
[30] AR 600-8-4, *supra* note 1, ¶ 2-4; JAGMAN, *supra* note 4, § 0216; AFI 36-2910, *supra* note 6, ¶ 1.9; COMDTINST M5830.1A, *supra* note 8, at 7-3.
[31] AR 600-8-4, *supra* note 1, ¶ 2-4; JAGMAN, *supra* note 4, § 0216; AFI 36-2910, *supra* note 6, at 84; COMDTINST M5830.1A, *supra* note 8, at 7-3.

alone does not constitute misconduct.[32] Army regulations define simple negligence as "a failure to exercise the degree of care, which a person of ordinary prudence would usually take in the same or similar circumstance(s), taking into consideration age, maturity of judgment, experience, education, and training of the Soldier."[33] This definition is on par with the other branches' regulations.[34] However, because the standard of proof is not consistent across branches, the similarities do not overcome the disadvantages created by the lower standard of proof in the Army.

Army Regulation 600-8-4 first introduces the presumption by stating, "[a] Soldier's injury, illness, disease, or death is presumed to have occurred ILD unless rebutted by the evidence."[35] "In line of duty" is further clarified under the Terms to mean that a Soldier "is presumed to be in line of duty, unless a preponderance of the evidence supports the finding that the Soldier's injury, illness, disease or death happened while the member was absent from duty without leave or due to the member's own misconduct."[36] Preponderance of evidence is defined as "[f]indings [that] must be supported by a greater weight of evidence (more likely than not) than supports any different conclusion."[37]

Navy regulation also addresses the presumption; however, it requires a different standard of proof. Navy guidance clearly and explicitly lays out that "[a]n injury or disease suffered by a member of the Naval service, will, however, be presumed to have been incurred [ILD] and not as a result of misconduct, unless contrary findings supported by clear and convincing evidence are made."[38] The instruction further clarifies that while most administrative investigations only require an evidentiary standard of preponderance of the evidence, LOD investigations require a higher standard of clear and convincing evidence.[39] Per the instruction, "clear and convincing means that the truth of the facts asserted is highly probable. To be clear and convincing, evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons, after considering all the facts."[40] The instruction then clarifies that clear and convincing is a lower evidentiary standard than proof beyond a reasonable doubt.[41]

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[32] AR 600-8-4, *supra* note 1, ¶ 2-4; JAGMAN, *supra* note 4, § 0216; AFI 36-2910, *supra* note 6, ¶ A2.6.3; COMDTINST M5830.1A, *supra* note 8, at 7-3.
[33] AR 600-8-4, *supra* note 1, at 45.
[34] *See* JAGMAN, *supra* note 4, § 0216; AFI 36-2910, *supra* note 6, ¶ A2.6.3; COMDTINST M5830.1A, *supra* note 8, at 7-3.
[35] AR 600-8-4, *supra* note 1, ¶ 2-4.
[36] *Id*. at 43.
[37] *Id*. at 45.
[38] JAGMAN, *supra* note 4, § 0212.
[39] *Id*. § 0214.
[40] *Id*.
[41] *Id*.

The Air Force regulation requires different standards of proof based on the duration of the member's orders (for reservists) and what the ultimate LOD determination is. First, the Air Force specifies that members' conditions are presumed to have been incurred ILD, and the burden of proof is on the government to prove that the condition was incurred Not in the Line of Duty (NILOD).[42] For a finding of ILD, the evidentiary standard is preponderance of the evidence; the Air Force defines preponderance of the evidence as "the greater weight of credible evidence."[43] The Air Force broadly defines a category of NILOD, "Not Due to Member's Misconduct" for conditions that "Existed Prior to Service" (EPTS) and are "Not Service Aggravated" (NSA).[44] To reach this finding, the Air Force requires an evidentiary standard of clear and unmistakable evidence for any active duty personnel or reservists on orders greater than 30 days.[45] For those on orders less than 30 days, the standard is preponderance of the evidence.[46] The Air Force defines "clear and unmistakable evidence" as,

> [U]ndebatable information that the condition existed prior to military service or if increased in service was not aggravated by military service. In other words, reasonable minds could only conclude that the condition existed prior to military service from a review of all of the evidence in the record. It is a standard of evidentiary proof that is higher than a preponderance of the evidence and clear and convincing evidence.[47]

Finally, for a finding of NILOD and due to the member's misconduct, the Air Force requires an evidentiary standard of clear and convincing evidence for all members.[48] Clear and convincing evidence is defined as, "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. It is a burden of proof that is higher than a preponderance of the evidence but lower than clear and unmistakable evidence."[49] The Air Force's standards of proof are summarized in the table below:[50]

[42] AFI 36-2910, *supra* note 6, ¶ 1.9.
[43] *Id.* ¶ 1.10.
[44] *Id.* ¶ 1.11.
[45] *Id.*
[46] *Id.* ¶ 1.11.2.
[47] *Id.* ¶ 1.11.1.1.
[48] *Id.* ¶ 1.11.3.
[49] *Id.* at 81.
[50] *Id.* at 13 tbl. 1.1.

Duration of Member's Orders	In Line of Duty	Not in Line of Duty– Not Due to Member's Misconduct-EPTS-Not Service Aggravated	Not in Line of Duty – Due to Member's Misconduct
30 days or less	Preponderance of the Evidence	Preponderance of the Evidence	Clear and Convincing Evidence
Greater than 30 days	Preponderance of the Evidence	Clear and Unmistakable Evidence	Clear and Convincing Evidence

The Coast Guard instruction directs that LOD determinations are presumed ILD and not due to misconduct unless clear and convincing evidence shows otherwise.[51] Clear and convincing evidence is then defined as "evidence as would convince an ordinary prudent-minded person beyond a well-founded doubt."[52]

When contrasted with the Army's requirement of preponderance of the evidence, it is easy to conclude that Navy and Marine Corps, Air Force, and Coast Guard personnel will more often be found ILD than Army personnel, because clear and convincing is a more difficult standard of proof to meet to rebut the required presumption. For example, if there is enough evidence to prove that Servicemember X's injury was due to their own willful abuse of alcohol based on a preponderance of the evidence, and Servicemember X serves in the Army, then they will be found *not in the line of duty*. This will, in turn, adversely affect their receipt of benefits. On the other hand, if Servicemember X serves in the Navy, and the exact same evidence does not rise to the level of clear and convincing, Servicemember X will be found *in the line of duty*. This will, in turn, positively affect their receipt of benefits. This is unfair, especially when the circumstances surrounding the events and the amount of evidence available to investigators are exactly the same. Army personnel are, conclusively, at a disadvantage when compared to those in the Navy and Marine Corps, Air Force, and Coast Guard.

D. Legal Rights Pertaining to LOD Determinations

Although service members do have some legal rights in LOD investigations, they are limited by both poor explanation of the rights and inconsistencies between the branches. While all branches implement the federal requirement to warn a servicemember that they do not have to give a statement during LOD investigations, there is no guidance as to when the warnings must be given, which limits their efficacy. Further, while the warnings vary between the branches in length and detail, none properly address when the statements can be used or the breadth of benefits that a servicemember stands to lose with a negative

[51] COMDTINST M5830.1A, *supra* note 8, at 7-3.
[52] *Id.*

LOD determination. Finally, there are some legal rights which simply do not exist in LOD investigations and determinations. This is not necessarily an error but is because the LOD forum is not a criminal proceeding. Thus, service members have no legal right to an evidentiary hearing during this process. Together, this lack of protection combines to disadvantage service members during the LOD investigation and determination process.

Service members do have a right to refuse to make a statement during their LOD determination. Per 10 U.S.C. § 1219, "[a] member of an armed force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid."[53] This statute applies only to written statements.[54] Each branch's respective guidance for LOD investigations references this statute and requires warnings before requesting statements regarding the investigated injury or disease.[55] The Army, Navy, Air Force, and Coast Guard have also expanded this right of refusal to oral statements made by the servicemember and then reduced to writing.[56] For example, the Navy regulation specifies that, "[t]he spirit of this [warning requirement] will be violated if a person, in the course of an investigation, obtains the member's oral statements and reduces them to writing, unless the above advice was given first."[57]

Yet, as pointed out in Major Lancaster's article, none of the branches provide guidance as to when exactly the warning must be given or what evidence may be used if taken without a warning.[58] As research for his article, Major Lancaster proposed a fact pattern to thirteen judge advocates from the various services in an informal survey.[59] The fact pattern began with a Soldier who jumps out of a window, hurts his knee, refuses to tell his military commander what happened for fear of punishment, but explains to the doctor what happened in order to receive proper medical care.[60] The doctor records the answers on the Soldier's medical records, which are then reported to the command with the doctor's recommendation that the Soldier's injury be found NILOD.[61] Without any further evidence (as the Soldier invokes his right to refuse to make a statement), the approving authority finds the Soldier NILOD.[62] All thirteen judge

[53] 10 U.S.C. § 1219 (1962).
[54] *Id.*; *see also* Lancaster, *supra* note 13, at 608.
[55] AR-600-8-4, *supra* note 1, ¶ 3-3; JAGMAN, *supra* note 4, § 0212; AFI 36-2910, *supra* note 6, ¶ A3.2.3.2.1; COMDTINST M5830.1A, *supra* note 8, at 7-26.
[56] AR-600-8-4, *supra* note 1, ¶ 3-3; JAGMAN, *supra* note 4, § 0212; AFI 36-2910, *supra* note 6, ¶ A3.2.3.2.1; COMDTINST M5830.1A, *supra* note 8, at 7-26; *see also* Lancaster, *supra* note 13, at 608.
[57] JAGMAN, *supra* note 4, § 0212.
[58] *See* Lancaster, *supra* note 13, at 608.
[59] *Id.* at 608–09.
[60] *Id.*
[61] *Id.*
[62] *Id.*

advocates in the informal survey interpreted their service regulation to allow the use of the medical information in making the determination, despite the lack of warnings under 10 U.S.C. § 1219.[63] This illustrates how the ambiguity in the service branches' application of 10 U.S.C. § 1219 undermines the spirit of the statute and can lead to negative consequences for service members, including violations of their rights and inappropriate use of statements to limit their future benefits.

Turning to the warning itself, the branches' warnings vary greatly, but none capture when the statements can be used against the servicemember and the extent of benefits that a servicemember can lose over a negative LOD determination. For example, the Navy's sample warning cautions the Sailor or Marine that (1) questions have arisen concerning whether their injury was incurred in the line of duty or as a result of their own misconduct; (2) if the determination is not in the line of duty or as a result of their own misconduct, they will be required to serve for an additional period beyond their present enlistment to make up for time lost; (3) lost duty time will not count as creditable service for pay entitlement purposes; (4) they may be required to forfeit pay when absence from duty in excess of one day follows the intemperate use of liquor or drugs; and (5) if they are permanently disabled, and the disability is determined to have been the result of misconduct or was incurred NILOD, they may be barred from receiving disability pay or allowances as well as *veterans' benefits*.[64] Finally, the member is warned that they cannot be required to give a statement, and then asked if they do or do not desire to submit a statement.[65] The Air Force's sample warning is much simpler. It merely states:

> I have been advised that 10 USC § 1219 provides as follows:
>
> 'A member of an armed force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that (he) (she) has. Any such statement against (his) (her) interests, signed by a member, is invalid.'[66]

These warnings do not explain what veterans' benefits may be affected by giving a statement or how the statements made can be used. Most importantly, neither warning explains the true depth of ramifications that a negatively postured statement can have on a servicemember's future entitlements.

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[63] *Id.*
[64] JAGMAN, *supra* note 4, at A-2-j.
[65] *Id.*
[66] AFI 36-2910, *supra* note 6, at 94 fig. A4.1.

Further limiting service members' rights, the servicemember has no entitlement to an evidentiary hearing during a LOD determination. The United States Claims Court held in *Renicker v. United States* that it was not a violation of due process to have no formal hearing during a LOD investigation process.[67] Applying *Mathews v. Eldridge*,[68] the Claims Court found that the Army regulations clearly provide service members with an extensive right to review an adverse finding.[69] In finding that there was no due process violation, the Claims Court cited the servicemember's notice and opportunity to respond to formal LOD investigations, the opportunity to appeal the LOD decision, the opportunity to appear before a formal Physical Evaluation Board, and the right to apply to the Army Board for Correction of Military Records.[70] Therefore, because service members are given the opportunity to submit written statements and appeal LOD decisions, they are not entitled based on the circumstances to any further legal processes. In conclusion, the safeguards in place for service members are not adequate to protect them during the LOD investigation and determination process.

E. Possible Outcomes of Line of Duty Investigations

The service branches are aligned in the three possible outcomes of a LOD investigation. An injury or illness incurred by a servicemember can be found to be (1) "in line of duty" and "not due to the member's own misconduct"; (2) "not

[67] Renicker v. United States, 17 Cl. Ct. 611, 615–17 (1989). Terry Renicker, an active duty Army Soldier, lost his left eye in an incident; the facts of the incident remained in contention, but Renicker admitted to being drunk at the time of the altercation with another Army Soldier. Renicker was struck in the left eye with a beer mug by the other servicemember. Based upon a Criminal Investigation Division report of the incident, a LOD investigating officer found that Renicker incurred his injuries "not in the line of duty – due to his own misconduct." This decision was approved by the appointing and reviewing authorities. Renicker appealed this determination, but the reviewing authority concluded that the evidence was sufficient to support the finding of not in the line of duty – due to own misconduct. Renicker then attempted to argue the LOD decision in a formal Physical Evaluation Board (PEB) hearing, but withdrew his request and expressed understanding that the formal PEB was not the forum to argue a LOD determination. The PEB board concluded that the injury was not compensable under the Army's disability program because he had received an adverse line of duty determination. Renicker then applied to the Army Board for the Correction of Military Records (ABCMR) requesting that his record be corrected to show that his injury was incurred in the line of duty on the grounds that, amongst other things, the plaintiff had not been afforded a hearing. The ABCMR unanimously concluded that the regulations did not require a formal hearing. Renicker then filed a claim before the United States Claims Court in 1989, seeking an order from the court to require the Army to grant him a hearing on his LOD determination. The crux of Renicker's complaint was that the Army denied him a hearing at which he could challenge the adverse LOD determination by presenting his version of the events and by testing the credibility of the witnesses on whose testimony the determination was based. The Claims Court held that Army regulations do not require a hearing for any LOD investigation. The Claims Court also held that a PEB is not bound by an informal or formal LOD investigation report.

[68] Mathews v. Eldridge, 424 U.S. 319, 349 (1976) ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.").

[69] *Renicker*, 17 Cl. Ct. at 617.

[70] *Id.*

in line of duty" and "not due to the member's own misconduct"; or (3) "not in line of duty" and "due to the member's own misconduct."[71]

The Army regulation defines ILD as an "injury, illness, disease, or death" that "did not occur while the Soldier was [absent without leave] and was not due to the Soldier's own intentional misconduct or gross negligence."[72] Navy regulation defines all injuries as "in line of duty" unless the injury or illness was a result of the member's own misconduct; occurred while avoiding duty by deserting; occurred while absent without leave; occurred while confined under a court-martial sentence that included an unremitted dishonorable discharge; or occurred while under the sentence of a civil court following conviction of a felony.[73] The Air Force definition is relatively simple and says that ILD means that the injury or illness was incurred or aggravated while in an authorized duty status and was not due to misconduct.[74] The Coast Guard defines "in line of duty" as a member who is not absent without authority.[75]

All branches also dictate that NILOD, not due to one's own misconduct, applies only when a member is in an unauthorized status (usually absent without leave or authority), but the member's misconduct is not the proximate cause of the injury.[76] It is presumed that if a servicemember's misconduct is the proximate cause of their injury, the servicemember is NILOD.[77] In this case, the finding would be that the servicemember's injury or illness was NILOD, due to their own misconduct.[78] Misconduct, as explained in more detail above, only includes intentionally incurred injuries or illnesses or those incurred as the result of willful neglect or gross negligence, as opposed to simple negligence.[79] Any finding other than ILD (i.e., NILOD, not due to a member's own misconduct or NILOD, due to a member's own misconduct) can adversely affect entitlements.[80]

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[71] AR 600-8-4, *supra* note 1, ¶ 2-5; JAGMAN, *supra* note 4, § 0217; AFI 36-2910, *supra* note 6, ¶ 1.8; COMDTINST M5830.1A, *supra* note 8, at 7-4.
[72] AR 600-8-4, *supra* note 1, ¶ 2-5.
[73] JAGMAN, *supra* note 4, § 0215.
[74] AFI 36-2910, *supra* note 6, ¶ 1.8.1.
[75] COMDTINST M5830.1A, *supra* note 8, at 7-4.
[76] AR 600-8-4, *supra* note 1, ¶ 2-5; JAGMAN, *supra* note 4, § 0215; AFI 36-2910, *supra* note 6, ¶ 1.8; COMDTINST M5830.1A, *supra* note 8, at 7-5.
[77] AR 600-8-4, *supra* note 1, ¶ 2-5; JAGMAN, *supra* note 4, § 0215; AFI 36-2910, *supra* note 6, ¶ 1.8; COMDTINST M5830.1A, *supra* note 8, at 7-5.
[78] AR 600-8-4, *supra* note 1, ¶ 2-5; JAGMAN, *supra* note 4, § 0215; AFI 36-2910, *supra* note 6, ¶ 1.8; COMDTINST M5830.1A, *supra* note 8, at 7-5.
[79] AR-600-8-4, *supra* note 1, ¶ 2-4; JAGMAN, *supra* note 4, § 0216; AFI 36-2910, *supra* note 6, at 84; COMDTINST M5830.1A, *supra* note 8, at 7-3.
[80] AR-600-8-4, *supra* note 1, ¶ 2-3; JAGMAN, *supra* note 4, § 0213; AFI 36-2910, *supra* note 6, ¶ 1.3; COMDTINST M5830.1A, *supra* note 8, at 7-1.

F. VA Benefits as Explained in the Military Branches' Respective Regulations

Perhaps most concerning about the discrepancies in the various service branches' regulations regarding LOD investigations are the differences in the discussion of benefits administered by the VA. Only the Coast Guard regulation properly specifies the binding nature of LOD determinations on the VA. This creates ambiguity and misleads military commanders; specifically, military commanders are not informed as to the effects of their LOD determinations, which may inadvertently lead to less LOD investigations being ordered.

Army guidance states, "[i]n determining whether a veteran or his or her survivors or Family members are eligible for certain benefits, the Veterans Administration will make an independent decision with respect to benefit eligibility."[81] This is blatantly false, as the VA is actually bound by a service department finding of ILD.[82]

Navy instructions for LOD investigations also say that the VA makes its own determination with respect to misconduct and LOD, which is once again, false.[83] But, the Navy instructions do say that "[a]s a practical matter, these determinations often rest upon the facts that have been officially recorded and are on file within the [Department of the Navy]."[84] While vague, this generally alludes to the fact that it is impossible to separate the recorded investigation findings and the VA's determination with respect to misconduct and LOD. Still, this is not accurate; not only does the VA rely on the military records, including LOD investigations, but they are bound by the service department's LOD determination.[85]

The Air Force regulation merely states that the VA "may use a member's official military records, including any LOD determinations, when determining veteran benefits."[86] The Air Force does reference 38 U.S.C. § 1110, the subchapter on Wartime Disability Compensation, and 38 U.S.C. § 1131, the subchapter of Peacetime Disability Compensation. However, the Wartime and Peacetime Disability Compensation subchapters do not address the VA's treatment of LOD investigations and determinations; LOD investigations and determinations are addressed in 38 C.F.R §§ 3.1 (m)–(n). Thus, the Air Force's regulations, like those of the Army and Navy, once again fail to specify that the LOD determination is binding on the VA.

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[81] AR 600-8-4, *supra* note 1, ¶ 2-3.
[82] 38 C.F.R. § 3.1 (2021).
[83] JAGMAN, *supra* note 4, § 0223; 38 C.F.R. § 3.1 (2021).
[84] JAGMAN, supra note 4, § 0223.
[85] 38 C.F.R. § 3.1 (2021).
[86] AFI 36-2910, *supra* note 6, ¶ 1.3.4.

The Coast Guard regulation for LOD determinations says that "the VA uses the findings to determine eligibility for disability compensation and hospitalization benefits."[87] Additionally, the instruction clarifies that under VA regulations, "a finding by the Coast Guard that injury, disease, or death resulting from an injury or disease occurred in the LOD would be binding on the VA unless it is patently inconsistent with the requirements of laws administered by the VA."[88] This is entirely correct; the Coast Guard instruction properly cites 38 C.F.R. § 3.1(m), the governing statute regarding VA treatment of LOD investigations, which will be discussed further in Part III of this Note. The Coast Guard is unique in this respect.

The central problem with the lack of clarity is military commanders do not have a sense of the effects of their LOD determinations. Plainly, the Army, Navy, and Air Force's respective regulations lack proper explanations of the VA's treatment of the service department LOD determinations. By failing to fully inform the military commanders of the consequences of LOD determinations, many commanders may fail to assign investigations when an injury falls lower on the spectrum of "likely to cause permanent disability."[89] The ambiguity surrounding when LOD determinations are required further compounds the problem. Additionally, because service members are not entitled to an evidentiary hearing or given an extensive warning as to providing written statements, military commanders are the agents most poised to affect the potential outcomes. If commanders do not know that their LOD determinations are binding on the VA, then they may inadvertently be failing those who they lead.

III. VA TREATMENT OF LOD INVESTIGATIONS

A. Statutory Guidance

VA treatment of LOD investigations is governed by 38 C.F.R. §§ 3.1(m)–(n). This statute holds that:

> (m) In line of duty means an injury or disease incurred or aggravated during a period of active military, naval, air, or space service unless such injury or disease was the result of the veteran's own willful misconduct or, for claims filed after October 31, 1990, was a result of his or her abuse of alcohol or drugs. A service department finding that injury, disease or death occurred in line of duty will be binding on the Department of

[87] COMDTINST M5830.1A, *supra* note 8, at 7-2.
[88] *Id*.
[89] *See supra* notes 10, 15, 16, 25 and accompanying text.

> Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs . . . .
>
> (n) Willful misconduct means an act involving conscious wrongdoing or known prohibited action. A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs.[90]

Contrasting with the guidance of the Army, Navy, and Air Force,[91] the above statute clearly lays out that service department findings of ILD and not due to misconduct are binding on the VA, as long as they are not patently inconsistent with VA laws. This has broad implications for military officers and commanders who are ordering, conducting, and approving LOD determinations. Not only will the determination affect in-service entitlements, but it will have far-reaching implications for service members' benefits after the service. That most branches do not properly explain this to military commanders in the respective guidance is a disservice to Soldiers, Sailors, Marines, and Airmen who are the subjects of LOD investigations.

B. Court Interpretation

The application of 38 C.F.R. §§ 3.1(m)–(n) was interpreted in *Smith v. Shinseki* in 2012.[92] Although not precedential, this case demonstrates the limits of 38 C.F.R §§ 3.1(m)–(n) and exemplifies a situation in which a LOD determination can be found "patently inconsistent" with VA laws. In that case, Mr. Smith, an Army member, was involved in a car accident; when he was brought to the hospital, there was no "official" documentation of an initial blood alcohol level, but it was noted on his discharge report that his blood alcohol level was "elevated to the 150 range at the time of admission."[93] There was no command LOD investigation completed, but on the hospital entrance form labeled "admission and coding" it was indicated by circled sections that Smith's injury was incurred ILD and signed by a Major Kerins, the supervising physician.[94] The VA Regional Office denied Smith's claim for the injuries received in the accident, deciding that the automobile accident and subsequent injuries were the result of willful misconduct.[95] Smith appealed, arguing that the Major's response on the hospital

[90] 38 C.F.R. §§ 3.1 (m)–(n) (2021).
[91] *See supra* text accompanying notes 76–81.
[92] Smith v. Shinseki, No. 11-3409, 2012 LEXIS 2490, at *1–11 (U.S. App. Vet. Cl. Dec. 26, 2012).
[93] *Id.* at *2.
[94] *Id.* at *3.
[95] *Id.* at *4.

entrance form that his injury was "in line of duty" constituted a service department finding and was binding on the VA.[96]

The Board held that Major Kerins' notation on the entrance form was not, in fact, a LOD determination, but was merely a "For Local Use" section of an admission and coding form that was not considered a service department determination on LOD.[97] The Court of Appeals for Veterans Claims, in a single-judge decision, held that even if Major Kerins' signature on the form was considered a service department finding, the Board found that Mr. Smith was extremely intoxicated at the time of the accident, and Mr. Smith did not expressly challenge his intoxication.[98] This, in turn, rendered Major Kerins' determination "patently inconsistent with the requirements of laws administered by the VA" because Mr. Smith was intoxicated.[99] Even though this case is not precedential, it illustrates how 38 C.F.R. §§ 3.1(m)–(n) is limited and represents a LOD determination which is "patently inconsistent" with VA laws. Yet, this decision also shows that a determination must be obviously and glaringly inconsistent with VA law to be deemed inconsistent, thus demonstrating how important service department LOD determinations are in VA decisions.

The application of 38 C.F.R. §§ 3.1(m)–(n) was also interpreted in *Crediford v. Shulkin* in 2017.[100] In that case, a Coast Guard veteran, Mr. Crediford, applied for benefits for an injury relating to an automobile accident that involved possible misconduct. Crediford's commanding officer, at the time of the accident, issued a report that stated fatigue and alcohol were responsible for the automobile accident, but that Crediford's "injuries were not a result of his own misconduct and were incurred in the line of duty."[101] This report included "findings of fact, opinions, and recommendations of the investigating officer" and was approved by an "Action of the Convening Authority."[102] Crediford subsequently pleaded guilty to a criminal charge of negligent driving and paid a fine.[103] Several months later, the Commander of the Thirteenth Coast Guard District issued a Memorandum, in which he referenced a "finding" by the Commandant of the Coast Guard that was said to have "approved a finding that injuries sustained . . . were 'not incurred in the line of duty and were due to his own misconduct.'"[104] When Crediford applied for VA benefits for the severe pain he claimed stemmed from the automobile accident, compensation was denied

[96] *Id.* at *5.
[97] *Id.* at *8.
[98] *Id.* at *9.
[99] *Id*. (quoting 38 C.F.R. § 3.1(m) (2002)).
[100] Crediford v. Shulkin, 877 F.3d 1040, 1041 (Fed. Cir. 2017).
[101] *Id.* at 1042.
[102] *Id*.
[103] *Id*.
[104] *Id.* at 1043.

because the VA Regional Office asserted that the injuries were due to his own willful misconduct, did not occur ILD, and that Crediford's records did not contain a LOD determination.[105] The Board and Veterans Court affirmed the Regional Office's decision.[106]

On appeal, the Federal Circuit held that the Board could not make its own findings of fact regarding LOD and willful misconduct, even when there were two conflicting service department determinations.[107] Additionally, the Federal Circuit held that the commander's finding must be addressed by the VA.[108] This demonstrates how critical LOD determinations are when establishing VA compensation for veterans injured while in service. Both properly conducted command investigations and determinations directly contradicted by another service department decision are binding on the VA. In fact, the VA is not allowed to make its own findings of fact, despite conflicting decisions and an abundance of facts that point to misconduct. Rather, the VA is truly held to what the service department decides.

IV. SOLUTIONS

There are obvious and glaring issues with the service departments' varying regulations regarding LOD determinations, and the VA is usually bound by the service departments' determinations, both per statute and a precedential decision. Because this is an area in which military and veteran law intersect, there are two distinct proposals to address the discrepancies between branches and create equal treatment for all service members. First, the various service departments can revise their regulations on how to conduct LOD investigations, bring them in line with each other, improve clarity, and require more strict compliance. Specifically, all the services' regulations should require LOD investigations (1) if the injury results in the servicemember being unable to perform military duties for more than 24 hours, including only medically necessary treatment vice command authorized treatment, or (2) a medical professional deems that there is a possibility of permanent disability. Further, all branches should raise the evidentiary standard to "clear and convincing" to rebut the presumption of an ILD, not due to misconduct determination. Across all branches, medical professionals should also be limited to providing only the injury diagnosis to the commands during LOD investigations. Finally, the service departments' regulations should properly inform commanders that their LOD determinations are binding on the VA.

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[105] *Id*.
[106] *Id*.
[107] *Id.* at 1046.
[108] *Id*. at 1046–47.

Alternatively, the C.F.R. can be revised; rather than making LOD determinations binding on the VA unless patently inconsistent with VA regulations, the service department findings can instead be treated as another piece of evidence to be taken into consideration when making decisions on benefits. However, both case law and common sense support that service departments are in the best position to make LOD determinations, and the inconsistencies in regulations across branches are getting in the way of proper execution. Therefore, the easiest and best solution is to revise service departments' regulations to ensure that service members have the greatest opportunity to receive the VA benefits they earned.

A. Revision of Service Departments' LOD Regulations

As explored above, the service departments' respective regulations have stark inconsistencies and, in some instances, undoubtedly false information. Revising the various branches' LOD guidance to align the departments and provide clarity would be a large undertaking. What is explored below, therefore, is just a snapshot of the most important issues that should be revised.

First, there needs to be more transparency regarding when LOD determinations are required. Major Lancaster proposes a "two-part black and white test of what constitutes an injury under AR 600-8-4" to address when LOD determinations are required.[109] His two-part test includes asking, first, whether the injury results in the servicemember being unable to perform military duties for more than 24 hours, and second, if it is probable or possible that the injury may result in a permanent disability.[110]

Yet, if the two-part test is applied to all the branches, Major Lancaster's solution still fails to resolve the vagueness of the statement "when probable or possible that the injury may result in a permanent disability." Rather than requiring military commanders to postulate about the future consequences of a servicemember's injuries, it may be more prudent to require LOD determinations only when a *medical professional* advises there is a probability or possibility of permanent disability. This properly relieves military commanders of their responsibility to order LOD determinations based on speculation not founded in medical knowledge and puts the responsibility solely on the shoulders of medical professionals.

Major Lancaster further explains that under AR 600-8-4, there is no guidance as to whether or not time spent in specific medical care facilities like hospitalization or outpatient facilities counts towards the 24-hours-lost

[109] Lancaster, *supra* note 13, at 603.
[110] *Id*.

requirement for LOD investigations.[111] He resolves this by proposing that medically necessary treatment should count towards the 24-hour requirement, while unnecessary "command authorized" treatment should not.[112] Incorporating this thought, the various service departments' guidelines should be revised to require LOD investigations (1) if the injury results in the servicemember being unable to perform military duties for more than 24 hours, including only medically necessary treatment versus command authorized treatment, or (2) a medical professional deems that there is a possibility of permanent disability.

Next, there needs to be equality in the evidentiary standard required to rebut the presumption of an ILD, not due to member's own misconduct determination. Since the Navy, Air Force, and Coast Guard currently require an evidentiary standard of "clear and convincing" for an adverse finding,[113] while the Army only requires "preponderance of the evidence,"[114] all the branches' standards should be raised to "clear and convincing." This would align the various service departments, raising the standard to be more rigorous versus less, to better protect service members.

There also needs to be more clarity in exactly when warnings are required under 10 U.S.C. § 1219 and what evidence may be used if taken before warnings are provided. Major Lancaster proposed restricting the information that the command receives from a servicemember's medical record during a LOD investigation to just the diagnosis of the injury.[115] This would, in turn, allow medical professionals to treat service members properly because service members could be honest about the origin of their injury without worrying about the repercussions of their honesty.[116]

Finally, the various service departments' regulations need to be updated to properly reflect 38 C.F.R. §§ 3.1(m)–(n). By misstating the authority military commanders have in the LOD determinations, LOD investigations and those assigned to conduct them may not receive the time, training, and attention required to make these conclusions. Further, military commanders may fail to assign investigations when there exists ambiguity as to whether they are required, when the presumption should be to over-assign LOD investigations. If commanders are informed as to the true use of LOD determinations, there is a greater likelihood that investigations will be conducted properly and often, as all good leaders know that caring for their service members means ensuring they have access to benefits after they leave the service.

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[111] *Id.* at 604.
[112] *Id*.
[113] *See supra* notes 38–52 and accompanying text.
[114] *See supra* notes 36–37 and accompanying text.
[115] Lancaster, *supra* note 13, at 610.
[116] *Id*.

B. Revision of the Code of Federal Regulations

Alternatively, the C.F.R. VA regulations can be revised to hold service department LOD determinations as a piece of evidence to be considered when making independent LOD determinations, rather than a binding decision on the VA. Per *Crediford v. Shulkin*, "the regulations recognize that the Service Department is in the best position to assess willful misconduct and line of duty actions of its Service."[117] While that may be true, because of the discrepancies in the regulations across service departments, service members receive varying evidentiary standards and rights depending on which service they joined. Variable handling because of branch of service seems patently inconsistent with the mission of the VA; service members should not get different treatment, and different access to benefits, just because they joined one branch over another.

38 U.S.C. § 7104(a) states that "[d]ecisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."[118] If 38 C.F.R. §§ 3.1(m)–(n) is amended so that a service department finding that injury, disease, or death occurred ILD and not due to misconduct is *not* binding on the VA, then LOD determinations and the accompanying investigations will merely be another piece of evidence under 38 U.S.C. § 7104(a). Although this may be the simpler solution to the problem of variation, vagueness, and ambiguity in LOD determination regulations amongst the service departments, changing the C.F.R. is a complex process. Further, as case law explains, service departments are best positioned to make LOD determinations; to take that power away from the commanders may cause more harm to the servicemember than good.

V. CONCLUSION

Variations that exist amongst the branches acutely affect the rights of service members relating to LOD determinations. Ambiguity as to when LOD determinations are required, stark differences in evidentiary standards needed to rebut favorable presumptions, a lack of clarity regarding the exclusion of evidence taken in violation of required warnings, and false statements regarding the VA's treatment of service departments' determinations all combine to undermine a system that has a worthy goal of ensuring that injured service members or dependents of deceased service members receive the correct benefits. There is no indication that the VA is aware of and taking action to address these discrepancies amongst the service departments. Nevertheless, VA guidance defers to determinations of ILD, not due to misconduct made by service departments,

[117] Crediford v. Shulkin, 877 F.3d 1040, 1046 (Fed. Cir. 2017).
[118] 38 U.S.C. § 7104 (2021).

unless they are patently inconsistent with VA regulations. Therefore, to ensure equality in access to VA benefits, LOD regulations must be standardized across all branches.

NATIONAL SECURITY ZONES IN OUTER SPACE

Commander Mark T. Rasmussen, JAGC, USN*

The space domain has changed dramatically since the adoption of the Outer Space Treaty in 1967. The rapid evolution of technology and military capabilities has created an environment that is well-characterized as congested, contested, and competitive. This Article examines the concept of national security zones in outer space as a mechanism to avoid miscalculation and military escalation in the domain. Through examination of the existing international legal framework, this Article proposes that the establishment of such zones are legally permissible in certain circumstances.

I. INTRODUCTION

> *Today, outer space is free. It is unscarred by conflict. No nation holds a concession there. It must remain this way.*[1]

In November of 2019, Russia launched a pair of satellites.[2] Shortly thereafter, the satellites maneuvered precariously close to a vital U.S. national security satellite. By February, the Russian behavior was so alarming that it prompted a rare public comment from General John Raymond, Commander of U.S. Space Command. General Raymond stated,

> [s]imilar activities in any other domain would be interpreted as potentially threatening behavior . . . . This is unusual and disturbing behavior and has the potential to create a dangerous situation in space. The United States finds these recent activities

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[1] Letter of Transmittal from President Lyndon B. Johnson to the United States Senate (Feb. 7, 1967) [hereinafter Johnson Letter of Transmittal] (asking the Senate for its advice and consent to the United States ratification of the Outer Space Treaty).

[2] Sandra Erwin, *Raymond Calls Out Russia For "Threatening Behavior" in Outer Space*, SPACE NEWS (Feb. 10, 2020), https://bit.ly/3cnV875.

> to be concerning and do not reflect the behavior of a responsible spacefaring nation.[3]

Regardless of the actual intent of the Russians, from the standpoint of the United States, the Russian maneuvers were indistinguishable from those that would occur in the event of (or precede) an attack on the critical U.S. satellite.[4]

General Raymond's statements reflect the difficulty in determining whether an adversary is demonstrating hostile intent in the space domain. Undoubtedly, the Russian maneuvers were intentional and aggressive. However, if they were reasonably perceived as a threat of an imminent attack, it would have been legally permissible for the United States to respond accordingly with force.[5] An armed conflict in outer space could have potentially been triggered.

The U.S. military uses satellites in nearly every aspect of its operations, to include facilitating communications, intelligence, surveillance, and reconnaissance, missile warning, and position, navigation, and timing.[6] In response to a question about what happens to the U.S. military without space, General John Hyten responded, "[w]hat happens is you go back to World War II . . . you go back to industrial age warfare."[7] To compound the problem, satellites are incredibly vulnerable. They are fragile and rely on weak passive defenses. Satellites inherently travel predictable orbits and lack the ability to camouflage.

Given the modern-day military's incredible reliance on satellites,[8] any sort of conflict in space would be strategic in nature and could escalate rapidly.[9] Accordingly, spacefaring states need to make additional efforts toward

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[3] Caroline Kelly & Barbara Starr, *Space Force Says Russian Satellites are Following American Satellite*, CNN (Feb. 11, 2020, 9:46 AM), https://cnn.it/3pMQL8N.
[4] W.J. Hennigan, *Exclusive: Strange Russian Spacecraft Shadowing U.S. Spy Satellite, General Says*, TIME (Feb. 10, 2020, 11:28 AM), https://bit.ly/3CwBY9B.
[5] U.N. Charter art. 51.
[6] U.S. DEF. INTEL. AGENCY, CHALLENGES TO SECURITY IN SPACE 8 (2019), https://bit.ly/2lHl82Z.
[7] *60 Minutes: The Battle Above* (CBS television broadcast Apr. 26, 2015).
[8] *See* William J. Lynn, III, *A Military Strategy for the New Space Environment*, 34 WASH. Q., Summer 2011, at 7 (quoting the former Deputy Secretary of Defense stating that "[s]pace systems enable our modern way of war. They allow our warfighters to strike with precision, to navigate with accuracy, to communicate with certainty, and to see the battlefield with clarity.").
[9] U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW 21 (2018) ("The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their *command and control, or warning and attack assessment capabilities*.") (emphasis added).

eliminating the potential for misperception, especially with respect to behavior that could be misconstrued as hostile intent.[10]

In this regard, a potential remedy is the establishment of national security zones around critical space assets. Similar to confidence building measures in effective arms control regimes, these zones could promote better communication and assist in signaling non-aggressive intentions.[11] By mitigating the risk of miscalculation, these zones could help avoid potential escalation of conflict in outer space.

Yet, there are potential pitfalls with the establishment of national security zones both in terms of policy and international legal obligations. With regard to the former, *inter alia*, an undesirable precedent could be set. From a legal perspective, there are two cardinal principles of space law that could be violated: a state's right to free use of outer space and the prohibition against appropriation in the domain. These principles, however, should not be read in isolation and are not dispositive of the legality of zones in outer space. There are other aspects of space and international law that must be considered. When appropriately accounted for, declarations of narrowly tailored national security zones in outer space are legally permissible in certain circumstances.

Part II of this Article briefly reviews the development of the relevant treatises, then analyzes the fundamental principles of freedom of use and non-appropriation found in Articles I and II, respectively, of the Outer Space Treaty. These principles are the major limiting factors in a state's authority to create zones in outer space. Part II concludes with a brief discussion on state practice as it relates to the establishment of zones. Part III examines other rights and obligations found in the Outer Space Treaty that restrict a state's freedom of use in outer space. Part III then examines the overarching goal of peaceful use, the due regard obligation, and advance consultation requirements for activities that could potentially cause harmful interference in Article IX. Part III concludes with a discussion of relevant aspects of international law as they relate to outer space in the national security context, including the *jus ad bellum* principles, internationally wrongful acts, the employment of countermeasures, and the doctrine of necessity. Part IV is an application of the framework outlined in Parts II and III that analyzes the feasibility of different potential zone constructs in the peacetime context and in the event of an armed conflict.

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[10] *See generally War in Space: The Next Battlefield* (CNN television broadcast Nov. 29, 2016), https://bit.ly/3dL0ucQ.

[11] JOZEF GOLBLATT, ARMS CONTROL: THE NEW GUIDE TO NEGOTIATIONS AND AGREEMENTS 10 (2d ed. 2002) ("The objective of [confidence building measures] is to translate certain principles of international law into positive action so as to provide credibility to states' affirmations of their peaceful intentions.").

II. LIMITATIONS TO THE ESTABLISHMENT OF ZONES

A. Background

There is perhaps no other body of law more lacking in jurisprudence and legal precedent than "space law."[12] The rapid evolution of space technology, in combination with the competition of the Cold War, led to a "golden age" of international law-making by treatises during the 1960s and 1970s.[13] The seminal agreement was the Outer Space Treaty, which laid the foundation for the international law governing outer space.[14] The momentum for treatises ceased in 1979.[15] Since then, there have been numerous United Nations General Assembly Resolutions and various political commitments. However, these instruments are not legally binding from an international law perspective.

The geopolitical landscape has changed dramatically since the adoption of the Outer Space Treaty. So has outer space itself. Today, the space environment is well characterized as "congested, contested, and competitive."[16] The advancements in technology, the rise in the number of spacefaring states, and the ever-increasing congestion in space has created issues that could not have been foreseen during the formulation of the treatises. Accordingly, the legal inertia has hindered elaboration of many principles within the Outer Space Treaty applicable to resolving recently raised legal issues connected with these new developments. The subject of national security zones in outer space is one of these issues.

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[12] HANDBOOK OF SPACE LAW, at xxvi (Frans von der Dunk & Fabio Tronchetti eds., 2017) ("[S]pace law should be defined as 'every legal or regulatory regime having a significant impact, even if implicitly or indirectly, on at least one type of space activity or major space application,' which in principle encompasses both international and national law and regulation, as well as regional and institutional arrangements as appropriate.").

[13] *Id.* § 2.2. There are five classical space treaties: The Outer Space Treaty of 1967; The Rescue Agreement of 1968; The Liability Convention of 1972; The Registration Convention of 1975; and The Moon Agreement of 1979.

[14] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty]. Over 100 states have ratified the Outer Space Treaty, including the five major spacefaring states: the United States, the People's Republic of China, Russia, and the European Space Agency states.

[15] *See* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Agreement]. The Moon Agreement primarily involved the exploitation of resources on the Moon and other celestial bodies. It includes the controversial concept that the objects were the "common heritage of mankind[,]" which led to very few ratifications of the Treaty.

[16] JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2011).

B. Freedom of Use

Nevertheless, existing international law articulates fundamental rules governing national activities in outer space. Many of these principles are indeed broad. These typical characteristics of space law can be beneficial by affording adaptability to the legal issues raised by the dynamic space environment.

One of the cornerstones of the existing space treaties is freedom of exploration and use. The obligation seems simplistic, but application of the *lex lata* can be complex. Article I proclaims that space is "the province of all mankind"[17] and further declares that:

> [t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries . . . . Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.[18]

States are thus entitled to use all areas of outer space within certain limitations.[19]

As it pertains to the establishment of national security zones around satellites, the language of Article I is prohibitive. A state circumscribing any sort of area in outer space can, of course, inhibit another state's ability to transit the subject area should they want to. Accordingly, a solitary read of Article I suggests that a declaration of a zone could constitute an unlawful limitation on the right to free use under the Outer Space Treaty.[20] It could also amount to an illegal appropriation.

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[17] "Province of all mankind" is not defined in the Outer Space Treaty, but it is generally interpreted to limit states from using outer space exclusively for their own benefit and instead requires their activities be for the benefit of all mankind. *See* Stephen Hobe, *Outer Space as the Province of All Mankind – An Assessment of 40 years of Development*, 50 PROC. ON L. OUTER SPACE 442, 448 (2007).

[18] Outer Space Treaty, *supra* note 14, art. I.

[19] These limitations include: the "non-appropriation" clause in Article II; the "international law" clause in Article III; the "denuclearization/WMD" clause in Article IV; the "responsibility clause" in Article VI; the "liability clause" in Article VII; the "cooperation and mutual assistance," "due regard," and "consultation and interference" clauses in Article IX; and the "observation and information" clause in Articles X and XI. The restrictions relevant to the establishment of national security zones in outer space are discussed in detail in Part III.

[20] Outer Space Treaty, *supra* note 14, art. I.

C. The Problem of Appropriation

1. Article II

The free exploration and use rights are reinforced by the non-appropriation principle found in Article II of the Outer Space Treaty.[21] This is the crux of the legal feasibility of establishing national security zones in outer space. Similar to the international law regarding the status of the high seas, "space law" prohibits claims of national sovereignty in outer space.[22] This is a cardinal rule of the space legal framework. Article II provides that "[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[23] In determining whether establishing national security zones would amount to an appropriation, there are a number of factors to consider.

The first consideration is: what exactly constitutes an "appropriation"? Under international law, the terms of a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[24] It is under this framework that the term "appropriation" must be interpreted.

Webster's Dictionary defines "appropriate" as: "1. to take exclusive possession of; 2. to set apart for or assign to a particular purpose or use; and 3. to take or make use of without authority or right."[25] Under any definition of the term, if a state were to designate an area around a space asset that was permanent and entirely exclusionary, then doing so would constitute an appropriation and essentially equate to asserting territorial rights to that space.

However, the language of Article II suggests that an appropriation includes more than claims of national sovereignty in outer space. The inclusion of the terms "by means of use or occupation, *or any other means*" makes clear that it encompasses additional forms of appropriation.[26] This "catch all . . . carefully and intentionally asserted . . . leaves no room for any form or shape of appropriation of outer space by whatsoever means."[27] It is indeed a broad

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[21] Paul G. Dembling & Daniel M. Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COM. 419, 431 (1967).
[22] *See* United Nations Convention on the Law of the Sea, art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
[23] Outer Space Treaty, *supra* note 14, art. II.
[24] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
[25] *Appropriate*, MERRIAM-WEBSTER.COM, https://bit.ly/2T4SGXp.
[26] Outer Space Treaty, *supra* note 14, art. II (emphasis added).
[27] 1 COLOGNE COMMENTARY ON SPACE LAW 54, ¶ 41 (Stephan Hobe, Bernhard Schmidt-Tedd, & Kai-Uwe Schrogl eds., 2015) [hereinafter COLOGNE COMMENTARY].

prohibition. However, the law of treaty interpretation under Article 31 of the Vienna Convention requires looking at the ordinary meaning of a term "in [its] context and in the light of its object and purpose."[28] Notable in this regard is Article IX's due regard and advance consultation requirements.[29] These additional considerations are important in analyzing the issue of appropriation and are addressed in Part III.

The matter of appropriation becomes more obscure if the state is not attempting to exercise any dominion over the area but rather to simply notify an adversary of their heightened concern should an object come within a certain proximity of their space asset. In this context, there is no claim of possession or exclusive right of use. An action such as this would seem to be aimed at enforcing the claiming state's own rights under the Treaty, *inter alia,* free use and, presumably, preserving peace.[30] Other states could assert their rights under Article I and proceed into the designated area, but they would be doing so with the knowledge of how another state perceives such actions. A reasonable interpretation of the non-appropriation principle is that it does not extend so far as to prohibit non-exclusionary zones in outer space.

2. State Practice

A look at state practice is useful when analyzing the issue of appropriation. Aside from widely rejected claims by some equatorial states with regard to geostationary orbit, no major spacefaring state has made any sort of territorial claim to outer space.[31] In sum, "[t]he practice of states in space has been a substantial departure from the experiences on Earth during the age of exploration and colonization through the 20th century expeditions to Antarctica."[32] There is thus much merit to the position that the principles of free use and non-appropriation reflect customary international law.[33]

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[28] Vienna Convention, *supra* note 24, art. 31, ¶ 1.
[29] Outer Space Treaty, *supra* note 14, art. IX.
[30] *See* U.N. Charter art. 2, ¶ 3.
[31] *The Declaration of the First Meeting of Equatorial Countries* (Dec. 3, 1976). Also known as "The Bogota Declaration," eight equatorial countries claimed that "any device to be placed permanently on the segment of a geostationary orbit of an equatorial state shall require previous and expressed authorization on the part of the concerned state." Columbia also has an article in its Constitution claiming sovereignty of the segment of the geostationary orbit above its territory. Of note, the incredibly valuable geostationary orbit is approximately 36,000 km above the equator. In this orbit, a satellite turns at the same angular speed of the Earth making it essentially stationary in its position to the Earth.
[32] Leslie I. Tennen, *New Developments and the Legal Framework Covering the Exploitation of the Resources of the Moon*, 47 PROC. ON L. OUTER SPACE 520, 522 (2004).
[33] *See generally* Fabio Tronchetti, *Non-Appropriation Principles under Attack: Using Article II of the Outer Space Treaty in its Defence*, 50 PROC. ON L. OUTER SPACE 526 (2007).

However, there are instances of state activities in space that are contrary to the strict interpretation of Articles I and II of the Outer Space Treaty that would not even permit non-exclusive or temporary zones. In 2006, in an effort to mitigate risk associated with resupplying the International Space Station (ISS), NASA established a 200 meter "Keep Out Sphere" and a four kilometer by two kilometer "Approach Ellipsoid."[34] These are undoubtedly "zones" in outer space. There have been no formal objections to their legal permissibility.

Moreover, the rarity of states deliberately approaching another state's space asset beyond "normal" distances illustrates a few principles. First, there is a general understanding that there is some undefined area around satellites that a state would find encroachment upon as unacceptable. Second, another state coming within this undefined area is a serious concern. This is especially true for space assets vital to national security. These "norms of behavior" in outer space are reflected by the aforementioned Russian maneuvers and the response of the United States. So, while there have been no serious claims of national sovereignty in outer space, state practice has developed such that certain zones are not objectionable under existing international law.

3. Supplemental Means of Interpretation

Assuming some level of ambiguity with the term "appropriation" or an unreasonable result from applying the aforementioned treaty interpretation rules, a look beyond the language of the article to confirm the meaning of a term such as "appropriation" is permitted.[35] This includes the *travaux preparatoires* and "the circumstances of its conclusion."[36]

Well before the entry into force of the Outer Space Treaty, there was widespread belief that the legal status of outer space should be regarded like the high seas as *res communis omnium*.[37] In that, it was an area open to all states and not subject to claims of sovereignty by any. This consensus was reflected when, after the launching of Sputnik 1 into orbit, no state claimed that it violated their sovereign territory.[38] This was ten years before adoption of the Outer Space Treaty.

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[34] Diane S. Koons, Craig Schreiber, Francisco Acevedo, & Matt Sechrist, Risk Mitigation Approach to Commercial Resupply to the International Space Station § 2.1 (Fourth Annual International Association for the Advancement of Space Conference, 2010), https://go.nasa.gov/3pCLP64.
[35] Vienna Convention, *supra* note 24, art. 32.
[36] *Id*.
[37] *See* Zachos A. Paliouras, *The Non-Appropriation Principle: The Grundnorm of International Space Law*, 27 LIEDEN J. INT'L L. 37, 41 (2014).
[38] 1 COLOGNE COMMENTARY, *supra* note 27, at 45.

Not only was the principle of *res communis omnium* one of the earliest accepted tenets of how space would be governed, it was also considered to be of paramount importance.[39] It is not a coincidence that the principle is found in the second article of the treaty. The phrasing of Article II evolved via a series of United Nations General Assembly Resolutions.[40] Of note, the wording in the later of these U.N. resolutions is nearly identical to Article II, and all were adopted unanimously. In 1966, the U.S. Permanent Representative to the Committee on the Peaceful Uses of Outer Space outlined 12 points for inclusion into the Outer Space Treaty.[41] Three of the points were: "1. The Moon and other celestial bodies should be free for exploration by all in accordance with international law . . . . 2. Celestial bodies should not be subject to any claim of sovereignty . . . . 5. Open access to all areas of celestial bodies should be assured . . . ."[42]

Ultimately, there was hardly any debate over the text of Article II.[43] Although some criticized "the use of the word 'appropriation' for vagueness, the Soviet delegate had indicated . . . that the term referred to the ban on assertion of national claims by way of any human activity in outer space or on the moon or other celestial bodies."[44] To the extent that Article II is facially ambiguous or would lead to unreasonable results, an examination of the background of the Outer Space Treaty provides clarification. Outer space is not subject to any form of permanent territorial claim. There are, however, other principles of space and international law that could justify exclusive use of an area of outer space as discussed in Parts III and IV.

III. RESTRICTIONS ON FREE USE

As noted above, the principles and limitations articulated in Articles I and II should not be read in isolation. Indeed, under the Vienna Convention, treaty terms are to be interpreted in their context and in light of their object and purpose. Surrounding articles can provide context as well as further elaborate on the object and purpose of a treaty. A state's right of freedom of use is limited by its obligations and rights other states have under the Outer Space Treaty. Under the principle of treaty effectiveness, articles should be interpreted so as to not deny meaning to any treaty provision.[45] Aside from Articles I and II, many other aspects

[39] Tennen, *supra* note 32, at 520–23.
[40] G.A. Res. 1721 (XVI) (Dec. 20, 1961); G.A. Res. 1962 (XVIII), at 15–16 (Dec. 13, 1963).
[41] Letter from the Permanent Representative of the U.S. to the Chairman of the Committee on the Peaceful Uses of Outer Space (June 16, 1966), https://bit.ly/3AAjqUI.
[42] *Id.*
[43] Dembling & Arons, *supra* note 21, at 431.
[44] *Id.*
[45] RICHARD GARDINER, TREATY INTERPRETATION § 2.1 (2d ed. 2015) ("Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be

and provisions of the Outer Space Treaty are consistent and permissive with regard to the establishment of national security zones.

A. The Aspiration for Peaceful Use

The goal that the use of outer space be for peaceful purposes is shared among all space treatises.[46] It was first codified in the Outer Space Treaty.[47] The first two lines of the Preamble state: "[i]nspired by the great prospects opening up before mankind as a result of man's entry into outer space, [r]ecognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes . . . ."[48] It is important to emphasize that because this phrase appears only in the Preamble, it is, therefore, not a binding legal obligation as it relates to national activities in outer space.[49]

The phrase reappears in Article IV, which provides that "[t]he Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes."[50] Noticeably missing from this article is the word "outer space." The explicit absence of the term and the plethora of military activity in outer space reflect that there is no general prohibition of military use in the space domain.[51]

Yet, given its prevalence throughout the space treatises, it is important to understand what the term "peaceful use" means in relation to activities in outer space. As Part III.C discusses in greater detail, all activities must be conducted in accordance with international law, which includes the United Nations Charter.[52] Under the Charter framework, the opposite of "peaceful" is "aggressive."[53] In

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interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.").

[46] *See supra* text accompanying note 12.

[47] Outer Space Treaty, *supra* note 14, pmbl.

[48] *Id*.

[49] Vienna Convention, *supra* note 24, art. 31, ¶ 2.

[50] Outer Space Treaty, *supra* note 14, art. IV.

[51] *See Canada Working Paper, Terminology Relevant to Arms Control and Outer Space* 10 (Conf. on Disarmament, CD/716, CD/OS/WP.15, 1986) [hereinafter *Canada Working Paper*]. The restrictions on military activity in outer space are found in the remainder of Article IV, which prohibits placing nuclear weapons or weapons of mass destruction in orbit or installing them on celestial bodies. It also prohibits, "[t]he establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden." Outer Space Treaty, *supra* note 14, art. IV.

[52] Outer Space Treaty, *supra* note 14, art. III.

[53] *Canada Working Paper*, *supra* note 51, at 10; *see also* U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

addition, Article IV of the Outer Space Treaty has generally been interpreted as not prohibiting peaceful military activity, only activity that would run afoul of the Charter obligations, *i.e.* unlawful threats or use of force.

Lastly, another example of the aspirational desire for peace can be found simply in the title of the United Nations Committee tasked with overseeing space related activities and the implementation of the treaties and agreements since 1959.[54] This body is called the United Nations Committee on the Peaceful Uses of Outer Space.[55] Undoubtedly, maintaining peace in the space domain has been a bedrock goal since the first days of exploration and use.

The establishment of national security zones in space does not run counter to this goal of peaceful use and non-aggression. To the contrary, such zones could help ensure the rights of states to operate in space freely without provocation or interference. With the objective of mitigating confusion and preventing conflict, these zones would be in accordance with one of the overarching goals of space law and public international law in general.

B. State Responsibility and Article IX

In 2007, the People's Republic of China conducted a test of a direct ascent anti-satellite weapon (ASAT) against one of its own older weather satellites.[56] The satellite, like most man-made objects in outer space, was at an altitude of approximately 530 miles in low Earth orbit. China provided no prior warning to the international community that they were going to conduct the test.[57] By 2010, the test had created at least 2,841 pieces of debris, making it the largest debris-generating event to date.[58] Space debris is an obvious hazard that could destroy other space assets in the event of a collision. The fragments from the Chinese test will likely remain in orbit for decades or even centuries.[59] Part of the official response from the United States included a statement that "China's development and testing of such weapons is inconsistent with the spirit of cooperation that both countries aspire to in the civil space area."[60]

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[54] G.A. Res. 1472 (XIV) (Dec. 12, 1959).
[55] U.N. Comm. On the Peaceful Uses of Outer Space, *COPUOUS 2022 Session* (2022), https://bit.ly/3c5nV0f.
[56] SHIRLEY KAN, CONG. RSCH. SERV., RS22652, CHINA'S ANTI-SATELLITE WEAPONS TEST 1 (2007), https://bit.ly/3QBDcEQ.
[57] *Id.* at 2.
[58] NASA, *Update on Three Major Debris Clouds*, 14 ORBITAL DEBRIS Q. NEWS, no. 2, 2010, at 4, https://go.nasa.gov/3dMWEAd.
[59] NICHOLAS L. JOHNSON, HISTORY OF ON-ORBIT SATELLITE FRAGMENTATIONS 26, 36 (14th ed. 2008).
[60] KAN, *supra* note 56, at 1.

The space treatises neither explicitly prohibit the testing of ASAT technology nor do they prohibit the creation of space debris. However, a key concept is that of state responsibility. Article VI of the Outer Space Treaty provides that "States Parties to the Treaty shall bear international responsibility for national activities in outer space . . . and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty."[61]

If there was a violation of the Outer Space Treaty as a result of the Chinese ASAT test, it would be found in Article IX, which is the most useful in terms of prescribing "rules of the road" in outer space. It is the most voluminous article in the treaty and includes a number of different concepts. It states:

> In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of *cooperation and mutual assistance* and *shall* conduct all their activities in outer space, including the Moon and other celestial bodies, with *due regard* to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially *harmful interference* with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate *international consultations* before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment.[62]

[61] Outer Space Treaty, *supra* note 14, art. VI.
[62] *Id.* art. IX (emphasis added).

In examining national security zones in outer space, the principles of cooperation, due regard, harmful interference, and consultation are all relevant.

1. Cooperation

The ISS is, without a doubt, the best example of successful international cooperation in outer space.[63] For over thirty years, major spacefaring states have worked together "to establish a long-term international cooperative framework among the Partners, on the basis of genuine partnership, for the detailed design, development, operation and utilization of a permanently inhabited civil international Space Station" to further "the scientific, technological, and commercial use of outer space."[64] In this venture, the partner-states have created a unique and robust legal regime that addresses a number of issues including funding, liability, jurisdiction, and intellectual property rights.[65]

The principle of "cooperation" is not a binding obligation, "[r]ather, it should be regarded as a 'general principle' that needs to be concretised by more detailed rules."[66] Article IX reflects that additional international agreements are necessary in order to protect the interests of all states in outer space. Accordingly, the principle of cooperation has a direct nexus to preserving the most important principles of space law.[67] It is in this "spirit of cooperation" that states should seek to similarly establish the necessary frameworks to create zones around space assets they deem vital to national security. Doing so would contribute towards the continued free and peaceful use of outer space.

2. Due Regard

It is in this same vein of protecting other states' interests that another principle of Article IX resides—that of due regard. As it relates to zones in outer space, the obligation of due regard is a restriction on a state's freedom of use. In other words, the Outer Space Treaty did not grant the rights that it did without conditions.[68]

The concept that a state is obligated to conduct its activities with "due regard" for the interests of other states is not unique to the space domain. In the

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[63] Space Station Intergovernmental Agreement, at 1, Jan. 29, 1998, TIAS No. 12927 (establishing the ISS via an Intergovernmental Agreement between 15 partner states including the United States, Governments of Member States of the European Space Agency, Japan, and Russia).
[64] *Id*. art. 1, ¶ 1.
[65] HANDBOOK OF SPACE LAW, *supra* note 12, § 11.3.2. The framework includes the Intergovernmental Agreement, several bilateral agreements, implementing arrangements, and contracts.
[66] 1 COLOGNE COMMENTARY, *supra* note 27, at 174, ¶ 21.
[67] *Id*. ¶ 19.
[68] *See supra* text accompanying note 19.

aviation realm, the phrase was adopted in 1944 at the Chicago Convention.[69] It is also found in Article 87 of UNCLOS.[70] Article 87 addresses freedom of the high seas and provides that the high seas are open to all states but that "[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."[71]

While some have argued that the Outer Space Treaty's use of "due regard" is overly broad and potentially ambiguous, it is nevertheless a binding legal obligation.[72] It is one that includes both objective and subjective elements. With the former, a state must, at all times, respect and take into account the interests of other states while exercising its rights of freedom of exploration and use. The term "due" interjects a reasonableness standard whereby a state interprets and balances its own interests while accounting for the interests of other states. In this context, whether a space activity violates the due regard principle can be circumstantial. For example, assume a state conducts a rendezvous and proximity operation (RPO) that requires the target satellite to unexpectedly maneuver to avoid a collision, which then causes interference with the satellite's signal. In the event that this was a consensual RPO, with the requisite notifications and precautions, it would have been conducted in compliance with the due regard principle. In the alternative, if the RPO were to occur during a period of geopolitical turmoil and was conducted by an adversary state without consent or notification, that could, very likely, be considered a violation of the treaty.

Like aviation law and the law of the sea, the due regard principle in the space treaties is closely tied with ensuring safety. In this respect, the establishment of national security zones is cohesive with Article IX. As with any object in motion, let alone those travelling at thousands of miles per hour, maintaining distance is a prudent precautionary measure.

More importantly, albeit likely already known by others, national security zones would highlight what one state considers its most important assets in space. Should a state choose to not recognize the other state's critical interests and engage in provocative or reckless behavior, it does so at the risk of violating the due regard principle. In turn, such unlawful actions can also potentially "open the door" for another state's response actions, to include self-defense and countermeasures that are addressed in Part III.C.

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[69] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947).
[70] UNCLOS, *supra* note 22, art. 87.
[71] *Id.*
[72] *See generally* P. J. Blount, *Renovating Space: The Future of International Space Law*, 40 DENVER J. INT'L L. & POL'Y 515, 525 (2011).

3. Harmful Interference and Consultations

The final relevant aspect found in Article IX is the obligation of a state to engage in "international consultations" prior to initiating an activity that could potentially cause harmful interference.[73] Alternatively, a state has the right to request consultation if it believes the activities of another would cause harmful interference.[74]

Harmful interference is yet another broad concept left undefined by the Outer Space Treaty. However, it can be divided into three categories: "(1) Observational Interference (i.e. either terrestrial based astronomical observations or space based terrestrial observations), (2) Radio Frequency Interference, and (3) Physical Interference (i.e. interference with the freedom of physical movement and/or physical operations in outer space)."[75]An action that potentially results in any of the three interference types most likely triggers the consultation obligation.

The procedure and enforcement mechanism regarding appropriate consultation is not set out in the space treatises. At a minimum, the language of Article IX requires formal notification of the proposed activities.[76] However, recalling the other principles incorporated in Article IX's use of "cooperation and mutual assistance" and "due regard," a good faith interpretation would be that it encompasses more in light of the context and the object and purpose.[77]

Given the immense reliance on space assets for national infrastructure and military operations, it is no surprise how serious satellite interference is taken. The 2017 National Security Strategy stated that "[t]he United States considers unfettered access to and freedom to operate in space to be a vital interest. Any harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, manner, and domain of our choosing."[78] It behooves states to avoid misperception of activities that can cause harmful interference, especially during peacetime. Again, a state's ability to accomplish this could be improved via the recognition of zones around national security assets.

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[73] Outer Space Treaty, *supra* note 14, art. IX.
[74] *Id*.
[75] Michael C. Mineiro, *FY-1C and USA-193 ASAT Intercepts: An Assessment of Legal Obligations under Article IX of the Outer Space Treaty*, 34 J. SPACE L. 321, 337 (2008).
[76] *Id*. at 343. Despite the widespread condemnation of the plethora of debris created by the 2007 Chinese ASAT test, it was the Chinese failure to engage in consultation that was the most clear violation of the Outer Space Treaty.
[77] *Id*. at 339.
[78] EXEC. OFF. OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 31 (2017).

Zones that are neither permanent nor entirely exclusionary but are rather designed to ensure other states adhere to Article IX's obligations of due regard and advance consultations prior to potentially harmful interference are legally permissible. This type of declaration would not run afoul of Articles I and II when properly interpreted using the Vienna Convention rules, which call for terms to be interpreted in their context and in light of object and purpose. Moreover, the principle of effectiveness of treaty interpretation is applicable, meaning one provision cannot be read to deny all meaning to another.

C. Applicability of International Law

While at the same time reinforcing a state's right to freely use outer space, Article III of the Outer Space Treaty also imposes the most important restrictions on a state's activities by requiring that activities be conducted in accordance with international law.[79] The Outer Space Treaty explicitly mentions the United Nations Charter and states the purpose of Article III is "maintaining international peace and security and promoting international cooperation and understanding."[80]

Surprisingly, there were early debates about the applicability of the Charter to outer space.[81] The express inclusion was undoubtedly due to the legitimate fear of the extension of the arms race into outer space and the recognition of the importance of the rule of law in the domain.[82] Sputnik was launched less than ten years prior and the threat of nuclear war was very real. The Permanent Representative of the United States, Ambassador Goldberg, stated, "[a]s man steps into the void of outer space, he will depend for his survival not only on his amazing technology but also on this other gift which is no less precious: the rule of law among nations."[83]

1. *Jus Ad Bellum* Principles

The language "shall carry on" in Article III is unequivocal and without caveats.[84] Accordingly, the rules governing threats and use of force are legally binding in outer space. Article 2(4) of the Charter provides that "[a]ll Members

[79] *Id.*; Outer Space Treaty, *supra* note 14, art. III.
[80] Outer Space Treaty, *supra* note 14, art. III.
[81] 1 COLOGNE COMMENTARY, *supra* note 27, at 65, ¶ 1.
[82] LaToya Tate, *The Status of the Outer Space Treaty at International Law during War and Those Measures Short of War*, 32 J. SPACE L. 177, 178 (2006) ("As States continued to create and develop nuclear weapons and weapons of mass destruction, scientists recognized that outer space was the ultimate high ground on the battlefield and that extending weapons within outer space would change the modern definition of war.").
[83] Dembling & Arons, *supra* note 21, at 432.
[84] Outer Space Treaty, *supra* note 14, art. III.

shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[85]

What constitutes a "use of force" is a hot topic for debate in the cyber domain.[86] Many of the same complexities exist in applying this principle to the space domain. In any domain, the analysis must first and foremost begin with the Charter itself because it is the foundation. Yet, the Charter does not define the phrase. However, its text is nevertheless useful in examining what does not constitute a use of force. Article 41 provides that:

> The Security Council may decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, *and other means of communication*, and the severance of diplomatic relations.[87]

In accordance with the rule of treaty interpretation, this indicates that interference with a satellite's signal alone does not constitute a use of force and that, therefore, the threshold is higher.[88] The Charter Preamble and Articles 42 and 44 together suggest that "force" and "armed force" are equivalent terms.[89]

The Charter's framers could have never imagined how quickly technology would expand the Charter's application to new domains. At its core, the Charter was attempting to prevent the violence and physical destruction seen in World War II. Accordingly, one has to avoid arguing *lex ferenda* and instead apply the law as written. As such, the prohibition on the threat and use of force connotes these types of kinetic actions in the space domain and not those that fall short, such as signal interference.

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[85] U.N. Charter art. 2, ¶ 4.
[86] *E.g.*, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael Schmitt ed., 2013).
[87] U.N. Charter art. 41 (emphasis added).
[88] Vienna Convention, *supra* note 24, art. 31. *But cf.* NUCLEAR POSTURE REVIEW, *supra* note 9 (stating American policy that an interruption of a signal of a satellite of critical import such as those that support nuclear weapons operations may be deemed a hostile act).
[89] U.N. Charter pmbl., arts. 41, 44. The Preamble states that "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . . ." Articles 42 and 44 involve Chapter VII enforcement actions involving the use of force and reference using the armed forces.

The same applies to the right of self-defense under Article 51.[90] The article uses the term "armed attack." The International Court of Justice in the *Nicaragua* case stated that an armed attack involves (1) an illegal use of force; (2) "the most grave form" of force; and (3) that it must be attributable to the responsible state.[91] However, "[t]he United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force."[92] Lastly, the self-defense response must be necessary and proportional to the armed attack.[93] This is the legal framework for exercising the right of self-defense in outer space just as it is in any domain.

2. Internationally Wrongful Acts

In outer space, a state can conduct an array of actions that do not amount to the use of force, but are otherwise very concerning. The United States' response to the aforementioned Russian maneuvers is telling. There was no official statement that it constituted a use of force. In fact, there has never been a public announcement of an illegal use of force in outer space. Without more, a satellite intentionally coming into close proximity to another is likely best characterized as espionage, and spying is not illegal under international law.[94]

Nevertheless, coming precariously close to another satellite could constitute a violation of a legal obligation under the Outer Space Treaty such as due regard or advanced consultation. As such, actions that fall short of being a use of force can still be considered internationally wrongful acts. States are responsible for "conduct consisting of an action or omission [that]: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[95]

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[90] *Id.* art. 51 (providing that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

[91] Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgement, 1986 I.C.J. 14, ¶ 191 (June 27).

[92] OFFICE OF GEN. COUNSEL, DEP'T OF DEF., LAW OF WAR MANUAL § 1.11.5.2 [hereinafter DOD LAW OF WAR MANUAL].

[93] *See* Corfu Channel Case (U.K. v. Alb.), Judgement, 1949 I.C.J. 4 (Apr. 9); Oil Platforms (Iran v. U.S.), Judgement, 2003 I.C.J. 161 (Nov. 6).

[94] Gary Brown & Keira Poellet, *The Customary International Law of Cyberspace*, STRATEGIC STUD. Q., Fall 2019, at 133 (noting that "customary international law is notably silent on the practice of spying during peacetime . . . [and] there is no international law prohibiting espionage").

[95] *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 1–2 (2001) [hereinafter ILC Articles on State Responsibility].

In response to internationally wrongful acts, an injured state is permitted to take certain legal actions. There are also some legal defenses that an offending state may rely on to preclude actions responding to what would normally be considered an internationally wrongful act. The basic rules surrounding these aspects of international law are discussed below. The application of these principles in the context of establishing national security zones in outer space are discussed in Part IV.

a. Countermeasures

In response to internationally wrongful acts, the injured state can impose countermeasures, which may otherwise be unlawful, against the offending state to convince it to stop violating international law.[96] Before taking countermeasures, an injured state must first request that the offending state adhere to or fulfill its legal obligations. If this request is ignored, then the injured state must then notify the offending state before it takes countermeasures.[97] Countermeasures must be suspended if the internationally wrongful act has ceased; the use of countermeasures does not relieve a state of its obligation to refrain from the threat of or use of force.[98]

b. Necessity

Another legal principle an offending state may rely on for acts that are otherwise violations of an international legal obligation is that of necessity. Necessity may be invoked if the action "(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[99]

Necessity does not require the very existence of the state to be in peril. In 1967 a Liberian supertanker named *Torrey Canyon*, carrying over 100,000 tons of oil, ran aground off the southwest coast of England outside of British territorial seas.[100] Thousands of tons of oil leaked into the sea damaging fisheries, beaches, and birdlife. After attempts to move the vessel failed and she began to break apart, the British government decided to bomb her in order to burn off the remaining oil. In analyzing the legality of this incident as it relates to state responsibility, the International Law Commission (ILC) noted,

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[96] DOD LAW OF WAR MANUAL, *supra* note 92, § 18.18.1.
[97] ILC Articles on State Responsibility, *supra* note 95, art. 52.
[98] *Id*. arts. 49–50.
[99] *Id*. art. 25.
[100] Int'l Law Comm'n, Rep. on the Work of its Thirty-Second Session, U.N. Doc. A/35/10 (1980), at 39 [hereinafter ILC Report].

> [w]hatever other possible justifications there may have been for the British Government's action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.[101]

The ILC justified British actions on what were essentially environmental grounds, demonstrating that the doctrine of necessity can be relied upon in a wide array of circumstances. Nevertheless, what qualifies under the first prong of "essential interest" remains rather vague and circumstantial. Undoubtedly, the invocation of necessity "must be of an exceptional nature . . . . [Including] 'political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, [and] the preservation of the environment of its territory or a part thereof.'"[102] With regard to the second prong of "grave and imminent peril," the ILC referred to this as "a threat to the interest at the actual time" and that "the peril must not have been escapable by any other means."[103]

IV. APPLICATION OF THE LEGAL FRAMEWORK

In an effort to prevent nonconsensual close-proximity approaches, a state may unilaterally designate zones around its space assets. However, these must be carefully prescribed in order to avoid violating international legal obligations and, therefore, infringing on existing rights of other states. The geopolitical context is also relevant as the existence of an armed conflict changes the analysis.

A. In Peacetime

A state could legally establish a zone around any of its space assets during peacetime so long as it does not limit the rights another state has under the Outer Space Treaty or customary international law. As previously discussed, the two most important considerations are the right to free use under Article I and the non-appropriation principle in Article II.

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[101] *Id*.
[102] Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS & DEV. L.J. 1, 15 (2000) (quoting Professor Roberto Ago).
[103] ILC Articles on State Responsibility, *supra* note 95, art. 49, ¶ 33.

1. Non-exclusionary Zones

If the designated area was not permanently exclusionary, but instead only temporary pending consultation, this would not constitute an appropriation. Rather, this would serve as a mechanism to implement the Article IX obligations of due regard and advance consultation requirements. A designated exclusionary zone would also serve to notify other states that entry into that zone would be concerning. Such a zone would not prevent another state from ultimately using the area and, thus, the zone would not impede other states' right to free use. These zones could be justified in terms of operational safety and preserving peace. Another state would remain free to approach, but would do so at the risk of potentially escalating a precarious situation or violating its own legal commitments.

2. Zones as a Countermeasure

There is no general legal prohibition on one state's satellite approaching that of another state. However, under certain circumstances, doing so may present issues regarding obligations under the Outer Space Treaty and international law. This is particularly true with regard to approaching satellites vital to national security. If a state's conduct in outer space impairs the rights of another state or constitutes a violation of its own obligations, another state would be legally permitted to establish a zone around its space assets. Under the countermeasures doctrine, the implementing state could create zones that would otherwise be unlawful. The zone could be exclusionary and constitute an appropriation and limit another state's free use of that area of outer space. This is subject to the limitations of employing countermeasures, including that the counter-measure ceases when the other party comes into compliance—i.e., when the other party consults in advance of an approach that could potentially cause harmful interference.

3. Zones Established Under the Necessity Doctrine

Another possibility whereby a state could legally declare a zone that would otherwise be unlawful under the Outer Space Treaty is if it legitimately does so under the doctrine of necessity. As noted earlier, invoking the doctrine of necessity should only be done in exceptional circumstances to safeguard "essential interests" that are threatened. There are unquestionably space assets that provide capabilities and services that qualify as "essential interests," such as satellites that support missile warning and position, navigation, and timing.[104] Foreign activities in outer space that potentially put these objects in peril could

[104] *See supra* text accompanying note 6.

justify the establishment of zones under the necessity doctrine. Under certain dire circumstances, these zones could be permanent and exclusionary.

4. Zones as a United Nations Article 41 Enforcement Measure

In addition to a state unilaterally declaring a zone, it could also be established as a United Nations Security Council Chapter VII enforcement action. Under Article 39 of the Charter, "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[105] Article 41 addresses measures not involving the use of armed force.[106]

As previously discussed, the Charter applies to outer space via Article III of the Outer Space Treaty. Accordingly, the Security Council, pursuant to its Chapter VII authority, could impose zones in space. These zones could span the spectrum of restrictions and even be entirely exclusionary. Security Council actions in this regard are not uncommon; Article 41 enforcement of zones in outer space is no different than the Security Council declaring "no-fly zones."[107]

Yet, similar to procedures to establish no-fly zones, the creation of Security Council enforcement zones in outer space are subject to veto.[108] The Security Council is composed of five permanent members—the United States, United Kingdom, France, Russia, and China—and ten rotating non-permanent members.[109] Decisions of the Security Council require nine affirmative votes, and each permanent member has the ability to veto.[110] Given the oftentimes adversarial relations and competing interests between some of the permanent members, the feasibility of Article 41 zones in outer space is limited.

B. In the Event of Armed Conflict

Belligerents engaged in an armed conflict can assert additional rights that do not exist during peacetime. Accordingly, the framework for declaring zones

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[105] U.N. Charter art. 39.
[106] *Id.* art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.").
[107] *See, e.g.*, S.C. Res. 688 (Apr. 5, 1991) (establishing a no-fly zone over northern Iraq).
[108] *See, e.g.*, Beth Van Schaack, *5 and Counting: Russia Vetoes No-Fly-Zone in the Security Council*, JUST SEC. (Oct. 10, 2016), https://bit.ly/3ASipaV.
[109] U.N. Charter art. 23.
[110] *Id.* art. 27.

around satellites changes in the event of an armed conflict between states. All obligations under the law of armed conflict are applicable in outer space just as they are in every domain.[111]

1. Effect of Armed Conflict on the Outer Space Treaty

A preliminary question is whether the onset of hostilities has any impact on a state's rights and obligations under the Outer Space Treaty. More specifically, the existence of hostilities raises two issues: first, whether a party can suspend or terminate provisions of the Outer Space Treaty; and second, the impact on the rights and obligations under the Treaty should any principles be incompatible with the law of armed conflict. Existing international law does not clearly answer the former entirely.[112] The Vienna Convention on the Law of Treaties provides that, "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty . . . from the outbreak of hostilities between States."[113]

To the extent that the Outer Space Treaty conflicts with the Charter, the latter clearly supersedes the former.[114] However, many of the *jus in bello* principles are found elsewhere such as the Geneva Conventions and customary international law. In an armed conflict, many of the rights of belligerents could conflict with provisions of the Outer Space Treaty.

One doctrine of treaty hierarchy is that of *lex specialis*, whereby if two laws govern the same factual situation, the law governing the specific prevails over the law governing the general. This cannot be read to suggest that the provisions of the Outer Space Treaty prevail over the law of armed conflict; space law and the law of armed conflict are both *lex specialis*.

In the event that the two regimes conflict, fundamental principles of the law of armed conflict as reflections of customary international law prevail. Article III of the Outer Space Treaty explicitly incorporates international law.[115] Article 30 of the Vienna Convention provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[116]

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[111] *See* U.S. DEP'T OF DEF., DIR. 2311.01, DOD LAW OF WAR PROGRAM para. 1.2 (2020) ("It is DoD policy that: Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.").
[112] *See* Int'l Law Comm'n, Rep. on the Works of its Fifty-Seventh Session, U.N. Doc. A/60/10, at Ch. XI (2005).
[113] Vienna Convention, *supra* note 24, art. 73.
[114] U.N. Charter art. 103.
[115] Outer Space Treaty, *supra* note 14, art. III.
[116] Vienna Convention, *supra* note 24, art. 30, ¶ 2.

> There can be no doubt that a substantial part of international law applies to outer space. This includes not only long-established rules of customary international law, such as the principles of good faith and of *pacta sunt servanda*, but also basic and explicit tenets of international law that have found their way into the UN Charter. Examples are the sovereign equality of States, non-intervention and non-aggression, the prohibition on the use of force, the right to self-defence, and the peaceful settlement of international disputes. These principles can be found in various provisions in the United Nations Charter . . . . Similarly, and only to the extent that they are applicable, branches of international law that have undergone substantial developments in the decades following the adoption of the Charter also apply to human activities in outer space. This includes international human rights law . . . .[117]

This is not to say that the Outer Space Treaty does not apply in the event of an armed conflict. The majority of scholarly opinions on the subject and state practice indicates that it does.[118] States have an obligation to harmonize both regimes to the extent they can. If they cannot be reconciled, any superseding of a provision of the Outer Space Treaty must be done only to the extent necessary.

2. Zones as a Matter of Military Necessity

As outer space and the high seas both have the status of *res communis omnium*, conflict in these domains is analogous in many ways. Moreover, similar to an aircraft carrier, many satellites are incredibly critical to achieving military objectives and their destruction would have catastrophic consequences. In the context of the high seas, "[w]ithin the immediate area of naval operations (e.g., in the vicinity of naval units to ensure proper battlespace management and self-defense objectives), a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit such vessels and aircraft from entering the area."[119] Like naval warfare, exclusion zones in outer space could be justified by the doctrine of military necessity. This principle justifies measures "required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources," which includes defending oneself without interference from neutral states.[120]

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[117] 1 COLOGNE COMMENTARY, *supra* note 27, at 67, ¶¶ 13–14.
[118] *See* Tate, *supra* note 82.
[119] U.S. DEP'T OF NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 7.8 (2022).
[120] *Id.* § 5.3.1.

However, national security zones in outer space do not preclude other obligations under the law of armed conflict such as lawful targeting. Also, "the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality."[121] In this regard, the nature of the space object, the declared restrictions, and the size of the declared zone are all relevant to its validity. For example, there could be a valid military necessity to declare a zone to ensure the protection of satellites that provide position, navigation, and timing for military vehicles, or weapons. These are essential for military operations. The same cannot be said for a private commercial satellite the function of which is entirely unrelated to military operations.

3. Zones as an Exercise of Anticipatory Self-Defense

The right to self-defense applies whether in peacetime or in armed conflict. This right extends to space-based objects such as satellites. Accordingly, states may declare zones around satellites in order to deter threats of imminent force. However, as previously discussed, the threshold for self-defense is that of an armed attack or, in the view of the United States, even potentially an illegal use of force. As such, any entry into the declared zone is not, in itself, likely a valid justification for the use of force in response.

If based on anticipatory self-defense alone, the zone would not confer any additional rights to the declaring state. Entry would be permissible so long as it did not constitute the threat of imminent use of force.[122] Yet, imminence in space is different than it is terrestrially. Space situational awareness is limited. So is the ability to react. These all factor into a state's ability to justify zones based on this principle.

This type of zone would serve mostly as a deterrent and notification. It could convey at which point a state may potentially perceive an approaching object as an imminent threat. Thus, putting other states on notice that they might consider available means to repel the threat as an exercise of self-defense. In the

[121] INT'L INST. HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA art. 106 (Louise Doswald-Beck ed., 1995).

[122] *See generally* Martin A. Rogoff & Edward Collins, Jr., *The* Caroline *Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 498 (1990) ("This formulation, known as the *Caroline* doctrine, asserts that use of force by one nation against another is permissible as a self-defense action only if force is both necessary and proportionate. The first of these conditions, necessity, means that resort to force in response to an armed attack, or the imminent threat of an armed attack, is allowed only when an alternative means of redress is lacking. The second condition, proportionality, is linked closely to necessity in requiring that a use of force in self-defense.").

event of an armed conflict, zones in outer space could be very effective communication tools used to deter escalation.

4. Zones as a United Nations Article 42 Enforcement Measure

Subject to the aforementioned veto powers of the permanent members, the United Nations Security Council could also establish zones in outer space as an Article 42 enforcement measure. These measures can include taking action by force "as may be necessary to maintain or restore international peace & security."[123] The measures are "coercive *vis-à-vis* the culprit state or entity. But they are also mandatory *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization . . . and with one another . . . in the implementation of the action or measures decided by the Security Council."[124]

In the event of an armed conflict between spacefaring nations, a declaration of zones in outer space as a Chapter VII measure could be prudent. Large scale conflict has not previously extended to space. If it did, the results would be catastrophic. The destruction of national security satellites would impede the technological advances that allow for efficient military operations and would likely result in an increase in collateral damage. Economic stability would also likely be affected. Additionally, there would be the inevitable creation of space debris placing other space objects at risk, including those of non-belligerent states.

V. CONCLUSION

"The pacific character of space activities has promoted an atmosphere contributing to the peaceful relations between states, and the concomitant reduction in the possibility that space would become the cause of, or the arena for, armed conflict."[125] Two defining features of space law that have been critical to preserving peace in outer space are the principles of free use and non-appropriation. Territorial aggression often leads to conflict.

The delineation of any sort of boundaries in outer space runs the risk of violating these cardinal principles that, in turn, could disrupt the current peaceful status of the domain. The declaration of a zone around a space object under any justification also could set a precedent that could become problematic in the future. When boundaries are pushed in any domain, other states tend to follow suit. The proverbial "slippery slope" must be considered. A common national

[123] U.N. Charter art. 42.
[124] Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 111 (Int'l Crim. Trib for the Former Yugoslavia Oct. 2, 1995).
[125] Tennen, *supra* note 32, at 523.

security dilemma is that policies designed to increase a state's security can inadvertently be perceived as decreasing the security of others.[126] This can lead to actions by the other state which, in turn, actually increase the threat to the declaring state.

Yet, if carefully crafted in conformance with space and international law, national security zones could be a useful mechanism to ensure that a state's rights under the Outer Space Treaty and U.N. Charter are protected. Properly conceived zones could help to protect a nation's most critical satellites. As potentially valuable communication tools, the zones could clearly identify which space objects a state deems most important for national security purposes. They also offer the ability to mitigate the risk of miscalculation of another state's intent. Most importantly, national security zones in outer space could help preserve peace.

The concerns about outer space and the principles adopted to address them are just as valid presently as they were in 1967. "Today, outer space is free. It is unscarred by conflict. No nation holds a concession there. It must remain this way."[127]

[126] *See* Jack M. Beard, *Soft Law's Failure on the Horizon: The International Code of Conduct for Outer Space Activities*, 38 U. PA. J. INT'L L. 335, 359 (2017).
[127] Johnson Letter of Transmittal, *supra* note 1.

HOW DO YOU VALUE A VICTIM?: VICTIM IMPACT STATEMENTS IN MILITARY SEXUAL ASSAULT TRIALS

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This Article examines a timely and important issue—the use of Victim Impact Statements (VIS) in criminal trials and, more specifically, in military courts-martial. The right for victims of offenses to provide VIS has existed in the United States for approximately three decades. However, the military's implementation of similar rights for victims has languished, with the advent of the right for a victim to provide a VIS having been implemented only within the last decade. Relying on legal precedent in the form of appellate case decisions and qualitative assessments of trial court records, this article explores the current state of the law regarding the substance of VIS to then juxtapose that with trial court records for cases where the substance of the VIS was not considered on appeal. To date, no publication has qualitatively assessed the substance of VIS provided in military courts-martial. The results of this study provide ample support for the conclusion that follow-on research is necessary in order to inform decision-making related to victim rights in the military. Additionally, the Article recommends proposed solutions to the current state of the law and practice and should further inform the debate surrounding whether VIS, from a policy perspective, should be included at the sentencing phase of trials.

I. INTRODUCTION

When Charles Manson and his followers murdered numerous people in the summer of 1969,[1] it sparked the mother of a victim to deliver one of the first—

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[1] Andrew J. Atchison & Kathleen M. Heide, *Charles Manson and the Family: The Application of Sociological Theories to Multiple Murder*, 55 INT. J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 771, 772 (2011); ERIC W. HICKEY, ENCYCLOPEDIA OF MURDER AND VIOLENT CRIME 291–96 (2003).

if not, the first—modern victim impact statements ("VIS") in the United States.[2] Sharon Tate was a beloved Hollywood actress, who was married and with child when one of Manson's followers brutally stabbed her to death. In 1982, California voters approved Proposition 8 to amend their Constitution to allow VIS at sentencing and parole hearings. Doris Tate, the mother of Sharon, delivered her VIS in 1983 at the parole hearing of her daughter's murderer.[3]

Around the same time Doris Tate was navigating the California criminal justice system, President Ronald Reagan commissioned a task force to assess the need for legislative changes related to victims' rights.[4] The results of the task force included the enactment of the Victim and Witness Protection Act of 1982 (VWPA), which afforded victims the right to provide VIS in federal court.[5] This was the precursor to the Crime Victims' Rights Act (CVRA) of 2004.[6] The rights afforded through the CVRA—specifically rights related to VIS—have been the subject of extensive appellate case law. Some of the case law addresses the substantive nature of VIS, and some of it addresses the procedural manner in which VIS are provided to courts. Both aspects—substance and procedure—are fraught with perilous legal issues, including the potential of violating constitutional safeguards for accused. Directly opposing these safeguards are victims' rights, largely not enshrined in state constitutions, that can be frustrated by the process through which victims have been allowed to participate in criminal proceedings.

In civilian courts, the substance of VIS and the procedures by which they are introduced vary by jurisdiction.[7] What can and should be included in VIS in civilian jurisdictions is not always made clear by legislatures.[8] Therefore, it is

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[2] VIS have been around in some form or another prior to the founding of the United States of America, having been borrowed from its English counterpart. There is some room to conclude that the concept of VIS, or principles which support it, come from Roman law. *See, e.g.*, George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L. J. 343, 356–62, n.101 (1925) (describing appeals made by victims of trespass under Roman Law); Mark Stevens, *Victim Impact Statements Considered in Sentencing: Constitutional Concerns*, 2 CAL. CRIM. L. REV. 3, ¶ 2 (2000) (describing VIS as a legacy of English common law).

[3] Merrill W. Steeg, Victim Impact: The Manson Murders and the Rise of The Victims' Rights Movement 12, 25 (May 31, 2021) (M.A. thesis, California College of Arts) (ScholarWorks).

[4] LOIS HAIGHT HARRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME at vii (1982).

[5] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[6] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405 (codified as amended at 18 U.S.C. § 3771 (2015)); Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 584–87 (2005) (discussing the expansion of victim's rights under the law).

[7] MODEL PENAL CODE: SENTENCING 473–75 (AM. LAW INST., Proposed Final Draft 2017) [hereinafter MODEL PENAL CODE: SENTENCING].

[8] *Id.*

sometimes left to courts to decide the inner contours of what can be admitted through VIS.

VIS are provided to courts in a variety of formats, including written and oral statements. A major distinction between written VIS and victim testimony is the dynamic and sometimes unpredictable nature of the latter.[9] This distinction is important when considering both procedural and substantive limitations of VIS in court. Procedurally, when a witness testifies, the witness can be cross-examined. Substantively, when a witness is under examination, the contents of the statement become less predictable than in written format. For instance, under the pressure of examination, even if only direct examination, a witness' ability to cogently respond to basic questions can be frustrated. On the witness stand, witnesses are asked to call to mind information that was recorded in their memory from an earlier point in time. In many, if not most, sexual assault cases, the incident the witness is required to recall occurred a year or more earlier. Memory degrades over time and when coupled with the requirements of examination to recall upon demand, the ability to accurately state what previously took place diminishes. This does not begin to address the sometimes problematic interaction that occurs when a victim of sexual assault is asked to recount the details of the assault and the adverse consequences stemming from it in front of the offender and public. Regardless of the testimonial obstacles, little research has been conducted to ascertain what is actually being said in open court during the pre-sentencing phase of military sexual assault trials.[10] Laws are being enacted and amended to allow broader opportunities for victims' *voices* during the criminal justice process, but there are few-to-no empirically-derived studies on the substance of those voices when they are heard in court.[11]

This Article aims to shed light on an important topic that has never been studied in detail previously,[12] namely, the voices of victims who have been afforded, and taken advantage of, the opportunity to provide VIS in military sexual assault trials.

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[9] Heather Zaykowski et al., *Judicial Narratives of Ideal and Deviant Victims in Judges' Capital Sentencing Decisions*, 39 AM. J. CRIM. JUST. 716, 720 (2014) (describing VIS as "second-hand retellings" and testimony as "far more visceral and emotional").

[10] *See generally, e.g.*, Edward Meyers, Note, *Right or Burden: Victim Impact Statements at Court-Martial*, 30 PUB. INT. L.J. 117 (2021) (discussing one appellate court decision concerning one VIS).

[11] *See generally* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2002) (providing a salient piece that eloquently and thoroughly discusses and analyzes the theoretical considerations surrounding victim impact statements, but limited by the nature of the article wherein the discussion centers on one seminal appellate decision).

[12] The author is unaware of any published research qualitatively assessing the substantive contents of victim impact statements in the civilian or military systems.

Part II provides background describing the U.S. Supreme Court and military appellate court jurisprudence that laid the foundation for the procedural mechanisms through which VIS are utilized in courts-martial. Part III includes a synopsis of the literary framework for this study, incorporating the scholarly discourse surrounding VIS. Part III also includes a subsection on gendered violence and intersectional approaches to understanding violence to illuminate the way in which those bodies of literature inform the scholarly discourse. Lastly, Part III includes reference to the military mission, which sets the military criminal justice system apart from its civilian analogs. Part IV consists of the methodologies used to conduct the research for this Article, relying on qualitative coding of trial transcripts.

In Prong One (Part V),[13] the Article relies solely on records predating the enactment of Rules for Courts-Martial (RCM) 1001A[14] and 1001(c)[15] and uses qualitative methods to expose themes within VIS. In Prong Two (Part VI), the Article discusses appellate military cases that have interpreted RCM 1001A and 1001(c). The Article adopts this two-prong approach, because relying solely on appellate case law is insufficient to inform the discussion about the propriety of VIS. Not all cases with VIS are heard on appeal, and, when they are, the issue of VIS is not always litigated. For instance, many of the records from Prong Two were assigned without error on appeal, and, therefore, there is no appellate decision that would inform a reader that VIS was submitted at the trial level. Additionally, only one of the 50 records analyzed in Prong Two assigned any error related to VIS.[16]

Melding these two approaches gives greater depth and breadth of understanding to the current structure of the military criminal justice system. The findings presented here can assist policy-makers when they decide whether, and to what extent, changes, if any, should be made to the military's criminal justice process. Ultimately, questions remain regarding whether the value of the victim

[13] Prong One and Prong Two reference the dual-prong approach used in this Article. However, Prong One is included in Part V and Prong Two is included in Part VI.
[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001A (2016) [hereinafter 2016 MCM].
[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c) (2019) [hereinafter MCM]. Created in 2016, RCM 1001A is the precursor to current RCM 1001(c), both of which address VIS at sentencing in courts-martial. Because the text of RCM 1001A (2016 MCM) and 1001(c) (MCM) are identical, the RCM numbers are used interchangeably throughout the Article.
[16] In the one case that did find error, the error was not attributable to the merits or sentencing portion of the trial. United States v. Northrup, No. 201100478, 2012 CCA LEXIS 846 (N-M. Ct. Crim. App. Feb. 23, 2012). In denying the accused's clemency request, the convening authority considered VIS without giving the accused an opportunity to respond to it. *Id*. at *2–3. The appellate court set aside the denial of clemency and required that the convening authority reconsider clemency in accordance with the rules that allowed the accused to comment on any adverse matters provided to the convening authority. *Id*.

should be a consideration in sentencing, and if it should be, to what extent that value is permitted under the military rules as currently drafted.

Part VII is dedicated to the analysis and conclusion from the findings in Prongs One and Two. Part VIII provides modest proposals for reform based on these findings and conclusions.

II. THE LEGAL LANDSCAPE

A. Seminal U.S. Supreme Court and Military Case Law Addressing VIS

Both federal courts and Congress have provided legal guidelines for the use of VIS in criminal cases, but they are a relatively new tool utilized in criminal trials. It was not until 1991 that the U.S. Supreme Court in *Payne v. Tennessee* sanctioned the use of VIS in capital trials.[17] In a cocaine- and alcohol-fueled episode, Pervis Tyrone Payne went to Charisse Christopher's house and made sexual advances on her.[18] When she resisted, he stabbed Charisse and her two children, resulting in her death and the death of her two-year-old child.[19] Her other child survived after extensive surgeries. The grandmother of the deceased child testified at trial about the impact the two-year-old's death had on the surviving child.[20] In argument, the prosecutor referenced that testimony when asking for the death penalty, and the jury awarded the death penalty.[21] On appeal, Payne contended that the admission of the grandmother's testimony and the prosecutor's closing argument prejudiced his rights under the Eighth Amendment of the U.S. Constitution.[22]

Evaluating the Eighth Amendment jurisprudence as applied to the facts in *Payne*, the U.S. Supreme Court analyzed the admissibility of VIS in capital cases. Eschewing notions attributing value assignments to some victims over others, the Court reasoned that VIS "is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[23] In overturning prior cases, the *Payne* court held that VIS provided the finder of fact information about the

[17] Payne v. Tennessee, 501 U.S. 808, 830 (1991).
[18] *Id.* at 812.
[19] *Id.* at 813.
[20] *Id.* at 814–15.
[21] *Id.* at 815.
[22] *Id.* at 816–17 (citing Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989)) (explaining that the appellant relied on *Booth* and *Gathers* to argue that introducing the VIS violated the Eighth Amendment, because it led to an arbitrary sentencing outcome).
[23] *Id.* at 823.

specific harm caused by the accused and does not lead to arbitrary sentencing decisions.[24]

Military courts refined the contours of the use of VIS in military criminal trials. In *United States v. Pearson*,[25] the Court of Military Appeals (CMA)[26] was grappling with an unprecedented challenge to victim impact information—the argument that VIS was impermissible and could not be admitted as evidence at trial—which included testimony that the victim was "an outstanding person and Marine, and that his family and community were devastated by his loss."[27] Citing to federal practice and acknowledging the desire to incorporate the "full measure of loss suffered by all of the victims, including the family and the close community," the CMA found that this type of evidence can be permissible in the military context, even after applying the Military Rule of Evidence (MRE) 403 balancing test.[28]

In *Pearson*, the victim died as a result of the negligent act of the accused while the two were engaged in a bar fight.[29] At the time *Pearson* was decided, "the victim . . . ha[d] no standing in the Court beyond the status of a mere witness – he ha[d] no right of allocution and [was] often overlooked in the process of plea negotiation."[30] However, the appellate court also found that it was appropriate, if not necessary, to sentence an accused after "listening to the victim's offense-related needs."[31] Yet even *Pearson* found limits to the kind of information that could be considered, overturning the sentence based on testimony that included the community's desires regarding an appropriate sentence.[32] The appellate court's ruling echoed sentiments from *Payne*:

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[24] *Id.* at 825.
[25] United States v. Pearson, 17 M.J. 149 (C.M.A. 1984).
[26] The CMA is the name of the court that preceded the Court of Appeals for the Armed Forces.
[27] *Pearson*, 17 M.J. at 152.
[28] *Id*. at 153. *Pearson* involved government evidence in aggravation, which is subject to the Military Rules of Evidence. Applying MCM, Military Rules of Evidence (M.R.E.), the court found that the "victim's character and magnitude of loss felt by his family and community" was not unfairly prejudicial and therefore admissible. *Id.* However, it did overturn the sentence after finding the trial court impermissibly admitted testimony from the father which said, "I've been sitting over there trying to think how I can go back home, how I can call my wife tonight, and how I can go back home to Reeseville, and tell them that the verdict was negligent homicide[,]" and testimony from someone from the victim's unit that the entire unit was waiting on the results of the court-martial. *Id.* at 151 (quoting the father's testimony). *But see* United States v. Tyler, 81 M.J. 108 (C.A.A.F. 2021) (holding that victim impact statements offered by the victim, not the Government, are not evidence and therefore not subject to M.R.E. 403).
[29] *Pearson*, 17 M.J. at 150.
[30] *Id.* at 152 (internal citations omitted).
[31] *Id*.
[32] *Id.* at 153.

> Thus trial judges, in their sound discretion, may permit counsel to introduce evidence of the character of the victim. This is not to imply that the life of a victim who is unloved or unappreciated by his community is any less precious than that of a pillar of society. It is simply a recognition that the actual extent of damages inflicted by a criminal can be brought to the attention of the sentencing body.[33]

The CMA's decision in *Pearson* acknowledged the importance of conveying the effect of victim impact information but drew a line between the impact to the victim's family and unit and the impact of the court-martial verdict.

B. Procedural Developments

Over 30 years after victims received the right to provide VIS at sentencing hearings in federal courts through the VWPA, Congress created Article 6b, Uniform Code of Military Justice (UCMJ),[34] and promulgation of the Rules for Courts-Martial (RCM) implementing that statute followed.[35] Sentencing principles in the military now allow victims the independent right to introduce information that relates to the impact of crimes on them.[36] These changes are consistent with the majority of jurisdictions within the United States, which require sworn statements at capital hearings.[37] According to the RCM, victims are entitled to provide a sworn or unsworn statement, and the unsworn statement may be made orally, in writing, or both.[38]

There are two ways in which VIS may be introduced in a military sentencing hearing. The first way is via the prosecutor, who may introduce evidence in aggravation under RCM 1001(b)(4), which states:

> Trial counsel may present evidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of

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[33] *Id*.
[34] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 953 (2013); Exec. Order No. 13696, 80 C.F.R. § 35783 (2015).
[35] *See* 2016 MCM, *supra* note 14, R.C.M. 1001A(b)(4) ("Right to be reasonably heard. (A) Capital cases. In capital cases, for purposes of this rule, the 'right to be reasonably heard' means the right to make a sworn statement."). Prior to this change, victims could be called as witnesses by the Government to offer sworn statements and, in limited circumstances, they could provide handwritten statements the prosecution could offer as evidence. However, victims did not hold a right independent of the prosecution to present VIS to the court.
[36] MCM, *supra* note 15, R.C.M. 1001(c).
[37] MODEL PENAL CODE: SENTENCING, *supra* note 7.
[38] MCM, *supra* note 15, R.C.M. 1001(c)(2)(D)(ii).

> financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command *directly and immediately resulting from* the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.[39]

Military law has provided the opportunity for evidence in aggravation to be considered since at least as far back as the late nineteenth century.[40] It is likely that a court could have heard testimony from a victim for sentencing purposes prior to 1891.[41] The law related to VIS is currently evolving, and through this evolution, the lack of clarity on what can and should be considered 'victim impact' is apparent. This lack of clarity is not simply a military problem but exists in state jurisdictions too.[42] In the military, at least one court has interpreted the scope of the substance of a victim's VIS under RCM 1001A and RCM 1001(c) as broader and more encompassing than the government's ability to introduce evidence in aggravation under RCM 1001(b)(4).[43] The basis for finding a broader right stems from the language, 'arising from' in RCM 1001(c)(2)(B), as distinguished from 'resulting from,' used to define evidence in aggravation under RCM 1001(b)(4). However, whether the scope of VIS in the military is broader than the government's evidence in aggravation is not settled.

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[39] MCM, *supra* note 15, R.C.M. 1001(b)(4) (emphasis added).

[40] ARTHUR MURRAY, INSTRUCTIONS FOR COURTS-MARTIAL INCLUDING SUMMARY COURTS 24 (2d ed. 1891) ("In all cases of discretionary punishment . . . full knowledge of the circumstances attending the offense is essential to an enlightened exercise of the discretion of the court in measuring punishment, and for the information of the reviewing authority in judging of the merits of the sentence. It is, therefore, proper for the court to take evidence after a plea of guilty in any such case, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation that accompany the offense.").

[41] *Id*.; MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. IX, ¶ 154(c) (1921) [hereinafter 1921 MCM] (restating similar language to that found in the Murray Manual: "In cases where the punishment is discretionary a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority in acting on the sentence.").

[42] MODEL PENAL CODE: SENTENCING, *supra* note 7; Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument after* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1035 (1992) (finding that the *Payne* decision's single-pronged approach to constitutionally problematic evidence, that is also deemed harmless, creates an ambiguity for trial participants in assessing whether evidence is admissible).

[43] *See* United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240 (N-M. Ct. Crim. App. Apr. 13, 2017)*; see also* discussion, *infra*, Part V.

The second way in which VIS may be introduced is by the victim, after the prosecution has presented its evidence. In some cases, VIS is introduced both as prosecution aggravation evidence and through the victim, but there is no requirement that either or both mechanisms be used. A victim has a right to reasonably be heard under RCM 1001(c)(2)(B), which includes the ability to provide victim impact information: "victim impact includes any financial, social, psychological, or medical impact on the crime victim *directly relating to or arising from* the offense of which the accused has been found guilty."[44]

III. LITERARY FRAMEWORK

A. VIS

The scholarly debate surrounding VIS reveals a chasm between two opposing views, including those who support the use of VIS and those who do not. The debates revolve around the arguments illuminated in the U.S. Supreme Court case law already discussed. Yet the scholarly discourse provides additional context to the debate due to the scientific findings from the research fueling the discussion. While case law can address the greater issues revolving around VIS, it is limited to the facts of the case before the court. In this Part, the Article includes some of the research and literature that helps inform the debate from a scientific perspective.

Permitting the admission of VIS in criminal proceedings has been one significant change to the law regarding victim rights. While this change occurred at different times in different jurisdictions, most states allow for VIS in some form.[45] The primary purpose of the VIS, from a legal standpoint, is to provide information to the finder of fact for consideration when voting on a sentence and can be used as a basis to ask for more or less punishment from the finder of fact.[46] Some opine that another purpose of VIS is to provide a channel through which victims receive a therapeutic benefit.[47] Yet others believe that any therapeutic

[44] (emphasis added). *See supra* note 15 (explaining that the language in RCMs 1001A and 1001(c) is the same).
[45] *See* Kimberly J. Winbush, *Admissibility of Victim Impact Evidence in Noncapital State Proceedings*, 8 A.L.R. 7th Art. 6 (2016).
[46] *See, e.g.*, Karen-Lee Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUAL. HEALTH RES. 1445, 1445 (2013) [hereinafter Miller, *Purposing*]; Karen-Lee Miller, *Relational Caring: The Use of the Victim Impact Statement by Sexually Assaulted Women*, 29 VIOLENCE & VICTIMS 797, 797–98 (2014) [hereinafter Miller, *Relational*].
[47] Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 5 (1994); Amy L. Wevodau et al., *The Role of Emotion and Cognition in Juror Perceptions of Victim Impact Statements*, 27 SOC. JUST. RSCH. 45, 47 (2014).

benefit to the victim may not be worth the possible additional trauma experienced through participating in the criminal justice process.[48]

Although many jurisdictions allow victims to provide a VIS, studies have shown that victims often do not participate when afforded the right to do so.[49] These results might be skewed when taking into account other research that shows victims do not always remember providing VIS.[50] Despite this, based on the data that is available, victims choose to provide VIS for a variety of reasons. In one study, benefits of providing VIS were assessed through qualitative victim interviews and various themes were pronounced.[51] While focusing on the harm to the victim was a component of the reason victims provided VIS, the potential to prevent harm to others also arose as a compelling reason for victims to participate in the process.[52]

Proponents of the laws allowing the admission of VIS in criminal proceedings believe that the change in the law has been instrumental in giving victims a "voice" throughout the criminal justice process, because it allows victims the opportunity to express their thoughts about the decisions made throughout the process.[53] Researchers have questioned whether the advent of VIS has given victims any additional satisfaction in the criminal justice process, and findings are mixed.[54]

The debate surrounding VIS has precipitated research on the impact VIS have on sentencing outcomes.[55] In one study, potential jurors were given a questionnaire to assess personal attributes of the participant and the way in which the participant stated they would sentence a sexual assault offender, based on a

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[48] Miller, *Relational*, *supra* note 46, at 799.

[49] Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH., PUB. POL'Y, & L. 492, 493 (2004) (finding that most victims do not participate when afforded the opportunity to provide VIS. Only 18 percent of victims attended the sentencing hearing, and only nine percent provided an oral statement to a judge or jury).

[50] *See* Jeanna M. Mastrocinque, *Victim Personal Statements: An Analysis of Notification and Utilization*, 14 CRIMINOLOGY & CRIM. JUST. 216, 229 (2013) (identifying this as a suggested topic for additional research on VIS).

[51] Miller, *Relational*, *supra* note 46, at 807 (describing how the interviews identified multiple reasons for why victims chose to participate in the proceedings, with a common theme being the desire to help other victims); *id.* at 802 (identifying victims' concerns for the safety of others or those who also suffered as a result of the violence).

[52] *Id.* at 804.

[53] Kristin L. Anderson, *Victims' Voices and Victims' Choices in Three IPV Courts*, 21 VIOLENCE AGAINST WOMEN 105, 107 (2015); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 217 (1999); Mastrocinque, *supra* note 50, at 217.

[54] Davis & Smith, *supra* note 47, at 10–11.

[55] Erez & Rogers, *supra* note 53, at 220–21; Amy L. Wevodau et al., *Why the Impact? Negative Affective Change as a Mediator of the Effects of Victim Impact Statements*, 29 J. INTERPERSONAL VIOLENCE 45, 46 (2014).

vignette provided in the study.[56] The questions pertaining to personal attributes were used to determine whether the participants were more likely to make judgments based on emotion.[57] The study showed that the introduction of a VIS in a criminal trial had a positive correlation with increased confinement.[58] Yet this study did not address whether VIS impacted sentencing decisions in actual cases.

Some scholars have criticized the reforms allowing VIS to be admitted in criminal trials.[59] Professor Susan Bandes argues that the focus in determining punishment should be on the offender rather than the victim.[60] One major concern for Bandes is that while allowing admission of VIS might seem to be a positive change in the law, it ultimately harms the community of victims when assessed at the meta-level.[61] Bandes posits that VIS are "inappropriate" and should be suppressed, because they "appeal to hatred, the desire for undifferentiated vengeance, and even bigotry."[62] If the focus of a sentencing proceeding is, in part, on the victim, and the value of the victim is given weight in determining an appropriate sentence, then there must be some victims who are valued more than others in terms of punishments imposed. Bandes supports her arguments for abolishing VIS, in part, on the findings in the studies conducted by David Baldus.[63] Those studies showed that the death penalty was 22 percent more likely to be awarded to Black defendants with White victims than Black defendants with Black victims.[64]

Bandes perceives this purported disparity in sentencing based on the value ascribed to the victim as problematic.[65] For instance, some victims state they were more trusting of others before the assault.[66] Some victims state they were unable to keep intimate bonds with others due to the assault.[67] While the contextual evidence provided by the VIS logically assists in assessing the totality

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[56] Wevodau et al., *supra* note 55, at 51.
[57] *Id.* at 52.
[58] *Id.* at 57.
[59] Stevens, *supra* note 2, ¶¶ 49–55 (arguing VIS can be subject to U.S. Constitution, Fourteenth Amendment challenges).
[60] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365–66, 398 (1996).
[61] *Id.* at 405–08.
[62] *Id.* at 365.
[63] *Id.*
[64] *Id.* at 398 (citing to DAVID C. BALDUS, GEORGE WOODWORTH, & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern Univ. Press, 1990)); *see also* McClesky v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting) (relying on the Baldus study to show that race increased the likelihood of the death penalty being sought and awarded and concluding, therefore, that the sentence to death was constitutionally untenable in McClesky's case).
[65] Bandes, *supra* note 60, at 398.
[66] Miller, *Purposing*, *supra* note 46, at 1453.
[67] *Id.*

of the harm inflicted by the perpetrator, it implicitly allows for the conclusion that the experiences of victims who do not suffer in the same way—in terms of factors that should increase the punishment for the offender—are not as important as others who do. In other words, assailing an unsympathetic victim potentially provides a benefit to the offender in sentencing. Furthermore, given the results of studies showing racial effects in punishments awarded in criminal trials,[68] differentiating between victims through VIS creates the possibility of the very kind of racial discrimination found problematic by the dissent in the U.S. Supreme Court's case of *McClesky v. Kemp*.[69]

B. Gendered Violence

In the context of sexual assault, the empirical evidence supports the arguments of some that introducing VIS implicitly asks the finder of fact to make a value judgment on the victim.[70] Placing value judgments on the worth of women is nothing new, especially as it relates to their purity, directly tied to their virginity.[71] Historically, women were chattel, the exclusive property of their fathers or husbands.[72] A sexual violation against a woman, or more precisely a virgin, was, by law and social construction, a violation against the man who owned her.[73] It was her virginity that made her valuable, or of value.[74] While some

[68] Sara Steen, Rodney L. Engen, & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005) (finding Black defendants were significantly more likely to be confined compared to White defendants); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judge's Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2006) (finding White defendants received the greatest leniency in sentencing, followed by Black and then Hispanic defendants).

[69] *See supra* note 64.

[70] Bandes, *supra* note 60, at 394–95.

[71] *See generally* Susan Estrich, *Real Rape*, 95 YALE L.J. 1087, 1141 (1986) ("Rape has long been viewed not only as a crime against women, but also as a crime against the man who is entitled to exclusive possession of that woman."); NILS CHRISTIE, THE IDEAL VICTIM 19 (1986) (being a virgin increases the likelihood that a victim is considered an ideal rape victim); Mirka Smolej, *Constructing Ideal Victims? Violence Narratives in Finnish Crime-Appeal Programming*, 6 CRIME MEDIA CULT. 69, 81 (2010) ("the identification as an 'ideal victim' is connected with vulnerability and innocence.").

[72] Gerald D. Robin, *Forcible Rape Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQ. 136, 149 (1977); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 13 (1st Ballantine Books ed. 1975).

[73] BROWNMILLER, *supra* note 72, at 17.

[74] *See* Jennifer Dunn & Tennley Vik, *Virginity for Sale: A Foucauldian Moment in the History of Sexuality*, 18 SEX. CULT. 487, 491 (2014) (discussing the social and economic value of virginity throughout history); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 110 (1989) (describing how feminists have recognized that greater society perceives that "[v]irtuous girls, virginal, are 'attractive,' up on those pedestals from which they must be brought down; unvirtuous girls, whores, are 'provocative,' so deserve what they get."). MacKinnon further explains: "The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally [have intercourse with], who is open season and who is off limits, not how to listen to women. The paradigm categories are

ancient cultures proscribed the death penalty for taking a woman's virginity, some merely required the offender to pay the price a suitor would have paid to marry her.[75] Of course, given the woman was her father's chattel, the compensatory fee was paid to the father.[76] In Assyrian culture, the father was not paid nor was capital punishment imposed on the offender, but as a consolation to the father, he was allowed to rape the wife of the offender.[77]

The criminal code applicable to the military, being enacted by a society that adhered to chattel law, included marriage as a defense to sexual assault well into the twenty-first Century.[78] The exception to criminal sanction for marital rape was included by the drafters of the Model Penal Code who, broadly, did not want an "unwarranted intrusion of the penal law into the life of the family."[79] Additionally, in American culture, the crime of sexual assault has historically been seen as a crime against the state vice the victim.[80]

With this context in mind, one could reasonably conclude that the arguments in *Payne* and *Pearson*, which implicitly fail to acknowledge the underlying sociological schema that pervade VIS,[81] are unsatisfying. Although the concept of VIS is relatively new compared to the long history showing subjugation of women to men, it, at least implicitly, seems to hold faith with earlier conceptions about female autonomy—that is, society should make distinctions in criminal justice decision-making based on the value of the victim.[82] Although virginity could be a relevant factor for consideration at a sentencing hearing under current laws, melding the old with the new continues to raise

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the virginial daughter and other young girls, with whom all sex is proscribed, and the whorelike wives and prostitutes, with whom no sex is proscribed." *Id*. at 175.

[75] BROWNMILLER, *supra* note 72, at 20.

[76] *Id.*

[77] *Id.*

[78] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45.a.(g) (2012), *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45.a.(o)(1) (2008).

[79] Estrich, *supra* note 71, at 1142 n.176.

[80] *See* Jamie L. Small, *Classing Sex Offenders: How Prosecutors and Defense Attorneys Differentiate Men Accused of Sexual Assault*, 49 LAW & SOC'Y REV. 109, 122 (2015) (suggesting that historically, the anti-rape agenda has been rooted in a paternalistic vision of society wherein "[s]exual assault emerges as a crime against the state to be resolved by prosecutors."); *see also* Edna Erez, *Who is Afraid of the Big Bad Victim: Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 547 (1999) (comparing the restitutive model of justice with the traditional standards, the latter of which is not meant to make the victim whole).

[81] Friederike Eyssel & Gerd Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, 26 J. INTERPERSONAL VIOLENCE 1579, 1581 (2011) (focusing on "schematic influences of rape-supporting attitudes on perceptions of guilt and responsibility in rape cases.").

[82] Of the victims with a coded gender in the cases reviewed for this Article, the data revealed that 47 of the cases included female victims and three cases included male victims.

questions about how to incorporate impact to victims without the pitfall that *Payne* and *Pearson* dismiss.[83]

C. Intersectional Approaches to Gendered Violence

An intersectional approach uncovers how gender and race, as two examples, impact individuals in different ways, including how society constructs and responds to individuals with those characteristics.[84] Some scholars take an intersectional approach in order to appreciate the contextual, causal factors that underlie some forms of gendered violence.[85] Intersectional approaches to gendered violence allow for an appreciation of how heteronormativity does not explain the circumstances through which all individuals experience and respond to violence.[86] Historically, constructions of victimization failed to take into account intersectional approaches to understanding victimization, because those constructions focused on responding to the experiences of middle-class White women, which differed from lower-income (and) Black women.[87] For instance, dominant discourse on race and gender fail to appreciate or treat as significant experiences of Black women in violent situations.[88] The experiences of middle-class women included the social and economic ability to access resources in response to victimization by violence.[89] Further, defining victimization in middle-class White women's terms meant that the experiences of low-income, Black women were "invisible to the mainstream public . . . [or] cast as something other than a case of gender violence."[90] Therefore, these mainstream discourses failed

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[83] Payne v. Tennessee, 501 U.S. 808, 819 (1991); United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984).

[84] *See, e.g.,* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) ("Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment."); Xavier Guadalupe-Diaz, *An Exploration of Differences in the Help-Seeking of LGBQ Victims of Violence by Race, Economic Class and Gender*, 9 GAY LESBIAN ISSUES PSYCHOL. REV. 15 (2013) (finding that in "the hypothesized statement that both class and gender identity are important factors in the decision to seek help for LGBQ victims of violence, class was especially influential."); Archana Bodas LaPollo, Lisa Bond, & Jennifer L. Lauby, *Hypermasculinity and Sexual Risk Among Black and White Men Who Have Sex with Men and Women*, 8 AM. J. MENS HEALTH 362 (2014); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012) [hereinafter RICHIE, ARRESTED JUSTICE] ("Black women's bodies are simultaneously marked by racial, gender, sexual, color, historical, class, and other stigmas . . .").

[85] *See, e.g.*, Crenshaw, *supra* note 84; Guadalupe-Diaz, *supra* note 84; LaPollo, Bond, & Lauby, *supra* note 84; RICHIE, ARRESTED JUSTICE, *supra* note 84.

[86] Clare Cannon et al., *Re-Theorizing Intimate Partner Violence through Post-Structural Feminism, Queer Theory, and the Sociology of Gender*, 4 SOC. SCI. 668, 672 (2015).

[87] Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 J. WOMEN CULTURE & SOC'Y 1133, 1135 (2000) [hereinafter Richie, *Feminist*].

[88] Crenshaw, *supra* note 84, at 1269.

[89] Richie, *Feminist*, *supra* note 87, at 1135.

[90] *Id.*

to account for the stark differences between the experiences of victims of violence within and without Black communities and at different levels of the socio-economic ladder.[91] These differences have often been left out or masked in mainstream discourses concerning both issues of race and gender because neither takes into account the impact of being both Black and a woman.[92] And while gender and race are factors analyzed through intersectional approaches, many other characteristics are as well.

D. Military Environment

Consideration must also be given to the notion that the military society is separated, arguably for good reason, from its civilian counterparts. The basis for the military's criminal code and the system that adheres to it is predicated on the need to maintain a disciplined fighting force, and is executed to some extent through criminal sanctions. Questions arise in the context of VIS as to what extent should the impact of sexual assault—to the mission, not just the individual—be considered at sentencing. The extent of harm to the military mission can be significant, especially when victims are military members and offenses occur within units.

When it comes to the military mission, two countervailing positions arise. One view is that the bounds of VIS could be constrained by principles of sentencing that include *foreseeable* damage caused by the offender.[93] Otherwise, one might find sentencing what some believe it has become—a popularity contest, the results of which directly impact the sentence imposed on the offender.[94] Another view exists that sexual assault, in some cases, has such a detrimental impact to the military mission that punishments to offenders should take into account that harm, regardless of its foreseeability by the offender.[95]

IV. METHODOLOGY

This study uses a two-part approach. Prong One of the study involves a qualitative review of trial-level records that predated the enactment of RCM 1001A and 1001(c), and used convenience sampling, which included reviewing as many records of trial as practicable for Navy sexual assault cases. These cases represent those to which the author had access during his tenure litigating cases

[91] RICHIE, ARRESTED JUSTICE, *supra* note 84, at 1.
[92] Crenshaw, *supra* note 84, at 1242.
[93] United States v. Stephens, 66 M.J. 520, 528 (A.F. Ct. Crim. App. 2008) (discussing foreseeable consequences as appropriate considerations for sentencing).
[94] Bandes, *supra* note 60, at 410 ("The victim impact statement dehumanizes the defendant and employs the victim's story for a particular end: to cast the defendant from the human community.").
[95] *See infra* Part VI.

as a defense counsel and prosecutor.[96] The Navy does not keep a verbatim transcript of every trial; only trials meeting specific criteria are transcribed.[97] There are thousands of military trials that have not been recorded. There are thousands of records that, although audio-recorded, have not been reduced to a transcript. Thus, the sampling plan is one of convenience, but also one involving practical realities. Within the 50 trials reviewed,[98] there were 66 victims and 61 VIS provided during the sentencing proceedings. Some of the trials had multiple victims. Some of the victims were children, and some of the VIS were provided by a family member of the victim. There were several cases with a finding of guilty where the victim did not testify at the pre-sentencing hearing. In those instances, the victim had already testified during the merits portion of the trial.

To qualitatively analyze these records, the author used grounded theory.[99] The process of grounded theory entails the review of data through two stages: "open [coding] and focused coding."[100] Open or "initial" coding is a process of looking at the data to determine "what is happening."[101] If the researcher finds there are "patterns, consequences, inconsistencies, [or] contradictions[,]" then the researcher will annotate those as a possible theme.[102] However, sometimes there is only one instance of a phenomenon occurring. That only one instance can be found should not dissuade the researcher from including the theme because pervasiveness is but one aspect of making initial coding decisions.[103] The second phase is called focused coding. Focused coding is the process of organizing themes in the data in order to analyze large amounts of data.[104]

The methodologies used herein are akin to those used by Gregory Matoesian, David Brereton, and Philip Rumney, who studied the language in trials

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[96] From 2009 to 2016, the author served as a defense counsel. From 2016 to 2021, he served as a prosecutor.

[97] During the timeframe studied, a trial with a sentence that exceeded six months or where a punitive discharge was adjudged were required to be transcribed verbatim. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b)(2)(B) (2000).

[98] For a full list of cases used for the purposes of this analysis, see *infra* Appendix A; *see also infra* Appendix C for descriptive statistics of the cases relied upon in this study and listed in Appendix A.

[99] The author is unaware of any other published studies that have analyzed VIS in a similar way. *But see generally* Tali Gal & Ruthy Lowenstein Lazar, *Sounds of Silence: A Thematic Analysis of Victim Impact Statements*, 27 LEWIS & CLARK L. REV. (forthcoming 2023), https://bit.ly/3Bjjkjy (discussing how allowing VIS to be used during criminal proceedings can "create a new framework that integrates the legal and therapeutic discourses.").

[100] Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOC. PROBS. 393, 395 (1998).

[101] Kathy Charmaz & Karen Henwood, *Grounded Theory*, *in* THE SAGE HANDBOOK OF QUALITATIVE RESEARCH IN PSYCHOLOGY 1, 8 (3d ed., 2008).

[102] Frohmann, *supra* note 100, at 395.

[103] *See* ROBERT M. EMERSON ET AL., WRITING ETHNOGRAPHIC FIELDNOTES 161–62 (1st ed. 1995).

[104] Charmaz & Henwood, *supra* note 101, at 7.

to discover what actually happened at trial.[105] These studies help illuminate the extent to which rape law reforms have effectuated change within the criminal justice process. For instance, Matoesian questioned whether rape shield laws produced the intended benefits legislatures had in mind when enacting them.[106] Matoesian only had to analyze one trial to come to the conclusion that criminal justice actors have a penchant for subverting the purpose of the rules.[107] He showed how "subtle descriptions emanating from the patriarchal logic of sexual rationality" and "overt sexual history references" were both types of rape shield evidence.[108] In his estimation, the former type of rape shield evidence flowed through the testimony of witnesses without objection from the participants.[109]

In Prong Two, the author researched cases addressing the language of RCM 1001A and 1001(c), specifically the 'directly related to or arising from' language. Using LexisNexis search features, the author searched all military cases with the search parameter 'arising from.' The search focused on 'arising from' rather than 'directly related to,' because the latter phrase was already contained in RCM 1001(b)(4). This produced 1,584 results. He then focused the search further with the search term, "victim impact." The author used this search term in the event that a court characterized a VIS as a statement or evidence. This search resulted in 66 cases. 55 cases were removed from the analysis, because they (1) predated RCM 1001A, and/or (2) they had the search terms in the opinion without addressing the substance of VIS within the scope of RCM 1001A or 1001(c). 11 cases remained for analysis and are discussed *infra* Part VI.

V. FINDINGS (PRONG ONE)

Core concepts and themes pervaded the data during the qualitative review of trials that preceded the enactment of RCM 1001A. There were other themes that were not as prevalent, but were included because of the perceived importance of highlighting them, such as instances of retaliation. Effort was made to include the exact language from the transcripts in order to allow the reader to make a

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[105] *See generally* David Brereton, *How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials*, 37 BRIT. J. CRIMINOLOGY 242 (1997) (examining transcripts of trials to qualitatively assess the difference in treatment of rape and assault victims); Gregory M. Matoesian, *"You Were Interested in Him as a Person?": Rhythms of Domination in the Kennedy Smith Rape Trial*, 22 L. & SOC'Y INQUIRY 55 (1997) (using conversation analysis to qualitatively analyze one rape trial to illuminate members' meanings through trial-talk); Philip N. S. Rumney, *Gender Neutrality, Rape and Trial Talk*, 21 INT. J. SEMIOTICS L. 139 (2008) (examining transcripts of trials to qualitatively assess the difference in treatment of female and male victims of sexual assault during cross-examination).

[106] Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 691 (1995).

[107] *Id.*

[108] *Id.*

[109] *Id.*

judgment about what the data means.[110] That a particular phenomenon was not discussed during testimony is not an indicator that it did not occur, which is an important factor to keep in mind considering the results. The burden of testifying in open court about a highly sensitive topic such as sexual assault could cause enough stress or anxiety that a victim might not remember to mention a particular detail.[111] Additionally, the prosecutor might not have thought a particular line of inquiry was relevant or for some other reason it was not addressed.

In the subparts that follow, the themes are grouped into victim focus, offender focus, and retaliation. Under victim focus, the groupings consist of: (1) Victim, Mental/Emotional Effect; (2) Victim, Other Effect; (3) Victim Contemporaneous Response to Sexual Assault; (4) Victim, Loss of Trust in Service and/or Chain of Command; and (5) Victims' Thoughts about the Criminal Justice Process. Several cases represented overlapping themes.

A. Victim Focus

A majority of the testimony of victims in the sample focused on the victim response.[112] Within the context of the victim-focus theme, most of the testimony covered the impact of the sexual assault on the victim. However, testimony was elicited that focused on the victim before the assault and, to a lesser degree, during the assault. In most cases, there was little-to-no discussion about the facts pertaining to the sexual assault. The lack of focus on the sexual assault event itself can be explained in the cases that were contested, where the victim earlier testified about those facts.[113]

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[110] *See infra* Appendix A and Appendix B. Appendix A provides a citation list of the trial-level cases analyzed in this study. Appendix B includes individual verbatim transcript excerpts from some of those trials referenced in Appendix A. The excerpts contained in Appendix B were selected, because they provide salient examples of the themes found within the greater data set. The full Records of Trial ("ROT") for all of the cases relied upon in this article and contained in Appendix A can be obtained by contacting the Criminal Law Division of the Office of the Judge Advocate General, U.S. Navy (Code 20).

[111] Meyers, *supra* note 10, at 146.

[112] There was only one contested case with a VIS where the victim's testimony focused on the facts of the sexual offense. *See* United States v. Owens, No. 10-09, ROT p. 546 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009). This case was different than most other cases because it was a domestic violence case involving a married couple with children. *Id*. There were numerous instances of psychological and physical abuse over an extended period of time. *Id*. at 547–48. However, the victim spent more time recounting the verbal abuse, a non-criminal offense, than she did recounting the physical abuse. *Id*. at 546–48.

[113] *See* United States v. Gifford, No. 10-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Feb. 12, 2012), *aff'd*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. Feb. 12, 2013); United States v. Jordan, No. 6-11 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Aug. 16, 2011); United States v. Kennedy, No. 16-11 (Commander, Navy Region Southeast, Kings Bay, Georgia, Aug. 25, 2011); United States v. Western, No. 20-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 1, 2011); United States v. Perry, No. 18-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Aug. 18, 2011); United States v. Hernandez-Alverado, No. 18-05 (Commanding

1. Victim, Mental/Emotional Effect

The testimony concerning the impact of the sexual assault on the victim can be parsed into impacts on mental processes and impacts associated with other aspects of victims' lives. For instance, one victim described how she has changed as a result of the sexual assault: "it's made me someone who's, like, less carefree. And now I have to—everything is more calculated."[114] In contrast, there are aspects of the sexual assault that have affected victims physically. For example, one child victim responded to the sexual assault by physically harming herself. As her mother described it, "[the child will] pull her hair; she'll bite herself; she'll scratch herself."[115] These physical manifestations might be a product of the psychological impact caused by the sexual assault. However, where there is reference to the mental processes of the victim, these were coded under mental processes. Testimony concerning impact not directly related to mental processes was coded separately.

All but three of the VIS provided in the form of testimony referenced an impact to the victim's emotional or psychological state emanating from the sexual trauma. Victims testified about going into "deep shock" and being "numb," as well as suffering from "depression" and "PTSD."[116] Ten victims testified that they had "nightmares" or "bad dreams."[117] However, there were several victims who stated they had many "psychological issues" without providing further context.

Officer, 1st Force Service Support Group, Camp Pendleton, California, Nov. 5, 2004) (Victims 1 through 4), *aff'd*, 2006 CCA LEXIS 298 (N-M. Ct. Crim. App. Nov. 21, 2006); United States v. Heyward, No. 05-0699 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Oct. 5, 2001); United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000) (Victims 1 and 2).

[114] United States v. Castillo, No. M12-01, ROT p. 1700 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).

[115] United States v. Cantrell, No. 1-04, ROT p. 1687 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, June 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).

[116] United States v. Bohlayer, No. 1-2014, ROT p. 56 (Commander, Marine Corps Installations Command, Washington Navy Yard, District of Columbia, Nov. 1, 2013); United States v. Edmond, No. 01-12 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sept. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. 2015); United States v. Antonio, No. 02-2013 (3d Marine Aircraft Wing, Camp Pendleton, California, Feb. 28, 2013); *Cantrell*, No. 1-04; United States v. Harris, No. 23-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 21, 2011), *aff'd*, 2012 CCA LEXIS 860 (N-M. Ct. Crim. App. Feb. 21, 2012); *Owens*, No. 10-09.

[117] *Bohlayer*, No. 1-2014; *Antonio*, No. 02-2013; United States v. Sanchez, No. 2-2013 (Commanding General, Marine Corps Air Station Miramar, San Diego, California, Oct. 29, 2012); United States v. Barr, No. 02-12 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011); *Harris*, No. 23-11; United States v. Holmes, No. 9-2011 (Commander, Navy Region Midwest, Great Lakes, Illinois, Aug. 27, 2011), *aff'd*, 2012 CCA LEXIS 782 (N-M. Crim. Ct. App. Dec. 18, 2012); *Owens*, No. 10-09; United States v. Morgan, No. 04-1036 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003); *Meredith*, No. 06-0697.

Some of the victims who testified about experiencing nightmares went into vivid details about those experiences.

Most victims were left with only negative perspectives concerning the sexual assault. 16 victims testified about how they continued to think about the sexual assault and the offender, especially when something occurred that triggered a "flashback."[118] The sample excerpts in Appendix B, Set #1, show how victims described the mental processes from which they suffered as a result of the sexual trauma. The mental processes affected the way in which victims engaged in basic aspects of daily life. As an example, one victim was unable to go to bed without ensuring that she was fortified in her home.[119] Shopping on base was no longer an option because the offender could have been present.[120] Contrastingly, in at least two instances, the victims testified they were actually stronger for having experienced sexual assault.[121]

Military victims are unique, compared to some populations. The data showed that many victims were required to remain at the same duty station, and in some cases in the same barracks, as the offender.[122] The military is also unique because there are potentially punitive consequences for failing to remain at one's place of duty. A victim serving on active duty in the military cannot simply quit or fail to appear at work without potentially facing punitive consequences. One victim testified about this very issue. She was aware that her failure to show up at the command could result in her being punished for being absent without authority.[123] Her fear of the offender was so significant that she risked punishment in order to avoid coming into contact with him.[124] Another victim was upset with the command, because they kept the offender on the ship with her where there were no locks on the berthing compartments.[125] She responded by sleeping in a chair in a locked space where she normally worked on the ship. Another victim

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[118] United States v. Muro, No. 12-2012, ROT p. 137, 140 (Commanding General, 3d Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012); United States v. Wylie, No. 5-12, ROT p. 186 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011) (Victim 1 and 2); *Owens*, No. 10-09, ROT p. 549.

[119] *Muro*, No. 12-2012, ROT p. 140.

[120] *Id*. at 137.

[121] *See infra* Appendix B, Set #2; *Castillo*, No. M12-01, ROT p. 142; *Cantrell*, No. 1-04, ROT p. 105 (one victim stated she was "stronger" for having endured the offense and the latter stated it made her a "strong woman").

[122] *See, e.g*., *Edmond*, No. 01-12, ROT p. 1837 (where the victim discussed feeling unsafe when she was required to live in the same barracks as the accused); *Antonio*, No. 02-2013, ROT p. 36 (where the victim described her experience living in the barracks with the accused after the assault as a form of "prison").

[123] *Muro*, No. 12-2012, ROT p. 137.

[124] *Id*.

[125] United States v. Hollars, No. 1-11, ROT p. 2145 (Commanding Officer, USS NIMITZ (CVN 68), Bremerton, Washington, Jan. 12, 2012), *aff'd*, 2012 CCA LEXIS 505 (N-M. Ct. Crim. App. June 19, 2012).

moved barracks rooms, but even this prophylactic measure did not fully mediate the effects of her hypervigilance, as she continued to experience heightened concern about her safety.[126]

2. Victim, Other Effect

Victims of sexual assault suffer from impacts other than mental and emotional ones, such as physical injury. However, some of these impacts may be indirectly related to the mental and emotional impacts from the assault.[127] In some cases, the source of the impact might be wholly outside the victim's control, such as a supervisor's response to the process flowing from the sexual assault.

One theme relating to the impact of the sexual assault encompasses work-related performance. One victim suffered at school; her grades decreased due to lack of focus and motivation.[128] Another victim had to be moved to an administrative position, because, as she described, it was "extremely hard to function at work when [she felt] like there [wa]s no one [she could] turn to."[129] The job she had performed previously required mental alertness and a high degree of danger. In contrast, one victim excelled after being sexually assaulted; she graduated at the top of her class through two training schools. She was transferred to another duty station and continued to excel there.[130] Two additional victims presented a further contrast by testifying that they experienced no effect on their personal or professional lives resulting from the assault and ensuing criminal process.[131]

Victims also suffered negative consequences at work, with no apparent connection to their military performance. Two military victims testified about how they were placed on an administrative "hold" for months due to the pending criminal trial; one victim stated she was on hold for over a year.[132] Their hold

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[126] United States v. Hudson, No. 2-11, ROT pp. 195–96 (Commander, National Naval Medical Center, Bethesda, Maryland, June 21, 2011), *aff'd*, 2012 CCA LEXIS 344 (N-M. Ct. Crim. App. Aug. 31, 2012).
[127] Alina Suris & Lisa Lind, *Military Sexual Trauma: A Review of Prevalence and Associated Health Consequences in Veterans*, 9 TRAUMA, VIOLENCE, & ABUSE 250, 261 (2008) (recognizing the link between post-traumatic stress disorder associated with sexual assault trauma and physical health symptoms).
[128] *Cantrell*, No. 1-04, ROT pp. 103–08.
[129] *Castillo*, No. M12-01, ROT p. 162.
[130] *Meredith*, No. 06-0697, ROT p. 990.
[131] *Castillo*, No. M12-01, ROT p. 1718 (Victim 2); United States v. Gonzalez, No. 18-11, ROT p. 210 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, May 12, 2011), *aff'd*, 2011 CCA LEXIS 644 (N-M. Ct. Crim. App. Nov. 30, 2011).
[132] United States v. Byrd, No. 7-95, ROT p. 127 (Victim 1), ROT p. 130 (Victim 3) (Chief of Naval Education and Training, Pensacola, Florida, May 1, 1995), *vacated*, 53 M.J. 35 (C.A.A.F. 2000).

status affected their ability to transfer, which in turn affected their opportunity to promote.

3. Victim, Contemporaneous Response to Sexual Assault

Approximately one third of the victims recounted their immediate response to being sexually assaulted.[133] Within the testimony, there were many different ways in which victims responded in the moment of the assault. Some of the victims responded by using verbal and physical countermeasures to match the offender. Others were overwhelmed with emotion and were unable to react at all. Several victims recounted their response to the assault by stating how they would have preferred to respond.

As an example, one victim used verbal protestations to try to stop the assault and the second used physical force.[134] Another victim ultimately used verbal protestations to attempt to stop her attacker. However, she described that there was a period initially where she froze. The second victim explained how she resisted to the utmost,[135] but was unable to defeat her attacker who was "larger, stronger, and *trained*."[136]

Some victims testified about how they relived the sexual assault and imagined responding differently, and in so doing, they appear to engage in self-

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[133] *Bohlayer*, No. 1-2014; United States v. Oakley, No. 01-14 (Commander, Navy Region Northwest, San Diego, California, Sept. 13, 2013); United States v. Cardona, No. 1-13 (Commanding Officer, Naval Computer and Telecommunications Area Master Station, San Diego, California, May 23, 2013), aff'd, 2013 CCA LEXIS 1110 (N-M. Ct. Crim. App. Dec. 13, 2013); *Antonio*, No. 02-2013; United States v. Adams, No. 05-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, June 5, 2012), *aff'd*, 2012 CCA LEXIS 642 (N-M. Ct. Crim. App. Oct. 31, 2012); United States v. Moore, No. 12-12 (Commander, Navy Region Southeast, Jacksonville, Florida, Apr. 26, 2012); *Muro*, No. 12-2012; *Hollars*, No. 1-11; United States v. Lugo, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 23, 2011); *Barr*, No. 02-12; *Castillo*, No. M12-01; *Edmond*, No. 01-12; United States v. Moreno, No. 1C-11 (Victim 2) (Commander Navy Region Europe, Africa, Southwest Asia, FPO AE 09622-0008, Sept. 22, 2011); *Harris*, No. 23-11; United States v. Gomez, No. 02-12 (Victim 2) (Commander, Navy Region Southwest, San Diego, California, June 16, 2011), *aff'd*, 2012 CCA LEXIS 738 (N-M. Ct. Crim. App. Jan. 24, 2012); *Gonzalez*, No. 18-11; *Owens*, No. 10-09; United States v. Montoya, No. 1-07 (Commandant, Naval District Washington, Washington Navy Yard, District of Columbia, Aug. 14, 2007); United States v. Huertas, No. 07-04 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 9, 2003); *Morgan*, No. 04-1036; *Perry*, No. 18-11; *Robinson*, No. 01-2012; *Wylie*, No. 5-12 (Victims 1 and 2).

[134] Appendix B, Set # 3; *Wylie*, No. 5-12, ROT p. 213 (Victim 2); *Castillo*, No. M12-01, ROT p. 152 (Victim 1).

[135] *See* Estrich, *supra* note 71, at 1986; M. Dyan McGuire, Steve Donner & Elizabeth Callahan, *Misogyny: It's Still the Law—An Empirical Assessment of the Missouri Juvenile Court System's Processing of Rape and Robbery Offenders*, 29 GENDER ISSUES 1, 3 (2012) ("Historically, rape victims needed to prove that they resisted to their utmost in order to establish their non-consent to being raped.").

[136] *Castillo*, No. M12-01, ROT p. 152 (Victim 1) (emphasis added).

blame. When they relive the experience, they choose to change their actions in the imagined scenario. There were two salient examples.[137] Neither victim focused on the offender and how his actions could have been different; they instead focused on how they could have prevented the assault. One victim's reaction to the sexual assault was that she "froze" and did not resist in any verbal or physical manner.[138] She thought about how she could have screamed or not been in his presence. In her mind, had she done something differently she would have been able to move on with her career.[139] Another victim imagined punching the offender harder, running away, or screaming; had she taken different steps, she believed she could have avoided the sexual assault and its adverse consequences.[140]

In one case, the victim had interacted with the offender before the sexual assault by sending text messages to him and riding in a car with him. It was later that he sexually assaulted her in a barracks room.[141] There were two question sequences relevant to this analysis. In the first question-sequence, the prosecutor focused on an interaction that preceded the acts that form the basis for the offense. Based on other information in the record, it appears the prosecutor was attempting to set the scene for how the offender became aggressive in the car. The prosecutor was likely trying to show how the offender had committed other uncharged misconduct as an aggravating factor for sentencing.

In the second question-sequence, the prosecutor elicited from the victim that she did not consent to any touching in the car. It appears the prosecutor was looking for testimony supporting a claim of utmost resistance, or an explanation for the lack of it, when the prosecutor asked the victim what else she could have done. The victim stated she had told the offender either "no" or "stop" and conveyed that saying "no" or "stop" should have been enough.[142]

4. Victim, Loss of Trust in Service and/or Chain of Command

There were 17 victims who expressed their lost trust in military members or their chain of command through the process.[143] Some desired to get out of the service even though they had previously considered making it a career. Other

[137] Appendix B, Set # 4; *Morgan*, No. 04-1036, ROT p. 2589; *Edmond*, No. 01-12, ROT p. 1238.
[138] *Morgan*, No. 04-1036, ROT p. 2589.
[139] *Id*.
[140] *Edmond*, No. 01-12, ROT p. 1238.
[141] Appendix B, Set # 5; *Barr*, No. 02-12, ROT p. 263.
[142] *Id*.
[143] *Antonio*, No. 02-2013; *Sanchez*, No. 2-2013; *Adams*, No. 05-2012; *Hollars*, No. 1-11; *Wylie*, No. 5-12 (Victims 1 and 2); *Castillo*, No. M12-01 (Victims 1 through 3); *Edmond*, No. 01-12; *Moreno*, No. 1C-11; *Perry*, No. 18-11; *Gomez*, No. 02-12; *Montoya*, No. 1-07; *Moore*, No. 12-12; *Huertas*, No. 07-04; *Meredith*, No. 06-0697.

victims lost trust in their chain of command based on either the status of the offender as a higher ranking individual or the actions of the command in response to the victim's accusation. For example, in one case, an officer assaulted an enlisted member, and the victim stated she could no longer trust officers.[144] In another case, the victim lost trust in the chain of command because she was adversely affected in job duties.[145]

Three victims testified about how their perspectives about the military changed after the assault, but the degree and nature of the change was different with all three.[146] One victim thought less of the military in general.[147] One was happy about how the military had responded to her complaint, by protecting her and initiating criminal action.[148] She described how someone issued an "MPO," which is a military protective order, and she was the only one who described the trial process as positive and attributes that success to the military.[149] Another victim thought less of the men in the military.[150]

5. Victims' Thoughts about the Criminal Justice Process

The data also exposed victims' thoughts and feelings about the criminal trial process. Several testified that undergoing the sexual assault forensic exam was "humiliat[ing],"[151] "violat[ing],"[152] and "invasive,"[153] and one testified that it made her "angry."[154] Several victims testified about how difficult it was to testify in court. In preparation for one victim's testimony, the prosecutor told her that the defense would characterize her as a "whore" and a "slut."[155] She described her thought process leading to her decision to testify, stating that she felt like she "had to."[156]

These particular victims, along with the other victims in this study, were able to suffer through what has been labelled the "crucible" of the criminal justice

[144] *Wylie*, No. 5-12, ROT p. 2962 (Victim 1).
[145] *Castillo*, No. M12-01, ROT p. 1732 (Victim 3).
[146] Appendix B, Set # 6.
[147] *Castillo*, No. M12-01, ROT p. 1732 (Victim 3).
[148] *Edmond*, No. 01-12, ROT p. 1241.
[149] *Id*. A Military Protective Order (MPO) is similar to civilian orders of protection. They are orders issued by military commanders to individuals under their command, which generally state that the individual may not come into close contact, or have any other contact, with another individual. DD Form 2873, Military Protective Order, July 2004.
[150] *Castillo*, No. M12-01, ROT p. 1718 (Victim 2).
[151] *Antonio*, No. 02-2013, ROT p. 33; *Moore*, No. 12-12, ROT p. 1186.
[152] *Robinson*, No. 01-2012, ROT p. 1414; *Antonio*, No. 02-2013, ROT p. 32; *Cardona*, No. 1-13, ROT p. 138.
[153] *Cardona*, No. 1-13, ROT p. 138.
[154] *Moore*, No. 12-12, ROT p. 1186.
[155] Appendix B, Set # 7; *Meredith*, No. 06-0697, ROT pp. 993–94.
[156] Appendix B, Set # 7; *Meredith*, No. 06-0697, ROT pp. 993–94.

process.[157] At every stage of the process, there are potential pitfalls and attrition[158] that might preclude a victim from testifying at a pre-sentencing hearing.[159] For the individual victim, there are potentially competing interests that would dissuade the victim from continuing down the lengthy criminal justice process.[160] This was not lost on these victims, as one victim aptly pointed out.[161]

One victim was proud that she became an example for other "survivors."[162] Another victim was supportive of a fellow victim that endured the process with her; but for this fellow victim, she might not have come forward.[163] Yet not every victim's testimony was as appreciative for having survived the criminal justice process. One victim testified that the entire process "backfire[d]" on her, and therefore she should never have reported the crime.[164] Her case was an egregious example of how an active duty sailor was adversely prejudiced by making a complaint of sexual assault. She was physically injured as a result of the assault.[165] Her injury hindered her ability to perform the semi-annual physical fitness test, which in turn administratively disqualified her from promoting.[166]

B. Offender Focus

There was relatively little focus on the offender in the VIS reviewed. Only seven victims spent any time focusing on the offender. For two of those seven, the testimony was limited to "he took advantage of me,"[167] and "I'm disappointed"[168] when asked about the offender's actions. The other victims who focused on the offender did so for different reasons.

The offender's physical characteristics were described to show the nature of the sexual assault, which included the use of force by an offender who overpowered the victim. In other cases, the victim and offender were military

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[157] JOHN O. SAVINO & BRENT E. TURVEY, *Sex Crimes on Trial*, *in* RAPE INVESTIGATION HANDBOOK 463, 471 (2nd ed. 2011).
[158] Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture Examining Police and Prosecutor Decision-making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 671–73 (2012).
[159] *See generally* SAVINO & TURVEY, *supra* note 157 (discussing the various ways in which cases attrite from reporting to charging, such as poor investigations leading to prosecutors declining to charge).
[160] Rebecca Campbell, *The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 26 AM. J. CMTY PSYCH. 355, 355–79 (1998).
[161] Appendix B, Set # 8; *Edmond*, No. 01-12, ROT p. 1240.
[162] *Edmond*, No. 01-12, ROT p. 1242.
[163] *Wylie*, No. 5-12, ROT p. 213 (Victim 2).
[164] *Sanchez*, No. 2-2013, ROT p. 150.
[165] *Id*.
[166] *Id*.
[167] *Gomez*, No. 02-12, ROT p. 281.
[168] *Byrd*, No. 7-95, ROT p. 127 (Victim 1).

members where the offender outranked the victim. The testimony was used to note the rank disparity. In another case, the victim testified that the offender had begun sexually harassing her as soon as she started working for the offender.[169]

C. Retaliation

Although there were many instances of negative treatment of victims, such as being ostracized by friends, there were only three instances discussed that clearly fell within the concept of retaliation.[170] Although not prevalent in the findings, the issue is important from a victim reporting perspective because of the feedback in victim surveys conducted by the Department of Defense shows that victims fear reprisal and retaliation if they report.[171] One victim testified about how her supervisor verbally abused her in the workplace. The retaliation was exacerbated by the fact that others from the unit were present when the abuse occurred. Supervisors often have an easier time setting the tone of a unit. Here, the tone was that the victim was a liar with immoral qualities. The victim also felt the supervisor treated her differently regarding job assignments by micro-managing her.[172]

VI. FINDINGS (PRONG TWO)

A. Overview of Military Courts Addressing RCM 1001A 'Directly Related To or Arising From'

Through dozens of opinions, the military courts have grappled with nuanced issues associated with the new right for victims to offer VIS, ranging from procedural aspects to the substantive contours of the rule. For the latter, 11 cases contained issues that centered on the scope of RCM 1001A, including whether the subject VIS was 'directly related to or arising from' the conduct for which the accused was found guilty.

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[169] *Castillo*, No. M12-01, ROT p. 1706.

[170] *See* Appendix B, Set # 9. The DoD has explored the effects of retaliation on victim reporting patterns. *See* DEP'T OF DEFENSE, RETALIATION PREVENTION AND RESPONSE STRATEGY: REGARDING SEXUAL ASSAULT AND HARASSMENT REPORTS (2016). The DOD provides the following:

> Retaliation for reporting a criminal offense can occur in one of several ways, including reprisal (as legally defined in 10 USC 1034), ostracism, or maltreatment (as defined pursuant to this strategy). These three means do not cover all conduct that could qualify as retaliation. For example, it would not include an action taken by a peer or subordinate against an alleged victim in an effort to dissuade the alleged victim from participating in a prosecution; these categories must be expanded to include all potential retaliatory acts.

[171] DEP'T OF DEFENSE, FY12 DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, 27 (2012).

[172] *See* Appendix B, Set # 9.

1. Court of Appeals for the Armed Forces

In the single Court of Appeals for the Armed Forces (CAAF) case,[173] Senior Judge Ryan, concurring in part and dissenting in part, highlighted, in the context of an ineffective assistance of counsel claim, that the military judge committed an abuse of discretion by allowing the government to present an unsworn statement by the husband of the woman with whom the accused had committed adultery.[174] Senior Judge Ryan's opinion held that the VIS was improperly used by the participants as "evidence," and that the substance exceeded the scope authorized by RCM 1001A.[175] The VIS was improper evidence, procedurally, because it was offered by the prosecutor in aggravation and the military judge did not allow the defense to cross-examine the witness.[176] The VIS exceeded the scope of RCM 1001A based on the husband's statement that included the fact that he had been on a violent deployment during the affair, and that he was unaware the affair was occurring. The court opined that neither of these facts were directly related to or arose from the offense of which the accused was found guilty.[177]

2. Air Force Court of Criminal Appeals

The Air Force Court of Criminal Appeals (AFCCA) has on six occasions addressed whether the contents of a VIS was encompassed within the phrase 'arising from' in RCM 1001A.[178] In *United States v. Da Silva*, the defense objected to the contents of two VIS.[179] One victim stated the accused violated her trust and that he violated her. The court found that these statements were "directly related to [and] arose from" the sexual harassment the accused committed against her.[180] The other victim was more specific, stating that the accused violated her body without her consent.[181] In assessing the matters in the VIS, the court noted that the accused had been acquitted by the court members of kissing this victim without her consent, and therefore the statements relating to how the accused

[173] United States v. Scott, 81 M.J. 79 (C.A.A.F. 2021) (J. Ryan, dissenting). See also United States v. Halfacre, 2021 CAAF LEXIS 324 (C.A.A.F. Apr. 20, 2021), where CAAF affirmed the decision in United States v. Halfacre, 80 M.J. 656 (N-M. Ct. Crim. App. 2020) without substantive analysis.
[174] *Scott*, 81 M.J. at 90.
[175] *Id*.
[176] *Id*. at 91.
[177] *Id*.
[178] 2016 MCM, *supra* note 14, R.C.M. 1001A.
[179] United States v. Da Silva, No. 39599, 2020 CCA LEXIS 213, at *54 (A.F. Ct. Crim. App. June 25, 2020).
[180] *Id*. at *56.
[181] *Id*. at *60.

violated the victim's body were outside the scope of matters appropriate for a VIS.[182]

In *United States v. Dunlap*, the accused was found guilty of adultery, and the court found some matters in the VIS, submitted by the accused's wife, acceptable and others objectionable.[183] The wife stated she felt angered and disgusted by what she learned, which the court found directly related to the offense, because it was a "predictable and natural consequence[]" of the misconduct.[184] The physical separation between the accused and his wife, the court found, had a more tenuous connection, but was not a "large leap."[185] It "was at least a substantial contributing factor" or "the cause" of the separation and therefore within the scope of RCM 1001A.[186] Stated differently, "emotional harm suffered by [the non-offending spouse was] directly related to and *proximately caused* by the adultery Appellant committed with [the non-offending spouse]."[187] Based on that rationale, the court then found that the monetary loss the wife suffered from, *inter alia*, having to move was also within the scope of RCM 1001A.[188] The court also analyzed information provided by the wife that while she was pregnant, the accused learned of the pregnancy and reacted negatively to it.[189] The court found that this information was not 'directly related to' or 'arising from' the offense of adultery with another woman.[190]

In *United States v. Gillian*, the accused was convicted of assault consummated by battery and communicating threats against the victim.[191] In this case, the court found that the VIS included matters "not strictly arising from the convicted offenses."[192] Some of these matters included references to guns and drugs, as well as allusions to sexual assault amongst other things.[193] Ultimately, the court concluded that "some" of the matters in the VIS were outside the scope

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[182] *Id*. at *54. The accused was acquitted of committing abusive sexual contact. *Id*. at *1, n.3. The accused was found guilty of sexual harassment in violation of a lawful general order by making "verbal comments . . . accompanied by physical conduct of removing her lunch to-go box from her lap, placing his hand in her lap, running his fingers through [the victim's] hair, and after a brief interruption, touching her inner thigh[,]" which the court characterized as "physical conduct of touching her in a sexual manner." *Id*. at *22–23.
[183] United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *20 (A.F. Ct. Crim. App. May 4, 2020).
[184] *Id*. at *23.
[185] *Id*.
[186] *Id*.
[187] *Id*. at *20 (emphasis added).
[188] *Id*. at *23.
[189] *Id*. at *24.
[190] *Id*.
[191] United States v. Gillian, No. ACM 39692, 2020 CCA LEXIS 397, at *1 (A.F. Ct. Crim. App. Oct. 30, 2020).
[192] *Id*. at *11.
[193] *Id*. at *11–12.

of RCM 1001A.[194] However, given it was a military judge alone trial, the court assumed the judge did not consider matters that were inappropriate.[195] Therefore, the court found no prejudice to the accused even though information not 'arising from' the offenses was offered.[196]

In *United States v. Johnson*, the court, *sua sponte*, raised the issue of whether the VIS contained inappropriate information.[197] The *Johnson* case involved a married couple that was going through a civil divorce proceeding simultaneously with the criminal trial against the accused.[198] At issue in that case, *inter alia*, was the victim's perspective on how the criminal proceeding affected the victim's position in the civil divorce proceeding.[199] The court reasoned the information was outside the scope of RCM 1001A; while it did arise out of the offenses that the accused was found guilty of, it did not "directly arise" from those offenses.[200]

In *United States v. King*, the court declined to follow the approach propounded by the government—that foreseeability is the lens through which RCM 1001A matters should be reviewed.[201] In that case, the accused sexually abused the victim, a minor child. The victim stated in her VIS that as a result of the offense, she was required to move in and live with the accused's parents in another state. The court found that the victim's movements "[were] directly related to or *resulted from*" the offenses and therefore within the scope of RCM 1001A.[202] The victim also commented on other matters, such as the impact of delays in the trial. The court analyzed the comments in the VIS about delays in the trial assuming, *arguendo*, they were improper.[203] The court found that even if it was error to allow the victim to discuss the delay, it did not "substantially influence" the members in awarding a sentence.[204]

The court in *United States v. Lull*, in a footnote, identified the likelihood that there is a difference between the language 'resulting from' in RCM 1001(b) and 'arising from' in RCM 1001A but decided that providing clarity on that

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[194] *Id*. at *15.
[195] *Id*.
[196] *Id*.
[197] United States v. Johnson, No. ACM 39676, 2020 CCA LEXIS 364, at *1 (A.F. Ct. Crim. App. Oct. 16, 2020), *rev'd on other grounds*, 2021 LEXIS 739 (C.A.A.F. Aug. 10, 2021).
[198] *Id*. at *24.
[199] *Id*. at *43.
[200] *Id*. at *45.
[201] United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *1 (A.F. Ct. Crim. App. Aug. 16, 2021).
[202] *Id*. at *135 (emphasis added).
[203] *Id*. at *141.
[204] *Id*. at *142.

distinction was unnecessary.[205] The VIS in *Lull* included the victim's comments about the time it took to process the criminal case. Citing to *United States v. Stephens*, the court found that someone who sexually assaults another should foresee the likelihood of a criminal trial emanating from the offense.[206] Although *Stephens* was a case that predated RCM 1001A, the court held that matters that "result[ed] from" in *Stephens*, similarly "arose from" in *Lull*.[207]

3. Navy and Marine Corps Court of Criminal Appeals

The Navy and Marine Corps Court of Criminal Appeals (NMCCA) has issued four opinions that centered on the scope of VIS and whether the substance 'directly related to' or 'arose from' the misconduct for which the accused was found guilty. In *United States v. Daniels*, the findings and sentence were upheld over the defense's objection to the VIS.[208] The court addressed the words 'arising from,' to conclude that VIS rights under RCM 1001A are "arguably broader and more encompassing than government evidence in aggravation," which has to be "directly related to or resulting from" the offense.[209] The court found the VIS properly included psychological impact information 'arising from' the offenses for which the accused was found guilty.[210]

In *United States v. Mellette*, the court found that the VIS exceeded the scope of matters offered under RCM 1001A because the victim asked for a specific sentence.[211] The victim told the finders of fact that the accused needed a "significant amount" of confinement.[212] While finding it was error to allow the victim to recommend a specific amount, the court also found that the error did not prejudice the accused, especially when taking into account the fact that the court had already reassessed the accused's sentence on other grounds.[213]

In the case of *In re* A.J.W., the NMCCA upheld the trial court's decision concerning the scope of the VIS where the accused was found guilty of adultery

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[205] United States v. Lull, No. ACM 39555, 2020 CCA LEXIS 301, at *141 n.51 (A.F. Ct. Crim. App. Sept. 2, 2020).
[206] United States v. Stephens, 66 M.J. 520, 528 (A.F. Ct. Crim. App. 2008).
[207] *Lull*, 2020 CCA LEXIS 301, at *141.
[208] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *7 (N-M. Ct. Crim. App. Apr. 13, 2017).
[209] *Id*.; *but see* United States v. Halfacre, 80 M.J. 656, 658 (N-M. Ct. Crim. App. 2020) (citing *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988) for the proposition that the sources of evidence in aggravation is potentially greater than VIS under RCM 1001A because RCM 1001(b) allows for evidence from witnesses, whereas RCM 1001A requires the person be deemed a victim before providing matters to be considered).
[210] Appendix B, Set # 10: *Daniels*, 2017 CCA LEXIS 240, at *7–8.
[211] United States v. Mellette, 81 M.J. 681, 700 (N-M. Ct. Crim. App. 2021), *rev'd on other grounds*, 2022 CAAF LEXIS 544 (2022).
[212] *Id*. (emphasis omitted).
[213] *Id*. at 700–01.

and orders violations.[214] The VIS contained information related to the adultery offense, including the fact that the victim stated she had been sexually assaulted.[215] The VIS also included information concerning the orders violations relating to the psychological impact the violation of the military protective order had on the victim.[216] The trial court limited the substance of the VIS related to sexual assault, but considered the psychological impact from the violation of the military protective order.[217] Under an abuse of discretion standard, the appellate court upheld the trial court's rationale that the impact described by the victim related to sexual assault and not the act of adultery.[218] Therefore, according to the appellate court, the trial court was within its discretion to hold that the impact described by the victim did not 'directly relate to' or 'arise from' the adultery offense.[219] In coming to this conclusion, the NMCCA cited the decision in *Dunlap* approvingly, where the AFCCA stated that the VIS information was "proximately caused" by the accused's commission of the offense.[220]

More recently in *United States v. Miller*, the accused pled guilty to use of a controlled substance and false official statements made during the investigation of the false official statements.[221] The illicit drug use by the accused was done in coordination with another servicemember who died as a result of overdosing on those drugs.[222] In presentencing, the deceased servicemember's mother provided a VIS concerning the impact the death had on her.[223] The defense objected to the trial court's consideration of the VIS, alleging the mother was not a victim within the meaning of the rules.[224] NMCCA disagreed and held that the trial court appropriately determined that the mother was a victim within the meaning of the rules.[225] Additionally, the appellate court held that the psychological harm the mother suffered "directly arose from [some of the charged] offenses."[226] The NMCCA distinguished between the drug-related charges and the false official statement charge, finding the mother was not

[214] *In re* A.J.W., 80 M.J. 737, 745 (N-M. Ct. Crim. App. 2021).
[215] *Id*. at 740.
[216] *Id*. at 742.
[217] *Id*.
[218] *Id*. at 740.
[219] *Id*.
[220] *Id*. at 746.
[221] United States v. Miller, No. 201900234, 2022 CCA LEXIS 418, at *1 (N-M Ct. Crim. App. July 20, 2022). The author was the prosecutor in this case. *See also Miller*, 2022 CCA LEXIS 418, at *4 n.7 (citing *United States v. Felix*, No. 201800071, 2019 CCA LEXIS 258, *33–39 (N-M. Ct. Crim. App. June 19, 2019) to abrogate the language in *Felix* that found the VIS of the victim's mother was outside the scope of RCM 1001A solely because the mother was appointed as a designee of the victim rather than a victim in her own right).
[222] *Id*. at *2.
[223] *Id*. at *3–4.
[224] *Id*. at *5.
[225] *Id*. at *6.
[226] *Id*. at *7.

properly a victim of the latter.[227] However, the appellate court did not engage further the discussion regarding the standard—i.e., whether directly modifies arising; it simply stated the evidence presented by the mother did directly arise from the offenses.

VII. DISCUSSION

A. What Does 'Arising From' Mean?

When comparing the law developed in Prong Two with the results in Prong One, some initial conclusions can be drawn. The plain language of RCM 1001A and the case law interpreting it provides some clarity regarding what arising from means, but it is unclear whether 'directly' modifies 'arising.' Based on the law, as it exists at the writing of this Article, some of the information contained in the VIS from Prong One likely would have been inadmissible if it were offered under RCM 1001A/1001(c).

The definitions of 'arise' and 'result' reveal some difference between the two.[228] Rules of statutory construction dictate that the use of different words in the same rule, without some evidence to the contrary, were meant to be different in meaning.[229] 'Result' is defined as a "consequence," whereas 'arise' is defined as "to come into being."[230] Through case law, 'resulting from,' in the military sentencing context, has been further defined as "*a reasonable linkage between the offense and alleged effect thereof*."[231] Although not in a sentencing context, the CAAF has used the terms, 'resulting from' and 'arising from,' interchangeably when evaluating an incomplete record of trial.[232] In doing so, they found there was no "prejudice *arising from* the incomplete record" nor was there "any prejudice to appellant *resulting from*" their omission that could not be cured by the lower court's decision.[233] However, although CAAF may have used these

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[227] *Id*.

[228] Indeed, there must be some difference. If the President meant them to be the same, it would have been very easy to simply use the same language.

[229] ANTONIN SCALIA, BRYAN A. GARNER & FRANK H. EASTERBROOK, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (1st ed. 2011) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

[230] *Arise*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[231] United States v. Witt, 21 M.J. 637, 641 (A.C.M.R. 1985) (emphasis in original); *see also* United States v. Hicks, 2009 CCA LEXIS 177, at *7 (N-M. Ct. Crim. App. Mar. 29, 2009); United States v. Barber, 27 M.J. 885, 887 (A.C.M.R. 1989).

[232] United States v. Santoro, 46 M.J. 344, 347 (C.A.A.F. 1997); *see also* United States v. Ashby, 68 M.J. 108, 127–29 (C.A.A.F. 2009) ("[T]he CIB's decision did not *result from* outside influences . . . . unlawful command influence *arising from* the other actions by senior military officials . . . [did not] taint[]" the court-martial process. (emphasis added)).

[233] *Santoro*, 46 M.J. at 347 (emphasis added).

terms interchangeably in some scenarios, it appears CAAF has never decided under what circumstances those terms are not interchangeable.

The NMCCA found that, *arguably*, the term 'arising from' is broader in scope than the term 'resulting from'.[234] Although this does not provide a substantial amount of clarity, it does provide some, given there is a plethora of case law discussing the contours of the phrase 'resulting from.'[235] Further, the NMCCA, citing to Air Force cases, seems to approve of a definition that equates arising from to proximate causation.[236] The conclusion that arise is broader in scope than result makes sense when using the standard dictionary definition of the term arise.[237] In contrast to a result or consequence, something may come into existence from an offense but not be caused by the offense. For instance, a victim who was drinking while underage prior to meeting the assailant and being assaulted might later be punished for underage drinking. Though the punishment arose out of the offense, along with the investigation and reporting that exposed the underage drinking, the offense did not result in the underage drinking. While there may be substantial overlap between those things that do result from the offense when compared with those that arise from an offense, such as the investigation and the reporting, the underage drinking did not. However, it came "to attention" as a result of the offense.[238]

The facts in *Miller* also provide an example of a factual scenario where the harm included in the VIS may have arisen from the charges but did not result from them.[239] While the accused in *Miller* and the decedent shared in a similar criminal activity—acquiring and using drugs—NMCCA found that the decedent's death arose from the appellant's *drug use*.[240] The NMCCA also found that the decedent's death arose from the appellant's drug paraphernalia possession, because the appellant provided the needle the decedent used for the fatal dose.[241] For purposes of distinguishing the two terms, arising from and

[234] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *7 (N-M. Ct. Crim. App. Apr. 13, 2017).
[235] *See* United States v. Nourse, 55 M.J. 229, 231 (C.A.A.F. 2001). The Navy also tells us that statements in a VIS that request a specific amount of confinement are outside the scope of RCM 1001A. United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *11 (A.F. Ct. Crim. App. May 4, 2020).
[236] *See, e.g.,* DEP'T OF THE ARMY, MILITARY JUDGES' BENCHBOOK 402 (2020) (defining proximate cause as: "the natural and probable result of the accused's conduct."); *Proximate Cause*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("[T]hat cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.").
[237] *Arise*, MERRIAM-WEBSTER DICTIONARY, https://bit.ly/3rRQWAH (defining *arise* as: "to begin to occur or to exist**:** to come into being or to attention.").
[238] *See generally id.* (defining *arise* in part as: "to come . . . to attention.").
[239] *See* United States v. Miller, 2022 CCA LEXIS 418, at *1–3 (N-M Ct. Crim. App. July 20, 2022).
[240] *Id*. at *6.
[241] *Id*. at *6–7.

resulting from, the court's finding that the death resulted from the appellant's drug use better illustrates the area where the two terms may not overlap. It is a logical conclusion that providing a needle to someone who intends to use it to ingest a dangerous drug would result in death, though the connection may be tenuous. The link is more tenuous when considering the situation where the two are merely using drugs together. In the latter scenario, the death arose from those circumstances that included the appellant's drug use without there being a connection that leads to the conclusion that the death resulted from that use.

The Air Force has decided the greatest number of cases interpreting RCM 1001A and therefore has provided the greatest amount of guidance as to what the terms mean. However, the AFCCA has also issued opinions that, when taken together, muddle the meaning of 'arising from.' For instance, one Air Force case used the term "strictly" to modify arising,[242] whereas another case used "directly."[243] Another court analyzed whether VIS matters, under RCM 1001A, had 'resulted from' the offense.[244] This may have been merely a scrivener's error, but it is an error that obscures the meaning of the rule and leaves doubt as to whether the terms are always interchangeable. Moreover, when comparing *King* and *Lull*, the courts obfuscate whether foreseeability is the lens through which a military judge should view VIS information.[245] The *Lull* court also stated that there "may" be a difference between arising from and resulting from, but it was "unnecessary" to decide that issue in the case.[246] Yet, as previously stated, the Air Force also appeared to equate 'arising from' with proximate causation, embracing tort concepts in defining the phrase.[247] Applying tort concepts would be helpful, given the depth and breadth of legal analysis devoted to defining them.

B. Does 'Directly' Modify 'Arising From'?

The phrasing used in RCM 1001A/1001(c) leads to an ambiguity as to whether the word 'directly' modifies 'arising from.' "Or" is a coordinating conjunction, and here it is joining two present participles, 'arising' and 'relating,' which are adjective-verbs and both describe 'offense' in this statement. 'Directly'

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[242] United States v. Gillian, No. ACM 39692, 2020 CCA LEXIS 397, at *11 (A.F. Ct. Crim. App. Oct. 30, 2020).
[243] United States v. Simon, No. S32569, 2020 CCA LEXIS 281, at *12 (A.F. Ct. Crim. App. Aug. 19, 2020).
[244] United States v. King, 2021 CCA LEXIS 415, at *135 (A.F. Ct. Crim. App. Aug. 16, 2021).
[245] *Compare King*, 2021 CCA LEXIS 415, at *133 (expressly stating it would not adopt foreseeability as the test for what may be considered under RCM 1001A), *with* United States v. Lull, 2020 CCA LEXIS 301, at *140–41 (A.F. Ct. Crim. App. Sept. 2, 2020) (finding that it was appropriate to discuss the ensuing litigation that arose from the sexual assault based, in part, on the implicit premise that the litigation was a foreseeable consequence of the sexual assault).
[246] *Lull*, 2020 CCA LEXIS 301, at *141 n.51.
[247] United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *19 (A.F. Ct. Crim. App. May 4, 2020).

modifies 'relating to' because of its proximity, but whether or not it also modifies 'arising from' is a matter of interpretation.

The conclusion that 'directly' modifies 'arising from' in RCM 1001(c) is supported by cases that stand for the proposition that "directly" modifies 'resulting from' in RCM 1001(b).[248] The sentence structure is equivalent in both rules, and the President would have been aware of case law interpreting the formerly enacted clause, resulting from, when E.O. 13669 was issued.[249] Therefore, it stands to reason that if courts have found that the term 'directly' modifies the subsequent phrase, 'resulting from', then 'directly' would also modify 'arising from' where 'arising' replaces 'resulting'. In this vein, the defense counsel in *United States v. Simon* claimed that the information in the VIS was not "directly arising from" the offenses.[250] While not granting relief in that case, the same court, in *Johnson*, did grant relief because information contained in the VIS did not "directly arise" from the offense to which the accused was found guilty.[251] Lastly, the rule of lenity also supports a reading where 'directly' modifies 'arising from.' The rule of lenity is, "broadly stated, where a writing lends itself equally

[248] *See, e.g.*, United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006) (holding that the appellee offered no evidence that he was prejudiced in any substantial way by evidence "concerning the Coast Guard's response to his allegations that others were involved with drugs." The appellee claimed that the evidence at issue did not "'*directly' result from* his various drug offenses, but rather from his identification of others involved with drugs[.]" (emphasis added)); United States v. White, No. 39600, 2020 CCA LEXIS 235, at *21 (A.F. Ct. Crim. App. July 15, 2020) (holding that the trial court judge did not abuse his discretion in finding that that aggravation evidence "'directly resulted' from Appellant's assault with the knife."); United States v. Stapp, 60 M.J. 795, 803 (A. Ct. Crim. App. 2004) (holding, in part, that the trial judge erred in allowing testimony from a witness that "exaggerated the degree of dishonor directly resulting from the offenses of which appellant had been found guilty[.]"); United States v. Broussard, 35 M.J. 665, 670 (A.C.M.R. 1992) (holding that "[t]he government may present evidence in the sentencing portion of the trial of any aggravating circumstances directly resulting from the offenses of which an accused has been found guilty.") (citation omitted); United States v. Robertson, 27 M.J. 741, 742–43 (A.C.M.R. 1998) (holding, in part, that aggravation evidence offered by the government was "directly resulting from the offense of which the appellant was found guilty.") (citation omitted); United States v. Olsen, 79 M.J. 682, 689 (C.G. Ct. Crim. App. 2019) ("The parties seem to misapprehend that evidence in aggravation must be of actual harm already inflicted, but this is not so for two reasons. First, R.C.M. 1001(b)(4) allows not only evidence of aggravating circumstances directly 'resulting from the offenses of which the accused has been found guilty,' but those 'directly relating to' them."); United States v. Baer, 1999 CCA LEXIS 180, at *21 (N-M. Ct. Crim. App. June 30, 1999) ("The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge and his judgment will not be lightly overturned.") (citation omitted); United States v. Guzman, 1998 CCA LEXIS 312 at *7–8 (N-M. Ct. Crim. App. 1998) (finding testimony of victim in aggravation was an "aggravating circumstance[] directly . . . resulting from the offenses of which [the appellant was] found guilty.") (citation omitted).

[249] Exec. Order No. 13669, 79 Fed. Reg. 34,999 (June 18, 2014).

[250] United States v. Simon, No. S32569, 2020 CCA LEXIS 281, at *12 (A.F. Ct. Crim. App. Aug. 19, 2020).

[251] United States v. Johnson, 2020 CCA LEXIS 364, *45 (A.F. Ct. Crim. App. Oct. 16, 2020), *aff'd in part, rev'd in part*, 81 M.J. 451 (C.A.A.F. 2021).

to two different readings, the choice should be that reading which is least harsh to the accused."[252] Assuming that the term 'directly arising' is more limiting than just the term 'arising,' the former would be the preferred interpretation under the rule of lenity.

This distinction is not without a difference. In *Johnson*, the court was confronted with the question as to whether the accused's litigation in the civil divorce proceedings 'arose from' the offenses for which the accused was found guilty.[253] While stating that the harm to the victim did 'arise' out of the offenses, the court stated that the harm did not 'directly arise from' them.[254] Therefore, the distinction between these two phrases has been interpreted by at least one court and has had a practical application in an actual case.

The language of RCM 1001(b)(4), when describing impact to the mission or command, states that the impact must be "directly and *immediately* resulting from" the offense.[255] Adding the modifier immediately must have been done in order to further restrict the introduction of information related to mission or command impact.[256] In comparing directly and immediately, one interpretation is that directly concerns the linear connection to the harm, whereas immediately concerns the temporal connection. However, the language of the rule also shows some desire by the drafters to modify 'resulting from' with 'directly.'

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[252] United States v. Brinston, 31 M.J. 222, 226 (C.A.A.F. 1990).
[253] *Johnson*, 2020 CCA LEXIS 364, at *45.
[254] *Id*. at *44–45.
[255] MCM, *supra* note 15, R.C.M. 1001(b)(4) (emphasis added).
[256] United States v. Armon, 51 M.J. 83, 87 (C.A.A.F. 2009) (finding that testimony that commander was offended by accused's wearing of unauthorized insignia and decorations and that the misconduct led to a breakdown in trust among combat soldiers was directly and immediately resulting from the accused's offenses.); United States v. Fisher, 67 M.J. 617, 620 (A. Ct. Crim. App. 2009) (finding that the administrative burden of trial is not immediately and directly resulting from accused's offenses); United States v. Harris, 67 M.J. 550, 553 (C.G. Ct. Crim. App. 2008) (finding that drug use by accused that had impact on unit morale was directly and immediately resulting from accused's offense); United States v. Fay, 59 M.J. 747, 748 (C.G. Ct. Crim. App. 2004) (finding that evidence concerning increased "supervision, musters and inspections" were not directly and immediately resulting from the accused's wrongful drug use); United States v. Sterling, 2015 CCA LEXIS 65, at *26 (N-M. Ct. Crim. App. Feb. 26, 2015) (finding time to refer case was "solely within the Government's control" and therefore not directly and immediately resulting from accused's orders violations), *aff'd on other grounds*, 75 M.J. 407 (C.A.A.F. 2016); United States v. Marcus, 2003 CCA LEXIS 173, at *5 (A.F. Ct. Crim. App. July 9, 2003) (finding that the company commander's remedial actions were directly and immediately resulting from accused's wrongful concealment of a government weapon, which made the commander's actions "significantly more likely"); United States v. McKeague, No. ACM S31187, 2007 CCA LEXIS 404, at *4 (A.F. Ct. Crim. App. Sept. 24, 2007) (finding the increase in workload for others at the command during the time the accused was using drugs was directly and immediately resulting from the accused's drug use).

C. Intersectionality and the Findings from Prong One

The results of Prong One show that VIS were largely victim-focused. This finding makes sense given that the rules applicable at courts-martial require VIS to relate to the impact to the victim from the offense for which the accused was found guilty. Yet a world in which inclusivity and respect for all is the ideal, the words of Professor Bandes are worth repeating:

> Victim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims. In this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity.[257]

The sample from Prong One includes only cases where a conviction resulted. Therefore, it can be expected that the substance of the VIS fit within the confines of what an ideal victim would experience. As this study relied on qualitative methods and was limited to conviction cases, the findings cannot support conclusions as to the factors that increased the likelihood of conviction. Yet the findings do support the research that addresses the ways in which race, class, and gender impact processing. As only one example, over half of the victims made a fresh complaint and/or received a sexual assault medical forensic examination (SAMFE). Research, addressed below, shows that cases with a SAMFE and/or fresh complaint are more likely to avoid attrition, but many of the victims discussed making the fresh complaint and/or the harm caused by undergoing a SAMFE within their VIS.

These findings support a conclusion that court-martial participants' reaction to a particular offense is shaped by the way in which society places expectations on individuals based on race, class, and gender and then views them through that lens. In other words, when victims engage in behavior consistent with how victims are believed to behave (e.g., obtaining a forensic examination) and their case results in a conviction, then that phenomenon necessarily excludes those classes of victims (e.g., undocumented immigrants) who have additional barriers to conforming to that behavior.[258] The inclusion of 'real' victim criterion (e.g., SAMFE) in VIS further reifies the notion that class status matters within the criminal justice system, as victim conformity to expected norms becomes an acceptable criteria for sentencing. If, as the courts state, the only matters that may

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[257] Bandes, *supra* note 60, at 406.

[258] Ira Sommers & Deborah Baskin, *The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents*, 32 JUST. SYST. J. 314, 324–25 (2011) (finding charging and conviction rates increased when the victim received medical treatment).

be addressed in VIS are those that are a likely consequence of sexual assault, then the courts, through their decisions, evidence those expectations, which are premised on the ideal victim. Stated differently, if victims are expected to report the assault immediately and undergo a forensic examination, then what of those who do not? Is a lack of early reporting or forensic examination a matter to be considered in sentencing? If so, does the victim's failure to do so support an increase or decrease in the sentence to be awarded? And how does reporting early and undergoing a forensic examination help the finder of fact in a sentencing determination? For what reason should an offender be punished differently in a case where the victim, for reasons associated with race, class, and gender, does not report early or undergo a forensic examination?[259]

Furthermore, there is a significant amount of support for the conclusion that victims do not all respond to sexual assault similarly. Race, class, and gender, *inter alia*, mediate the response. Crenshaw points out that "[w]omen of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile."[260] Certain other classes of victims do not trust law enforcement or, in the case of (undocumented) immigrants, may be reluctant to immediately report a sexual assault and may have a more difficult time navigating access to resources.[261] In the case of sexual assault forensic examinations, delay in reporting may preclude the efficacy of the examination results. But are those cases where the victim never wanted to report—an indirect byproduct stemming from race, class, and gender—distinguishable from a sentencing perspective? Put another way, if an offender attacks someone on the 'fringe' or who is otherwise 'marginalized,' should that translate to a reduction or increase in the sentence based on the fact that the marginalization precluded VIS information such as undergoing a forensic examination?[262]

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[259] *Cf.* United States v. Stapp, 60 M.J. 795, 800–01 (A. Ct. Crim. App. 2004) ("Moreover, appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect."). The feminist movement has replaced the term victim with survivor, based in part on the premise that the term victim excludes agentic qualities from those who experience violence. The choice to report and undergo forensic examination is anything but commonplace, but when it does occur, it is through the agency of the person who experienced violence. If true, then, arguably, the victim has an intervening choice that "play[s] the only important part in bringing about the" reporting or forensic examination. *Id*. at 801. Yet if one does not equate 'material role' with 'an independent, intervening event that played the only important part in bringing about the effect,' then reporting and forensic examinations would be included.

[260] Crenshaw, *supra* note 84, at 1257.

[261] *See* S.J. Creek & Jennifer L. Dunn, *Rethinking Gender and Violence: Agency, Heterogeneity, and Intersectionality*, 5 SOC. COMPASS 311–22 (2011); Crenshaw, *supra* note 84, at 1247.

[262] *Cf.* Crenshaw, *supra* note 84, at 1246–50 (accounting for, as an example, how certain classes of victims, including Black women and immigrants, respond to and are treated differently when responding to sexual assault, as compared with other races and classes of victims); Zaykowski et al., *supra* note 9, at 728 (finding a correlation between ideal victim characteristics and imposition of the

The military is no exception to delays in and absence of reporting, and being a military victim adds further complications to reporting. Surveys of victims who did not report show that they were concerned about losing their security clearances and losing opportunities for advancement, as well as being punished for minor infractions committed by the victim.[263] Delays in reporting by military servicemembers are also exacerbated by the duty locations where servicemembers are sent, which makes it more difficult for them to make reports.[264]

While Crenshaw and Ritchie address intersectional concerns in the civilian system,[265] the military brings with it its own distinctions, especially related to class.[266] Officers and enlisted servicemembers fall within distinct classes within the military. A case is more likely to be charged in the military where the victim is an officer.[267] But there is another class distinction that bears on the substance of VIS, which is the class distinction between active duty and civilian victims. Civilian spouses of military members are the least likely to participate in investigations, whereas active duty servicemember victims are the most likely to participate.[268] Additionally, cases with a civilian victim were more likely to result in a conviction.[269]

The results from this study also show that class distinctions between civilians and military victims resulted in substantive differences in the process, namely, the substance of VIS. 17 military victims discussed the response from their chain of command and the resulting lack of trust in others.[270] A civilian would be unable to discuss the chain of command's response, as they are not subject to any military command. While a civilian could discuss the response by

death penalty); Creek & Dunn, *supra* note 261, at 318 (highlighting "how marginalized identities intersect with the experiences of domestic violence").

[263] DEP'T OF DEFENSE, FY12 DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 18 (2012).

[264] *Id.* at 37 (for instance, when the victim is deployed overseas).

[265] Crenshaw, *supra* note 84; RICHIE, ARRESTED JUSTICE, *supra* note 84.

[266] *See* Patricia D. Breen & Brian D. Johnson, *Military Justice: Case Processing and Sentencing Decisions in America's "Other" Criminal Courts*, 35 JUST. Q. 639–69 (2017); DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 1–128 (2020) [hereinafter DAC-IPAD].

[267] DAC-IPAD, *supra* note 266, at 20.

[268] *Id.* at 21–22.

[269] *Id*. at 21.

[270] *Perry*, No. 18-11, ROT p. 2695; *Castillo*, No. M12-01, ROT p. 1700 (Victim 1), p. 1722 (Victim 3); *Wylie*, No. 5-12, ROT p. 2962; *Antonio*, No. 02-2013, ROT p. 35; *Gomez*, No. 02-12, ROT p. 281 (Victim 1); *Meredith*, No. 06-0697, ROT p. 1077; *Montoya*, No. 1-07, ROT p. 1092; *Moore*, No. 12-12, ROT p. 1170; *Rosales*, No. 03-2012, ROT p. 1561; *Huertas*, No. 07-04, ROT p. 9; *Moreno*, No. 1C-11, ROT p. 2535 (Victim 1), 2553 (Victim 2); *Morgan*, No. 04-1036, ROT p. 2578; *Robinson*, No. 01-2012, ROT p. 1417; *Sanchez*, No. 2-2013, ROT pp. 1619–20; *Edmond*, No. 01-12, ROT pp. 1837, 1845.

criminal justice actors, the same is true for a military servicemember. The response of the command or military organization, while overlapping to some degree with the criminal justice process, is separate and distinct from the criminal justice process. The organizational response from the military imposes burdens on military victims, which is evidenced by the findings of this study (e.g., changes to job duties).[271] These burdens are distinguishable from civilian victims who participate in the military justice process because civilians' professions cannot be impacted in the same manner as military victims. The distinction between the impact to civilian and military victims is worth noting given the arguments for and against the admission of VIS.

Although not pervasive in the findings, retaliation only occurred against military victims. Two obvious points emanate from this finding. First, it likely does not account for all of the cases where retaliation occurred because the practical effect of retaliation, or the fear of it, is attrition within the process. Second, a command's ability to retaliate against a civilian is much more limited. Therefore, the status as a military victim opens the possibility for substantive VIS information which has little-to-no bearing on what the accused actually did.

Furthermore, the *Payne* decision used an anecdote from the U.S. Supreme Court's opinion in *South Carolina v. Gathers*[272] to support the conclusion that, in capital litigation, murdering an unsympathetic victim can lead to the death penalty: "The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."[273]

The *Payne* court's assessment of the victim in *Gathers* is in stark contrast to other evidence presented in the case:

> He went to the park, as his mother testified, to "spread the Word." The religious tract had been written by Haynes, and was called "The Game Guy's Prayer." It extolled the virtue of sports, and the values of leading a Christian life through football and boxing metaphors. *It would be difficult to create a victim who could create more sympathy among jurors than Richard Haynes*. Demetrius Gathers, in contrast, was a violent thug. Gathers and three friends sat on the park bench next to Haynes, drinking beer as Haynes was reading a Bible. When Gathers

[271] *See*, *e.g.*, *Harris*, No. 23-11, ROT p. 2026.
[272] South Carolina v. Gathers, 490 U.S. 805, 808 (1989).
[273] Payne v. Tennessee, 501 U.S. 808, 823–24 (1991).

> attempted to engage Haynes in conversation, Haynes stated he did not wish to talk to Gathers.
>
> Gathers and his friends then proceeded to brutally beat and kick Haynes. Gathers smashed his beer bottle over Haynes' head. He then beat Haynes severely with an umbrella. Before leaving the scene of the beating, as Haynes lay unconscious, Gathers inserted the umbrella in Haynes' anus and tried to open it.
>
> After adjourning to the apartment complex where Gathers and some of his friends lived, Gathers and one friend returned to the park with a large knife. As Haynes lay partially conscious, Gathers and his friend strew his belongings along a bike pathway, looking for something to steal, but finding nothing. Gathers then stabbed Haynes repeatedly until he died. Gathers admitted to all the facts presented.[274]

The *Payne* court's conclusion about the propriety of VIS invokes the fact that the victim in *Gathers* was mentally disabled. The *Payne* court's rationale for invoking this fact was to suggest that, if any characteristic of the victim would, the mental capacity of the victim was the characteristic most likely to reduce the possibility of the death penalty.[275] The opinion also seems to imply that the characteristics of the victim do not have an impact on jury decision-making because the death penalty was awarded in spite of the victim having had that characteristic. Yet the point of providing the jury the victim's characteristics must be, at least in part, to influence the decision-making of the jury. This is the critical issue with VIS, which is why it is important to assess which characteristics impact decision-making.[276] The CMA's comments in *Pearson* resonate on this point where the court distinguishes between "unloved or unappreciated" victims and those who are "pillar[s] of society."[277] What makes someone a pillar of society? At one point in this nation's history, and potentially still today, factors such as

[274] Stevens, *supra* note 2, ¶¶ 34–36 (emphasis added) (internal citations omitted).
[275] *See Payne*, 501 U.S. at 823–24 (discussing the fact that the victim was unemployed, which was directly attributed to the victim's mental capacity). If one cited to unemployment as a salient characteristic for consideration, it should also be appreciated that the unemployment was possibly mediated by the characteristic regarding the victim's mental capacity. In this way, it is easy to see how the intersectionality approach exposes the way in which class makes its way into decision-making through seemingly innocuous characteristics.
[276] One can consider the words of Atticus Finch, "he did what any God-fearing, persevering, respectable white man would do under the circumstances," in order to appreciate how individual characteristics are called upon in everyday life to invoke (hidden) schema. Mr. Finch, along with the jurors, must have been aware of a what a God-fearing, persevering, respectable White man would do under the circumstances, just as the court in *Payne* seemed so sure that others knew the worth of a mentally challenged individual. HARPER LEE, TO KILL A MOCKINGBIRD 206 (1982).
[277] United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984).

race, class, and gender bore directly on whether someone could attain the status of being a pillar of society. Therefore, one received justice commensurate with one's socio-economic status. That affluent White people received leniency in the criminal justice system is nothing new.[278] That these effects can and sometimes do impact military courts-martial has been known for some time as well.[279]

Moreover, contrary to the conclusions drawn from the *Payne* court, the victim in *Gathers* was much more than a mentally-challenged person who was also unemployed. There were undercurrents of intersectional dimensions that were present for the members to consider. For the court to state that most would not have found the victim to be a contributor to society shows the lack of value the court placed on the activities the victim was doing at the time he was murdered: evangelizing. Religion is one dimension that certainly could have had an impact on a Charleston, South Carolina jury. In fact, the prosecutor expressly called upon this dimension when arguing for the death penalty, referring to the victim as "Reverend Minister Haynes," while reciting his prayers.[280] Indeed, the very reason the Supreme Court of Carolina ordered a new sentencing hearing, precipitating the request for and grant of certiorari to the U.S. Supreme Court, was based on the prosecutor's comments about the religious component to the case.[281]

Recalling the earlier finding from this study where VIS addressed the command's response,[282] the response by others is often linked to race, class, and gender in an indirect way. For instance, a prosecutor may be cold or distant, as opposed to empathetic, when confronted with a victim who does not fit within the ideal victim framework. Yet, again, individuals often fall outside of the ideal victim framework based on factors related to intersectional concerns. A classic example is when the police are called to a location after one spouse injures the other, who is an undocumented immigrant or is earning citizenship by being married to the offender.[283] Based on the immigration status, the victim refuses to speak to police. Later, the victim decides to file a report, after learning from an attorney that domestic violence cases receive favorable treatment regarding immigration status. The prosecutor may view this entire issue as one of credibility.

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[278] *See* GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 114 (1989) (internal citations omitted) ("In 1855 white men sitting in the Kansas legislature, duly elected by other white men, passed a law that sentenced white men convicted of rape of a white woman to up to five years in prison, while the penalty for a black man convicted of the same offense was castration, the costs of the procedure to be rendered by the desexed.").

[279] David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, J. CRIM. L. & CRIMINOLOGY 1227, 1272 (2011) (finding the Black offender-White victim dyad was more likely than any other composition to receive the death penalty in courts-martial).

[280] *Gathers*, 490 U.S. at 808.

[281] State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988).

[282] *See supra* Part V.A.

[283] *See generally* Crenshaw, *supra* note 84, at 1247.

An ideal victim is credible when she makes a report without wavering or motivation to lie. Yet credibility is mediated through class status, that is, by the fact that the victim risks legal backlash by making a report (e.g., deportation) and then is thought to make a report in order to gain a benefit (e.g., citizenship). The application of this concept is apparent in any number of scenarios, and class status of a military member is included, where collateral consequences for minor offenses may provide similar motives related to reporting (e.g., being punished after the investigation reveals the victim had been underage drinking).

The records also showed other ways victims allude to and expressly discuss matters related to class status. An example previously discussed saliently makes the point where the victim's chain of command retaliated against the victim. While that may be proper information to be considered by the finder of fact because it arises, potentially directly, from the offense, the question is whether it should be.[284]

As a hypothetical scenario, consider two sexual assault cases that are identical in all respects except for the fact that in the first case, the command retaliated against the victim and the prosecution's office treated her poorly.[285] Both victims provide VIS, but the victim from the first case provides a statement discussing how poorly she was treated by her command and the prosecution's office. Allowing this information to be considered by a jury can be as problematic as the concerns raised by Professor Bandes, because it would include intervening circumstances outside of the offender's control.[286] Policymakers should consider whether this type of information is appropriate and, if not, make adjustments as necessary to effectuate their will.

VIII. PROPOSED SOLUTIONS AND RECOMMENDATIONS

The results of the present exploration show that additional clarity about the limits of VIS should be provided by the appellate courts, Congress, or the President. The additional clarity could come in the form of explicitly expressing whether 'directly' modifies 'arising from' in RCM 1001(c). While that would not resolve all legal issues surrounding what is permissible in VIS, it would provide more clarity. The current framework of the rule strongly supports a finding that

[284] Under a 'resulting from' framework, that type of evidence might not be admissible, especially in light of the constraining force of M.R.E. 403 balancing. However, if the phrase 'arising from' is broader in scope than 'resulting from,' then, arguably, it might be admissible. *See* United States v. Stapp, 60 M.J. 795, 800–01 (A. Ct. Crim. App. 2004) (holding that principles of tort law are applicable to sentencing, although the "offense must play a material role in bringing about the effect at issue").
[285] Consider Appendix B, Evidence Set #10 as another example.
[286] The accused's ability to object to VIS matters that were outside of the accused's "control" was expressly rejected in *United States v. King*, 2021 CCA LEXIS 415, at *134 (A.F. Ct. Crim. App. Aug. 16, 2021).

'directly' does modify 'arising,' but it would be better for policy makers and courts to be as clear as possible on this point. There are ways in which grammatical changes could alleviate the possible ambiguities.

To remove the ambiguity and make the word 'directly' definitively not apply to 'arising from' would require a change in word order, as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim arising from or directly relating to the offense of which the accused has been found guilty.*

The word 'directly' only modifies 'relating to' because that is the participle which is placed before it. Grammatically, it cannot be interpreted as applying to the participle 'arising' because it comes after that participle.

To remove the ambiguity and make the word 'directly' apply to 'arising from' as well as 'relating to,' there are at least two possible options. In the most definitive method, 'directly' would need to be repeated before 'arising from,' as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to or directly arising from the offense of which the accused has been found guilty.*

This repetition makes it clear that the author of the sentence wants 'directly' to apply to both participles because 'directly' is placed next to both participles. As awkward as this may appear, it eliminates the ambiguity; there would be no other possible interpretation.

An alternative way to limit the ambiguity and make the word 'directly' more clearly apply to 'arising from' as well as 'relating to' would be to insert commas around 'arising from,' as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to, or arising from, the offense of which the accused has been found guilty.*

This more clearly sets up the phrase, 'arising from,' as a grammatical equivalent and substitute for 'relating to.' The commas frame exactly what would be substituted in the phrase before the coordinating conjunction 'or' and therefore lead the eye to see the adverb 'directly' as applying to the substituted phrase,

'arising from' in addition to the phrase, 'relating to.' There is still slight ambiguity with this phrasing, but the meaning is closer to definitive than in the statement as it stands.

The results of this study also bring attention to the debate surrounding the use of VIS in military sexual assault trials. Very compelling arguments exist for both sides of the debate.[287] On one hand, the extent to which a victim suffers harm from the offense is some indication of the severity of the offense. On the other hand, no two victims experience harm the same way even if the offense was similar. Additionally, neither side of the debate has addressed how, if at all, good order and discipline—a necessary component of a functioning military and a bedrock for justifying the court-martial system—informs the two opposing views. A final recommendation is for researchers to conduct further studies relating to the military to assess the extent to which VIS results in differential decision-making in courts-martial sentencing. While this endeavor would be difficult for a variety of reasons (e.g., lack of transparency, forum election, court-martial type, plea agreement limitations, etc.), it is important to understand the impact of legislation on military courts.

One final note related to the findings suggests that some victims were appreciative of the work done by criminal justice actors because of how those actors treated the victims. While this finding is consistent with what one might expect, it brings attention to the opportunity for feedback that is not currently requested nor otherwise acquired. The feedback from the victims in the analyzed records is known because it was discussed in a VIS and now included in this article, but otherwise would have been lost. Furthermore, feedback from victims who voluntarily stopped participating would be helpful in understanding where improvement to the process should be made. Therefore, it is recommended that the military services institute a process whereby they can receive feedback from victims on the process in order to better improve the system as a whole, but also to appreciate the ways in which victims experience providing VIS.[288] The best repository for these surveys would likely be victim service centers.

IX. CONCLUSION

The purpose of this Article was to review trial-level and appellate records, using a dual-prong approach to assess the current state of the law regarding VIS and to explore what information has been included in VIS. The

[287] *See generally, e.g.*, Joshua D. Greenberg, Comment, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 INDIANA L.J. 1349, 1349–82 (2000) (discussing the countervailing views for allowing VIS).

[288] *See* Davis & Smith, *supra* note 47, at 10–11 (finding that VIS did not lead "to greater feelings of involvement, greater satisfaction with the justice process, or greater satisfaction with dispositions").

findings show that the appellate case law does not provide a cohesive and clear framework for VIS nor does it comport with the information that is often included in VIS. The findings also showed several themes between the VIS, which were mostly victim-centric. These findings are helpful in informing the debate concerning VIS, especially as it relates to military criminal trials.

APPENDIX A[1]

United States v. Bohlayer, No. 1-2014 (Commander, Marine Corps Installations Command, Washington Navy Yard, District of Columbia, Nov. 1, 2013).

United States v. Oakley, No. 01-14 (Commander, Navy Region Northwest, San Diego, California, Sept. 13, 2013), *aff'd*, 2015 CCA LEXIS 846 (N-M. Ct. Crim. App. Apr. 21, 2015).

United States v. Cardona, No. 1-13 (Commanding Officer, Naval Computer and Telecommunications Area Master Station, San Diego, California, May 23, 2013), *aff'd*, 2013 CCA LEXIS 1110 (N-M. Ct. Crim. App. Dec. 31, 2013).

United States v. Antonio, No. 02-2013 (3d Marine Aircraft Wing, Camp Pendleton, California, Feb. 28, 2013).

United States v. Sanchez, No. 2-2013 (Commanding General, Marine Corps Air Station Miramar, San Diego, California, Oct. 29, 2012).

United States v. Robinson, No. 01-2012 (Commanding General, Marine Corps Air Ground Combat Center, Twentynine Palms, California, Oct. 11, 2012), *aff'd*, 2013 CCA LEXIS 429 (N-M. Ct. Crim. App. Apr. 30, 2013).

United States v. Bucknam, No. 01-2012 (Naval Construction Battalion Center, Pensacola, Florida, Aug. 24, 2012), *aff'd*, 2013 CCA LEXIS 174 (N-M. Ct. Crim. App. Feb. 28, 2013).

United States v. Adams, No. 05-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, June 5, 2012), *aff'd*, 2012 CCA LEXIS 642 (N-M. Ct. Crim. App. Oct. 31, 2012).

United States v. Rosales, No. 03-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, May 21, 2012), *aff'd*, 2013 CCA LEXIS 87 (N-M. Ct. Crim. App. Feb. 12, 2013).

United States v. Moore, No. 12-12 (Commander, Navy Region Southeast, Jacksonville, Florida, Apr. 26, 2012), *aff'd*, 2013 CCA LEXIS 171 (N-M. Ct. Crim. App. Jan. 8, 2013).

United States v. Gifford, No. 10-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Feb. 12, 2012), *aff'd*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. Feb. 12, 2013), *petition denied*, 2013 CAAF LEXIS 851 (C.A.A.F. Aug. 2, 2013).

United States v. Muro, No. 12-2012 (Commanding General, 3D Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012), *aff'd*, 2012 CCA LEXIS 559 (N-M. Ct. Crim. App. July 31, 2012).

United States v. Hollars, No. 1-11 (Commanding Officer, USS NIMITZ (CVN 68), Bremerton, Washington, Jan. 12, 2012), *aff'd*, 2012 CCA LEXIS 505 (N-M. Ct. Crim. App. June 19, 2012).

[1] The cases are listed in reverse chronological order.

United States v. Gabbard, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Dec. 2, 2011), *aff'd*, 2012 CCA LEXIS 598 (N-M. Ct. Crim. App. July 24, 2012).

United States v. Lugo, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 23, 2011), *aff'd*, 2013 CCA LEXIS 40 (N-M. Ct. Crim. App. Jan. 29, 2013).

United States v. Hucks, No. 3-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 3, 2011), *aff'd*, 2012 CCA LEXIS 673 (N-M. Ct. Crim. App. May 15, 2012).

United States v. Barr, No. 02-12 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011), *aff'd*, 2012 CCA LEXIS 748 (N-M. Ct. Crim. App. Apr. 30, 2012).

United States v. Wylie, No. 5-12 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011), *aff'd*, 2012 CCA LEXIS 456 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 2013 CAAF LEXIS 299 (C.A.A.F. Mar. 22, 2013).

United States v. Castillo, No. M12-01 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).

United States v. Edmond, No. 01-12 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sept. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. Apr. 30, 2015).

United States v. Moreno, No. 1C-11 (Commander Navy Region Europe, Africa, Southwest Asia, FPO AE 09622-0008, Sept. 22, 2011), *aff'd*, 72 M.J. 521 (N-M. Ct. Crim. App. Jan. 31, 2013).

United States v. Harris, No. 23-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 21, 2011), *aff'd*, 2012 CCA LEXIS 860 (N-M. Ct. Crim. App. Feb. 21, 2012).

United States v. Kahuli, No. 7-11 (Commander, Navy Region Northwest, Bremerton, Washington, Sept. 20, 2011), *aff'd*, 2012 CCA LEXIS 857 (N-M. Ct. Crim. App. Feb. 23, 2012).

United States v. Merrey, No. 24-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 9, 2011), *petition denied*, 2012 CAAF LEXIS 726 (C.A.A.F. June 26, 2012).

United States v. Western, No. 20-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 1, 2011), *aff'd*, 2012 CCA LEXIS 333 (N-M. Ct. Crim. App. Aug. 29, 2012), *petition denied*, 2013 CAAF LEXIS 51 (C.A.A.F. Jan. 14, 2013).

United States v. Holmes, No. 9-2011 (Commander, Navy Region Midwest, Great Lakes, Illinois, Aug. 27, 2011), *aff'd*, 2012 CCA LEXIS 782 (N-M. Ct. Crim. App. Dec. 18, 2012), *petition denied*, 2013 CAAF LEXIS 429 (C.A.A.F. Apr. 26, 2013).

United States v. Kennedy, No. 16-11 (Commander, Navy Region Southeast, Kings Bay, Georgia, Aug. 25, 2011), *aff'd*, 2012 CCA LEXIS 724 (N-M. Ct. Crim. App. Apr. 26, 2012), *petition denied*, 2012 CAAF LEXIS 1006 (C.A.A.F. Aug. 29, 2012).

United States v. Perry, No. 18-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Aug. 18, 2011), *aff'd*, 2012 CCA LEXIS 701 (N-M. Ct. Crim. App. June 26, 2012), *petition denied*, 2012 CAAF LEXIS 956 (C.A.A.F. Aug. 24, 2012).

United States v. Jordan, No. 6-11 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Aug. 16, 2011), *aff'd*, 2012 CCA LEXIS 454 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 72 M.J. 403 (C.A.A.F. June 18, 2013).

United States v. Ariston, No. 8-2011 (Navy Region Midwest, Great Lakes, Illinois, July 28, 2011), *aff'd*, 2012 CCA LEXIS 497 (N-M. Ct. Crim. App. July 31, 2012).

United States v. Heckrotte, No. 8-11 (Commander, Navy Region Midwest, Great Lakes, Illinois, July 28, 2011), *aff'd*, 2012 CCA LEXIS 457 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 2013 CAAF LEXIS 278 (C.A.A.F. Mar. 14, 2013).

United States v. Hudson, No. 2-11 (Commander, National Naval Medical Center, Bethesda, Maryland, June 21, 2011), *aff'd*, 2012 CCA LEXIS 344 (N-M. Ct. Crim. App. Aug. 31, 2012).

United States v. Gomez, No. 02-12 (Commander, Navy Region Southwest, San Diego, California, June 16, 2011), *aff'd*, 2012 CCA LEXIS 738 (N-M. Ct. Crim. App. Jan. 24, 2012).

United States v. Mayberry, No. 14-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 16, 2011), *aff'd*, 2013 CCA LEXIS 366 (N-M. Ct. Crim. App. Apr. 30, 2013), *aff'd*, 2013 CAAF LEXIS 920 (C.A.A.F. Aug. 15, 2013).

United States v. Northrup, No. 2-11 (Commander, Navy Region Midwest, Great Lakes, Illinois, June 2, 2011), *aff'd*, 2012 CCA LEXIS 846 (N-M. Ct. Crim. App. Feb. 23, 2012).

United States v. Gonzalez, No. 18-11 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, May 12, 2011), *aff'd*, 2011 CCA LEXIS 644 (N-M. Ct. Crim. App. Nov. 30, 2011).

United States v. Owens, No. 10-09 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009), *aff'd*, 2010 CCA LEXIS 751 (N-M. Ct. Crim. App. Jan. 7, 2010).

United States v. Wylie, No. 1-12 (Commander, Navy Region Midwest, Great Lakes, Illinois, Nov. 18, 2011, *aff'd*, 2012 CCA LEXIS 719 (N-M. Ct. Crim. App. Nov. 6, 2012), *petition denied*, 2013 CAAF LEXIS 190 (C.A.A.F. Feb. 14, 2013).

United States v. Montoya, No. 1-07 (Commandant, Naval District Washington, Washington Navy Yard, District of Columbia, Aug. 14, 2007), *aff'd*,

2009 CCA LEXIS 75 (N-M. Ct. Crim. App. Feb. 24, 2009), *petition denied*, 2009 CAAF LEXIS 1063 (C.A.A.F. Sept. 18, 2009).

United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000), *aff'd*, 2006 CCA LEXIS 117 (N-M. Ct. Crim. App. May 30, 2006), *petition denied*, 2006 CAAF LEXIS 1428 (C.A.A.F. Nov. 6, 2006).

United States v. Curtis, No. 25-06 (Commanding Officer, Combat Service Support Group 15, 1st Force Service Support Group, Camp Pendleton, California, Mar. 2, 2006).

United States v. Hernandez-Alverado, No. 18-05 (Commanding Officer, 1st Force Service Support Group, Camp Pendleton, California, Nov. 5, 2004), *aff'd*, 2006 CCA LEXIS 298 (N-M. Ct. Crim. App. Nov. 21, 2006).

United States v. Cantrell, No. 1-04 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, June 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).

United States v. Huertas, No. 07-04 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 9, 2003), *aff'd*, NMCCA 200400757 (N-M. Ct. Crim. App. Nov. 22, 2004).

United States v. Morgan, No. 04-1036 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003), *aff'd*, NMCCA 200301800 (N-M. Ct. Crim. App. Feb. 25, 2004).

United States v. Heyward, No. 05-0699 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Oct. 5, 2001).

United Sates v. Alstadt, No. 01-1183 (Commanding General, Marine Corps Recruit Depot/ Western Recruiting Region, San Diego, California, June 14, 2001), *aff'd*, NMCCA 200100093 (N-M. Ct. Crim. App. June 14, 2001).

United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000), *aff'd*, 2006 CCA LEXIS 117 (N-M. Ct. Crim. App. May 30, 2006), *petition denied*, 2006 CAAF LEXIS 1428 (C.A.A.F. Nov. 6, 2006).

United States v. Gomezarroyo, No. 4-98 (Commanding General, Marine Corps Base Camp Smedley D. Butler, Okinawa, Japan, Aug. 27, 1998), *aff'd*, 1999 CCA LEXIS 276 (N-M. Ct. Crim. App. Oct. 19, 1999), *petition denied*, 53 M.J. 214 (C.A.A.F. 2000).

United States v. Byrd, No. 7-95 (Chief of Naval Education and Training, Pensacola, Florida, May 1, 1995), *vacated*, 53 M.J. 35 (C.A.A.F. 2000).

APPENDIX B

Key

Witness (W)
Prosecutor/Trial Counsel (TC)

Set #1

Victim One:
W: Coming on base is the worst for me. I'm completely on edge, waiting for something terrible to happen. I feel like he could be anywhere, like he's always right behind me looking for an opportunity.[1]

Victim Two:
W: It made me sick to my stomach. I live north and I would have to drive down to [the base]. There were a few days that whenever he was in the same building that I was at I couldn't come on base. I wouldn't come on base. They could charge me UA [unauthorized absence] or do anything but I am not coming on base. I would do everything to avoid, sir. I would not go to the [base shop]. I had [another member of my command] come down from [the base] a couple of times whenever I went to the [base shop]. I wouldn't go to the commissary because, sir, there's only one commissary and one [base shop] on that base. I wouldn't go to the gym because his barracks were directly across from the gym. . .[2]

When he came back -- whenever he has duty I have a routine at night. I specifically bought this house because it has a camera so you can see who is outside; front door, front driveway, everything. I have a ritual of locking doors and then I go upstairs and I have a mirror that I have strategically placed to where I can see anybody who comes in the door, and I lock my door -- I lock all the doors so when my husband is on duty, if he comes homes and he doesn't wake me up he can get in the house because I have dead bolted everything. At night -- even now, even with him being back I get up in the middle of the night and I make him go check the doors, sir.[3]

[1] United States v. Owens, No. 10-09, ROT p. 549 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009).
[2] United States v. Muro, No. 12-2012, ROT p. 137 (Commanding General, 3D Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012).
[3] *Id.* No. 12-2012, ROT p. 140.

Victim Three:
TC: Do you still think about the fear that came over you?
W: Yes, sir.
TC: How often do you think about the fear?
W: Every day, sir.
TC: And what happens to your body, physically, when you start thinking about what happened?
W: I--I shake, I can't breathe very well. I have troubled putting my thoughts together, just----[4]

Set # 2

Victim One:
W: But, don't think you broke me. Your actions were all just a test. And through that, I stood true to my morals. Your demeaning words, indecent touch, and constant pressure at work still say with me. It may have weakened me at the time, but now I'm stronger. I'm still standing, I'm here, able to face you and tell you that what you did was wrong.[5]

Victim Two:
TC: And how has it affected you emotionally?
W: Emotionally? It's a bit bad emotionally, but it's made me a strong woman.[6]

Set # 3

Victim One:
TC: What's going through your mind as you, kind of, wake up and realize what's happening?
W: When I woke up, I didn't really know what was going on. I didn't know how to comprehend it. I kind of froze, and I thought, you know, I have to do something to stop this, but I didn't know what I could do; and then eventually I just, like, I rolled over and I kind of said, "What the fuck."[7]

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[4] United States v. Wylie, No. 5-12, ROT p. 186 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011).
[5] United States v. Castillo, No. M12-01, ROT p. 142 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).
[6] United States v. Cantrell, No. 1-04, ROT p. 105 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Jun. 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).
[7] *Wylie*, No. 5-12, ROT p. 213.

Victim Two:
TC: All right. And the only way you could think of to get out of those headlocks was to go after his most vulnerable area. Is that correct?
W: Yes, sir.
TC: So, you hit him in the groin area out of self-defense?
W: Yes, sir.
TC: Not out of some sexual desire?
W: No, sir.
TC: Not because of some sexual lust, or sexual foreplay?
W: No, sir.
TC: He put you in a headlock, and you were in a compromised position?
W: Yes, sir.
TC: And you struck back the only way I knew how?
W: Yes, sir.
TC: The most effective way possible against a larger and stronger opponent?
W: Larger, stronger, and trained, sir.[8]

Set # 4

Victim One:
TC: You talked about, when you think about it, should've, could've. What do you mean by that?
W: I always think like I froze up during it. What would have happened if I could have screamed? What would have happened if I never went at all? I always think of how I could be.
TC: What do you mean, how you could be?
W: Like if the attack had never happened at all, like if I had never went to his house. If I had just chosen to be safer that night, I could still be [at the same duty station] and I could've done many deployments and just how, I wouldn't have to have these nightmares. I wouldn't have to have any anxiety attacks.[9]

Victim Two:
TC: Did you ever blame yourself?
W: Yes, ma'am.
TC: Can you tell the members a little bit about that?
W: Well, I'll make up situations in my head where I can like punch him even harder, or like run away, or scream, or just like wish I never had

[8] *Castillo*, No. M12-01, ROT p. 152.
[9] United States v. Morgan, No. 04-1036, ROT p. 793 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003).

watch that day, or I could have gone out somewhere else besides that area.[10]

Set # 5

Victim One:
TC: And how did the car ride start out, what happened?
W: The car ride it started out all--kind of brief introductions and just everybody trying to figure out how to get out of [the town where I live]. Then things started to get odd because I'd been under the impression we would be hanging out as friends and acquaintances. And he started immediately complimenting me about my appearance and how attractive he found me, and he started playing with my hands and I started to become increasingly uncomfortable.
TC: Sorry let me just stop you there. Now, you mentioned it became odd. It sounded like he was starting to express some physical interest in you. Did it take you by surprise even though you mentioned earlier that there were some flirtatious text messages that he had sent earlier?
W: It did because I thought I had been clear that I did not, I was not interested in romantic intentions and----
TC: And that was--and those were messages back to him?
W: Yeah, but he'd also talk to me on the phone for a brief period of time, so yes.

Victim One Continued:
TC: Were any of his physical advances or any of his physical touches to your body wanted or desired by you?
W: No.
TC: While in the car?
W: No.
TC: And at the time, was there anything else that came to mind to you that you could have done to let him know that beyond what you already did?
W: In my understanding, when somebody tells you no or stop that's sufficient.[11]

[10] United States v. Edmond, No. 01-12, ROT p. 1238 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sep. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. Apr. 30, 2015).
[11] United States v. Barr, No. 02-12, ROT p. 263 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011).

Set # 6

Victim One:
TC: Have [the offender's] actions, have they affected your views of the military?
W: Yes, sir, because I now view the military as something that's not pure. It's something that has a lot of downfalls.[12]

Victim Two:
TC: Has this experience affected your opinion of the Navy?
W: No, I still think the Navy is really good because, after all, they helped me a lot. They brought me to the hospital. They got me the things I needed. They put an MPO [protection order]. They even gave me a chance to put this on trial and gave me a choice.[13]

Victim Three:
TC: Did it make it uncomfortable for you to come to work?
W: Yes.
TC: Did it impact your relationship with your chain of command?
W: No.
TC: Did it affect how you viewed the military?
W: It affected how I viewed other males in the military.[14]

Set # 7

TC: Were you made aware as to what you would be subjected to in order to get this case to trial?
W: Kind of, sir. You gave me a ballpark idea. . .
TC: And, what were you told to expect or what did you expect as far as once you came into the courtroom?
W: That, I would be made out to sound like a slut or a whore or something like that and I was asking for what happened to me and that--or, that it was my fault.
TC: The possibility of that happening--did that scare you?
W: Yes, sir.
TC: Why?
W: That's--that's not me--that's--that's nothing close to me.
TC: Did that deter you from wanting to do this?
W: No, it was--I knew it would be hard but I had to do it--I had to.

[12] *Castillo*, No. M12-01, ROT p. 140 (Victim 1).
[13] *Edmond*, No. 01-12, ROT p. 1241.
[14] *Castillo*, No. M12-01, ROT p. 157 (Victim 2).

TC: Why did you have to?
W: Because what he did was wrong.
TC: How do you feel about being her today?
W: I hate it.
TC: How do you feel about the fact that aspects about you and who you are was basically placed on display in front of a room full of people you don't even know?
W: I hate it.[15]

Set # 8

Victim One:
W: Well, this was really hard to get through, and you've just got to keep fighting day by day. There's going to be people that are going to talk, and you just have to be strong every day. . . I feel proud that I stood up, especially not for me, but for all the victims out there and survivors.[16]

Victim Two:
W: What plans do I have? At this point, I just want to kind of get this court case over with and move on. I mean I'll never really move on from what happened; it's going to stay there. But hopefully, my experience with this will allow other people to--to come forward maybe if--if it gets big enough. If it doesn't, then—well, it--it doesn't really matter, but specifically, I really hope [the other victim in this case]--I--like--she's my biggest concern. She's the real reason I, like, came forward and everything. So the fact that--the reason I'm testifying is so that she can see there are good leaders out there, and there are people who are--there are people who are capable of doing good things. I'm helping her out. I'm helping people who don't know how to stand up for themselves. So that's what I hope we get out of this.[17]

Set # 9

TC: Could you please tell the court the impact of his actions on you, if any?
W: The biggest impact was rumors around [the unit]. I had one of my own supervisors dislike me for it, and voiced her opinion very strongly against me, by calling me a whore, and not trusting me to be able to do anything on my own.

[15] United States v. Meredith, No. 06-0697, ROT pp. 993–94 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000) (Victim 1).
[16] *Edmond*, No. 01-12, ROT p. 1240.
[17] *Wylie*, No. 5-12, ROT p. 222–23 ((Victim 2).

TC: So, as a result of these rumors, your supervisor actually called you a whore?
W: Yes.
TC: Was this in the workplace?
W: Yes.
TC: Were there others around?
W: There were a few others around, yes.[18]

Set # 10

W: I took care of my niece and nephew since they were little. I love them like they are my children. My sister doesn't [let] me see them anymore. I've lost my sister, my niece and my nephew because of you, Lanorris. You took advantage of the terrible situation I was in. I only had two choices, go back to Chicago or ignore what you were doing to me. I will live with what you've done to me for the rest of my life. For the last three years, you've lied and told everyone that this didn't happen. And now you get to pretend to be a man and take responsibility. You would never have taken responsibility. You were ready to let people call me a liar and be ashamed [sic] upon for the rest of my life. I was labeled as a disgrace. You taught me how to read at the same time you molested me. I hate you, but I'm forced to think about you every day. I'm still confused every day how to think about what has happened to me. But I'm [a] survivor. I'm empowered by the horrors of what I have to go through every day. But I'm going to get through this.[19]

[18] *Castillo*, No. M12-01, ROT p. 156 (Victim 2).
[19] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *3 (N-M. Ct. Crim. App. Apr. 13, 2017).

APPENDIX C

Descriptive Statistics

	N=50	Missing	Mean
Court-Martial Type			
General Court-Martial	42	0	0.84
Special Court-Martial	8	0	0.16
Class			
Offender Rank E-6 and Below	43	0	0.86
Offender Rank E-7 and Above	7	0	0.14
Victim Active Duty[1]	35	0	0.70
Victim Civilian	15	0	0.30
Victim Child	8	0	0.16
Gender			
Offender Sex Male	50	0	1.00
Victim Sex Female[2]	47	0	0.94
Race			
Offender Race White	17	4	0.37
Offender Race Non-White	29	4	0.63
Victim Race White[3]	24	10	0.60
Victim Race Non-White	16	10	0.40
Offender Black/Victim White	4	14	0.11
Discharge			
Dishonorable/Dismissal	29	0	0.58
Bad Conduct	15	0	0.30
None	6	0	0.12

[1] Multi-victim cases were counted as one where there was at least one active duty member.
[2] Multi-victim cases were counted as one. No multi-victim case included two different sexes.
[3] Multi-victim cases were counted as one. Multi-victim cases with at least one White victim were counted as White victim cases.

FIGHTING DESTRUCTIVE DRAGONS WITH SEA TURTLES: GOING ON THE LEGAL OFFENSIVE USING "INFO-LAWFARE" AGAINST THE PEOPLE'S REPUBLIC OF CHINA

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Attempts to thwart expansionism of the People's Republic of China (PRC) in the East and South China Seas by directly confronting their excessive maritime and sovereignty claims through U.S. freedom of navigation operations have repeatedly proven ineffective, as have Association of Southeast Asian Nations-negotiated codes of conduct and Permanent Court of Arbitration rulings. This Article argues that in the dead wake of The Republic of the Philippines v. The People's Republic of China ruling, the United States has an opportunity to use "lawfare" combined with information operations to achieve this objective. This new concept of "info-lawfare" would fight the PRC in the legal domain and undermine the PRC's legal legitimacy based on its environmental violations. Finally, this article posits that the most effective way to leverage info-lawfare is together with our regional allies and partners, proposing an Indonesian-led multinational environmental program aimed at studying and exposing the damage done to the environment, coupled with a coordinated information campaign aimed at a world audience. This effort could unify the disputing nations and opinions to preserve the maritime environment from malign PRC activities: saving sea turtles from destructive dragons.

I. INTRODUCTION

Attempts to thwart expansionism of the People's Republic of China (PRC) in the East and South China Seas by directly confronting their excessive maritime and sovereignty claims through U.S. Freedom of Navigation operations have proven ineffective,[1] as have codes of conduct negotiated by the Association

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[1] U.S. DEP'T OF DEF., FREEDOM OF NAVIGATION (FON) PROGRAM (28 Feb. 2017), https://bit.ly/3ST08jt [hereinafter FON PROGRAM].

of Southeast Asian Nations (ASEAN),[2] and Permanent Court of Arbitration rulings. The PRC's pursuit of ambitions to expand sovereign claims to "historical waters" remains unchanged in response to any of these efforts.[3] A new course of action is required, especially in a renewed era of working with allies and partners under the recently published Interim National Security Strategy Guidance and expected National Defense Strategy.[4] Therefore, the United States must seek additional opportunities to work with allies and partners to find new methods to pursue and blunt further PRC efforts to undermine the rule of law. It is time for the United States to aggressively pursue actions to open new "battlefronts" in the legal and information domains against the PRC. The United States should confront the PRC in the legal domain using a new concept of "lawfare"[5] combined with information operations to further undermine the legitimacy of the PRC's claims via a new hybrid approach: *info-lawfare*.

To do so, the United States should seek opportunities to use existing legal breaches to highlight and then manage, through sustained support and information dissemination, themes consistent with a legal narrative countering the PRC's predatory posture of excessive maritime claims. A ready-made opportunity already exists in the South China Sea in the dead wake[6] of the South China Sea's Permanent Court of Arbitration decision in *The Republic of the Philippines v. The People's Republic of China.*[7]

II. WHAT IS "INFO-LAWFARE"?

Today, many of our adversaries, including the PRC, are in "competition [with the United States] . . . to creatively combine conventional and non-conventional methods to achieve their objectives. Many will operate below a threshold that invokes a direct military response from the United States while retaining the capability to escalate to more conventional armed conflict if

[2] *Association of Southeast Asian Nations: Declaration on the Conduct of Parties in the South China Sea*, ASS'N OF SOUTHEAST ASIAN NATIONS (Nov. 4, 2002), https://bit.ly/3G21bLd ("The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.").

[3] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2018, at 13 (16 May 2018), https://bit.ly/3Tlc8dP.

[4] U.S. DEP'T OF DEF., FACT SHEET: 2022 NATIONAL DEFENSE STRATEGY (28 Mar. 2022), https://bit.ly/3TYFcJ3.

[5] *See generally* Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, 87 INT'L L. STUD. 315, 315 (2011) ("[T]he strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.").

[6] *A Conversation with Erik Larson, Author of Dead Wake*, PENGUIN RANDOM HOUSE CAN., https://bit.ly/3WJ6uoL ("'Dead wake' is a maritime term for the disturbance that lingers on the surface of the sea long after the passage of a vessel—or a torpedo.").

[7] South China Sea Arbitration (Phil. v. China), PCA Case Repository 2013-19, Award on Merits (Perm. Ct. Arb. 2016).

desired."[8] This is observed in PRC strategy documents, where they view the "legal" pursuit of their sovereignty claims along the edges of the law as a means to achieve military and national objectives in South China Sea disputes and vis-à-vis the United Nations Convention on the Law of the Sea (UNCLOS).[9] This competitive approach below the threshold of direct military confrontation falls into one of the three types of warfare the PRC conducts as *lawfare*.[10] The concept of *lawfare* has been researched and written on extensively—in essence, it is using the law, or the vagueness of the law, to achieve a military objective.[11] This is exactly what the PRC is doing when it makes excessive maritime claims, unfounded assertions of "law," and simultaneously engages in the unlawful development and arming of maritime features within the South China Sea under the color of baseless historical claims.[12]

The PRC wages *lawfare* even beyond the South China Sea's geographical bounds, as seen for example in its effort to limit U.S. Freedom of Navigation operations in the Pacific through environmental proxy groups such as the Natural Resources Defense Council, seeking to enjoin U.S. submarine and naval activities in U.S. courts.[13] This threatens to effectuate an "area denial" through quasi-legal processes rather than by force. A U.S. congressional hearing found that "[t]he political activism of the Natural Resources Defense Council continues to coincide with China's geopolitical interests, while it regularly files lawsuits against the Pentagon aimed at constraining military exercises vital to national security . . . . The organization 'collaborates with Chinese government entities deeply involved in Chinese efforts to assert sovereignty over the South China Sea in contravention of international law.'"[14] Clearly, the PRC government already utilizes information warfare as a critical part of *lawfare*, and as another means to pursue strategic objectives below the level of armed conflict.[15]

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[8] JOINT CHIEFS OF STAFF, JOINT CONCEPT FOR INTEGRATED CAMPAIGNING, at v (16 Mar. 2018).

[9] Peng Guangqian, *China's Maritime Rights, and Interests*, *in* 7 NAVAL WAR COLL., CHINA MAR. STUD. INST., MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS 15, 20 (Peter Dutton ed., 2010).

[10] RICHARD M. CROWELL, WAR IN THE INFORMATION AGE: A PRIMER FOR INFORMATION OPERATIONS AND CYBERSPACE OPERATIONS IN 21ST CENTURY WARFARE 28 (2010), https://bit.ly/3T4Vw9O.

[11] *Id.*; *see also About Lawfare: A Brief History of the Term and the Site*, LAWFARE, https://bit.ly/3UfkzYC (discussing the term "lawfare" as popularized by General Dunlap in 2001, though in use as early as 1999 in a book by two People's Liberation Army Officers).

[12] Raul (Pete) Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region*, 90 INT'L L. STUD. 66, 100 (2014), https://bit.ly/3DNimyg.

[13] Kevin Mooney, *Lawmakers Suggest Lawsuit-Happy Environmentalists Help China, Hurt National Security*, DAILY SIGNAL (July 20, 2018), https://dailysign.al/3UlcXUC.

[14] *Id.*

[15] CROWELL, *supra* note 10, at 8.

U.S. doctrine also employs information as a means of enabling national objectives, often as a supporting activity of other lines of effort, but occasionally as the primary, or supported, line of effort. Information operations are considered to be "at the heart of diplomacy and military operations, . . . providing a powerful means for influence" in support of objectives.[16] This is done through "[t]he integrated employment . . . of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own."[17] Therefore, it is within the United States' capability to develop messages that could influence regional and world opinion, as well as PRC leadership, through the right sources and with the right messages.[18] Thus, if the PRC is willing to impact our operations through information and the law, there is no reason the United States cannot do the same. Now is the opportunity for this new concept of *info-lawfare*, with new messages blending law and information operations, to support a specific objective.

III. THE OPERATING ENVIRONMENT

Over the years, the PRC government has been asserting "indisputable sovereignty over the islands in the South China Sea and the adjacent waters," as well as their right to the seabed and subsoil.[19] The PRC claimed its rights were supported by "abundant historical and legal evidence" within the area commonly referred to as the PRC's "Nine-Dash Line."[20] Bounded by the Nine-Dash Line are "[o]ffshore coral reefs [that] are subject to complex overlapping sovereignty claims by up to six regional nations," including the PRC, Taiwan, Philippines, Brunei, Malaysia, and Vietnam (hereinafter "disputing coastal states"), in addition to overlapping portions of the exclusive economic zone claims of Indonesia.[21] These claims and overlapping areas enflamed disputes among the many nations, and as a result, the "[e]scalating tensions have led to widespread structural reinforcement of military outposts on many reefs via dredging and filling,"[22] by the PRC in particular. In essence, the PRC has been building a series of mutually

[16] JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS II-1 (27 Nov. 2012) (as amended through Nov. 20, 2014).
[17] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 110 (Nov. 8, 2010) (as amended through Feb. 15, 2016).
[18] *See* CROWELL, *supra* note 10, at 8.
[19] BUREAU OCEANS & INT'L ENV'T. & SCI. AFF., LIMITS IN THE SEAS NO. 143, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 1 (2014) [hereinafter LIMITS IN THE SEAS NO. 143].
[20] *Id*; *see infra* p. 225 fig.1.
[21] John W. McManus, *Offshore Coral Reef Damage, Overfishing, and Paths to Peace in the South China Sea*, 32 INT'L J. MARINE & COASTAL L. 199, 199–200 (2017).
[22] *Id.* at 199.

supporting maritime forward operating bases[23] that reinforce not only their claims to the area, but also complicate and deter military planning by other nations in the event of crisis and conflict.[24] This, in turn, has led to an energized U.S. program for conducting Freedom of Navigation operations over the years to object to PRC claims.[25] To date, however, Freedom of Navigation operations have not deterred or stopped the PRC's expansionist conduct.

In an effort to seek a legal ruling to stop the PRC's expansion, the government of the Philippines filed a claim in 2013 seeking a determination by the Permanent Court of Arbitration of their rights afforded within UNCLOS.[26] Despite being a state party to UNCLOS, the PRC refused to acknowledge the jurisdiction of the court. Notwithstanding, in July 2016, the court ruled that the PRC had no claim to "historic rights" within the "Nine-Dash Line;" the PRC's activities to enforce their claims were unlawful; and the PRC had caused severe damage to the environment and fragile ecosystems in the South China Sea.[27] Nonetheless, due to the court's failure to make the sovereignty determinations desperately sought by the Philippines to settle disputed claims within the South China Sea, the ruling did not entirely thwart the PRC's unlawful claims. The court also addressed critical environmental violations by the PRC. These have yet to be explored, which creates a new opportunity to undermine the PRC's claims via *info-lawfare* on a front other than sovereignty disputes.

IV. ENVIRONMENTAL [TAX] EVASION?

Since diplomatic approaches, international arbitration, and freedom of navigation operations have so far failed to terminate the PRC's pursuit of illegitimate South China Sea claims, the United States and its partners should expand their approach. Like the legend of lawman Eliot Ness and his

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[23] For a discussion of forward operation base doctrine as here applied to the maritime environment, see U.S. DEP'T OF ARMY, ARMY DOCTRINE PUB. 3-0, OPERATIONS 2-11 (31 July 2019) https://bit.ly/3fC5GRI.

[24] Pedrozo, *supra* note 12; *see also* Jim Gomes & Aaron Favila, *US Admiral Says China Fully Militarized Isles*, ASSOCIATED PRESS (Mar. 21, 2022), https://bit.ly/3E0f1fj.

[25] FON PROGRAM, *supra* note 1, at 1 (describing how the purpose of the U.S. FON Program is "[to] exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interests" that are "reflected in the Law of the Sea Convention . . . [that] if left unchallenged, could impinge on the rights, freedoms, and uses of the sea and airspace guaranteed to all States under international law.").

[26] South China Sea Arbitration (Phil. v. China), PCA Case Repository 2013-19, Award on Merits ¶ 7 (Perm. Ct. Arb. 2016).

[27] *Id.* ¶¶ 382, 392, 396. The court held that there is no legal basis for the PRC to claim historic rights to resources within the sea areas falling within the "Nine-Dash Line." None of the Spratly Islands are capable of generating extended maritime zones and none of the features claimed by the PRC are capable of generating an exclusive economic zone. PRC law enforcement vessels unlawfully created a serious risk of collision, and the PRC caused severe harm to the coral reef environment and violated its obligations to preserve and protect fragile ecosystems.

"Untouchables" taking down Al Capone and his organized crime syndicate for tax evasion rather than their alleged underlying murder and bootlegging,[28] there is an opportunity for the United States to augment current direct approaches by leveraging violations of environmental regulations to de-legitimize the PRC's excessive maritime and sovereignty claims. Historically, international court rulings on the environment were but a paper tiger. However, as of February 2, 2018, the International Court of Justice (ICJ) ruled for the first time that a nation could be held liable for compensation and indemnification to another nation as a result of damage they caused to the environment.[29] Does this mean the PRC will change course because of the potential the ICJ would award damages to the disputing parties? It is unlikely. However, if this new concept and course of action could be applied to the South China Sea and publicized through an information campaign on the environmental damage inflicted by the PRC, it could at least impact the worldview of the PRC's claims, and perhaps gather support against their claims beyond South China Sea coastal nations. Further, this new opportunity to deter the PRC's unlawful conduct under environmental conventions could unify the coastal nations, overcoming their own maritime claim disputes through collaborative action to seek collective damages from their common foe.

Using the South China Sea arbitration's environmental ruling as the backdrop, the United States has the opportunity to develop messages focusing on scientific study and the extent of the destruction the PRC has caused. The PRC's willfully destructive activities and ensuing degradation to sea life and fisheries may well galvanize a diverse audience among many nations. A compelling narrative describing such impacts might be conveyed through coordinated real-time web videos, social media, web pages, academic articles (law review articles included), and print and radio news stories. This would achieve effects on a broad audience to see, understand, and seek action to remedy the PRC's breach of international environmental regulations,[30] thereby shaping the legal narrative in broad opposition to the PRC's unlawful conduct. The United States could then assist the surrounding nations to seek a ruling and damages against the PRC,

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[28] *Eliot Ness 1902–1957*, ALCOHOL & TOBACCO, TAX & TRADE BUREAU (Dec. 21, 2012), https://bit.ly/3fu86lv; *see also* Neely Tucker, *Eliot Ness and Al Capone: The Men, the Myths and the Bad Man in the Dark*, WASH. POST (Feb. 18, 2014), https://wapo.st/3NxvevT; Samantha Drake, *Myths Surround 'Untouchable' Lawman Eliot Ness. What's the Truth?*, WASH. POST (June 1, 2022), https://wapo.st/3FL3eTr.

[29] Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgement on Compensation, 2018 I.C.J. 17 (Feb. 2) ("The Court is [ ] of the view that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.").

[30] South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award on Merits ¶¶ 956, 959–60, 964, 966, 983 (Perm. Ct. Arb. 2016).

further reducing the legitimacy of the PRC's conduct in the South China Sea, and limiting expansion of such conduct around the world. However, factual news alone may be insufficient to rally people and nations to support. To fully engage in *info-lawfare*, the United States must frame the issue as a universal cause.

V. *EVERYONE* LOVES TURTLES!

The ecological and biological environment of the South China Sea is home to many unique and endangered species,[31] including the green sea[32] and hawksbill turtles.[33] These endangered turtles, ironically, are revered as a symbol of longevity in Chinese culture, but are being decimated by the PRC's conduct in the South China Sea.[34] According to researchers, "[t]he dredging and filling operations conducted in support of [the PRC's expansion] have raised concerns over potential damage to important ecosystems and associated fisheries."[35] The Permanent Court of Arbitration took note of these concerns and destructive PRC fishing and ruled that they have "no doubt that China's artificial island-building activities . . . have caused devastating and long-lasting damage to the marine environment"[36] and that "[they] thus consider[ ] the harvesting of sea turtles, species threatened with extinction, to constitute a harm to the marine environment."[37] The PRC had a duty to curtail and prevent additional damage to the environment and has a continuing duty under UNCLOS to preserve and protect the same, including the turtles, but has failed to do so.[38]

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[31] SEBASTIAN C.A. FERSE ET AL., ASSESSMENT OF THE POTENTIAL ENVIRONMENTAL CONSEQUENCES OF CONSTRUCTION ACTIVITIES ON SEVEN REEFS IN THE SPRATLY ISLANDS IN THE SOUTH CHINA SEA 13 (2016), https://bit.ly/3WAC1ZY. There are 571 species of stony corals, 3,365 marine fishes, more than 1,500 species of sponges, 982 species of echinoderms, 45 mangrove species, 20 seagrass species, and 7 species of giant clams. *Id.*

[32] *Id*; *see also South China Sea Arbitration*, No. 2013-19 ¶¶ 960, 983; *Green Turtle: About the Species*, NAT'L OCEANOGRAPHIC & ATMOSPHERIC ADMIN., https://bit.ly/3zLlGaZ.

[33] FERSE ET AL., *supra* note 31; *see also South China Sea Arbitration*, No. 2013-19 ¶¶ 960, 983; *Hawksbill Turtle: About the Species*, NAT'L OCEANOGRAPHIC & ATMOSPHERIC ADMIN., https://bit.ly/3hbsurX.

[34] *South China Sea Arbitration*, No. 2013-19 ¶¶ 960, 983; *see also* Liu Lin et al., *Sea Turtle Demand in China Threatens the Survival of Wild Populations*, 24 ISCIENCE, June 25, 2021, at 1, https://bit.ly/3Utse5J.

[35] McManus, *supra* note 21, at 200.

[36] *South China Sea Arbitration*, No. 2013-19 ¶ 983 ("Based on the compelling evidence, expert reports, and critical assessment of Chinese claims described above, the Tribunal has no doubt that China's artificial island-building activities on the seven reefs in the Spratly Islands have caused devastating and long-lasting damage to the marine environment.").

[37] *Id.* ¶ 382.

[38] *Id.* ¶ 394 ("The Tribunal accordingly finds that through its construction activities, China has breached its obligation under Article 192 to protect and preserve the marine environment, has conducted dredging in such a way as to pollute the marine environment with sediment in breach of Article 194(1), and has violated its duty under Article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.").

Merely highlighting the environmental and legal implications in articles and talking points will not change PRC behaviors. This effort needs a cause, a message, and a mascot. Therefore, what better relatable, pure, and universal mascot is there—for not only the plight of the indigenous species of that region, but for the systemic disregard of the rule of law—than a helpless and lovable sea turtle? Everyone loves sea turtles; especially with their Disney-esque appearance and personality.

However, within this strategy, it is harder to determine *who* will present this message and *where* they will operate in a manner that not only presents the universal turtle in the best light, but also rallies regional cooperation and collaboration in the South China Sea. The United States is not positioned to be at the forefront of this program. This cannot be a U.S. cause. The United States would likely be seen or portrayed as an uninvited influence in the region, as the United States is not a coastal nation of the South China Sea, and moreover has not ratified UNCLOS, which is a persistent stumbling block when proposing adherence to international maritime law.[39] Therefore an intermediary must be identified who would not only benefit from de-legitimizing the PRC's unlawful claims and activities but is also a credible and reliable U.S. partner.

VI. IF NOT "US"–THEN WHO?

Indonesia is best suited to take the lead, because it is seen as a "middle power" country in the region that also derives both economic and resource benefits from the South China Sea.[40] Indonesia, therefore, has an economic interest and the regional credibility to play a constructive role in building a multinational coalition that can work under international law to "limit great [PRC] power ambitions."[41] Additionally, Indonesia has had disputes between its environmental enforcement agents and PRC-based fisherman and maritime militia. The PRC has asserted that their "traditional fishing grounds" include portions of Indonesia's exclusive economic zone around the Natuna Islands within the PRC's claimed "Nine-Dash Line."[42] This has resulted in Indonesia's increased military and diplomatic resistance to the PRC's claims and actions in the South China Sea, which is a departure from its historical neutrality on sovereignty issues.[43]

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[39] *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, U.N. DIV. FOR OCEAN AFF. & L. SEA (May 13, 2022), https://bit.ly/3fxLAIe.
[40] Gatra Priyandita, *Can Australia and Indonesia Work Together on Challenges in the South China Sea?*, CONVERSATION (Oct. 26, 2017), https://bit.ly/3WueXfg; *see also* Andrew Erskine, *The Middle Power Dynamic in the Indo-Pacific: Unpacking How Vietnam and Indonesia Can Shape Regional Security and Economic Issues*, J. INDO-PAC. AFF. (Feb. 8, 2022), https://bit.ly/3Dua5hu.
[41] Priyandita, *supra* note 40.
[42] *See* LIMITS IN THE SEAS NO. 143, *supra* note 19.
[43] *See* Praiyandita, *supra* note 40.

Further demonstrating its regional leadership role is Indonesia's current work with various legitimate and respected international and regional environmental organizations such as ASEAN,[44] as well as having served as the Chairman of the Asian Environmental Compliance and Enforcement Network (AECAN).[45] As a result, the Indonesia Ministry of Environment is seen as a regional leader that can coordinate policy implementation, provide technical guidance, and supervise environmental management programs. It is also regarded as an innovator in the area of voluntary environmental compliance promotion.[46] Moreover, Indonesia has already been working with the United States via the U.S. Agency for International Development (USAID) and the U.S. Environmental Protection Agency (EPA) on environmental sustainability and regulation projects.[47]

USAID already supports the Government of Indonesia with projects that advance their marine and fisheries sector, which, similar to the South China Sea, suffers from overfishing, destructive fishing practices, pollution, and over-development.[48] The U.S. EPA likewise has been working with Indonesia in environmental enforcement training for enforcement officers, prosecutors, and civil servants. They focus on inspection techniques and strategies, as well as how to partner with other agencies during investigations to be most effective.[49] Previously, the U.S. EPA and Government of Indonesia partnered with AECEN and officials from thirteen countries to improve compliance with environmental laws and policies in Asia.[50] Therefore, if Indonesia leads this charge, the relationships, expertise, and influence that would be ideal to support this *info-lawfare* program are already in place.

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[44] *Declaration for a Decade of Coastal and Marine Environmental Protection in the South China Sea (2017–2027)*, ASEAN 1 (Nov. 13, 2017), https://bit.ly/3UqeJUB. Through ASEAN, member states have executed an agreement that provides the commitment of the region and the PRC to environmental stewardship, "[n]oting that the current environmental situation in the South China Sea requires collective attention and action to protect the marine ecosystem and biodiversity, in particular on vulnerable marine ecosystems and their physical and biogenic structure, including coral reefs, cold water habitats, hydrothermal vents and seamounts, of certain human activities." *Id.*

[45] *About Us*, ASIAN ENV'T COMPLIANCE & ENF'T NETWORK [hereinafter AECEN], https://bit.ly/3fDvv3W (describing how AECEN's mission focuses on the desire to "promote improved compliance with environmental legal requirements in Asia through regional exchange of innovative policies and practices . . . [and] Promote the development and implementation of improved environmental policies, laws, regulations and institutional arrangements; Strengthen practitioner capacity through specialized training and skills development; and Facilitate regional sharing of best practices and information on strategies for strengthening compliance and enforcement.").

[46] AECEN, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN INDONESIA 9 (2008), https://bit.ly/3t5w3SZ.

[47] *EPA Collaboration with Indonesia,* U.S. ENV'T PROT. AGENCY [hereinafter EPA *Collaboration*], https://bit.ly/3t0RmFy.

[48] *Indonesia*, *Environment*, U.S. AGENCY FOR INT'L DEV. (Oct. 25, 2022), https://bit.ly/3WujIWa.

[49] EPA *Collaboration*, *supra* note 47.

[50] *Id.*

VII. "OPERATION SEA TURTLE"

Using *info-lawfare* as the base concept, a program could be developed with a focus and narrative on cooperative multi-nation environmental education and study, led by Indonesia and underpinned by the Permanent Court of Arbitration ruling that builds on existing partnerships. The afloat program, with a lovable turtle mascot, might bring members and representatives of all the disputing coastal states onto a peaceful (and non-security related) traveling scientific afloat team, which would primarily and continuously broadcast and operate in the high-seas portion of the South China Sea in the area shown in Figure 2, *infra*. The team could also move into disputed waters to study ecology and train on remediation and sustainable fishing practices, concurrently reporting their findings and any interactions with PRC government vessels and fisherman on social media.

With an *info-lawfare* initiative focused on the narrative of legal compliance, sustainability, and the study of the environmental impact and damages resulting from the PRC's reclamation activities in the South China Sea, impacted nations can collectively confront the legality of the sovereignty and territorial disputes from the perspective of peaceful academia and environmental research, rather than from a contentious security posture. Nonetheless, there likely will be PRC resistance to their presence in waters that under UNCLOS are not subject to the claims of any nation but fall in the middle of the PRC's claimed waters within its "Nine-Dash Line." By design, this will force a dilemma for the PRC—either acquiesce to the presence and study, weakening its territorial claims and undermining its rejection of the Permanent Court's ruling; or, double-down and seek to enforce their excessive territorial claims. In either course of action, the PRC risks further damage to its cultivated image of legal legitimacy and its "historical rights" claims.

VIII. WHAT ABOUT ASEAN?

Some might argue that ASEAN is better suited for solving the South China Sea disputes. However, for over sixteen years, ASEAN has been working to establish a code of conduct, with the PRC's involvement, with still no likely useful end in sight. Additionally, with regional trade interests grouped within ASEAN, the likelihood of a unified willingness to aggressively accept risk to trade is remote.

Similarly, it could be argued the United States should not waste time, resources, and influence in Indonesia on environmental issues seemingly attenuated from the excessive maritime claims and sovereignty disputes in the region. However, existing partnerships, programs, and funding are already in place through USAID and the EPA with Indonesia. Furthermore, Indonesia's

"aggressive military posture and other moves regarding the Natunas are . . . sending [new] signals to China."[51] This stance toward the PRC may also indicate a further willingness to work with the United States to grow their regional position if the United States is ready to invest in more environmental projects. This is to the benefit of the U.S. position and current policy.

Finally, it could be argued that the PRC is highly unlikely to respond to *info-lawfare* based on environmental issues with any change in course, nor take or remediate the damage already done. While it seems indeed unlikely this approach will directly or immediately change their behavior, that is neither the point nor a realistic expectation. Pursuing the seemingly less confrontational and fractious environmental legal issues along with coordinated information sharing and communication, rather than the better known sovereignty issues, highlights for the world an additional narrative to delegitimize the PRC's predatory, destructive, and unlawful conduct. And this approach has better potential to unify the disputing parties (and worldwide partners) against the PRC than the sovereignty claims in which coastal states have simmering disputes among themselves, and which are of less interest to the rest of the world. As discussed above, it may also create an opportunity for PRC miscalculation in its response, which if coupled with extensive exposure and reporting, could further unify world nations and undermine PRC legitimacy.

IX. CONCLUSIONS AND RECOMMENDATIONS

This is not the only opportunity to pursue *info-lawfare*—just the first. The United States and the legal community must continue to explore opportunities to apply this approach. However, the United States has a unique opportunity right now to rise with its allies and partners to meet and fight the PRC in the legal and information domains, using the ready-made environmental opportunity to open another front to further undermine the PRC's regional and global legitimacy.

As a first step, the United States should seek the means to empower an Indonesian-led cooperative environmental program with the mission of continued education and study of the environmental impacts of the PRC's actions in the South China Sea. By working with Indonesia as a credible regional partner and expanding the activities and information dissemination through this program, this new approach can raise awareness and unify the disputing coastal states through their cooperative efforts to study and seek further legal action. Most importantly, it can expose the damage done to the environment to a world audience and apply pressure to PRC leadership to choose to either support these environmental efforts, acknowledge the damage being done by their "island" making, and also

[51] Joe Cochrane, *Indonesia, Long on Sidelines, Starts to Confront China's Territorial Claims*, N.Y. TIMES (Sept. 10, 2017), https://nyti.ms/3WmCJtp.

delegitimize their "Nine-Dash Line" claim; or choose to push back, risking miscalculation in a regional and potentially global affair.

This new variation on *lawfare*, with an information-centric approach, creates a new means to undermine the PRC's malign behavior. *Info-lawfare* can turn multinational *sea turtles* to fight the PRC's *destructive dragons*,[52] and thus preserve the maritime terrain for the United States and its allies and partners within the competitive gray zone.

[52] China has self-applied this traditional moniker in modern geopolitical context in reference to its own regional relationships. *See, e.g.*, Vidhi Doshi, *China's Foreign Minister Suggests 'Chinese Dragon' and 'Indian Elephant' Should Dance, not Fight*, WASH. POST (Mar. 9, 2018), https://wapo.st/3hd4hkO.

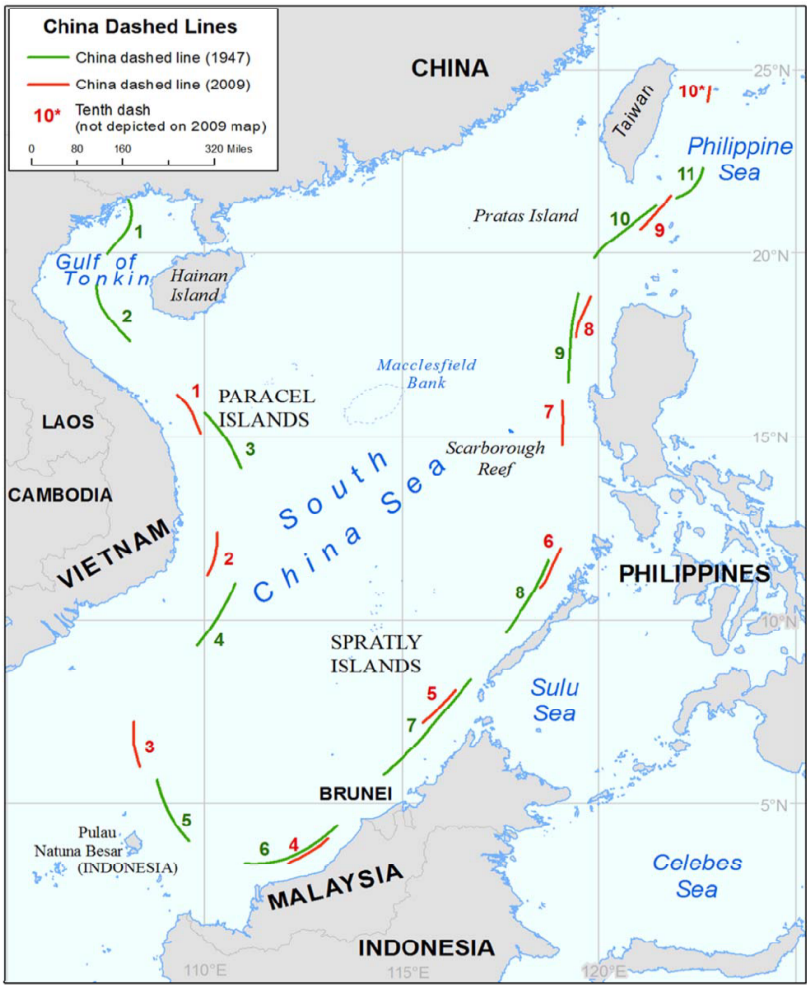

Figure 1. Department of State graphic of the South China Sea[53]

[53] LIMITS IN THE SEAS NO. 143, *supra* note 19, at 6.

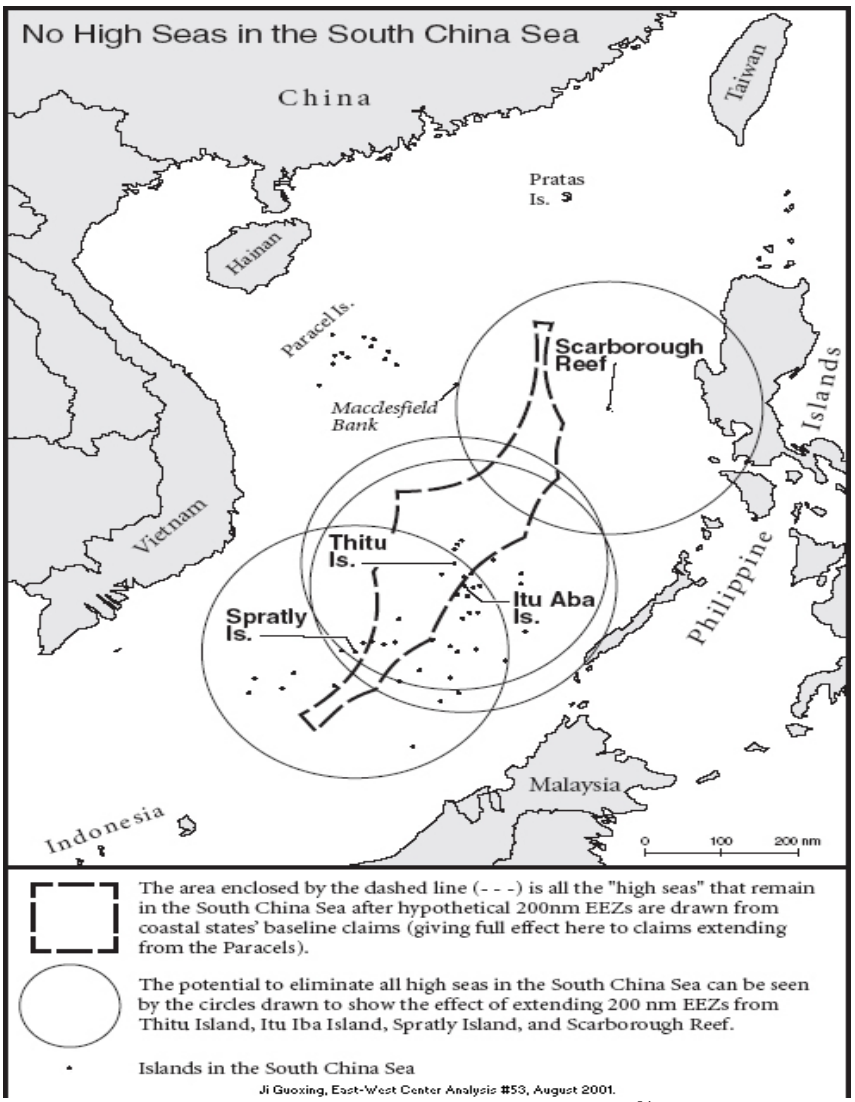

Figure 2. Ji Guoxing Map of High Seas in South China Sea.[54]

[54] Ji Guoxing, *Rough Waters in the South China Sea: Navigation Issues and Confidence-Building Measures*, EAST-WEST CTR., ASIA PAC. ISSUES 3 (Aug. 2001), https://bit.ly/3T, kt4Ru.