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Editor-in-Chief Comment

It has been an honor to be the Editor-in-Chief of this journal, which was born out of the passion of the students and faculty of this great campus. With the help and support of the law school, members of the armed services, and practitioners this law review has really begun to shine. May we continue to forge ahead, generating thoughtful and timely scholarly dialogue and debate on the critical challenges to our national security and the merits of armed conflict.

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ARTICLE

A Regime in Need of Balance:
The UN Counter-Terrorism Regimes of Security and Human Rights[*]

Isaac Kfir[*]

ABSTRACT

Since 9/11, the UN's counter-terrorism regime has developed two distinct approaches to combating international terrorism. The Security Council follows a traditional security doctrine that focuses on how to best protect states from the threat posed by international terrorists. This is largely due to the centrality of the state in Security Council thinking and attitudes. On the other hand, the General Assembly and the various UN human rights organs, influenced by the human security doctrine, have taken a more holistic, human rights-based approach to the threat of international terrorism. This paper offers a review of how the dichotomy above affects the application of UN policy vis-à-vis the UN's counter-terrorism regime. This paper calls for a bridging of the gap between these two approaches, advocating an interdisciplinary approach that combines the traditional state security and human security regimes.

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[*] The opinions, conclusions of this paper, and its faults are solely those of the author. I also wish to thank Professors Lauryn Gouldin, Todd Berger, Syracuse College of Law, Professor William C. Banks, Director of the Institute for National Security and Counterterrorism (INSCT); Professor Corri Zoli, Senior Researcher, INSCT, for helpful comments and conversations.

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I. INTRODUCTION

The destruction of the Twin Towers was a defining moment in world history, not only because it was the first act of mass terrorism by a non-state actors but because it was seen live across the world.[1] The reaction of the international society[2] was incredibly swift. It began with mass condemnation[3] and a call for action,[4] exemplified by President George W. Bush's speech before Congress:

> On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning.[5]

The declaration of war against Al Qaeda, and by extension against militant, radical Islam—Islamism[6]—led to legislation intended to help governments

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[1] *See, e.g.,* William Branigin, When Terror Hits Close to Home; Mix of Emotions Sweeps over County Residents, WASH. POST, Sept. 20, 2001, at FE.3.

[2] HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 13 (1977) (defining an international society as something that " . . . exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the working of common institutions").

[3] *See, e.g.,* Jean-Marie Colombani, We Are All Americans, LE MONDE, Sept. 12, 2001, http://www.worldpress.org/1101we_are_all_americans.htm (declaring to its French readership, "We are all Americans").

[4] *See, e.g.,* Judy Dempsey & Andrew Parker, NATO Call to Fight Terrorism Scourge, FIN. TIMES, Sept. 12, 2001, at 5 (describing NATO Secretary-General, Lord Robertson, stating: "I condemn in the strongest possible terms the attacks which have just been perpetrated against the United States of America. My sympathies go to the American people, the victims and their families. These barbaric acts constitute intolerable aggression against democracy and underline the need for the international community and the members of the alliance to unite their forces in fighting the scourge of terrorism.").

[5] President Bush's Address to a Joint Session of Congress and the Nation, WASH. POST, Sept. 20, *available at* 2001, http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [hereinafter President Bush's Address].

[6] When understood as a political movement, Islamism appears in different shades and types. Graham E. Fuller, The Future of Political Islam, 81 FOREIGN AFF. 48, 49 (2002) ("Today one encounters Islamists who may be either radical or moderate, political or apolitical, violent or quietist, traditional or modernist, democratic or authoritarian. The oppressive Taliban of Afghanistan and the murderous Algerian Armed Islamic Group (known by its French acronym, GIA) lie at one fanatic point of a compass that also includes Pakistan's peaceful and apolitical preaching-to-the-people movement, the Tablighi Jamaat; Egypt's mainstream conservative parliamentary party, the Muslim Brotherhood; and Turkey's democratic and modernist Fazilet/Ak Party.").

counter the threat that Al Qaeda and its affiliates[7] posed. As a result, states across the world adopted new legislative and policy agendas to address the threats posed by terrorism.[8] The intent was to both strengthen infrastructures in preparation for future terrorist attacks[9] and to adopt extraordinary measures to counter the emerging threats. The use of drones and targeted killing, not to mention the leaks involving the National Security Agency, are examples of how government policy has changed in response to terrorism.[10] Governments now generally take the position that it is better to err on the side of caution when it comes to Al Qaeda, [11] while also recognizing that some limitations exist on their ability to engage in unfettered, unregulated military campaign.[12] Consequently,

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[7] Eliza Manningham-Buller, The Safety of the Realm in Retrospect and Prospect, 148 THE RUSI JOURNAL 8 (2003) (noting that "the events of 11 September were a watershed in the history of terrorism. . . . [t]hese were dramatic and devastating attacks, resulting in major loss of life, destruction of property and economic damage across the globe"); *See also* Anthony Field, The 'New Terrorism': Revolution or Evolution?, 7 POLITICAL STUD. REV. 195 (2009) (identifying six reasons why Al Qaeda represents 'new' terrorism).

[8] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORISTS ATTACKS UPON THE UNITED STATES (2004) [hereinafter 9/11 COMMISSION REPORT] (calling for the establishment of the Department of Homeland Security to ensure better cooperation and information sharing); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; *See also* CLAUDIA HILLEBRAND, COUNTER-TERRORISM NETWORKS IN THE EUROPEAN UNION (2012) (highlighting the change in the European Union's counter-terrorism network and emphasizing the role of the US in facilitating the change).

[9] Shaun Hill, Maze, Grosvenor Square, London W1, GUARDIAN, Aug. 12, 2005, at 63 ("The US embassy looks like Checkpoint Charlie and there are armed police at every corner."); Hugh Muir, Lack of Funds Hampers 'Dirty Bomb' Response Say Met Chiefs, GUARDIAN, Feb. 26, 2006, at 10; *See also* Jon Coaffee, Protecting Vulnerable Cities: The UK's Resilience Response to Defending Everyday Urban Infrastructure, 86 J. INT'L AFF. 939 (2010).

[10] *See, e.g.,* Richard Murphy & Afsheen John Radsan, Due Process and Targeted Killing of Terrorists, 31 CARDOZO L. REV. 405 (2009) (arguing that the U.S. system of using drones and targeted killing needs more transparency and that due process principles should apply with respect to drone attacks); *See also* Harold Hongju Koh, Setting the World Right, 115 YALE L.J. 2350, 2353 (2006) (critiquing the way the Bush administration has approached the threat of terrorism by declaring, "We now downplay torture and violations of the Geneva Conventions committed by ourselves or our allies as necessary elements of the war on terror, claiming that freedom from fear is now the overriding human rights value."); Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily, GUARDIAN, June 5, 2013, http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order.

[11] NSA Director Keith Alexander has defended the NSA surveillance program claiming that it has foiled more than 50 terrorist attacks in over 20 countries, of which 10 were in directed at the US. FBI Deputy Director Sean Joyce has also supported the program. Spencer Ackerman, NSA chief Claims 'focused' Surveillance Disrupted more Than 50 Terror Plots, GUARDIAN, June 18, 2013, http://www.guardian.co.uk/world/2013/jun/18/nsa-surveillance-limited-focused-hearing.

[12] *See, e.g.,* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) (finding that the protection offered by international human rights law does not cease in time of armed conflict); *See also* G.A. Res.

governments have substantially increased their authorities to address the threat of terrorism.[13] Notably, the expansive approach to security since September 11, 2001 (9/11)[14] has initiated a debate as to how democratic states should combat terrorism. Increasingly it appears that the new laws, measures, and policies are at times at odds with well-established democratic principles,[15] such as fundamental rights.[16]

The reaction of some international organizations to 9/11 was more distinctive than that of some states, which radically changed in the way they respond to the threat of terrorism. The North Atlantic Council (NAC), for example, after recognizing that the United States had come under attack, allowed the U.S. to invoke Article 5 of the Washington Treaty against Al Qaeda. This enabled NATO to go to war against a non-state actor for the first time.[17] The most visible change however, was within the United Nations (UN). The UN is the organization entrusted with saving the international society from the scourge of war, promoting social progress, bolstering standards of living and freedoms, and advocating for international peace and security. The preamble to the UN Charter expressly declares the need "to save succeeding generations from the scourge of war," and the need to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights

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65/208, U.N. Doc. A/RES/65/208 (Mar. 30, 2010) ("[I]nternational human rights law and international humanitarian law are complementary and mutually reinforcing."); *See also* Cordula Droege, The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, 40 ISR. L. REV. 310 (2007) (arguing that, in the twenty-first century, international humanitarian law and international human rights law overlap and complement each other).

[13] David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (arguing that the substantive expansion in terms of responsibility and procedural changes have come to compromise basic principles of equal treatment, individual justice, rule of law and political freedoms).

[14] Matt McDonald, Human Security and the Construction of Security, 16 J. GLOBAL SOC'Y 290 (2002) ("In responding to the terrorist attacks by declaring war on a foreign government, Bush sought to create a context in which traditional mechanisms of security could be perceived as operating to achieve security for individuals.").

[15] *See, e.g.,* PAUL WILKINSON, TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE (2001); Norman Abrams, Development in US Anti-Terrorism Law, 4 J. INT'L CRIM. JUST. 1117 (2006); Martha Crenshaw, Counter-Terrorism Policy and the Political Process, 24 STUD. CONFLICT & TERRORISM 329 (2001).

[16] *See, e.g.,* Mark Sidel, Counter-terrorism and the Regulation of Civil Society in the USA, 41 DEVELOPMENT & CHANGE 293 (2010) (contrasting the American and British approach to counter-terrorism and charity regulation and finding that the US approach is more draconian, which affects the working of civil society groups).

[17] North American Treaty Organization (NATO): Statement By NATO Secretary General, Lord Robertson, 40 INT'L LEGAL MATERIALS 1268 (2001); *See also* Edward Alden & Alan Beattie, Help Urged over Terror Funding IMF/World Bank, FIN. TIMES (London), Nov. 16, 2001, at 10.

of men and women and of nations large and small."[18] The third section calls on the organization to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."[19]

The UN has approached the threat of terrorism similar to most states, targeting terrorists. One of the clearest examples was when Security Council placed international terrorism at the top of its agenda.[20] Concomitantly, the General Assembly also deepened its interest in international terrorism. The assembly however, adopted a different approach to combatting terrorism. It emphasized eliminating the root causes of terrorism rather than the terrorists themselves.[21]

Drawing influence from the New Haven School,[22] this paper offers a review of some of the counter-terrorism mechanisms adopted by the UN since 9/11. The paper highlights the current UN counter-terrorism regime's[23] two distinctive approaches to combating international terrorism, and specifically the Al Qaeda threat. The divergence appears most clearly when contrasting the

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[18] The issue of maintaining peace and security only appears towards the end of the Preamble.U.N. Charter pmbl.

[19] *Id.*

[20] Hilde H. Kramer & Steve A. Yetiv, The UN Security Council's Response to Terrorism: Before and After September 11, 2001, 122 POL. SCI. Q. 415 (2007) (noting that prior to 9/11 the Security Council adopted thirteen resolutions classified as dealing with terrorism, but between 2011 and 2005, the Council adopted twenty resolutions dealing with terrorism).

[21] G.A. Res. 59/195, ¶ Annex 3, U.N. Doc. A/RES/59/195 (Mar. 22, 2005) ("[T]errorism creates an environment that destroys the right of people to live in freedom from fear."); *See also* UNITED NATIONS, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE: A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 48 (2004), *available at* http://www.un.org/secureworld/report2.pdf; THE RESPONSIBILITY TO PROTECT, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY (2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf; U.N. Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. Doc. A/59/2005 (Mar. 25, 2005) [hereinafter In Larger Freedom]; Kofi Annan, Two Concepts of Sovereignty, ECONOMIST, Sept. 18, 1999, at 51–52, *available at* http://www.economist.com/node/324795.

[22] W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT'L L. 866 (1990) (noting the importance of innovation within the legal system and rejecting an anachronistic interpretation of such fundamental principles as sovereignty, rights (states' and human), and intervention); Paul Schiff Berman, A Pluralist Approach to International Law, 32 YALE J. INT'L L. 301 (2007); Laura A. Dickinson, Toward a New New Haven School of International Law, 32 YALE J. INT'L L. 547 (2007).

[23] Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, 36 J. INT'L ORGANIZATIONS 185 (1982) (defining an international regime as "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area").

response of the Security Council to those of the General Assembly, the Human Rights Council, the Human Rights Committee, and the Secretary-General's Office. In identifying this dichotomy, this paper does not seek to diminish the contribution of the UN's counter-terrorism regime or the efforts of the human rights community to ensure that a human rights perspective is present within the regime. Rather, this paper seeks to emphasize the duality of the regime, which ultimately weakens the UN's contribution to the counter-terrorism campaign.

Principally, this paper explains the development of the two approaches as it explores the different philosophical outlooks that the Security Council and the General Assembly incorporate. It also underscores how the dichotomy weakens the development of an effective program to counter and address the threat posed by terrorism in the post-9/11 period, which is what the UN needs to do. Ultimately, the Security Council follows a traditional conception of security—national security. Under this paradigm, the security of the state drives the political process, aiming to adopt policies to make sure that the state is safe from internal and external threats. Drawing from this, advocates argue that a strong state serves as the best guarantor for human rights;[24] after all, the right to life is the most important human right.[25] It is under this reasoning that the Council has accepted the state defense of public emergency[26] as a means to justify new state policies vis-à-vis international terrorism.[27] In contrast, the General Assembly and other UN organs follow a human security formula arguing that the suppression of social, economic, civil and political rights encourages people to turn to terrorism. Accordingly, their focus is to call upon states to ensure that they do not violate international human rights, refugee, or humanitarian law.[28] This is in large part why their counter-terrorism formula is more holistic, typically non-military,[29] and human rights-based.[30]

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[24] M. Cherif Bassiouni, Challenges Facing a Rule-of-Law Oriented World Order, 8 SANTA CLARA J. INT'L L. 1, 3 (2010).

[25] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to life, liberty and security of person.").

[26] *See* infra Part I.A.

[27] The clearest manifestation of this development is the right to invoke the defense of self-defense against non-state actors. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

[28] *See* G.A. Res. A/65/475, U.N. Doc. A/RES/65/34 (Jan. 10, 2011) (outlining measures to eliminate international terrorism); Press Release, Security Council, As Debate Concludes, Delegates Urge Capacity-Building Partnerships, Eradication of Root Causes in Fight Against Terrorism, U.N. Press Release GA/L/3434 (Oct. 9, 2012).

[29] Kalliopi K. Koufa, Terrorism and Human Rights, U.N. Economic and Social Council, E/CN.4/Sub.2/2001/31 (June 21, 2001) (Special Rapporteur on Terrorism and Human Rights); *See also* U.N. Secretary-General, Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy, ¶ 35–37, U.N. Doc. A/60/825 (April 27, 2006) [hereinafter Uniting Against Terrorism] (noting that exclusion—social, economic, and political—fosters

The paper proceeds in the following manner. The first section offers a short review of the two main traditions dominating security studies discourse and how it relates to the key United Nations organs: Security Council, General Assembly, General-Secretary and human rights community. The section also discussed Al Qaeda, highlighting its metamorphosis from a traditional style terrorist organization to quintessentially an ideology.[31] The second section examines how the 1267 Committee has interpreted its duties. Then, this paper reviews the Counter-terrorism Committee (CTC) and its work in helping states develop domestic counter-terrorism programs. The section proceeds by exploring Security Council Resolution 1566 and the impact of updating the 1930's definition of international terrorism. In looking at these Security Council organs, it becomes apparent that states—primarily the permanent members of the Security Counsel—dominated the process, leading to a counter-terrorism regime that diminishes basic human rights under the guise of security. Section four looks at the General Assembly, the UN Global Counter-terrorism Strategy, [32] and the work of the Special Rapporteur on Human Rights and Counter-terrorism. The section underlines how these different actors have adopted a human security formula in response to the Al Qaeda threat, which is very different from the way the Security Council has approached the threat. In doing so, these bodies epistemologically and ontologically pursue a human rights paradigm to counter the threat of terrorism.

This paper concludes by calling for synergy between the two UN security

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marginalization, which in turn can help terrorism grow).

[30] Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 26, 2004), *See also* Martin Scheinin, Impact on the Law of Treaties, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 30 (Menno T. Kamminga et al. eds, 2009).

[31] Michael Scheuer, Not Reading Means Losing: The National Security Cost of Ignoring Osama Bin Laden's Words, 37 WM. MITCHELL L. REV. 5320 (2011) (arguing that we have made faulty assessments as to the risks and threats posed by Al Qaeda and bin Laden due to a consistent failure to use primary sources); Nick Hopkins, US Heading for Point when 'Military Pursuit of al-Qaida Should End', GUARDIAN, Nov. 30, 2012, *available at* http://www.guardian.co.uk/world/2012/nov/30/us-war-against-al-qaida (U.S. Defense Department General Council Jen Johnson suggesting that a time will come when law enforcement measures will be more appropriate when dealing with Al Qaeda); David Alexander, U.S. Has Decimated Al Qaeda Chiefs But Must Persist In Fight: Panetta, REUTERS, *available at* Nov. 20, 2012, http://www.reuters.com/article/2012/11/21/us-usa-qaeda-panetta-idUSBRE8AK03R20121121; See, e.g., Morocco Arrests 'Terror' Cell, THE DAILY STAR, *available at* Nov. 5, 2012, http://www.dailystar.com.lb/News/Middle-East/2012/Nov-05/193970-morocco-arrests-terror-cell.ashx#axzz2BRlzHxQ1 (highlighting attempts to commit acts of terror by Al Qaeda or groups associated with Al Qaeda).

[32] G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

traditions. It argues that advocates of human security must recognize the concerns offered by states in defense of the measures that they have adopted to address jihadi terrorism. In doing so, there may be certain instances where abridging certain rights is warranted. This may especially be the case when dealing with threats like Al Qaeda that reject any form of compromise. This article recognizes that taking a solely socio-economic human rights approach is likely insufficient to deter terroristic campaigns from actors who reject such values and norms. States must understand however, the role of human security and respect human rights in order to understand why some individuals turn to terrorism. It will also help prevent states from creating overly aggressive counter-terrorism policies, especially ones that challenge conventional rights, that will inadvertently lead to even more acts of terrorism. Ultimately, the UN has an important role to play in countering the threat, but it can only do so if the two approaches recognize the validity and the usefulness of the other.

II. STATES, NATIONAL SECURITY, HUMAN SECURITY, UN ORGANS, 9/11 AND SECURITY STUDIES

A. States, National Security, International Law and the United Nations

The core assumption dominating the security studies field is that to attain national security, states must break, suspend, or establish new rules to address new threats.[33] This doctrine, developed during the Cold War, led scholars to focus on three core elements: military threats and the need for a strong response to such threats, maintenance of the status quo through a balancing act predominately of mutual destruction, and the centrality of states in the international system.[34] In such a context, national security is understood as a concept whereby the state seeks greater physical security, assurance of economic prosperity, and preservation of its values and interests.[35]

After the terrorist attacks on September 11, 2001, states recognized that Al Qaeda posed a serious threat to their national security. Viewed through the

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[33] HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (2d. ed. 1954); HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS S (1977); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[34] LAURA NEACK, ELUSIVE SECURITY: STATES FIRST, PEOPLE LAST (2007); Ken Booth, Security and Emancipation, 17 REV. INT'L STUD. 313 (1991).

[35] *See* LAURA NEACK, *supra* note 36; Arnold Wolfers, 'National Security' as an Ambiguous Symbol, 67 POL. SCI. Q. 481 (1952).

rubric of a public emergency[36]—a threat to the "life of the nation"— it led to a "declaration of war."[37] The declaration permitted states to take exceptional measures[38] to address threats without breaching international norms.[39]

President George W. Bush defended the invasion of Afghanistan with claims that Al Qaeda posed a threat to the existence of the United States, to its inhabitants, and to people across the world. He asserted that the only way to deal with such a threat was through military power. On September 16, 2001, President Bush went so far as to declare that a national emergency existed "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."[40] Those conceptions of security are visible within the United Nations Security Council, which is heralded as the guardian of

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[36] The ICCPR identifies the existence of a "public emergency," though neither the convention nor the Human Rights Committee (the monitoring body of the treaty) define the term "public emergency." International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; *See also* Dominic McGoldrick, The Interface between Public Emergency Powers and International Law, 2 INT'L J. CONST. L. 380 (2004).

[37] President Bush's Address, *supra* note 6 ("On September the 11th, enemies of freedom committed an act of war against our country").

[38] International law does not define "exceptional measures," though the term is used with regard to humanitarian intervention. See, e.g., FOREIGN AFFAIRS COMMITTEE, RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 4th Report from the House of Commons Foreign Affairs Committee, 2000 H.C., at 7, *available at* http://www.fco.gov.uk/resources/en/pdf/7179755/2000_aug_fourth_report? (taking the position that military action against Serbia was, "justified as an exceptional measure when it is the only means to avert an immediate and overwhelming catastrophe and is in support of objectives set by the UN Security Council, even if the express authorization of the Council has not been possible. Such cases would in the nature of things be exceptional and depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question."); *See also* Christopher Greenwood, International Law and the NATO Intervention in Kosovo, 49 INT'L & COMPARATIVE L. Q. 926 (2000) (arguing that NATO's use of force in Kosovo was legal under international law).

[39] See, e.g., Rosa Ehrenreich Brooks, War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror, 153 U. PA L. REV. 675 (2004); Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? 112 YALE L.J. 1011 (2003); Oren Gross, Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 YALE J. INT'L L. 437 (1998); Gabor Rona, Interesting Times for International Humanitarian Law: Challenges from the "War on Terror," 27 FLETCHER F. WORLD AFF. 55 (2003); Christian Tomuschat, Human Rights and International Humanitarian Law, 20 Eur. J. Int'l L. 15 (2010); David Weissbrodt, The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law, 31 U. PA. INT'L L.J. 1185 (2010).

[40] Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). *See also* Bush: Attacks 'Acts of War', CINCINNATI POST, Sept. 12, 2001, at 2A.

international peace and security.[41]

Defining "security" in the Security Council begins with the Permanent Members—China, France, Russia, the United Kingdom, and the United States—who posses veto powers.[42] Accordingly, these five states wield enormous influence[43] within the Council and on the conduct of international relations.[44] In the context of post-9/11 terrorism the permanent members disagree on some issues,[45] but when necessary they support a unified agenda[46] and a

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[41] U.N. Charter art. 24(1) ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").

[42] The UN Charter does not use the term "veto." Rather, the Security Council veto power is implied. U.N. Charter art. 27 ("1. Each member of the Security Council shall have one vote; 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members; 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .").

[43] *See* M. Cherif Bassiouni, Challenges Facing a Rule-of-Law Oriented World Order, 8 SANTA CLARA J. INT'L L. 1 (2010) (noting that the ad hoc manner in which the Security Council fulfills its mandate and emphasizing that it reflects the interest of the powerful and wealthy as opposed to Kantian values); Axel Dreher et al., Development Aid and International Politics: Does Membership on the UN Security Council Influence World Bank Decisions?, 88 J. DEV. ECON. 1, 4–6 (2009) (showing that membership in the Security Council has a positive impact on whether countries receive World Bank loans and arguing that the permanent members (primary contributors to the World Bank) use the loans to encourage temporary members to support their policy agendas in the Council); *See also* Ilyana Kuziemko & Eric Werker, How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations, 114 J. POL. ECON. 905 (2006).

[44] This may explain why the permanent members will not support any reform of the Security Council that would weaken the veto. Adeno Addis, Targeted Sanctions as a Counterterrorism Strategy, 19 TUL J. INT'L & COMPL. L. 187, 187 (2010) ("One rather doubts that the Administration has in mind reforming the veto power of the permanent five members or making the veto power available to a more representative body of the Council.").

[45] The French, for example, after initially supporting the U.S. position, came to see the Bush doctrine as amounting to a "simplistic approach that reduces all the world's problems to the struggle against terrorism." The French Foreign Secretary at the time, Hubert Vedrine, called on Europe to oppose U.S. hyper-power and argued that, to combat terrorism, one needs to "tackle the root causes, the situations, poverty, injustice." Tracy Sutherland, France Condemns Bush's War on Terror Tactics, THE AUSTRALIAN, Feb. 8, 2002, at 9.

[46] *Cf.* Allen S. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?, 59 STAN. L. REV. 415, 419 (2006) (arguing that the Security Council will revert to collective security to address new security threats—terrorism and the proliferation of weapons of mass destruction (WMD)), with Alexander Benard & Paul J. Leaf, Modern Threats and the United Nations Security Council: No Time for Complacency (A Response to Professor Allen Weiner), 62 STAN. L. REV. 1395, 1397 (2010) (arguing that Russia and China have strong economic relations with countries that sponsor terrorism and engage in WMD proliferation; therefore, Weiner's analysis is too idealistic).

shared concern over international terrorism.[47] As a result, the Security Council behaves as one would expect states to behave when identifying threats to their security: search for allies, form alliances, and—if necessary—suspend or ignore international law.[48]

Since the adoption of Resolution 1368, adopted a day after 9/11, not only reaffirmed the right to self-defense, but expanded the right to include acts against non-state actors, recognizing them as a threat to international peace and security, the Council has continued to follow a position that grants states enormous powers against those engaged in or suspected of terrorism.[49] Thus, even with the establishment of the Office of the Ombudsman—whose purpose is to enhance the protection of human rights within the UN 1267 sanctioning regime—[50] state authority prevails. Principally, the Office was established to protect individuals seeking to be removed from the Consolidated List.[51] Currently states have the authority to withhold information of who is on the list and the information that led to their name being added to the list.[52] Thus, the need for the Office arose from the lack of transparency and minimum standards

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[47] *See, e.g.,* Brian Fishman, Al-Qaeda and the Rise of China: Jihadi Geopolitics in a Post-Hegemonic World, 34 WASH. Q. 47 (2011) (suggesting that Al Qaeda is expanding its operations into China, and one could therefore understand Chinese support for more aggressive international measures against Al Qaeda); Chantal de Jonge Oudraat, Combatting Terrorism, 26 WASH. Q. 163, 168 (2003) (arguing that, with the adoption of Security Council Resolution 1368, the Council redefined the use of force; the resolution grants cart blanche powers to states to counter international terrorism. Oudraat adds that China and Russia supported such an interpretation).

[48] Evan S. Medeiros & M. Taylor Fravel, China's New Diplomacy, 82 FOREIGN AFF., Nov.-Dec. 2003, at 22, 22 ("In recent years, China has begun to take a less confrontational, more sophisticated, more confident, and, at times, more constructive approach toward regional and global affairs. In contrast to a decade ago, the world's most populous country now largely works within the international system. It has embraced much of the current constellation of international institutions, rules, and norms as a means to promote its national interests. And it has even sought to shape the evolution of that system in limited ways").

[49] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 09, 2001).

[50] S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

[51] The aim of the Consolidated List was to impose sanctions, such as the freezing of assets, on individuals affiliated with Al Qaeda and associated entities. S.C. Res. 1267, U.N. Doc. S/RES/1267 Para. 6 (Oct. 15, 1999)

[52] Throughout Resolution 1904, the Council encourages states to work with the Office of the Ombudsman. S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); In Annex II of Resolution 1904, for example, the delisting process exemplifies state dominance; the Ombudsman must engage in dialogue with the state and adopt the state's opinion regarding delisting. S.C. Res. 1904, *supra* note 52, ¶ 2, Annex II; Annex II makes clear that the Committee has the power to determine whether to delist a person. *Id.* Annex II; Moreover, the Ombudsman must "respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States." *Id.* ¶ 14, Annex II.

of evidence.[53]

B. *Human Security, the United Nations and 9/11*

The General Assembly and the human rights community, although horrified and disgusted by the attack, [54] have approached Al Qaeda in a manner that is markedly distinct from that of the Security Council.[55] The assembly focuses less on traditional security when discussing the threat of transnational terrorism. It views security and, more specifically, the causes of insecurity, through a human security paradigm.[56] Arguably for political reasons[57] however, the concept rarely appears in recent UN reports.[58] Human security was first defined by the United Nations Development Program (UNDP) in the year 2004.[59] The UNDP rejected the traditional conception of security as too narrow.[60] Instead, it

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[53] Bardo Fassbender, Targeted Sanctions and Due Process, Mar. 20, 2006. http://www.un.org/law/counsel/Fassbender_study.pdf

[54] *See, e.g.,* Han Seung-Soo, President, United Nations General Assembly, Acceptance Speech by H.E. Mr. Han Seung-Soo (Sept. 12, 2001) (during the fifty-sixth session of the General Assembly) ("Mere words cannot express the outrage and disgust we doubt less all feel for the vile actions perpetrated in our host country, the United States . . . . I condemn in the strongest possible terms these heinous acts of terrorism.").

[55] *See Id.* (highlighting the General Assembly's commitment to promote the Millennium Development Goals as a way to improve international affairs).

[56] *See* KAUL ET AL., UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 26–33 (1994) [hereinafter HUMAN DEVELOPMENT REPORT] (providing the first definition of human security).

[57] Mary Martin and Taylor Owen write that the shift has occurred because the key proponent of human security, Kofi Annan, stopped using the term while he was secretary-general. In 2006, he left the United Nations, which may also explain why the institution ceased using the term. Finally, the member states that promoted the idea had shifted their attention to R2P. Martin & Owen, *supra* note 71, at 212–13.

[58] Mary Martin & Taylor Owen, The Second Generation of Human Security: Lessons from the UN and EU Experience, 86 INT'L AFF. 211, 211 (2010) ("Canada, one of the principal initial proponents of the human security agenda, is also going through a period of withdrawal from both advocacy and use of the concept. A recently leaked internal email from the Department of Foreign Affairs and International Trade outlined a series of shifts in the language of Canadian foreign policy. 'Human security' was among a group of terms blacklisted in government parlance."). Notably, human security was used in the 2005 World Summit and a number of General Assembly resolutions. 2005 World Summit Outcome, ¶ 143, U.N. Doc. A/60/LI (Sept. 20, 2005); *See, e.g.,* G.A. Res. 64/291, U.N. Doc. A/RES/64/291 (July 27, 2010); G.A. Res. 66/290, U.N. Doc. A/RES/66/290 (Oct. 25, 2010).

[59] *See* HUMAN DEVELOPMENT REPORT, *supra* note 70; Astri Suhrke, A Stalled Initiative, 35 SECURITY DIALOGUE 365, 365 (2004).

[60] HUMAN DEVELOPMENT REPORT, *supra* note 70, at 22 (asserting that a fixation on states as opposed to people meant forgetting ". . .the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the

identifies security through seven categories: Economic security, understood as having an assured basic income; Food security, referring to ensuring that all people have access to basic food at all times; Health security; Environmental security; Personal security; Community security; and Political security, referring to human rights.[61]

Based on the UNDP report, human security has come to mean, "protecting people from severe and pervasive threats, both natural and societal, and empowering individuals and communities to develop the capabilities for making informed choices and acting on their own behalf."[62] Consequently, those embracing human security find the idea of derogation from international human rights treaties and conventions problematic, if not outright impossible.[63] For proponents of the human security model, the protection and preservation of human rights ensures national security.[64] When looking at the General Assembly and its resolutions, policies, and views over the last decade, it clearly adheres to the concept of human security. It continuously argues that the way to make the world more secure is by addressing issues that create divisions, resentments, and inequalities.[65]

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threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards."); see, Martin & Owen, *supra* note 71, at 211 (reviewing the development of human security—second generation human security—identified with the European Union and the United States in terms of new military doctrines).

[61] HUMAN DEVELOPMENT REPORT, *supra* note 70, at 25–33.

[62] Sadoka Ogata & Johan Cels, Human Security: Protecting and Empowering People, 9 GLOBAL GOVERNANCE 274 (2003).

[63] Human Rights Committee, General Comment No. 29, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); Jean-Marie Henckaerts, The Grave Breaches Regime as Customary International Law, 7 INT'L CRIM. JUST. 683 (2009). A good example of the tension between the two approaches is apparent in the discussion over the right to life (Article 6, ICCPR) and military necessity with respect to targeted killing. Under international humanitarian law—which deals with state conduct in times of conflict—in order to deprive a person of the right to life, the state must show that the individual was a member of an armed force engaged in combat. However, the person need not be in combat at the time of death. Therefore, the target's membership in an armed force determines his status. Conversely, under international human rights law, the decision to kill a person requires the state to examine the whole context in which the killing occurs. Tomuschat, *supra* note 48, at 15–23; United Nations Millennium Declaration, adopted Sept. 8, 2000, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (2000).

[64] *See, e.g.,* SHANNON D. BEBBE & MARY KALDOR, THE ULTIMATE WEAPON IS NO WEAPON: HUMAN SECURITY AND THE NEW RULES OF WAR AND PEACE (2010); *SEE ALSO* Charles R. Beitz, Human Rights as a Common Factor, 95 AM. POL. SCI. REV. 269 (2001).

[65] This will be seen most clearly in Part III.C(1) which deals with the United Nations Global Counter-terrorism Strategy.

C. *Understanding the Al Qaeda Terrorist Threat*

Al Qaeda is an ideological tool whose aim is proselytization and forming more Al Qaeda subsidiaries and affiliates.[66] It begins with Al Qaeda's radical and uncompromising ideology that divides the world into two spheres: House of Islam (*Dar-al-Islam*) and House of War (*Dar-al-Harb*).[67] In doing so, Al Qaeda emphasizes the centrality of religion in the war for the salvation of Islam.[68] Due to the "cosmic" nature of the conflict,[69] Al Qaeda rejects compromise[70] and

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[66] John Turner, From Cottage Industry to International Organisation: The Evolution of Salafi-Jihadism and the Emergence of the Al Qaeda Ideology, 22 TERRORISM & POL. VIOLENCE 541 (2010) (arguing that that, following the invasion of Afghanistan, Al Qaeda morphed into an ideology that draws on a host of Islamic thinking and doctrines). See Paul Cruickshank & Mohannad Hage Ali, Abu Musab Al Suri: Architect of the New Al Qaeda, 30 STUD. CONFLICT & TERRORISM 1 (2007) (analyzing Abu Musab Al Suri to show how Al Qaeda has become a decentralized movement, in addition to emphasizing the importance of the internet in this new phase of Al Qaeda); *See also* BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL QAIDA STRATEGIST ABU MUS'AB AL-SURI (2008); Farrall, *supra* note 109; Barak Mendelsohn, Al-Qaeda's Franchising Strategy, 53 SURVIVAL 29 (2011) (noting that Al Qaeda's survival is dependent on how its subsidiaries and affiliates adapt to the post-Bin Laden era).

[67] Assaf Moghadam argues that Al Qaeda adheres to a Salafi-Jihad ideology, which he sees as a product of nineteenth-century industrialization and its link to modernity. The Salafi-Jihadi ideology seeks to reverse the effects of modernity and globalization, which it sees as the cause of social, economic, and political changes. Salafi-Jihadism therefore seeks to raise awareness among Muslims that their religion is on the decline. Finally, Salafi-Jihadism identifies the enemy as crusaders, Zionists, and apostates. Assaf Moghadam, The Salafi Jihad as a Religious Ideology, 1 CTC SENTINEL 14, 14–15 (2008) [hereinafter Salafi Jihad].

[68] THE AL QAEDA MANUAL, http://www.fas.org/irp/world/para/manualpart1_1.pdf, at 8 (last visited Feb. 2, 2013) [hereinafter THE AL QAEDA MANUAL] ("These young men realized that an Islamic government would never be established except by the bomb and rifle. Islam does not coincide or make a truce with unbelief, but rather confronts it. The confrontation that Islam calls for with these godless and apostate regimes, does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.").

[69] Mark Juergensmeyer, Terror in the Name of God, 100 CURRENT HIST. 357 (2001) [hereinafter Terror in the Name of God] (arguing that Cosmic Wars refer to spiritual battles taking place in the here-and-now that require adherents to participate in the ultimate battle of Good versus Evil in defense of the faith); *See also* Mark Juergensmeyer, Terror Mandated by God, 9 TERRORISM & POL. VIOLENCE 16 (1997); Mark Juergensmeyer, The New Religious State, 27 COMP. POL. 27 (1995).

[70] *See* ABDEL BARI BARI ATWAN, THE SECRET HISTORY OF AL QAEDA (2008); *See also* Terror in the name of God, *Id.* at 358 ("In such battles, waged in divine time and with heaven's rewards, there is no need to compromise one's goals. No need, also, to contend with society's laws and limitations when one is obeying a higher authority. In spiritualizing violence, religion gives terrorism a remarkable power.").

demands total devotion and a willingness to sacrifice from its adherents.[71] The clearest manifestation of Al Qaeda's ideology appears in Osama bin Laden's infamous Declaration of Jihad. He interfused religion and history to emphasize the threat Muslims face from the crusading West[72] and from Muslim leaders, whom he believed abandoned Islam in favor of materialism.[73] The key threats that Al Qaeda generates stem from its religious zealotry that encourages suicide terrorism and mass casualty terrorism. These are relatively new developments in the realm of terrorism.[74] They are designed to exact heavy damage and to terrify others from working against them.[75] Ultimately, Al Qaeda's inflexible, cosmic ideology, mean that its recruits and affiliates not only show a willingness

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[71] In 2002 in Manchester, England, British police found an Al Qaeda Manual, which expresses how the organization viewed the world and how it believed that the war against the infidels should be conducted. THE AL QAEDA MANUAL, *supra* note 68, at 15 ("He [the member] has to be willing to do the work and undergo martyrdom for the purpose of achieving the goal and establishing the religion of majestic Allah on earth.").

[72] *See* Bin Laden's Fatwa, PBS NEWSHOUR (Aug. 27, 1996), http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html. "It should not be hidden from you that the people of Islam had suffered from aggression, iniquity and injustice imposed on them by the Zionist-Crusaders alliance and their collaborators; to the extent that the Muslims blood became the cheapest and their wealth as loot in the hands of the enemies. Their blood was spilled in Palestine and Iraq. The horrifying pictures of the massacre of Qana, in Lebanon are still fresh in our memory. Massacres in Tajakestan, Burma, Cashmere, Assam, Philippine, Fatani, Ogadin, Somalia, Erithria, Chechnia and in Bosnia-Herzegovina took place, massacres that send shivers in the body and shake the conscience. All of this and the world watch and hear, and not only didn't respond to these atrocities, but also with a clear conspiracy between the USA and its' allies and under the cover of the iniquitous United Nations, the dispossessed people were even prevented from obtaining arms to defend themselves.").

[73] Bin Laden's Real Crusade, BOSTON GLOBE, Sept. 30, 2001, at D6.

[74] It used to be that only a very small and select number of terrorist organizations such as Hezbollah or Hamas would engage in suicide terrorism and even then under very strict guidelines. See, e.g., Scott Atran, Genesis of Suicide Terrorism, 5612 SCIENCE 1534 (2003); Robert A. Pape, The Strategic Logic of Suicide Terrorism, 97 AM. POL. SCI. REV. 343 (2003).

[75] In 2007, reports appeared in the British press of an Islamist plot to kidnap, torture, and behead a British Muslim soldier in order to dissuade Muslims from joining the military. Philip Johnston & Nick Britten, Police Raids 'Foiled Plot to Behead Solider', TELEGRAPH (Feb. 1, 2007), http://www.telegraph.co.uk/news/uknews/1541272/Police-raids-foiled-plot-to-behead-soldier.html. Assaf Moghadam, Motives for Martyrdom: Al-Qaida, Salafi Jihad, and the Spread of Suicide Attacks, 33 INT'L SECURITY 46, 59 (2009) ("In al-Qaida's tactical arsenal, suicide attacks play a pivotal role. No other tactic symbolizes al-Qaida's tenaciousness and ability to inspire a large number of Muslims worldwide as much as 'martyrdom operations,' to use the group's euphemistic labeling. Al-Qaida has all but perfected this tactic and institutionalized it to an extent not seen in other terrorist groups. It instilled the spirit of self-sacrifice in the collective psyche of virtually all of its fighters, thus creating a cult of martyrdom that far exceeds the Palestinian and Lebanese cult of death in both scope and depth.").

to die in the process of attaining the goal, they often crave it.[76]

Al Qaeda's ability to use and manipulate the Internet accentuates the threat it poses.[77] The Internet allows Al Qaeda to transition from being a typical terrorist group to a global network. Through the Internet, it operates as a loose body of groups and individuals who share a set of ideas.[78] Its decentralized structure and ideological nature makes it difficult to combat and destroy.[79]

A study by Professors Manni Crone and Martin Harrow highlights the change and the threat that Al Qaeda's brand of terrorism and recruits posses. Crone and Harrow's typology recognizes four groups while examining the relationship between Al Qaeda and individuals. The relationship is dependent on a given individual's level of autonomy and attachment, or sense of belonging to the group. The first group is the *internal autonomous* terrorists, "homegrown," or Western-based, individuals unaffiliated with Al Qaeda but

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[76] Mohammed Siddique Khan, the leader of the July 7, 2005 bombing in London, typified this view with his "death statement": We are at war and I am a soldier. Now you too will taste the reality of this situation. . . . Our words have no impact upon you, therefore I'm going to talk to you in a language that you understand. Our words are dead until we give them life with our blood. . . . Your democratically elected governments continuously perpetuate atrocities against my people and your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters. . . . Until we feel security, you will be our target. Until you stop the bombing, gassing, imprisonment and torture of my people, we will not stop this fight. . . ." Vikram Dodd & Richard Norton-Taylor, Video of 7/7 Ringleader Blames Foreign Policy, GUARDIAN (Sept. 2, 2005), http://www.guardian.co.uk/uk/2005/sep/02/alqaida.politics.

[77] 9/11 COMMISSION REPORT, *supra* note 10, at 88 ("The emergence of the World Wide Web has given terrorists a much easier means of acquiring information and exercising command and control over their operations."). The Internet does not only focus on jihadi websites, it also allows for email communications, chat rooms, e-groups, message boards, and social networks such as Facebook. These mediums provide a useful tool for the dissemination of radical ideas because those providing the information can disguise or hide their identities.

[78] Leah Farrall, How al Qaeda Works—What the Organization's Subsidiaries Say about Its Strength, 90 FOREIGN AFF. 128, 133 (2011) ("Al Qaeda today is not a traditional hierarchical terrorist organization, with a pyramid-style organizational structure, and it does not exercise full command and control over its branch and franchises . . . . Due to its dispersed structure, al Qaeda operates as a devolved network hierarchy, in which levels of command authority are not always clear; personal ties between militants carry weight and, at times, transcend the command structure between core, branch, and franchises."); *See also* MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008); Jarret M. Brachman, High-Tech Terror: Al-Qaeda's Use of New Technology, 30 FLETCHER F. WORLD AFF. 149 (2006); Jason Burke, Al Qaeda, 142 FOREIGN POL'Y 18, 20–26 (2004); Steve Coll & Susan B. Glasser, Terrorists Turn to the Web as Base of Operations, WASH. POST, Aug. 7, 2005, at A01.

[79] *See* Coll & Glasser, *supra* note 77 (noting that "al Qaeda has become the first guerrilla movement in history to migrate from physical space to cyberspace"); *See also* Brachman, *supra* note 77, at 149–64.

who share its outlook.[80] The second group is the *internal affiliated* terrorists, homegrown individuals who have contacts with foreign Islamists, as typified for example by Burhan Hassan, a Somali-born American student who abandoned his studies to join al-Shabaab, ('The Youth'), a Somali-based terror group.[81] The third group is the *external autonomous* terrorists, who have little if any attachment to the West, but are independent of terrorist organizations. This group also includes non-Western Islamists existing outside of the West.[82] The fourth group is the *external affiliated* terrorists, best represented by the Nigerian Boko Haram, composed of individuals with little or no attachment to the West who have contact with non-Western terrorist or Islamist organizations.[83]

Crone and Harrow's typology fits with some of the terror attacks and recent threats that have affected the United States. In the year 2009, for example, the United States allegedly faced eleven separate Al Qaeda or Al Qaeda-inspired attacks. These included two physical attacks—the Fort Hood shooting (committed by a self-radicalized American military officer)[84] and a shooting incident in Little Rock Arkansas.[85] Besides the shootings, there were five serious plots, as well as four incidents involving Americans who wished to travel overseas to receive terrorist training.[86] What adds, to Al Qaeda's vicious

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[80] A good example of this is the 2005 ricin plot in the UK, which led to Kamel Bourgass' conviction. Bourgass was an Algerian national that came illegally to the UK. Duncan Campbell, Vikram Dodd, Richard Norton-Taylor and Rosie Cowan, Police killer gets 17 years for poison plot, GUARDIAN, Apr. 14, 2005, http://www.theguardian.com/uk/2005/apr/14/politics.terrorism. Another example is the killing of Lee Rigby by Michael Adebolajo and Michael Adebowale. The two were inspired by Al Qaeda, with Adebolajo claiming the attack on Rigby was a military strike. Vikram Dodd, Lee Rigby murder: Michael Adebolajo gets whole-life jail term, GUARDIAN, Apr. 14, 2005, http://www.theguardian.com/uk-news/2014/feb/26/lee-rigby-killers-michael-adebolajo-adebowale-whole-life-ruling

[81] Andrea Plott, 'A call to jihad, Answered in America,' N.Y. TIMES, (July 11, 2009), *available at* http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=all&_r=0;

[82] A good example of this is the Nigerian group Boko Haram. Freedom C. Onuoha, The Islamist Challenge: Nigeria's Boko Haram Crisis Explained, African Security Review Vol. 19, No. 2 (2010), pp. 54-67.

[83] Manni Crone & Martin Harrow, Homegrown Terrorism in the West, 23 TERRORISM & POL. VIOLENCE 521 (2011).

[84] Anwar al-Awlaki provides a good example of the threat that the new Al Qaeda cadre poses. Through the internet, al-Awlaki, a Yemeni-American, was able to influence Major Malik Hasan, a U.S. officer, to kill thirteen people in Fort Hood, Texas in November 2009. Reportedly, Anwar al-Awlaki also influenced Faisal Shahzad, the Times Square bomber. Jason Burke, Anwar al-Awlaki Obituary, GUARDIAN, Oct. 2, 2011, at 35.

[85] James Dao, Man claims terror ties in Little Rock Shooting, N.Y TIMES, (Jan. 21, 2010), *available at* http://www.nytimes.com/2010/01/22/us/22littlerock.html?hp

[86] Al Baker & William K. Rashbaum, Police Find Car Bomb in Times Square, N.Y. TIMES, May 2,

reputation is its alleged[87] use of unconventional weapons—chemical, biological, radiological, and nuclear (CBRN).[88] CBRN is a major concern because, "[f]rom a policymaker's perspective, the case of nuclear terrorism is the classic case of high-consequence, low-probability problem. It would be imprudent not to take action against such a threat, but an argument can be made that resources really should be focused on more likely non-nuclear events."[89] Al Qaeda and its affiliates have clearly contemplated the use of non-conventional weapons[90], heightening concerns over the possible use of such weapons in general.[91] The

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2010; Times Square Bomb Plot May Have Cost $7K, USA TODAY (May 9 2010), *available at* http://www.usatoday.com/news/nation/2010-05-08-nyc-bomb-plot_N.htm (expressing the threat that even a failed attack, such as the 2010 New York Times Square terror attack, can pose; even though the device failed, it required evacuation and a major security operation); Peter Bergen et. al., *supra* note 38, at 67–69 (2011).

[87] James R. Van De Velde, The Impossible Challenge of Deterring "Nuclear Terrorism" by Al Qaeda, 33 STUD. CONFLICT & TERRORISM 682, 684 (2010) ("Al Qaeda leadership in particular has shown a consistent interest in the development of a nuclear capability and other WMD. Former senior Al Qaeda operations planner Khalid Shaykh Muhammad (KSM) confirmed in March 2003 that senior Al Qaeda leadership—including bin Laden, Ayman al-Zawahiri, and Muhammad 'Atif (a.k.a. Abu Hamza al-Masri)—all believed that obtaining a CBRN capability was necessary and that they were intent on developing weapons that could cause large numbers of casualties.").

[88] 9/11 COMMISSION REPORT, *supra* note 10, at 245 (disclosing that Mohamed Atta, the leader of the nineteen bombers who committed the 9/11 attacks, mentioned targeting a nuclear facility during a meeting in Spain); *See also* Graham Allison, Nuclear Disorder: Surveying Atomic Threats, 89 FOREIGN AFF. 79 (2010); Mohamed El-Baradei & Jonas Cahr Store, How the World Can Combat Nuclear Terrorism, 48 INT'L ATOMIC ENERGY AGENCY BULL. 15 (2006). In 2013, authorities in Iraq claimed to uncovered an Al Qaeda plot to use chemical weapons. Additionally, between 2006 and 2007, Al Qaeda in Iraq had detonated 16 crude chlorine bombs. Iraq uncovers al-Qaeda 'chemical weapons plot, BBC News, Jun. 1 (2013), *available at* http://www.bbc.com/news/world-middle-east-22742201; Jim Garamone, Terrorists using chlorine bombs to intimidate Iraqis, U.S. Dept. of Defense, Jun. 7, 2007, *available at* http://www.defense.gov/news/newsarticle.aspx?id=46311

[89] Todd Moss, Nuclear Terrorism Redux: Conventionalists, Skeptics, and the Margin of Safety, 54 ORBIS 304 (2010). The former director of the Central Intelligence Agency, George Tenet, writes that from December 2002, "a loose association of groups planned a string of poison plots across Europe," a continuation of efforts that began in the late 1990s. Tenet further claims that Al Qaeda's anthrax program "had been developed in parallel to 9/11 planning." GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA'S TIME OF CRISIS 277–78 (2008).

[90] Over the last few years, the United Kingdom has faced a number of terror plots involving non-conventional weaponry. See, e.g., Joanna Walters et al., Three Held Over 'Poison Gas Bomb Plot, OBSERVER, Nov. 16, 2002, at 1; Nick Hopkins & Tania Branigan, Poison Find Sparks Terror Alert, GUARDIAN (Jan. 8, 2003), http://www.guardian.co.uk/uk/2003/jan/08/terrorism.alqaida.

[91] David Pallister, Seven Linked to al-Qaida are Jailed for Terror Plots, GUARDIAN, June 15, 2007, at 9; James Sturcke, Public Warned of Growing Threat of Terror Attacks, GUARDIAN (Nov. 30, 2007), *available at*

matter is augmented by the inherent weakness of the non-proliferation regime,[92] which may explain the adoption of a number of Security Council resolutions calling for the tightening of controls over these unconventional attack materials.[93]

III. THE UN COUNTER-TERRORISM REGIME

In the post-9/11 era, the UN system[94] places more attention on the causes and consequences of terrorism than before.[95] In developing its counter-terrorism regime, the Security Council has relied on its expansive powers to impose positive obligations on member states with respect to international terrorism.[96] The downing of Pan Am flight 103 in 1988,[97] UTA flight 772 in

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http://www.guardian.co.uk/uk/2007/nov/30/terrorism.politicalnews?INTCMP=SRCH.

[92] BOB GRAHAM ET AL., WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM (2008).

[93] *See, e.g.,* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (stating that the Security Council was gravely concerned of the threat of a terrorist organization, especially those identified by the United Nations "under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery").

[94] The phrase "UN System" refers to the United Nations; voluntary and special funds and programs; a number of specialized, affiliated agencies; and UN peacekeeping operations. MARJORIE ANN BROWNE, CONG. RESEARCH SERV., RL33611, UNITED NATIONS SYSTEM FUNDING: CONGRESSIONAL ISSUES (2013), *available at* http://www.fas.org/sgp/crs/row/RL33611.pdf.

[95] In 2005, the General Assembly formed the Counter-terrorism Implementation Task Force to help the organization coordinate the various counter-terrorism measures within the UN. See generally COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, *available at* http://www.un.org/en/terrorism/ctitf/office.shtml (last visited Oct. 16, 2012).

[96] *See, e.g.,* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); *See also* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) 1992 I.C.J 115 (Feb. 27) (discussing the power of the Security Council when it applies Chapter VII); W. Michael Reisman, The Constitutional Crisis in the United Nations, 87 AM. J. INT'L L. 83 (1993).

[97] Interestingly, it appears that the UN Security Council did not adopt specific a resolution condemning the Pan Am 103 flight terrorism. This is possibly because it was not known at the time who had committed this atrocity. However, the UK and the USA proposed tightening aviation security at the International Civil Aviation Organization, a UN specialized body. The proposal included a call for the banning of radios, computers, and other such electronic devices that cannot be easily inspected easily from being carried onto airplanes. John H. Cushman, Jr., U.S. and Britain Call for Stricter Aviation Security, N.Y. TIMES, Feb. 16, 1989 at A17; *See also* S.C. Res. 635, ¶ 5, U.N. Doc. S/RES/635 (Jun. 13, 1989) (adopting Security Council Resolution 635, which focused on explosives and called on "producers of plastic or sheet explosives, to intensify research into means of making such explosives more easily detectable, and to co-operate in this endeavor").

1989,[98] the attempted assassination of President Hosni Mubarak in 1995,[99] and the bombing of the U.S. embassies in Kenya and Tanzania in 1998[100] led the Security Council to view terrorism, when occurring at specific times and locations, as a threat to international peace and security.[101] These events illustrate that pre-9/11 resolutions were generally limited in scope.[102]

Since 9/11, terrorism has been securitized by the Security Council, with the resolutions placing more duties on states to counter terrorism[103] while recognizing that multilateral commitment is vital to counter the threat. The aim is to produce an internationally agreed response to the threat of terrorism by focusing on the security of states. Accordingly, the Council's counter-terrorism regime is composed of the following: the Al Qaeda/Taliban sanctioning committee (1267 Committee), the CTC, and the 1540 Committee.[104]

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[98] When investigations indicated Libya as potentially responsible for the Pan Am 103 and UTA 772 bombings, the Security Council adopted a resolution declaring that it was "Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have deleterious effect on international relations and jeopardize the security of States." S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) (emphasis added).

[99] *See, e.g.,* S.C. Res. 1044, U.N. Doc. S/RES/1044 (Jan. 31, 1996) (condemning "the terrorist assassination attempt on the life of the President of the Arab Republic of Egypt in Addis Ababa, Ethiopia, on 26 June 1995" and calling on the Sudanese government to comply with various requests to extradite to Ethiopia three individuals deemed to be connected with the assassination attempt).

[100] S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998).

[101] S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (expressing concern at the increase of acts of international terrorism and it condemning "all acts of terrorism, irrespective of motive, wherever and by whomever committed").

[102] S.C. Res. 635, *supra* note 94, at ¶ 1 (condemning "all acts of unlawful interference against the security of civil aviation," though its focus is on the type of explosive—plastic or sheet—used to bring down the airplane).

[103] *See, e.g.,* S.C. Res. 1624, ¶ 1(C), U.N. Doc. S/RES/1624 (Sep. 14, 2005) (assessing incitement of terrorist acts and calling on states to introduce legislation that prohibits the incitement of terrorist acts, prevents the conduct of incitement, and denies safe haven "to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct"); *See also* S.C. Res. 1735, ¶ 1(A)-(C), U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1988, ¶ 1(A)-(C), U.N. Doc. S/RES/1988 (June 17, 2011).

[104] The 1540 Committee recognized that the proliferation of nuclear, chemical and biological weapons including the means of their delivery amounts to a threat to the maintenance of international peace and security, and therefore it seeks to promote domestic legislation to prevent the proliferation of such weapons. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). The three committees have issued joint communiqués indicating were the Security Council counter-terrorism regime is at. See, e.g., Speakers In Security Council Call For Unified, Global Counter-Terrorism Effort, Following Briefings By Chairs Of Committees Set Up To Spearhead Fight, U.S. FEDERAL NEWS SERVICES (May 12, 2010), *available at* http://search.proquest.com.libezproxy2.syr.edu/docview/275950446?accountid=14214.

These entities clearly have a state-centric philosophy, as after all they were created by states.[105] Thus, the measures they mandate emphasize sovereign duties, such as preventing the movement of suspected terrorists, curtailing the terrorism financing and the proliferation of non-conventional weapons, and calling for inter-state cooperation.[106] In the following sections, a review of the key committees is offered to underline the dominance of the state-centric approach taken by the specialist terrorist-entities of the Security Council.

A. *The 1267 Committee: Addressing Threats from Individuals from a Statist Perspective*

By the late 1990s, large parts of Afghanistan were under the control of the Taliban. At that time, the Taliban was providing sanctuary to bin Laden, which explains why the United States urged the formation of the 1267 Al Qaeda/Taliban Committee.[107] Security Council Resolution 1267, which followed Resolution 1214,[108] amounted to a watershed in the history of the Security Council's treatment of terrorism. It emphasized that the Council saw terrorism as a threat to international peace and security and that it wanted to combat the phenomenon through sanctions and listing.[109] The Committee, composed of representatives of the Council, was empowered to freeze the assets of individuals and entities that had ties to Al Qaeda and the Taliban in addition to preventing their travelling.[110] The impact of the 1267 Committee has been

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[105] *See* Anthony Aust, The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Practitioner's View, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 31–38 (Erika de Wet & Andre Nollkaemper, eds., 2003).

[106] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001).

[107] Permanent Rep. of the U.S., Letter Dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), *available at* http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf (informing the Council that the U.S. had applied the right to self-defense in its attack on Afghanistan and asserting that the Taliban had allowed Al Qaeda to operate in the territories under its control).

[108] S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (declaring that the Council is deeply disturbed that terrorists use Taliban-controlled areas in Afghanistan for the "sheltering and training of terrorists and the planning of terrorist acts" and reiterating that "the suppression of international terrorism is essential for the maintenance of international peace and security").

[109] S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (imposing sanctions on the Taliban following its refusal to turn over bin Laden, even in the face of an arrest warrant). The Taliban's to try bin Laden through a panel of Islamic judges suggests that the Taliban felt the pressure of the Council's sanctions and growing unhappiness with their intransigency. John Lancaster, Afghanistan Offers to Try Bin Laden in Possible Prelude to Expulsion, WASH. POST, Oct. 30, 1999, at A22.

[110] Rene Uruena points out that, in its early years, the Committee had little restriction or oversight in the application of its mandate. However, after the listing of three Swedish

significant, specifically in terms of the listing process. As a result, some individuals have engaged in litigation to challenge their designation as terrorists,[111] while others have sought to question the mechanism and the idea of listing.[112]

There are serious questions about the scope of the Committee's powers, particularly in relation to domestic and international law.[113] In July 2006 for example, the Canadian government argued that being listed by the 1267 sanctions improperly prevented Abousfian Abdelrazik, a Sudanese-born naturalized Canadian, from reentering Canada.[114] The Canadian government argued that allowing Abdelrazik to enter Canada would breach its UN Charter obligation.[115] Moreover, numerous courts have questioned the very nature of 1267. Some courts interpret 1267 as subservient to the member states which

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nationals—Abdirisak Aden, Abdi Abdulaziz Ali, and Youssef Ali—member states permitted the introduction of some oversight: the 2002 Guidelines. Rene Uruena, International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror, 4 INT'L ORG. L. REV. 321 (2008); *See also* Monika Heupel, Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards, 85 INT'L AFF. 307 (2009); Eric Rosand, The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions, 98 AM. J. INT'L L. 745 (2004). S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002) (allowing the Committee to expand its remit with Resolution 1390, making its reach universal no longer restricted to Afghanistan).

[111] *See, e.g.,* Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada, 2009 F.C. 580 (Can. Ont.), *available at* http://decisions.fct-cf.gc.ca/en/2009/2009fc580/2009fc580.pdf; A, K, M, Q & G v. HM Treasury [2010] UKSC 2, *available at* http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_Judgment.pdf.

[112] Martin Scheinin for example noted "[t]he Special Rapporteur has maintained the position that the procedures for terrorist listing and delisting by the 1267 Committee of the Security Council do not meet international human rights standards concerning due process or fair trial." Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin, Geneva, June 29, 2011, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E

[113] Antonios Tzanakopoulos, United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada, 8 J. INT'L CRIM. JUST. 249, 250 (2010) ("[D]omestic courts are increasingly engaged by persons seeking to challenge restrictions imposed on them under the 1267 regime. Faced with the lack of any judicial remedies against Security Council decisions at both the international and the national level, affected persons are resorting to domestic courts, attacking the domestic acts adopted in implementation of the relevant resolutions.").

[114] It was the United States that had Abousfian Abdelrazik designated a member of Al Qaeda. From the Canadian court reports, this designation was based on his acquaintance with Ahmed Ressam (convicted of plotting to blow up the Los Angeles Airport) and Adil Charkaoui (arrested because he was a threat to Canada's national security). Abousfian Abdelrazik, 2009 F.C.R. at ¶ 11; *See also* A, K, M, Q & G v. HM Treasury [2010] UKSC 2 (raising similar issues in the British context).

[115] Tzanakopoulos, *supra* note 34, at 252–53.

meant that the mechanism to provide for protection from abuse to be insufficient.[116]

Despite criticism from the courts, the state-centric approach to security prevails within the 1267 Committee. This was recently exhibited in the case of Afghanistan where the key foreign and domestic stakeholders shifted their stance in relation to the Taliban. As the primary states engaged in Afghanistan—the United States, the UK, Germany, France and others—began to disengage and withdraw from Afghanistan, they recognized that there was a need to compromise with the Taliban.[117] Accordingly, they have instituted a distinction between members of Al Qaeda and the Taliban, with the former remaining heavily sanctioned, whereas sanctioning the latter is achieved more on political reasoning and whether they would work with the Afghan government.[118] This policy development highlights state dominance in the listing aspect of the UN counter-terrorism regime, which depends on whether states decide that a Taliban member has moderated his extreme attitudes, often by looking at their words[119] and not actions.[120] This decision, in turn, permits possible incorporation into the Afghan political system.[121] The shift in

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[116] A, K, M, Q & G, [2010] UKSC at ¶ 78 (welcoming the formation of the Office of the Ombudsman, but maintaining that it is not an effective judicial remedy).

[117] Karen DeYoung & Peter Finn, Karzai Supports U.S.-Taliban Talks, WASH. POST, Jan. 5, 2012, at A10; Jon Boone, Karzai Seeks Talks with Taliban, FIN. TIMES (Sept. 30, 2008), http://search.proquest.com/docview/229199215?accountid=14214; Dan Roberts and Emma Graham-Harrison, Taliban peace talks: 'Peace and reconciliation' negotiations to take place in Qatar, GUARDIAN (June 18, 2013) http://www.guardian.co.uk/world/2013/jun/18/us-peace-talks-taliban-afghanistan.

[118] *See, e.g.,* Helene Cooper & Thom Shanker, U.S. Seeking Opportunities in Easing Taliban Talks, N.Y. TIMES, Oct. 15, 2010, at A8; Alissa J. Rubin, Karzai Says Afghanistan Has Begun Taliban Talks, N.Y. TIMES, Feb. 16, 2012, at A4; Michael Semple, The Taliban's Qatar Office is a Positive Step, but Not a Prologue to Peace, GUARDIAN (June 19, 2013), *available at* http://www.guardian.co.uk/commentisfree/2013/jun/19/taliban-qatar-office-positive. Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin, Geneva, June 29, 2011, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E

[119] *See* ABDUL SALAM ZAEEF ET AL., MY LIFE WITH THE TALIBAN (2010).

[120] Reportedly, from 2011 to 2012 there was a 12 percent reduction in civilian casualties overall, but a 20 percent increase in injuries to women and girls. The most striking statistic was the 700 percent increase in the number of government employees targeted by the Taliban. Golnar Motevalli, Taliban Targeting Afghan Women and Government Workers, UN Report Finds, GUARDIAN (Feb. 19, 2013), http://www.guardian.co.uk/world/2013/feb/19/taliban-targeting-women-un-report. *See also* Anup Kaphle, List of Prominent Afghan Officials Assassinated (and Targeted) in 2012, WASH.. POST (Dec. 10, 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/10/list-of-prominent-afghan-officials-assassinated-and-targeted-in-2012/.

[121] Kamran Yousaf, Afghan Peace Process: 12 Taliban Peace Brokers May be Taken off UN List,

policy further empowers the Afghan government at the cost of international human rights and international criminal law.[122] The power to list or delist[123] is the power to grant a person immunity, even if they are accused of having committed international crimes.[124] In sum, because it was states that designed the UN Security Council counter-terrorism mechanism and their conception of security and threats is about protecting the state.

B. *The Counter-Terrorism Committee, States and Domestic Counter-terrorism*

i. Security Council Resolution 1373 (2001)

The CTC is rooted in Security Council Resolution 1373. It was adopted almost three weeks after 9/11. At the time, the adoption was revolutionary because it placed positive obligations on states to adopt a domestic counter-terrorism regime.[125] This had never been done before, particularly with respect to terrorism.[126] Notably, the resolution clarifies what the Security Council

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EXPRESS TRIB. (Nov. 19, 2012), http://tribune.com.pk/story/467889/afghan-peace-process-12-taliban-peace-brokers-may-be-taken-off-un-list/; *See also* Nikola Krastev, UN Considers Splitting Al-Qaeda-Taliban Blacklist, RADIO FREE EUR. (Oct. 18, 2012), *available at* http://www.rferl.org/content/un_considers_splitting_al-qaeda-taliban_blacklist/24237173.html.

[122] Razeshta Sethna, Afghan Women's Rights under Threat, GUARDIAN (June 20, 2013), *available at* http://www.guardian.com/global-development/2013/jun/20/afghan-womens-rights-under-threat; Hamida Ghafour, What Afghan Women Fear (it's not the Taliban), TORONTO STAR, Feb. 3, 2013, at p. A3.

[123] When the Taliban was in power, Mohammed Qalamuddin, one of the individuals that the Karzai government wanted take off the list, ran patrols that beat men and women whom the patrol felt were breaching Islamic law. Jason Burke, Making Peace with the Taliban? UN Pressed to Lift Afghan Sanctions, GUARDIAN (June 2, 2011), *available at* http://www.guardian.co.uk/world/2011/jun/02/afghanistan-peace-move-lifting-taliban-sanctions.

[124] Adrian Croft, Afghan Peace Negotiator Sees Progress in Talks with Taliban, REUTERS (Oct. 14, 2012), *available at* http://www.reuters.com/article/2012/10/14/us-afghanistan-stanekzai-idUSBRE89D0I620121014.

[125] Resolution 1373 serves as an indication that states lead the Security Council counter-terrorism regime by demanding that all states shall "[t]ake the necessary steps to prevent the commission of terrorist acts . . . [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens." S.C. Res. 1373, ¶ 2(b)-(c), U.N. Doc. S/RES/1373 (Sept. 29, 2001). Additionally, the Council demands that states shall, "[c]riminalize the wilful [sic.] provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts." *Id.* at ¶ 1(b).

[126] Sanjay Sethi, Security Council Strengthens Fight Against Terrorism, 39 UN CHRON. 22 (2002).

demands and expects from the member states—denial of safe haven for those who support terrorism and those that practice it.[127] Thus, 1373 lays out a mechanism compelling all member states to adopt a three-tiered program to combat terrorism. The first demands that states have a domestic counter-terrorism legislation program. The second requires an executive commitment to counter the threat of terrorism. The third requires each state to help the CTC by providing a report of its counter-terrorism regime.[128] The aim of the program is to help foster counter-terrorism dialogue between the CTC and the member states. Accordingly, based on the information provided by states, the CTC created a database of counter-terrorism mechanisms, which states can use to see which mechanisms other states have used.[129] Some claim that "[t]hrough its capacity-building and global coordination initiatives, the CTC has become a significant element in the worldwide campaign against terrorism.[130]

To further aid and develop groundbreaking initiatives developed by the CTC, the Security Counsel established the Counter-Terrorism Executive Directorate (CTED) in the year 2004.[131] This new body was mandated to visit countries in order to examine their compliance with 1373. CTED is a technical body, with 40 staff members, half of whom are legal experts whose expertise ranges from terrorist financing to border and customs control. They analyze the reports that are submitted by the states.[132] The purpose of CTED is to help the CTC and the members of the UN develop their counter-terrorism programs.[133] The hope was probably that through such interaction, states would harmonize their counter-terrorism mechanisms and provide protection against attacks.

In sum, Resolution 1373 and the subsequent resolutions adopted to sustain and expand the regime are limited in the scope of their enforcement. It remains unclear what the Council would do if a state rejected a CTC visit or if a country decided not to submit a report to the CTC.[134] The resolution accepts

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[127] S.C. Res. 1373, ¶ 2(b)-(c), U.N. Doc. S/RES/1373 (Sept. 29, 2001).

[128] *See* Eric Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 AM. J. INT'L L. 333, 333–34 (2003).

[129] Emilio J. Cardenas, The United Nations Security Council's Quest For Effectiveness, 25 MICH. J. INT'L L. 1341, 1342–44 (2004).

[130] Press Release, Spokesperson Richard Boucher, UN Security Council Enhances Coordination on Counter-Terrorism (Mar. 30, 2004), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2004/30899.htm [hereinafter UN SC Enhances Coordination].

[131] S.C. Res. 1535, U.N. Doc. S/RES/1535 (March. 26, 2004).

[132] *See Id.*; UN SC Enhances Coordination, *supra* note 124. E.J. Flynn, The Security Council's Counter-Terrorism Committee and Human Rights, 7 HUM. RTS L. REV. 371 (2007).

[133] S.C. Res. 1535, U.N. Doc. S/RES/1535 (March. 26, 2004).

[134] See Leslie Palti, Combating Terrorism While Protecting Human Rights, 41 UN CHRON. 27 (2004) (recognizing the limitation of the enforcement mechanism and appreciating that sovereign states cannot be compelled to submit reports).

the possibility that the Security Council may decide that, in failing to abide by the Resolution, a state is in breach of its obligations, raising the prospect of sanctions to attain compliance.[135] Additionally, 1373 only calls on states to apply the international standards of human rights for asylum seekers and those seeking refugee status.[136]

ii. Security Council Resolution 1566

In 2004, the Security Council adopted Resolution 1566 condemning all forms of terrorism and calling on member states to cooperate in combating terrorism.[137] Resolution 1566 is a response to the fact that an internationally accepted definition of terrorism has been missing from the counter-terrorism campaign for decades.[138] The Resolution offers a definition of terrorism as:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or

[135] Jimmy Gurule, The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding, 41 CASE W. RES. J. INT'L L. 19, 62–63 (2009) (arguing that by failing to enforce legal duties and obligations imposed by Resolutions 1267 and 1333 against non-compliant states, the Security Council runs the risk of rendering the UN sanctions regime (freezing terrorist assets) irrelevant in the fight against global terrorism).

[136] Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 33–50, U.N. Doc. A/65/258 (Aug. 6, 2010) (by Martin Scheinin) [hereinafter Report on the Promotion and Protection of Rights].

[137] S.C. Res. 1566, ¶ 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (alteration in original) ("Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.").

[138] *Id.*; *See also* Ben Saul, Definition of ''Terrorism'' in the UN Security Council: 1985–2004, 4 CHINESE J. INT'L L. 141 (2005) (reviewing the history of the "definition" of terrorism within the UN and noting that, until 9/11, resolutions neither imposed penalties vis-à-vis acts of terrorism nor defined terrorism). It was the assassination of King Alexander I of Yugoslavia and the French Foreign Minister, Louis Barthou in Marseille by the extremist Croat organization – Ustase – led by Ante Pavelic on October 9, 1934 that saw increase demand for some form of action, as by this point several high-profile killings had taken place. Robert A. Friedlander, Terrorism and International Law: What is Being Done, 8 RUTGERS-CAM L.J. 383, 386 (1976-1977). Friedlander notes that in 1833 the Belgian government adopted legislation prohibiting extradition of political offenders. The French and the Swiss parliaments adopted similar provision a year later. *Id.* at 384.

> particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are *under no circumstances justifiable* by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.[139]

A year after Resolution 1566 was adopted, the Council of Europe, which has 47 member states, and which drafted the European Convention on Human Rights, adopted the Convention on the Prevention of Terrorism, condemning terrorism, regardless of its motives.[140]

There are two key implications with the Terrorism Convention. First, it highlighted a historical shift in the way European countries addressed the issue of terrorism. European governments would only extradite individuals wanted in connection to crimes, as long as the political offence exception did not apply.[141] This essentially meant that those engaged in political opposition to a regime could escape extradition demands. Second, it affected the Council of Europe and the European Union in terms of their approach to the threat of terrorism and the need to combat it through an effective, transparent, legal regime. However, as Claudia Hillebrand persuasively shows, European courts have been timid in ensuring that the UN and EU 'terrorist lists' meet human rights standards. Instead they have argued that they lack the authority to examine the lists.[142] When it comes to terrorism cases—specifically listing—the European Court of Human Rights (ECHR) arguably has not taken a liberal interpretation of the Convention. Instead, they have opted to refer applicants to the judicial mechanism within the member states.[143] In other words, the

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[139] S.C. Res. 1566, *supra* note 130, at ¶ 3 (emphasis added); *See also* Saul, *supra* note 131.

[140] Council of Europe Convention on the Prevention of Terrorism, pmbl., May 16, 2005, C.E.T.S. no. 196.

[141] In 1891, the British High Court in Castioni imposed two basic requirements for the application of the political offense exception: first, the act had to take place during a political revolt or a disturbance. Second, the act in question had to have been ancillary to, or a part of, that same revolt or disturbance. In re Castioni [1891] 1 Q.B. 149. *See also* Abraham D. Sofaer, The Political Offense Exception and Terrorism,15 DENV. J. INT'L L & POL'Y 125 (1986-1987) (tracing the history of the political offence exception in relation to terrorism); Antje C. Petersen, Extradition and the Political Offense Exception in the Suppression of Terrorism, 67 IND. L.J. 767 (1991-1992) (analyzing various proposals dealing with how to retain the political offence exception in light of the threat posed by terrorism).

[142] *See, e.g.,* Claudia Hillebrand, *supra* note 9 at 164-165.

[143] Julia Hoffmann, Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test, CONSTELLATIONS 543, 555 (2008) (arguing that the European courts have focused on the issue of "information" or lack of, in relation to the UN and EU listing procedures. Hoffmann asserts "in a climate of fear, human rights guarantees are most easily undermined . . . . The European constitutional order must not be abused to circumvent those guarantees and

ECHR has to balance the demands of states with what it can impose on the member states.[144]

Ultimately, the importance of Resolution 1566 is that it highlighted the idea that state-sponsored terrorism in the post-9/11 period is not associated with wars of national liberation.[145] By taking such a position, the Security Council not moved away from the historical wrangling that prevented the formulation of a definition of terrorism. It also became more active in promoting an expansive definition of terrorism by states. Under the Security Council counter-terrorism regime, states are encouraged to adopt a definition of terrorism that encapsulates domestic and international terrorism.[146] Such an approach ultimately allows states to consider what is appropriate for them, even if it comes at the expense of individual rights and personal liberties, something that human security proponents reject, as they argue that when personal freedoms are undermined the conditions that facilitate terrorism prosper, which may explain the approach taken by the General Assembly, which is discussed below.

C. *The General Assembly, Human Security and Counter-Terrorism*

Immediately following 9/11 the General Assembly and other UN bodies took a secondary role in the counter-terrorism regime, as terrorism became a primary threat to the maintenance of international peace and security. The Council was able to take such a position because the Charter grants it primary responsibility to deal with threats to international peace and security.[147] Yet, as

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Community judges must not defer to the pressures of an international political climate which would lead to a permanent state of emergency and a sell-out of human rights protection within the EU.").

[144] Soon after 9/11, the British government informed the Council of Europe that it derogates from elements of the European Convention on Human Rights from Article 5 should it determine that an individual residing in the UK is deemed to be a threat, allowing their indefinite detention and possible deportation, as long as Article 3 (freedom from torture) of the Convention is not breached. Vijay M. Padmanabhan,Introductory Note to Human Rights Committee and the European Court of Human Rights-Treatment of Terrorism Suspects, 48 INT'L LEGAL MATERIALS 567, 568 (2009).

[145] Abraham D. Sofaer, Terrorism and the Law, 64 FOREIGN AFF. 901 (1986) (arguing that the rule of law has not been effective in addressing the threat of terrorism because states refuse to accept that terrorism is wrong, as some equate it with wars of national liberation).

[146] Ben Saul, Definition of ''Terrorism'' in the UN Security Council: 1985–2004, 4 CHINESE J. INT'L L. 141, 157 (2005)

[147] Article 24 declares "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Initially, during the Korean crisis, the General Assembly took the lead in dealing with the North Korean military attack because the

9/11 grew more distant, states increasingly felt that the campaign against Al Qaeda was too invasive from a human rights perspective[148] and that the state-centric counter-terrorism regime was actually facilitating terrorist recruitment.[149] The member states at the assembly also noted that that the focus had shifted away from human security toward traditional security. Those sentiments lead the General Assembly and UN human rights organs to demand more transparency, accountability, and openness.[150] Focus immediately landed on the listing procedure, managed by the CTC, where substantive human rights violations seemed to occur.[151] Arguably because the Council's reforms were not as expansive and extensive in terms of their protection for individuals, the Assembly supported the formulation of its own version of a counter-terrorism strategy.

i. The United Nations Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force

In 2005, the General Assembly declared its position on countering international terrorism by adopting the United Nations Global Counter-

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Security Council was in limbo due to the Soviet boycott. The Assembly was able to address an international threat to peace and security by highlighting that the charter underlines that the Council has primary as opposed to sole responsibility for the maintenance of international peace and security.

[148] Report on the Promotion and Protection of Rights, *supra* note 129, at ¶ 33–50 (arguing that state's record-keeping facilities and surveillance challenge the fundamental human right to privacy).

[149] *See* Tahir Abbas, Muslim Minorities in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period, 28 J. INTERCULTURAL STUD. 287 (2007).

[150] Growing criticism led to a number of changes within the 1267 Committee. First, the Analytical Support and Sanctions Monitoring Team, established in 2003, replaced the Monitoring Group (2001-2003). Second, the Committee adopted new guidelines explaining the listing and delisting processes and laying down some parameters that embrace fundamental human rights values. For example, the Office of the Ombudsperson, is meant to receive and process requests for delisting, acquire additional information from states and UN entities, and communicate with those wishing to be delisted. The latest set of Guidelines were adopted in January 2011. S. C. Comm. Pursuant to Resolution 1267 (1999) and 1989 (2011) Concerning Al Qaeda and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of Its Work (Jan. 26, 2011), *available at* http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

[151] S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (asking states to ensure that the measures they adopt in respect to their counter-terrorism programs comply "with all their obligations under international law" and declaring that states "should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law").

terrorism Strategy.[152] This was a natural continuation of the 2005 World Summit, which discussed the value and the need to adopt the responsibility to protect doctrine while also recognizing that security has changed.[153] The strategy amounted to a clear demarcation between the General Assembly and the Security Council on the issue of counter-terrorism, using a development-based approach to address insecurity.[154] According to some, the "fact that the Strategy was negotiated under the auspices of the General Assembly is also of positive significance, as the General Assembly generally carries more legitimacy than the Security Council due to its border representational base."[155]

The Strategy that the Assembly formulated has four pillars. Pillar I focuses on ensuring that counter-terrorism measures adopted by states do not breach human rights and the rule of law. Pillar I asserts that it is essential to "address the conditions conducive to the spread of terrorism," which the assembly identified as conflict, foreign occupation, oppression, poverty, lack of economic growth, under-development, lack of global prosperity, poor governance, human rights violations, political exclusion, and socio-economic marginalization.[156] Principally, what the assembly seems to be suggesting is that conditions in states—no distinction is made between democratic and non-democratic—such as alienation and poverty help foster terrorism. Under this Pillar, the Department of Political Affairs (DPA) has become involved in counter-terrorism efforts through its conflict prevention mandate.[157]

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[152] *Supra* note 29.

[153] Nevertheless, the World Summit instead of building momentum for internationalism, continued to highlight the centrality of state sovereignty in international relations. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at ¶ 138, (Oct. 24, 2005) (referring to the responsibility to protect civilians from international crimes and highlighting the centrality of states, holding that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means"); *See also* Rebecca J. Hamilton, The Responsibility to Protect: From Document to Doctrine—But What of Implementation, 19 HARV. HUM. RTS. J. 289 (2006).

[154] ARVINDER SAMBEI ET AL., COUNTER-TERRORISM LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 25 (2009); S.C. Res. 1963, ¶ 3, U.N. Doc. SC/RES/1963 (Dec. 20, 2010) (recognizing that, to defeat terrorism, we must use policy that goes beyond the use of force and includes law enforcement measures, "protection of human rights and fundamental freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence"); S.C. Res. 1963, ¶ 11, U.N. Doc. SC/RES/1963 (Dec. 20, 2010)(recognizing "that development, peace and security, and human rights are interlinked and mutually reinforcing, and underlining the international effort to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all.").

[155] SAMBEI, *supra* note 145, at 24–25.

[156] G.A. Res. 60/288, *supra* note 32, at Annex, Plan of Action.

[157] In a 2012 Report, the Secretary-General argued that the DPA "through its conflict

Pillar II calls upon the member states to undertake measures to prevent and combat terrorism, with specific focus on resources and means.[158] The strategy takes the view that what fuels terrorism is lack of resources, inequality and economic disparity. Therefore, for the Assembly, the way to address the conditions that foster terrorism is to remove what proponents of human security would call 'want.'

Pillar III calls for building state capacity to challenge, prevent, and combat terrorism and strengthen the UN system's counter-terrorism mechanisms.[159] This pillar strives to demand state compliance with the Security Council's counter-terrorism regime, specifically its resolutions such as 1373. At the same time, it underscores the importance of developing a state-based counter-terrorism mechanism in states that do not currently have one. This dovetails with the reporting mechanism instituted under 1373, which calls on states to advice the CTC what mechanism they lack in the hope that others would provide equipment and assistance.[160]

Finally, Pillar IV is composed of eight sections that demand states to respect and abide by international human rights law, international refugee law and international humanitarian law when combating terrorism.[161] The aim of this pillar is to call attention to the fact that the Security Council's approach to counter-terrorism insufficiently respected basic international human rights law. As states pursued security in the wake of 9/11, they increasingly derogated from key human rights mechanism.[162] Additionally, Pillar IV emphasizes the role of the United Nations system in this process.[163] The key emphasis being

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prevention mandate, makes valuable contributions to the global struggle against terrorism." This is because UN mediators and envoys strive to reduce political tensions, which, unless addressed, could lead to terrorism. U.N. Secretary-General, United Nations Global Counter-Terrorism Strategy: Activities of the United Nations System in Implementing the Strategy, ¶ 28, U.N. Doc. A/66/762 (Apr. 4, 2012).

[158] G.A. Res. 60/288, *supra* note 32, at Annex, Plan of Action.

[159] *Id.* at Annex: Plan of Action. § III.

[160] The Counter-terrorism Executive Directorate (CETD) keeps a list of donor countries, though it remains unclear and unknown what aid and assistance is provided, as states opt not publicise what they provide and to whom.

[161] *See* G.A. Res. 60/158, ¶ 2, U.N. Doc. A/RES/60/158 (Feb. 28, 2006) (reaffirming "the fundamental importance, including in response to terrorism and the fear of terrorism, of respecting all human rights and fundamental freedoms and the rule of law").

[162] The British government for example following the ricin plot indicate that it was willing to pull out of the European Convention of Human Rights, should the European Court of Human Rights prevent the British government from altering British asylum law. Rosemary Bennett, Asylum fears force human rights rethink, TIMES, Jan 27, 2003, at p. 1.

[163] G.A. Res. 60/288, *supra* note 32, at Annex, Plan of Action § 5 (reaffirming "the United Nations system's important role in strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective criminal justice systems,

two-fold, first recognizing a need to harmonizing the state response to terrorism, while at the same time wanting to make sure that the UN is involved because of the organization's commitment to individual rights and international human rights law.

ii. The Secretary-General, Human Security and Terrorism

The issue of terrorism has sparked a fierce debate over its root causes, as seen with the 2004 High-level Panel on Threats, Challenges and Changes captured.[164] The Panel identified six clusters of threats: inter-state war; intra-state conflict that includes genocide and large-scale human rights violations; poverty, infectious disease and environmental damage; weapons of mass destruction; terrorism; and transnational crime. The Panel claimed[165] that by addressing poverty, international society not only saves millions of lives but also strengthens states. This, they argue, would lead to better defenses against international terrorism and transnational organized crime. The report called for a multilayered approach. It underlined that terrorism is a result of failures in the state system to provide individuals with basic needs and argued that individuals turn to terrorism because they have no other cause of action.[166]

Notably, the panel recommended five elements to address terrorism. The first element calls for embracing human security and ideas that address social, political, and economic problems that prevent opportunities for growth and advancement. It surmised that weak social, political, and economic opportunities create conditions that terrorist use to recruit or that lead individuals to reach the conclusion that they can only affect change through violence.[167]

The panel emphasized the importance of education and public debate as

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which constitute the fundamental basis of our common fight against terrorism").

[164] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 48 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

[165] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 48 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf [hereinafter High-Level Panel];, *supra* note 21.

[166] The Panel declared: "Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and order." High-Level Panel, *supra* note 153.

[167] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 148 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

the second element. The view being that education provides more opportunities not only for individuals to escape poverty, intolerance and extremism as well as the means to participate in public discourse. The panel assumed that ignorance enables terrorists to recruit individuals.[168] The third element called for a stronger system of cooperation in law enforcement and intelligence-sharing in counter-terrorism. The Panel recognized that terrorists operate across borders and therefore there is a need for law enforcement to work together to counter the threat. Nevertheless, the Panel emphasized that for counter-terrorism to be effective it must operate within established legal—domestic and international—parameters.[169] The fourth element of the strategy refers to building state capacity to prevent terrorist recruitment and operation, which includes controlling dangerous materials, providing public health defense and developing a mechanism to prevent the financing of terrorism[170] The fifth sought to promote the ratification of all 12 international convention against terrorism, in addition to the eight recommendations on Terrorist Financing.[171]

Soon after the publication of the Panel's report, the Secretary-General followed suit with his own report. Entitled *Uniting Against Terrorism*, the report focused on "dissuasion, denial, deterrence, development of State capacity and defence [sic.] of human rights."[172] The Secretary-General argued "the defence of human rights is essential to the fulfillment of all aspects of a counter-terrorism strategy. The central role of human rights is therefore highlighted in every substantive section of this report, in addition to a section on human rights per se."[173]

Another important example in highlighting the dominance of the human security approach to combating terrorism was the adoption the decision by the assembly to establish its own counter-terrorism regime: the Global Counter-Terrorism Strategy, which emphasizes the centrality of human rights in an effective counter-terrorism regime. The plan of action attached to the

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[168] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 148 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

[169] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 148-149 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

[170] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 148-149 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

[171] Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 149-150 (2004), *available at* http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf

[172] Uniting Against Terrorism, *supra* note 29, at ¶ 4.

[173] *Id.*

Resolution declares:

> We, the States Members of the United Nations, resolve . . . [t]o recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.[174]

In sum, when looking at the General Assembly and its counter-terrorism regime, it is clear that initially the assembly was content to let the Security Council take the lead. This was mainly because the Charter entrusts the Security Council with primary responsibility for the maintenance of international peace and security. However, when it became clear that the Council's regime was quintessentially undermining personal liberties and basic rights and arguably challenging international human rights law, the General Assembly adopted a new approach. The following section examines the role played by the Special Rapporteurs, as these have been the most critical of the Security Council, arguing that the counter-terrorism agenda be turned on its head, as they are concerned that states are implement an agenda that fundamentally challenges human rights.

iii. The Special Rapporteurs, Human Rights and Counter-Terrorism

In 2005, the UN Commission on Human Rights (which became the Human Rights Council in 2006) appointed a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[175] The Special Rapporteur[176] was concerned that existing human

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[174] G.A. Res. 60/288, *supra* note 32, at Annex 3.

[175] The mandate of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism is to ensure that states pursuing terrorists do not breach international human rights, refugee, or international humanitarian law obligations. Commission on Human Rights 2005/80, Rep. of the Commission on Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 61st Sess., 60th mtg., Mar. 14-Apr. 22, 2005 (April 21, 2005).

[176] The Special Rapporteur is part of the Human Rights Council's Special Procedure regime. "Special Procedures" refers to the human rights regime that encapsulates a variety of designations and processes, including Independent Expert, Working Group member, Special Representative, and Special Rapporteurs. Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2004-2010) claims that the Special Procedures "hold governments, as well as other actors—ranging from the United Nations itself, through corporations to armed opposition groups—to account for alleged or perceived violations of

rights mechanisms were not providing sufficient human rights coverage. This concern led to studies regarding the effect of counter-terrorism on freedom of association, the effect of counter-terrorism on social, economic, and cultural rights, and the threat of suicide terrorism as a specific challenge to human rights and fundamental freedoms. It quickly became apparent that the states and the Special Rapporteur were approaching the issue of international terrorism very differently. The divergence may explain why, in one report, the Rapporteur conceded that "almost 70 per cent of the 52 countries requested have either not responded at all to requests, or have failed to approve a visit."[177] This state non-responsiveness was highly disheartening, as "[t]he Special Rapporteur sees the establishment of his mandate as a device to support and advise States in protecting and promoting human rights and fundamental rights while countering terrorism."[178]

To craft an international counter-terrorism campaign within the confines of international human rights law, the Special Rapporteur developed a four-fold policy. First, *complementarity*, under which the Rapporteur tailors projects to compliment the work already operating through existing mandate holders. Second, *comprehensiveness*, which recognizes that counter-terrorism measures have wide-ranging consequences. Therefore, assessing these measures vis-à-vis human rights requires a broad-brush approach. Third, *proactivity*, whereby letters, appeals, and country visits catalyze assessment of counter-terrorism measures through a human rights lens. Finally, the Special Rapporteur adopted a *thematic approach* in his study of how countries draft, adopt, and implement counter terrorism.[179]

This latter approach has led to tremendous tension among states that increasingly criticize the work of Special Rapporteurs and feel that Rapporteurs push the human rights agenda beyond their mandate.[180] In the field of terrorism, this tension came to the fore when Special Rapporteur Martin Scheinin decided to include sexual minorities in the protected category of

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international human rights norms. While they conspicuously lack any formal powers of enforcement, the practical impact of their work can be significant, and there are many instances in which governments and even the United Nations itself have been successfully pressured to adopt major changes in terms of policy and practice." Philip Alston, Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?, 52 HARV. INT'L L.J. 561, 565 (2011).

[177] Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killing, Human Rights Council, U.N. Doc. A/HRC/14/24 (May 20, 2010) (by Philip Alston).

[178] Report on the Promotion and Protection of Rights, *supra* note 129, at ¶ 2.

[179] *Id.* ¶ 7–10.

[180] *See, e.g.,* Alston, *supra* note 161, at 26; Philip Alston, The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston, 2 J. HUM. RTS. PRAC. 355, 359 (2010).

gender.[181] Specifically, the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has challenged a number of CTC practices as well as the Committee's agenda. The Special Rapporteur has taken issue with the non-public nature of CTED country-visits and with Security Council Resolution 1624, which deals with incitement for failing to address the human rights aspect of free speech.[182] During his tenure as Special Rapporteur, Martin Scheinin stated:

> [T]he Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the Council and continues to pose risks to the protection of a number of international human rights standards.[183]

In October 2011, Ben Emmerson, the newly appointed Special Rapporteur on Human Rights and Counter-terrorism, informed the CTC that he plans to focus on the rights of terrorists as well as the prevention of terrorism. Emmerson made clear that states prevent terrorism by promoting and protecting *all* human rights. He argued further that successful counter-terrorism policies are based on strict observance of human rights standards.[184] This conception of human rights transcends civil and political rights, as it is argued that pursuing social justice helps prevent injustice,[185] which is assumed to be the cause of terrorism.[186] While this view fails to consider that post-9/11 Islamic terrorism is motivated by a dogmatic ideology that seeks a world revolution, it does acknowledge that terrorism still occurs through the actions

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[181] Report on the Promotion and Protection of Rights, *supra* note 129. The General Assembly responded by refusing the accept the report and asking Scheinin "to make recommendations in the context of his mandate, with regard to preventing, combating and redressing violations of human rights and fundamental freedoms in the context of countering terrorism." G.A. Res. 64/168, ¶19, U.N. Doc. A/RES/64/168 (Jan. 22, 2009); *See also* Nigel S. Rodley, On the Responsibility of Special Rapporteurs, 15 INT'L J. HUM. RTS. 319 (2011).

[182] Report on the Promotion and Protection of Rights, *supra* note 129, at ¶¶ 51–58.

[183] *Id.* ¶ 39.

[184] UN Human Rights Office of the High Commissioner for Human Rights, New UN Expert on Counter-terrorism and Human Rights to Focus on Rights of Victims and Prevention of Terrorism, U.N. HUM. RTS. (Oct. 21, 2011), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11517&LangID=E.

[185] UN Human Rights Office of the High Commissioner for Human Rights, A Call on States to Ratify New Instrument to Enhance Protection of Economic, Social and Cultural Rights, U.N. HUM. RTS. (May 8, 2013), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx.

[186] High-Level Panel, *supra* note 153.

of individuals.[187]

IV. A NATIONAL SECURITY-HUMAN RIGHTS SYNERGY FOR THE UN COUNTER-TERRORISM REGIME

The UN's multiple counter-terrorism regimes that stem from an ideological gap between the Security Council and the General Assembly. Mending the gap calls for recognition that Al Qaeda poses a serious threat to states and to the international community. This is evident by the fact that security services repeatedly foil terror attempts.[188] Nevertheless, imposing an indefinite state of public emergency in order to allow de facto or de jure derogation from human rights mechanisms risks the values that states have fought so hard to develop and preserve. Thus, a process of "updating" or "contemporization"[189] is necessary to embed[190] both national security thinking and human rights values within the system. Contemporization within this context calls for a balance where national security and human rights complement one another.

The UN must recognize that a vibrant domestic counter-terrorism program controlled and supervised by a domestic judicial program is the most effective way to establish an international counter-terrorism regime. States—as opposed to international organizations—are better equipped to introduce and review counter-terrorism legislation, as evidenced by the continuous revisions of domestic counter-terrorism legislation to ensure consistency with fundamental human rights.[191] Human rights organizations are suspicious of the

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[187] *See, e.g.,* Paul Cruickshank & Mohannad Hage Ali, Abu Musab Al Suri: Architect of the New Al Qaeda, 30 STUD. CONFLICT & TERRORISM 1, 2 (2007) (discussing Abu Musab al-Suri and Al Qaeda's promotion of individual terrorism).

[188] *See* Ken Dilanian & Brian Bennett, Al Qaeda Bomb Plot Was Foiled By Double Agent, L.A. TIMES (May 9, 2012), http://articles.latimes.com/2012/may/09/world/la-fg-bomb-plot-20120509; Spanish Police Foil Al-Qaeda Terror Attack, TELEGRAPH (Aug. 2, 2012), *available at* http://www.telegraph.co.uk/news/worldnews/europe/spain/9447206/Spanish-police-foil-al-Qaeda-terror-attack.html.

[189] *See* W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT'L L. 866, 869 (1990).

[190] *See, e.g.,* Laurence R. Helfer, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 EUR. J. INT'L L. 130 (2008) (discussing embeddedness and the law); Ryan Goodman, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621 (2004).

[191] A and Others v. Secretary of State for the Home Department, [2004] UKHL 56 (finding the UK's Anti-Terror Law incompatible with international human rights). Fiona de Londras & Fergal F. Davis debate executive expansionism. De Londras emphasizes court willingness to challenge counter-terrorism legislation; Davis highlights extra-constitutionalism. Fiona de Londras & Fergal F. Davis, Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversights Mechanisms, 30 OXFORD J. LEGAL STUD. 19 (2010) (showing that each branch

ability of states to develop a balanced counter-terrorism regime. Obviously, the decision to adopt a new counter-terrorism mechanism through Chapter VII and the Security Counsel has led to the adoption of excessive measures,[192] mainly because of a lack of judicial oversight.[193] Allowing the General Assembly and specialist human rights entities to educate Council members on the value of human security (which address many of the issues that fuel terrorism—poverty, political oppression, disenchantment, and misery) would help to resolve some key tensions. Conversely, though, Special Rapporteurs and Special Procedures must also adjust and recognize that states have every right to national security through counter-terrorism. Additionally, the human rights community has to recognize that a human security approach does not explain why individuals turn to transnational terrorism, as many of Al Qaeda's adherents do not have poor socio-economic backgrounds.[194]

A national security-human rights nexus would greatly reduce the likelihood of such as *Kadi*[195] or *Yusuf*[196] do not occur. One way to attain accountability is by allowing the International Court of Justice (ICJ) to appraise Security Council resolutions on counter-terrorism.[197] This can be done through ICJ advisory opinions or something similar to the preliminary reference system that exists within the European Union.[198] For too long the Security Council has operated

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has much to offer in respect to the development of a domestic counter-terrorism regime, which is why they must improve their working relations).

[192] *See* Andrew Hudson, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights, 25 BERKELEY J. INT'L L. 203, 227 (2007) ("There is no doubt that the 1267 regime has shifted some responsibility for dealing with individuals who pose a security threat from member states to the Security Council. While there has been a transfer of authority, there has been no commensurate transfer of legal safeguards. This is problematic for a regime which has unprecedented and serious powers, no definition of terrorism, and an exceptionally broad category of individuals it can target.").

[193] *See* Monika Heupel, Multilateral Sanctions Against Terror Suspects and the Violation of Due Process Standards, 85 INT'L AFF. 307 (2009).

[194] Peter L. Bergen, HOLY WAR INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN (2002); Lawrence Wright, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 (2006).

[195] Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Comm'n of the European Communities, 2005 E.C.R. II-3649

[196] Case T-306/01, Ahmed Ali Yusuf & Al Barakaat Int'l Found. V. Council of the European Union and Comm'n of the European Communities, 2005 E.C.R. II-3533.

[197] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Reports (July 20); Legal Consequences for States of the Continued Present of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Reports (June 21).

[198] Treaty on the Functioning of the European Union art. 267, May 9, 2008, O.J. C 115/1 ("Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon."); *See also* Koen Lenaerts, The

without review or analysis, especially as discussions pertaining to resolution take place behind closed doors, making it difficult for any entity to oversee Council action, which may explain why, increasingly, domestic and regional courts have felt the need to challenge the Security Council.[199] If the Council is to continue to maintain international peace and security and not to change the world order, which it seems to be doing under the guise of combating terrorism,[200] it must accept that its structure, modus operandi, and composition have become anachronistic.[201] The advancement of the rule of law has become a central feature in international relations, as well as within national security strategies. It is the duty and responsibility of the Council to promote a strong counter-terrorism regime within domestic jurisdictions; it is equally the duty and responsibility of the Council to respect international human rights law. As Judge Myjer noted, "States are not allowed to combat international terrorism at all costs. They must not resort to methods, which undermine the very values they seek to protect. And this applies the more to those "absolute" rights from which no derogation may be made even in times of emergency . . . ."[202]

V. CONCLUSION

The attacks on September 11, 2001 were devastating because of their scope, scale and complete disregard for human life. The notion that a terrorist group would use passenger planes to undertake a large-scale attack, particularly against the United States was simply inconceivable. As a result, states sought ways and means to protect themselves and their inhabitants from

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Contribution of the European Court of Justice to the Area Of Freedom, Security and Justice, 59 INT'L & COMP. L.Q. 255 (2010).

[199] *See, e.g.,* A, K, M, Q & G v. HM Treasury [2010] UKSC 2 (noting that the freezing order is disproportionate and oppressive and the mechanism for the protection of the individuals and their rights weak, but generally criticizing the 1267 mechanism).

[200] *See* Namibia, 1971 I.C.J. at 115 (dissenting opinion of Sir Gerald Fitzmaurice).

[201] Professor Martti Koskenniemi captured this challenge: "The police are ransacking the temple, searching for criminals and those it calls terrorists. The mind of the police—the security police in this case—is a machine, programmed to believe that history ended and we won it; that what remains is a clash of civilizations and we intend to come up first. As it proceeds—helmets, boots, blackjacks and all—towards the altar, the people draw silently away into the small chapels, surrounding the navis, each to attend communion before a different god. After the police have gone, the altar hall is empty but for the few that were left to guard it, and their admirers. The frescoes, the bronze statuettes, the stained glass, the marble speak from different ages, through different symbols, and towards a now empty centre. Quod non fecerunt barbari, fecrunt Barberini. The peace of the police is not the calm of the temple but the silence of the tomb." Martti Koskenniemi, The Police in the Temple Order, Justice and the UN: A Dialectical View, 6 EUR. J. INT'L L. 325, 348 (1995).

[202] Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. (2008).

this new breed of terrorism whose principal agenda was to destroy and to kill. Based on what was known at the time of Al Qaeda and its ideology, states took the view that protection was paramount, leading them to adopt measures that at times challenged or suspended basic rights. What was not recognized however, was how those measures would impact or imped other as humanitarian actions.[203]

The decline in successful large-scale terrorist attacks has led the international community to reflection on whether a pervasive counter-terrorism regime is needed. Interfused within that introspection were questions as to whether the measures implemented were having an undermining effect on security. Taking a human security approach, the General Assembly increasingly argued that in order to prevent terrorism there is a need to address the conditions that foster terrorism, which they understood as 'want' and 'freedom'—without freedom and with want, terrorism prosper. The program includes regular review as to whether existing measures are effective.[204] Thus, the system that the assembly and the UN human rights community was predicated on addressing the political and civil rights abuses in addition to seeking to improve economic, social and cultural rights.

Ultimately, a two-tier approach to counter-terrorism has emerged within the UN which undermines the regime as it appears that each operate independently because the Council and Assembly have their own views as to what are the root causes of terrorism and how to address it. It is incumbent on both—Security Council and the General Assembly—to find a way to develop a more integrated policy that provides states with the security they desire but not at the expense of basic human rights, as only through such an approach is it possible for the United Nations to contribute to countering the threat of transnational terrorism, otherwise the UN would simply be another organization promoting a disjointed, contradictory policy of limited relevance.

[203] Kate Mackintosh and Patrick Duplat, Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action, July 2013. https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf

[204] Countering Terrorism, Protecting Human Rights: A Manuel, OSCE Office for Democratic Institutions and Human Rights, (2007), p. 259, *available at* http://www.osce.org.

ARTICLE

Drones at Home:
Domestic Drone Legislation - A Survey, Analysis and Framework

Colonel Dawn M.K. Zoldi *

ABSTRACT

Can the government employ drones domestically without running roughshod over personal privacy? In an effort to preemptively rein in potential government overreach, most states have proposed legislation that restricts or forbids government drone use. The intent is to prevent drone use for warrantless information and evidence collection. Ironically, many of these proposals will have the opposite affect intended. State-by-state drone legislation may lead to consequences such as the erosion of Fourth Amendment jurisprudential principles, losses of life and property, procedural windfalls to criminals, and deleterious effects on the military.

Lawmakers should take a nuanced approach to government drone use rather than selectively revising constitutional protections. A nuanced approach would allow the federal government to use drones to their full potential while also protecting personal privacies. There are four principles that should guide drone legislation: (1) apply the Fourth Amendment agnostically; (2) ensure operational purpose language distinguishes between law enforcement and non-law enforcement professionals; (3) focus new regulations focus on information collection, dissemination, and retention; (4) develop narrowly tailored remedies that deter specific behavior consistent with their historical purpose. Drone legislation drafted with these principles in mind will protect our national security and our civil liberties.

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I. INTRODUCTION

Federal drone use does not have to come at the expense of protecting personal privacy. The Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 mandates the "safe integration of civil unmanned aircraft systems" into the national airspace system by the end of 2015. It makes no mention however, of privacy protections. In the absence of Federal guidance, states have jumped into the fray. Most states have proposed restrictive legislation that limits government drone use for collecting information and evidence on residents or their property. In comparing state legislation and Department of Defense ("DoD") policies within established constitutional principles, this article seeks to present a coherent framework that provides for the protection of civil liberties while unlocking the full potential of government drone use.

Part II of this article details the state legislative landscape. Part III discusses

current DoD policies that apply to drones, in contrast to proposed state legislation. Part IV explores the unintended consequences that state drone legislation may have on civilian and military drone operations and the Fourth Amendment. It also proposes four principles that should guide future state drone legislation.

II. THE STATE LEGISLATIVE LANDSCAPE

Drone legislation and policy is a dynamic issue.[1] The overwhelming majority of states have proposed legislation to regulate drone use.[2] Almost half of the states are entertaining multiple bills simultaneously.[3] Eight states have already passed drone legislation.[4] The stated purpose or need for such action is generally to either protect citizens' privacy or to be free from "unwarranted" surveillance.[5] Most of these bills apply to local law enforcement agencies and prohibit them from using drones to collect information or evidence, with certain exceptions. Many levy administrative requirements on drone use and contain significant ramifications for violating them. A more detailed discussion of these state provisions follows.

A. *Applicability of State Legislation*

Restrictive state drone proposals are often too broadly written. While most state drone proposals apply to state governmental actors, many are written broadly enough to apply to Federal government and military operators. Furthermore, they generally do not regard the unique responsibilities or requirements of each entity. All but nine of the eighty-six state drone bills surveyed across forty-seven states apply to state, county, or municipal agency officials or employees.[6] Most apply to local law enforcement agencies directly

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[1] Some of the bills discussed herein have already died in committee, and by the time of publication, more bills will have been introduced. The usefulness of this review is to understand trends as a likely predictor of future action.

[2] Only seven states have yet to introduce a bill: CO, CT, DE, LA, MS, SD, and UT.

[3] Twenty-four states (AK, AZ, AR, CA, GA, IL, IN, IA, KY, MA MI, MN, NJ, NY, NC, OK, OR, PA, RI, SC, TN, VA, WA, and WV) have introduced two or more bills.

[4] FL, ID, IL, MT, OR, TN, TX, and VA have all passed drone legislation.

[5] *See supra* note 2 for a review of the various bill titles.

[6] Almost ninety percent of bills apply to state employees. Of those that do not, five create task forces, committees or legislative study groups to make recommendations on the impacts of drone use on privacy. See Enrolled H.R. 6, 28th Leg. (Alaska 2013); H.B. 2269, 51st Leg., 1st Reg. Sess. (Ariz. 2013); S.R. 217, 2013 Leg., Gen. Assemb. (Ill. 2013); S.R. 27, 118th Gen. Assemb., 1st Sess., (Ind. 2013); H. Comm. Res. 101 (W. Va. 2013) Two either appropriate funds for drone operations or request the FAA to consider their state a test site. See Assemb. J. Res. 6, 2013-2014 Reg. Sess. (Cal. 2013); S.B. 385, 77th Leg. (Nev. 2013); Assemb. B. 507, 77th Leg.

or by implication.[7] Thirty-five state drone proposals also specifically apply to the federal government.[8] Other state drone provisions apply to "persons,"

(Nev. 2013). The New Hampshire bill only applies to private persons and, in fact, specifically excludes government agencies from its prohibition on knowingly imaging the exteriors of residential dwellings. H.B. 619, ¶ IV-a, 2013 Sess. (N.H. 2013).

[7] S.B. 317, § 1(2) (Ala. 2013); H.B. 159a, 28th Leg., 1st Sess. (Alaska 2013) (amending § 4. AS 1865, Art. 13, § 18.65.900); H.B. 2574, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (amending § 1, Tit. 13, Ch. 30 ARS, 13-3007, § A); H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (amending Ark. Code Tit. 12, as 12-19-103); Assemb. B. 1327, § 1, Tit. 14, 14350(b) (Cal. 2013); S.B. 15, § 5 (Cal. 2013); S.B. 92, § 1(3) (Fla. 2013); S.B. 200, § 4(1), Gen. Assemb. (Ga. 2013); H.B. 560, § 2 (Ga. 2013) (amending Art. 2 of Ch. 5 of Tit. 17 Code of Ga. Ann. as 17-5-33(1) and (2)); S.B. 83, § 2563B-2(b), Reg. Sess. (Haw. 2012); S.B. 1134, § 1, 21-213(2)(b), 62nd Leg., 1st Reg. Sess. (Idaho 2013); S.B. 1587, § 5, Gen. Assemb. (Ill. 2013); S.B. 20, 118th Gen. Assemb., Reg. Sess. (Ind. 2013) (amending Ind. Code, Ch. 10, § 1); S.B. 276, § 80C.1-1 1, Gen. Assemb. (Iowa 2013); H.B. 410, §1.1 (Iowa 2013); H.B. 427, § 1.2 (Iowa 2013); H.B. 2394, § 1(a) (Kan. 2013); H.B. 454, § 1, Ch. 500(1)(b), Gen. Assemb. (Ky. 2013), Ky. 14 RS BR 1, § 1.(1)(b) (Ky. 2013); S.P. 72, 126th Leg., 1st Reg. Sess. (Me. 2013) (amends § 1, 25 MRSA Pt. 12, § 4501.1); H.B. 1233, 1-203-1(A)(3), Gen. Assemb. (Md. 2013); S.B. 1664, 188th Gen. Assemb. (Mass. 2013); H.B. 1357, § 1 (Mass. 2013) (amending Ch. 272 of Gen. Laws as 99C(c)); H.B. 4455, § 1(a) (Mich. 2013); H.F. 1620, § 3, Sub. 1(c) & (e), Leg. (Minn. 2013), S.F. 1506, § 1, Sub. 1(c) (Minn. 2013); H.F. 990, § 3, Subdiv. 1.(3) (Minn. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); S.B. 196, 63rd Leg. (Mont. 2013); Legis. B. 412, § 2(2), 103rd Leg., 1st Sess. (Neb. 2013); S.B. 3157, § 2.a., Gen. Assemb. (N.J. 2012); S.B. 3929, Gen. Assemb. (N.J. 2012); S.B. 556, § 2.B, 51st Leg. (N.M. 2013); S.B. 4537, § 1, S 52-A.1 (N.Y. 2013); S.B. 6244, § 1.S 700.16, ¶ 1; H.B. 312, § 15A-232(b), Gen. Assemb. (N.C. 2011); S.B. 402, § 716(e), Gen. Assemb. (N.C. 2013); H.B. 1373, § 1.1, 63rd Leg. Assemb. (N.D. 2013); H.B. 207, § 4651.50(A), 130th Gen. Assemb., Reg. Sess. (Ohio 2013); H.B. 1556, 54th Leg., 1st Sess. (Okla. 2013); H.B. 2710, § 1(b), 2013 Leg. Sess. (Or. 2013), S.B. 524, § 1(1)(b) (Or. 2013); S.B. 71, § 4(1) (Or. 2013); S.B. 853, § 2(1) (Or. 2013); H.B. 961, 2013 Sess., Gen. Assemb. (Pa. 2013) (amending Ch. 57 of Tit. 18 of Pa. Cons. Stat., Sub. E.1., § 5776(a)); S.B. 875, § 3 (Pa. 2013); H.B. Jan. 2013 Sess. (R.I. 2013) (amending Tit. 12 of Gen. L., Ch. 5.3, 12-5.3-1); H.B. 3415, 120th Sess., Gen. Assemb. (S.C. 2013) (amending Ch. 13, Tit. 17 of 1976 Code as 17-13-180(A)(2)); Gen. Assemb. B. 395, § 6-39-30(A)); H.B. 591, § 1(b)(2), Gen. Assemb. (Tenn. 2013); H.B. 912, Ch. 423, § 423.002(8) (Tex. 2013); H.B. 540, Gen. Assemb. (Vt. 2013) (amending § 1 20 V.S.A. Ch. 205 as § 4622(a)); S.B. 16, Gen. Assemb. (Vt. 2013); H.B. 20012, 1 § 1, Gen. Assemb. (Va. 2013); H.B. 1771, § 2, 63rd Leg., 2013 Reg. Sess. (Wash. 2013); S.B. 5782, 63rd Leg., 2013 Reg. Sess. (Wa. 2013); H.B. 2732, Art. 7, § 1-7-2, (W.Va. 2013); H.B. 2948, Art. 7, § 1-7-3 (W.Va. 2013); H.B. 2997, Art. 7, § 1-7-1 (W.Va. 2013); S.B. 196 & Assemb. B. 203, § 2(2) (Wyo. 2013); H.B. 0242, 7-3-1002(a)(ii) (Wyo. 2013). An outlier, the Arkansas bill, which makes it a crime to knowingly use a drone to record another person or person's property, specifically excludes law enforcement from its provisions. S.B. 1009, § 1(b)(2) (Ark. 2013).

[8] S.B. 317, § 1(2), 2013 Leg. (Ala. 2013) ("[A]ny municipal, county, state, or federal agency the personnel of which have (sic) the power of arrest and perform a law enforcement function."); S.B. 1109, §1, 5-60-106(b)(1)(A) – (B), 89th Gen. Assemb., Reg. Sess. (Ark. 2013) ([A] federal agency, unless acting at the request of a state law enforcement officer or emergency responder); S.B. 200, § 4(1), 2013 Gen. Assemb. (Ga. 2013); *See also* H.B. 560, § 2 (Ga. 2013) (amending Art. 2 of Ch. 5 of Tit. 17 Official Code of Ga. Ann. as 17-5-33(1) and (2)) ("[A] law

which includes officers of the United States.[9] Others extend their reach to "agents," which act on behalf of state authorities.[10] Interestingly, only nine bills mention the U.S. military, or some component thereof.[11] Three of those bills

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enforcement officer of any department or agency of the United States who is regularly employed and paid by the United States, this state or any such political subdivision…"); H.B. 1556, § 3(B)(6), 54th Leg., 1st Sess. (Okla. 2013); S.B. 853, §1(2) (Or. 2013); H.F. 1620, § 3, Sub 1(c), 88th Sess. (Minn. 2013) (federal agenc(ies)"); H.B. 3415, 120th Sess., Gen. Assemb. (S.C. 2013) (amending Ch. 13, Tit. 17 of 1976 Code as 17-13-180.(A)(2); H.B. 2732, Art. 7, § 1-7-2, 2013 Leg. (W. Va. 2013); H.B. 0242, 7-3-1002(a)(ii), 2013 Leg. (Wyo. 2013) (including "federal agency" in their definition of the term "law enforcement agency"); Assemb. B. 3929, 215th Leg. Assemb. (N.J. 2013) ("[S]tate, local, or interstate law enforcement agency"); The Oregon bill specifically includes Department of Justice (DoJ) criminal investigators in its definition of law enforcement. Two Massachusetts bills apply to government entities or officials, without further definition. H.B. 2710, § 1(1)(b) (Or. 2013). S.B. 133.525 defines police officers as including DoJ criminal investigators. http://www.oregonlaws.org/ors/133.525.

[9] H.B. 2574, § 13-3007.B., 51st Leg., 1st Reg. Sess. (Ariz. 2013); S.B. 15, § 2(a) – (b), 2013 Leg. (Cal. 2013) (amending § 1708.8 of the Civil Code); S.B. 783, § 263B-2(b), 27th Leg. (Haw. 2013); S.B. 1134, § 1(2)(a), 62nd Leg., 1st Reg. Sess. (Idaho 2013); H.F. 990, § 3, Subd.1(b), 88th Sess. (Minn. 2013); S.B. 20, § 4(a), 118th Gen. Assemb. (Ind. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb. (Mo. 2013); S.B. 71, 77th Leg. Assemb. (Or. 2013); S.B. 853, §2(2) (Or. 2013); A.O. 8091, § 1, ¶ 5, 2013 Leg. Assemb. (N.Y. 2013); H.B. 312, §2(a)(2), 2013 Leg. Sess. (N.C. 2013); Gen. Assemb. Sess. Jan. 2013 (R.I. 2013) (amending Tit. 12 of Gen. Laws, Ch. 5.3, 12-5.3.-1); H.B. 912, Ch. 423, § 423.003(a), 2013 Leg. (Tex. 2013); H.B. 1771 § 6, 63rd Leg. (Wash. 2013); S.B. 5782, § 2(6), 63rd Leg. (Wash. 2013); S.B. 203/196, § 3(2), 2013-2014 Leg. Sess. (Wis. 2013).

[10] H.B. 159, § 13(b), 2013 Leg. (Alaska 2013); S.B. 783, § 263B-2(b), 27th Leg., Reg. Sess. (Haw. 2013); H.B. 11, § 1(1)(c), Reg. Sess. (Ky. 2014); H.B. 207, § 4651.50(A), 130th Gen. Assemb., (Ohio 2013); H.B. 4455, § 1(a), 79th Leg., Reg. Sess. (Mich. 2013); Assemb. B. 6244, § 1, ¶ 1, 236th Leg. Sess., (N.Y. 2013); Assemb. B. 6370, ¶ 5(C), 236th Leg. Sess., (N.Y. 2013); S.B. 4537, § 52-a., 236th Leg. Sess., (N.Y. 2013); H.B. 5780, Ch. 5.3, 12-5.3-2(b), 2013 Leg. Sess., (R.I. 2013); H.B. 912, Ch. 423, § 423.002(8), 83rd Leg., (Tex. 2013); While none of these bills define the term "agent," an agency relationship is typically characterized as one in which "a person is authorized by another to act for him." BLACK'S LAW DICTIONARY 59 (5th ed. 1979). To conclusively determine the parameters of an agency relationship, one would have to research applicable criminal or civil precedent in the relevant state or federal forum.

[11] H.B. 11, § 1(4)(b), Reg. Sess. (Ky. 2014). The Kentucky General Assembly proposed a bill that would permit the "U.S. Armed Forces" stationed in the State to "use drones for purposes of training"; H.B. 1556, § 5.C., 1st Reg. Sess. of 54th Leg., (Okla. 2013). The Oklahoma bill, which was held over until next session and replaced with a call for an interim study on drone privacy issues, specifically permitted the "United States military" to operate "weaponized" drones over public land for purposes of testing and training; H.B. 1771, § 2 and 9(c), 63rd Leg., (Wash. 2013). This would exclude application of its prohibitions to the "Washington National Guard in title (sic) 32 U.S.C. status " and permit training exercises "conducted on a military base…." where the drone "does not collect personal information on persons located outside the military base"; Assemb. B. 3157, ¶ 5., 215th Leg., (N.J. 2013). The New Jersey proposal, which would make the purchase, ownership or possession of a drone a "disorderly persons offense," exempts "any member of the Armed Forces of the United States or member of the National

have become law.[12]

Bills that prohibit use of "weaponized" drones would also seemingly apply to the DoD, unless exempted.[13] The state proposals that overtly address the U.S. military have applicability language so broad that could be interpreted to include military use. If so, those proposals could have deleterious effects on military training, operations and combat readiness. Specifically, about one-third of the drone restriction bills are ambiguous enough to implicate the DoD. Several bills, which purport to apply to those acting under state authority, may apply to the National Guard in Title 32 or State Active Duty (SAD) status.[14] As discussed above, state bills that apply to any "person" or "entity," could apply to DoD officials, employees or personnel.[15] The same logic applies to bills that

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Guard while on duty or traveling to or from an authorized place of duty."; S.B. 875, § 5(1)-(3), 197th Gen. Assemb., (Pa. 2013). The Pennsylvania Senate Bill, which remains in committee, exempts its National Guard.; H.B. 46, § 305.639(2), 97th Gen. Assemb., First Reg. Sess., (Mo. 2013), The Missouri bill permits higher education institutes to conduct educational, research or training programs in collaboration with the DoD.; S.B. 853, § 12(1), 77th Leg. Assemb., (Or. 2013). Finally, a draft Oregon bill, would have excluded "the Armed Forces of the United States…or any component of the Oregon National Guard from using drones during a drill, training exercise or disaster response."

[12] H.B. 2710, § 16, 77th Leg. Assemb., (Or. 2013). The Oregon law explicitly exempts the "Armed Forces of the United States" from its provisions. The law references ORS 351.642, which defines "Armed Forces of the United States" as including: (A) The Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; (B) Reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; and (C) The National Guard of the United States and the Oregon National Guard.; H.B. 912, § 423.002(3), 83rd Leg., (Tex. 2013). The Texas law contains a lengthy "non-applicability" section which excludes drone use that is, "part of an operation, exercise, or mission of any branch of the United States military."; H.B. 2012, ¶ 1, § 1, 2013 Reg. Sess., (Va. 2013), The Virginia bill, which was approved on April 3, 2013, contains verbatim language of a Pennsylvania Senate Bill: S.B. 875, § 5(1)-(3), 197th Gen. Assemb. (Pa. 2013), which exempts its National Guard from prohibitions on drone use before 2015. Both state, "The prohibitions in this section shall not apply to the (State) National Guard while utilizing unmanned aircraft systems during training required to maintain readiness for its federal mission, when facilitating training for other United States Department of Defense units, or when such systems are utilized for the Commonwealth for purposes other than law enforcement, including damage assessment, traffic assessment, flood stages, and wildfire assessment…"

[13] States containing a ban against use of weaponized drones, as well as the concept of federal pre-emption, are discussed below.

[14] "Title 32" status is usually a "training" status, where the federal government provides training funds to National Guard units.

[15] S.B. 1134, § 21-213, ¶ (2)(a), 62nd Idaho Leg., 1st Reg. Sess., (Idaho 2013). Idaho applies their restrictions to any "entity" (undefined) or "person" using a drone to conduct surveillance. S.B. 1664, § 99C, ¶ (c), 188th Gen. Ct., (Mass. 2013). The Massachusetts proposal applies to government entities or officials, but does not define the term. See S.B. 20, Chap. 10, § 4, 118th Gen. Assemb., (Ind. 2013); H.B. 46, § 305.637, 97th Gen. Assemb., 1st Reg. Sess., (Mo. 2013); H.B. 912, § 423.002, (Tex. 2013). H.B. 1771, § 2, ¶ (6) and § 13, (Wash. 2013). These bills apply

extend their reach to "agents" of state law enforcement.[16]

B. *Drone Prohibitions and Exceptions*

Restrictive state legislative proposals will have unintended consequences. To preemptively rein in potential government overreach, most states have proposed legislation that forbids government officials from using drones to collect information or evidence without a warrant. However, many proposals selectively apply the judicially accepted exceptions to the warrant requirement. For this and other reasons, these proposals will have significant second and third order effects to the detriment of our greater society, including eroding long-standing Fourth Amendment jurisprudence.

Almost universally, state drone bills prohibit drone users from collecting or receiving "information and evidence" on persons within that State.[17] There are

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to any "person" operating a drone, and the Wash. bill defines a "person" broadly as "any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision or any other legal or commercial entity and any successor, representative, agent, agency or instrumentality thereof."

[16] An agency relationship between the DoD and State or local governments could occur during a Defense Support for Civil Authorities (DSCA) operation, such as assisting law enforcement or during disaster relief.

[17] S. B. 317, § 1(b)(1), 2013 Reg. Sess. (Ala. 2013); H.B. 159a, 28th Leg., (Alaska 2013). Amending § 4.; H.B. 2574, 51st Leg., First Reg. Sess., (Ariz. 2013). Amending § 1, Title 13, Ch. 30 ARS, 13-3007, § A.; H.B. 1904, (Ark. 2013). Amending AR Code Title 12, as 12-19-104(a).; S.B. 15, Title 14, § 14352(a), 2013-2014 Reg. Sess., (Cal. 2013) and Assemb. B. 1327, § 1, Title 14, 14350(a), 2013-2014 Reg. Sess., (Cal. 2013); S.B. 92, § 1(3), 115th Reg. Sess., (Fla. 2013); S.B. 200, § 5(b), 152nd Gen. Assemb., (Ga. 2013); S.B. 1134, § 1.,21-213(2)(a), 62nd Idaho Leg., 1st Reg. Sess., (Idaho 2013); S.B. 1587, § 10, (Ill. 2013); S.B. 20, (Ind. 2013). Amending Ind. Code, Ch. 10, Sec 4(a); H. File 410, §1.1., 85th Gen. Assemb., (Iowa 2013) and H. File 427, §1.2., 85th Gen. Assemb., (Iowa 2013); H.B. 2394 § 1(a), 85th Gen. Assemb., (Kan. 2013); H.B. 454, § 1 of KRS Ch. 500(2), 2013 Reg. Sess. (Ky. 2013) and H.B. 11, § 1(4)(b), Reg. Sess. (Ky. 2014); S. Paper 72, 126th Leg., (Me. 2013). Amends § 1, 25 MRSA Pt. 12, § 4502.2.; H.B. 1233, 1-203-1(B)(1), 433rd Sess. of Gen. Assemb., (Md. 2013); S.B. 1664, § 1, 188th Gen. Ct. (Ma. 2013). Amending Ch. 272 of Gen. Laws as 99C(c); H.B. 1357, 188th Gen. Ct. (Ma. 2013); H. B. 4455, § 3(3); H. File 990, § 3, Subd.2, 1st Reg. Sess., 88th Leg. Sess., (Minn. 2013) and S. File 1506, § 1, Sub 2., 1st Reg. Sess., 88th Leg. Sess., (Minn. 2013); H.B. 46, § 305.637.2, 97th Gen. Assemb., 1st Reg. Sess., (Mo. 2013); S.B. 196, § 1(1), 63rd Leg., (Mont. 2013); Leg. B. 412, § (3), 103rd Leg., (Neb. 2013); Assemb. B. 3157, §2.b., 215th Leg., (N.J. 2013) and Assemb. B. 3929, § 1.b. 215th Leg. (N.J. 2013); S.B. 556, § 3.A. - B., 51st Leg. Sess., (N.M. 2013); Assemb. B. 6244, § 1. S 700.16, ¶ 1, 236th Leg., (N.Y. 2013), Assemb. B. 6541, Sec 66-A.2, 236th Leg.; (N.Y. 2013), and S.B. 4537 § 1, S52-A.1, 236th Leg., (N.Y. 2013); H.B. 1373, § 2.1., 63rd Leg. Assemb. (N.D. 2013); H.B. 207, § 4561.50(A), 130th Gen. Assemb. (Ohio 2013); H.B. 1556, § 3.A., 54th Leg., 1st Reg. Sess., (Okla. 2013); H.B. 2710, § 3.(1), 77th Leg. Assemb., (Or. 2013), S.B. 524, §1(2), 77th Leg. Assemb. (Or. 2013), S.B. 71, 77th Leg. Assemb., (Or. 2013), and S.B. 853 § 2(1), 77th Leg. Assemb. (Or. 2013); H.B. 961, Subch. E.1., § 5776 (a), 197th Gen. Assemb., (Pa. 2013). Amending Ch. 57 of Title 18

a few outliers. New Hampshire for example, specifically provides that legislation will "not... impair or limit otherwise lawful activities of law enforcement personnel…"[18] Additionally, one Arkansas bill exempts law enforcement officers and emergency responders operating drones as part of their official job duties.[19] Similar bills in Michigan and North Carolina allow drone use for purposes other than intelligence or law enforcement.[20]

Despite the general rule prohibiting drone use to collect information, most state legislation contains exceptions that allow drone use for limited purposes. The most common exceptions occur when law enforcement obtains a judicial or court order, a basic Fourth Amendment tenant.[21] Indiana, Nebraska, New Jersey and West Virginia, however, have all proposed bills that fail to include a warrant exception, a minority view, which is more stringent than the Constitution would perhaps allow.[22]

Other common exceptions that allow the robust use of drones include imminent danger and the protection of life and property. Nineteen bills permit drone use in circumstances where there is a credible and high risk of a terrorist attack.[23] Bills from West Virginia and Kansas for example, would allow drones

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of PA Cons. Stat.; S.B. 411, 2013 Leg. Sess., (R.I. 2013). Amending Title 12 of General Laws, Ch. 5.3, 12-5.3.-2. and R.I. LC00564, § 1, § 12-5.3-2(a); H.B. 3415, 120th Sess., (S.C. 2013). Amending Ch. 13, Title 17 of 1976 Code as 17-13-180.(b); S.B. 395, § 1., Ch. 39, § 6-39-30(A), 120th Sess., (S.C. 2013); H.B. 591, § 1(c), 108th Gen. Assemb., (Tenn. 2013); H.B. 912, Ch. 423, § 423.003(a), 83rd Leg., (Tex. 2013); H.B. 540, 2013-2014 Leg. Sess., (Vt. 2013). Amending § 1 20 V.S.A. Ch. 205 as, § 4622(a); H.B. 1771, § 3., 63rd Leg., 2013 Reg. Sess., (Wash. 2013) and S.B. 5782, § 3, 63rd Leg., 2013 Reg. Sess., (Wash. 2013); H.B. 2732, 81st Leg., 2013 Reg. Sess., (W.Va. 2013) and H.B. 2948, Art. 7, § 1-7-3, 81st Leg., 2013 Reg. Sess., (W.Va. 2013); S.B. 196 and Assemb. B. 203, § 2, 175.55(2), 101st Leg., (Wis. 2013); H.B. 242, § 7-3-1003, 62nd Leg., (Wyo. 2013); See H.B. 4455, § 5, ¶(e), 97th Leg., Reg. Sess., (Mich. 2013) and H.B. 312, § 2(b), 2013 Gen. Assemb., (N.C. 2013). States that specifically allow drone use if not for an intelligence or law enforcement purpose. See S. File 276, 80C.1., 85th Gen. Assemb., (Iowa 2013); S.B. 875, § 3, 197th Gen. Assemb., (Pa. 2013), and H.B. 2012, 1. § 1., 2013 Reg. Sess., (Va. 2013). States that prohibit drone use, with limited exceptions, prior to July 1, 2015.

[18] NH HB 619, § 2, 2013 Sess. (N.H. 2013).

[19] S.B. 1109, § 1, 5-60-3(b)(1)(A)-(B) (Ark. 2013).

[20] H.B. 4455, § 5 ¶ (e.), 2013 H.R. (Mich. 2013); H.B. 312, § 2(b), 2013 Gen. Assemb. (N.C. 2013).¶

[21] Katz v. United States, 389 U.S. 347, 351 (1967).

[22] The crux of the Indiana bill is obtaining consent. S.B. 20, 118th Gen. Assemb., 1st Reg. Sess. (In. 2013). The NE bill prohibits law enforcement from using a drone to gather evidence and does not contain a warrant exception. It does, however, include a "terrorist attack" exception. Leg. B. 412, § 4, 103rd Leg., 1st Sess. (Ne. 2013). Although neither New Jersey nor West Virginia contain a warrant exception, they both permit drone use for terrorist attacks. NJ also permits use during disasters or emergencies. Assemb. B. 3929, 215th Leg. (N.J. 2013); H.B. 2948, 81st Leg., 1st Sess. (W. Va. 2013).

[23] All bills that contain a "terrorist attack" exception use similar language, "To counter a high

to be used for purposes of an "imminent terrorist attack," but only after obtaining a warrant.[24] This too, flies in the face of Fourth Amendment jurisprudence insofar as exigent circumstances constituting an imminent danger to life are a judicially recognized exception to the warrant requirement.[25]

Whether express or implied, and consistent with Fourth Amendment law, most state bills would permit drone use to save lives in emergency situations.[26] Seventy-two bills contain an explicit "imminent danger to life" exception.[27]

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risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security…determines that credible intelligence indicates that there is such a risk." See AL SB 317, § 1(b)(2)(a); FL SB 92, § 1(4)(a); IA HF 427, § 1.3.(a); IL SB 1587, § 15(1); KS HB 2394, § 1(c); KY HB 454, § 1 of KRS Ch. 500, § 1.(1)(3)(a); MD HB 1233, 1-203-1(B)(2)(I); MN SF 1506, § 1, Sub 3. (1) and MN HF 990, § 3, Subd.4(4); NE LB 412, § (4); NJ AB 3929, ¶ 1.c.; NY AO 6370/ SO 4537, § 1, S 52-A..3.A.(4); OH HB 207, § 4561.50(A)(1); SC HB 3415, amending Ch. 13, Title 17 of 1976 Code as 17-13-180.(B)(1); TN HB 591, § 1(d)(1); WV HB 2732, Art. 7, § 1-7-4, WV HB 2948, § 1-7-4; and WY HB 0242, 7-3-1004(a)(ii).ME SP 72, § 4503.1.A.(1)-(2) contains an emergency enforcement exception for threats to national, state or local security. KS HB 2394, § 1(c) and WV HB 2732, § 1-7-4 require a warrant to use a drone in terrorist attack scenarios.

[24] *See* H.B. 2394, § 1(c) (Kan. 2013); H.B. 2732, § 1-7-4, 81st Leg., 1st Sess. (W. Va. 2013).

[25] Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1920)("[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'").

[26] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967)("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

[27] For "danger to life" exceptions, see S.B. 317, § 1(b)(2)(c), 2013 Leg., Reg. Sess. (Ala. 2013); H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); A.B. 1327, §1, Title 14, §14550(c)(1), 2013 Leg., Reg. Sess. (Cal. 2013-14); Assemb. B. 1327, § 1, Title 14, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92 § 1(4)(c), Reg. Sess. (Fla. 2013); ¶S.B. 200, § 5(e)(1) (Ga. 2013); S.B. 2563B-4(1)(A) (Haw. 2013); S.B. 1134, §21-213(2), 62nd Leg., Reg. Sess. (Idaho 2013); S.B. 1587, §15(5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S.B. 276 § 2.c. (Iowa 2013) and H.F. 410, § 3.c. (Iowa 2013); H.B. 454, § 1, Reg. Sess. (Ky. 2013); S.P. 72, § 1, 25 MRSA Pt. 12, § 4503.1(A)(3), 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(B)(2)(II), Reg. Sess. (Md. 2013); H.F. 1506, § 1(4), 88th Leg., Reg. Sess. (Minn. 2013); S.F. 1620, § 3(5), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(b), 88th Leg., Reg. Sess. (Minn. 2013); H.B. 46, § 305.639.1, 97th Leg., Reg. Sess. (Mo. 2013); A.O. 3157, ¶ 1.d., Reg. Sess. (N.J. 2013); A.O. 6370, § 1, S 52-A.1., Reg. Sess. (N.Y. 2013); A.O. 6541, § 66-A.3.(B), Reg. Sess. (N.Y. 2013); H.B. 1373, § 3.2, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 207, § 4561.50(A)(3), Reg. Sess. (Ohio 2013); H.B. 1556, § 3.B.3, 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 1(2)(b), 77th Leg., Reg. Sess. (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of Gen. Laws, Ch. 5.3, 12-5.3.-2.(f)(1); H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 591, § 1(e), Reg. Sess. (Tenn. 2013); H.B. 912, § 423.002(a)(12), Reg. Sess. (Tex. 2013); H.B. 540, amending § 1.20 V.S.A. Ch. 205 (Vt. 2013); H.B. 1771, § 9(1)(a), 63d Leg., Reg. Sess. (Wash. 2013); H.B. 2997, § 1-7-3(a), Reg. Sess. (W. Va. 2013); S.B. 196, § 2, 175.55(s), Reg. Sess. (Wis. 2013).¶ H.B. 619 (N.H. 2013)does not contain an explicit "danger to life" exception but its bill was written so as not to be "construed to impair or limit any otherwise lawful activities of law enforcement personnel" See §2.V. Even

Sixteen bills allow drone use for disaster response, whether natural or man-made.[28] A slightly fewer number, about fourteen, expressly delineate Search and Rescue (SAR) operations as a drone use exception.[29] Along the same lines, bills from Iowa, Pennsylvania and Virginia contain exceptions that would allow drone use in support of "Amber" or similar missing person alerts.[30]

Eighteen bills include a provision to allow drone use to protect property from damage.[31] Protection of property, is also arguably inherent in drone use exceptions relating to disasters, firefighting, terrorist attacks, or emergency services.[32]

Other, less common drone use exceptions, relate to circumstances evoking judicially recognized exceptions to the warrant requirement.[33] In fact, only five

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though the following do not contain an explicit "danger to life" exceptions, other provisions would fairly embrace it: S.B. 1109 (Ark. 2013) (permits law enforcement to use drones for any purpose) and A.O. 6244 (N.Y. 2013) (permits lawful exceptions to the warrant requirement). Only fourteen bills do not include such language: H.B. 159a (Alaska 2013); H.B. 2574 (Ariz. 2013); H.B. 560 (Ga. 2013), S.B. 20 (Ind. 2013); H.B. 2394 (Kan. 2013); S.B. 196 (Mont. 2013); L.B. 412 (Neb. 2013); A.B. 3157 (N.J. 2013); S.B. 71 (Or. 2013), H.B. 961 (Pa. 2013), RI LC00564, Gen. Assemb. 395 (S.C. 2013), H.B. 2732 (R.I. 2013) and H.B. 2948 (W. Va. 2013).

[28] Disaster response clauses can be found at: CA Assembly Bill 1327, § 14350(c)(1) and (e)(1)-(2); GA SB 200 § 5, ¶ (e)(2); IA SF 276; ME SP 72, § 4503.2.(A), (B), (D); MN HF 1620 § 3, Sub. 4 ¶ (4) and MN HF 440, § 3, Subd.4(6); ND HB 1373 § 3, ¶ 3;NJ Assembly No. 3157, ¶ 4 and NJ AB 3929, §1.d.; OK HB 1556, §3.B.4.; OR HB 2710, § 5(3) and OR SB 853, § 8(1); TX HB 912, § 423.001(c)(3); PA SB 85, § 5(3) and VA HB 2012, 1. § 1; and WV HB 2997, Sec 1-7-3(b).

[29] For SAR clauses, see CA AB 1327 § 14350, ¶ (c)(1); FL SB 92 § 1, ¶ (4)(c); ID SB 1134, § 21-213, ¶ (2); IL SB 1587, § 15(4); IA SB 276 § 12 and IA HF 410, § 2.c.; ME SP 72, § 4503.2.E.; OK HB 1556 § 3.3; OR HB 2710, § 5(1); PA SB 875, §4; TN SB 796, §1(d)(5); TX HB 912 § 423.002(8)(D); VA H 2012 § 1, ¶ (iv) and WI SB 196/AB 203, §2(2).Of these, some require an imminent danger to life before a drone can be used for SAR: CA AB 1327 § 14350, ¶ (c)(1); IA HF 410, Sec 2.c.; OK HB 1556, § 3.B.3. ;PA SB 875, § 4; VA H 2012 § 1, ¶ (iv).

[30] IA SF 276 and IA HF 410, § 2.b.; PA SB 875, §4; and VA HB 2012, § 1, ¶ 1. Even where such specialized carve outs for imminent terrorist attacks, SAR, Amber or similar alerts and/or response to natural disasters do not exist, a plausible argument can be made that such situations would qualify under a State's more general provisions permitting drone use to alleviate danger to life.

[31] Danger to property provisions include: CA AB 1327 § 14350, ¶ (d)(2); FL SB 92 § 1, ¶ (4)(c); GA SB 200 § 5(e)(2); IL SB 1587, § 15, ¶ (3); IA SB 276 § 11, ¶ (b), IA HF 410, §1.2.c., and IA HF 427, §1.2.c.; KY HB 454 § 1, ¶ 3(c); MD HB 1233 § 1-203, ¶ (B)(II); MN HF 1620 § 3, Sub, 4, ¶ (3) and MN HF 990, § 3, Subd.4(5); NC HB 312 § 2(c)(3); ND HB 1373 § 3.3.; OH HB 207, § 4561.50(A)(3); SC H3415 § 2, ¶ (B)(3); OR HB 853, §8(1); PA SB 875, § 4; and TX HB 912 § 423.002.

[32] *See supra* notes 26-28 & 31.

[33] *See supra* note 24. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1920)("[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'"); Schmerber v. California, 384 U.S. 757 (1966); consent, Schneckloth v.

states explicitly codify such an exception, meaning that all other states either ignore or only partially recognize these existing Fourth Amendment jurisprudential exceptions.[34] For example, even though the Supreme Court has determined that a consensual search is consistent with the Fourth Amendment, less than a quarter of the bills surveyed expressly permit drone use where the individual has consented.[35] Similarly, despite the fact that Supreme Court has held exigent circumstances exist when a felon or suspect is fleeing and destruction of evidence is imminent, only sixteen bills include a "fleeing felon" exception and even fewer provide a carve-out to prevent the destruction of evidence.[36]

On the other hand, a small number of states would permit drone use in support of particular investigations in a manner that, arguably, ignores Fourth

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Bustamonte, 412 U.S. 218 (1973) and for plain view as it relates to aerial surveillance, California v. Ciraolo, 476 U.S. 207, 213 (1986); Florida v. Riley, 488 U.S. 445, 448 (1989).

[34] AK HB 159a, amending § 2(b)(2);CA Senate Bill No. 15, § 5 amending 14352 of Penal code, ¶ (b); IL SB 1587, § 30; MT SB 196, § 1(1)(b); NY AO 6244, § 1.1; and TN SB 796, §1(g)(2).

[35] Schmerber v. California, 384 U.S. 757 (1966). Bills with consent provisions include: AK HB 159a, amending § 2(b)(4); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § D.2.;AR HB1904, amending AR Code Title 12, as 12-19-104(a)(1); HI SB, 263B-2(c)(1);ID SB 1134, § 1.,21-213(2)(a)(i)-(ii); IL SB 1586, § 15(5); IN SB 20, § 4(a); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4502.2. (B);MA SB 1664, § 1(e); MI HB 4455, § 5(a);MN HF 1620/ 1706, § 2, Sub 2.;MO HB 46, § 305.637.2.; NM SB 556, § 3.A.; ND HB 1373, § 4.2.;OK HB 1556, § 3.B.5; OR HB 2710, § 4 and SB 853, § 5;and TX HB 912, Ch. 423, § 423.002(6). Consent would presumably be implied for State bills containing a proviso allowing drone use in accordance with judicially recognized exceptions to the warrant requirement. MA and NY bills contain provisions that only permit dissemination or receipt of information with the individual's consent. MA SB 1664/BH 1357, § 99-C(e) and NYAO 6541, § 66-A.3.(A).

[36] Tennessee v. Garner, 471 U.S. 1 (1985) (law enforcement may us non-lethal force to deter a fleeing felon); Roaden v. Kentucky, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation")."Fleeing felon" language is included in the following bills: AL SB 317 § 1, ¶ (a)2(c); CA AB 1327, § 1, Title 14, § 14350(c) and CA HB No. 15, amending penal code § 14352(b); FL SB 92 § 1, ¶ (4)(c); IL SB 1587 § 15 (3); KY HB 454 §1, ¶ 3(c); IA HF 427, § 1.3.c.; MN HB 1620 § 1, Sub. 3 and MN HF 990, § 3, Subd.4(5)(iii); NC HB 312 § 2, ¶ (c)(3)(iii); OH HB 207, § 4561.50(A)(3); SC H 3415 § 2, ¶ (B)(3);TN SB 796, § 1(d)(4); TX HB 912, Ch. 423, § 423.002(8)(A); WI SB 196/AB 203, § 2, 175.55(2); WY HB 242 § 1, ¶ 7-3-1004(a)(iv). Depending on interpretation, the following additional State bills may apply to fleeing suspects: CA AB 1327 § 14350, ¶ (c); ID SB 1134 § 1, ¶ 21-213(2); MD HB 1233 § 1-203.1(B)(2)(II); and ND HB 1373 § 3, ¶ 3.States that include the "destruction of evidence" exception for drones all use the same language, "to forestall (or prevent)… the destruction of evidence."See FL SB 92, § 1(3)(c); IL SB 1587, § 15(3); IA HF 427, § 1.3.c.; KY HB 454, § 1(3)(c); MN HF 1620/ 1706 § 3, Sub. 4(3) and MN HF 990, § 3, Subd.4(5)(iv) ; ND HB 1373, § 2.(c)(3)(iv) (adds the qualifier "imminent"); OH HB 207, § 4561.50(A)(3); SC H 3415, § 2.(B)(3) and WI SB 196/AB 203, § 2, 175.55(2).

[36] AK HB 159a, amending § 2(b)(2);CA Senate Bill No. 15, § 5 amending 14352 of Penal code, ¶ (b); IL SB 1587, § 30; MT SB 196, § 1(1)(b); NY AO 6244, § 1.1; and TN SB 796, §1(g)(2).

Amendment principles. Arkansas, Hawaii, Maine and Michigan for example, provide *carte blanche* to State or federal agencies when using drones for emergencies involving "conspiratorial activities threatening the national security interest" or "conspiratorial activities characteristic of organized crime."[37] Idaho would permit drone use, without a warrant, to investigate controlled substance crimes.[38] Additionally, California, Illinois, Oregon and Texas would also allow drones to assess crime scenes *sans* warrant.[39]

A few state bills provide for land-centric exceptions for drone use analogous to the plain view doctrine.[40] Nine permit drone use on or over public lands.[41] The Alaska, New York, North Dakota and Texas bills would permit drone use to monitor borders as well.[42] A handful of states allow for aerial inspections.[43]

While there are also states who would permit drone use for other purposes, most bills merely reiterate, in whole or in part, Fourth Amendment protections that already exist – and do so only because the tool to be used is a drone.[44]

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[37] *See* H.B. 1904, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S.B. 783, 27th Leg., Reg. Sess. (Haw. 2013); H.B. 4455, 96th Leg., Reg. Sess. (Mich. 2012).

[38] "Absent a warrant, and except for . . . controlled substance investigations, no person, entity, or State agency shall use an unmanned aircraft system to intentionally conduct surveillance . . ." S.B. 1134, §21-213(2), 62nd Leg., Reg. Sess. (Idaho 2013).

[39] A.B. 1327, §1, Title 14, §14550(c)(2), 2013 Leg., Reg. Sess. (Cal. 2013-14); S.B. 1587, §15(5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); H.B. 2710, §6(1), 77th Leg. Assemb., Reg. Sess. (Or. 2013) and S.B. 853, §7(1), 77th Leg. Assemb., Reg. Sess. (Or. 2013); H.B. 912, § 423.002(8)(B)-(C), 82nd Leg., Reg. Sess. (Tex. 2011).

[40] See California v. Ciraolo, 476 U.S. 207, 213 (1986); Florida v. Riley, 488 U.S. 445, 448 (1989).

[41] Public land exception bills include: H.B. 159, §2(b)(3) 28th Leg., 1st Sess. (Alaska 2013); H.B. 2574, §1(D)(2), 51st Leg., 1st Reg. Sess. (Ariz. 2013); A.B. 1327, §1, Title 14, §14550(c)(2), 2013 Gen. Assemb., Reg. Sess. (Cal. 2013-14); S.B. 1587, §15(5), 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013); H.B. 4455, §9(1), 97th Leg., Reg. Sess. (Mich. 2013); S.B. 196, §2(2)(B), 63rd Leg., Reg. Sess. (Mont. 2013); H.B. 1556, §4.A., 54th Leg., 1st Reg. Sess. (Okla. 2013) (allowing drones to transit public land (over flight) including military aircraft carrying weapons); H.B. 912, §3(B)(6), 83rd Leg., Reg. Sess. (Tex. 2013).

[42] H.B. 159, §2(b)(3), 28th Leg., 1st Reg. Sess. (Alaska 2013) (allowing drone use on public land and for border monitoring); S.B. 4537, §1.3.A(3), 2013 Leg., 236th Sess. (N.Y. 2013); H.B. 1373, §3(1), 63rd Leg. Assemb., Reg. Sess. (N.D. 2013); H.B. 912 Ch. 423, §423.002(a)(14), 83rd Leg., Reg. Sess. (Tx. 2013)(allowing drone use on public land and for border monitoring).

[43] *See* A.B. 1327, §14350(e)(1), 2013 Gen. Assemb., Reg. Sess. (Cal. 2013); S.B. 1134, §1(4) and §1.21-213(1)(b)(ii), 62nd Leg., 1st Reg. Sess. (Idaho 2013); A.B. 6541, §66-A.3(D), 2013 Leg., 236th Leg. Sess. (N.Y. 2013); H.B. 912, Ch. 423, §423.002(a), 83rd Leg., Reg. Sess. (Tex. 2013); S. Paper 126-72, 1st Reg. Sess., at § 4503 (Me. 2013). *See also* footnotes infra 47, 49 (discussing drone use provisions allowing for assessment of damage to land as part of natural disasters and for criminal or administrative investigations).

[44] A minority of bills allow drone use for non-governmental or benign governmental use, such as higher education, training, research, or recreation. See H.B. 46, §305.639(2), 98th Gen. Assemb., 1st Reg. Sess. (Mont. 2013); S.B. 4537, §1.B, 2013 Leg., 236th Leg. Sess. (N.Y. 2013)

C. *Operational and Procedural Considerations*

Disjointed state legislative drone proposals often contain procedural hurdles and operational constraints that exceed the warrant requirements for privacy. In addition to when operators may use drones, states have also attempted to legislate how they may be used through a series of operational restrictions and procedural requirements beyond obtaining a warrant and collecting only on "the place to be searched or persons or things to be seized."[45] For example, before an agency can acquire a drone, several states require explicit legislative approval to do so.[46] A discussion of other such considerations follows.

i. Weapons Restrictions

Nearly one-third of states restrict any drone operator from carrying or employing weapons from drones. Of these, several preclude equipping drones with non-lethal weapons, pepper spray, bean bag guns, mace and sound-based weapons as well.[47] Imagine a scenario where a law enforcement agent could use a drone to find a fleeing suspect, but could not use that same drone to stop him if he started indiscriminately killing innocent civilians. These prohibitions

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(excluding recreational use of model airplanes); A.B. 6541, §66-A.3.(D), 2013 Leg., 236th Leg. Sess. (N.Y. 2013); H.B. 1373, §3(4), 63rd Leg. Assemb., Reg. Sess. (N.D. 2013); H.B. 2710, §1.7(a)-(d), 77th Leg. Assemb., Reg. Sess. (Or. 2013); S. Paper 126-72, 1st Reg. Sess., at § 4503.3 (Me. 2013); H. File 2013-990, §3(2), 88th Leg. Sess., at § 3 (Minn. 2013). But see Section A *supra* (permitting the U.S. Military to train with drones).

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

[46] Acquisition provisions can be found in: Assemb. B. 1327, § 1, Title 14, 14351 (Cal. 2013) and S.B. 15, § 14355 (Cal. 2013); S.B. 20, § 6 (Ind. 2013); S.P. 72 amends § 1, 25 MRSA Pt. 12, § 4502.1 (Me. 2013); S.B. 1664, § 1 amending Ch. 272 of General Laws as 99C(b) (Mass. 2013) and Mass. H.B. 1357, § 99C(b); H.B. 4455, § 3(2) (Mich. 2013); B. A06451, § 66-A.1. (N.Y. 2013); H.B. 2710, § 1.(8) (Or. 2013) and S.B. 524, § 1(8) (Or. 2013); Gen. Assemb., Ch. 5.3, 12-5.3.-2.(b) amending title 12 of Gen. Laws (R.I. 2013); H.B. 1771, § 4(1) (Wash. 2013) and S.B. 5782, § 4(1) – (2) (Wash. 2013).

[47] The following drone bills contain weapons restrictions: H.B. 1904 § 12-19-104 (d) (Ark. 2013); S.B. No. 15, § 5, amending Title 14, § 14350 of the Penal Code, § 14351(a) (Cal. 2013) and A.B. 1327, § 14354.5 (Cal. 2013); S.B. 200 § 3(1) (Ga. 2013); S.B. 783 § 1 263B-2(e) (Haw. 2013); S.B. 276 § 14 (Iowa 2013) and H.F. 410, § 1.3 (Iowa 2013); H.B. 2394 § 1(b) (Kan. 2013); 14 Reg. Sess. BR 1, § 1(2) (Ky. 2013); S.P. 72 § 4502.3 (Me. 2013);
S.B. 1664 § 1(b) (Mass. 2013) and H.B. 1357, § 99-C(b) (Mass. 2013); H.B. 4455 § 3(4) (Mich. 2013); H.F. 990, § 3, Subd. 3 (Minn. 2013); H.B. 1373 § 4(1) (N.D. 2013); B. A06541 § 66-A.5. (N.Y. 2013); H.B. 1556, § 5.A (Okla. 2013); H.B. 2710, § 10 (Or. 2013) and S.B. 524, §1(6) (Or. 2013); S.B. 875, § 5 (Pa. 2013); Gen. Assemb. B. 395, Ch. 39, § 6-39-20 (S.C. 2013); H.B. 540 § 4622 (e) (Vt. 2013); H.B. 2012 § 1(1) (Va. 2013); H.B. 2732 § 1-7-3 (b) (W. Va.) and H.B. 2997, § 1-7-4(a) (W.Va. 2013); and S.B. 196/Assemb. B. 203, § 3 (Wis. 2013).

are analogous to telling a police officer that he can search a house, but cannot bring his gun.

ii. Collection, Retention and Dissemination Requirements

Many bills also restrict the time, place, and manner of drone operation. One of the most common time restrictions on drone use is a forty-eight hour mission execution window.[48] States with place restrictions focus primarily on the home and areas surrounding it, places of worship, as well as farms and agricultural areas.[49] Most states that include manner restrictions in their legislation generally require users to collect information only on the target and to avoid or minimize data collection on others.[50] Some states contain unique one-off manner restrictions or constraints. For example, one New Jersey bill would forbid drone use to enforce violations of motor vehicle or traffic violations.[51] Massachusetts, North Dakota, and West Virginia for example, preclude drone surveillance of citizens exercising their constitutional rights relating to freedom of speech and freedom of assembly.[52]

States often fail to consider the impact restrictions have on operational effectiveness. In addition to manner restrictions on drone operations, many states restrict how the information collected is used, disseminated, or retained. A number of bills reviewed prohibit use of facial recognition or other biometric matching technology, primarily on information collected on non-targets.[53] Very few bills address dissemination of information beyond the

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[48] For time limitations on drone operations see A.B. 1327 § 14350, (d)(2) (Cal. 2013) (two hours); H.B. 560, § 2(a)(4) (Ga. 2013); S.B. 783 § 1, 263B-2(c)(3)(B) (Haw. 2013); S.B. 1587, § 15(3) (Ill. 2013); S.P. 72, § 4502.2. D (Me. 2013); H.B. 4455 § 5(d) (Mich. 2013); and H.B. 1771 § 6.(4) and S.B. 5782, § 8(1)(c) (Wash. 2013).¶¶

[49] For place restrictions, see H.B. 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § B (Ariz. 2013); S.B. No. 15, § 3(j) (Cal. 2013); S.B. 2563B-2(c)(3)(A)-(B) (Haw. 2013); S.B. 1134, § 1.21-213(2)(a)(i)-(ii) (Idaho 2013); S.B. 556, § 3.B. (N.M. 2013); B. A06370/ S04537, § 1, S 52-A.2. (N.Y. 2013); H.B. 1373, § 6.4 (N.D. 2013).

[50] Manner restrictions with an emphasis on collecting only on the target include: H.B. 1904, amending Ark. Code Title 12, as 12-19-104(b)(1) (Ark. 2013); S.B. 15, Title 14, § 14354(a) (Cal. 2013); S.B. 263B-2(d) (Haw. 2013); S.P. 72 amends § 1, 25 MRSA Pt. 12, § 4502.3 (Me. 2013); S.B. 1664, § 1, amending Ch. 272 of General Laws as 99C(d)(1) and (3) (Mass. 2013); H.B. 4455 § 5(e) (Mich. 2013); H.B. 312, § 15A-232.(d) (N.C. 2013); B. A06541, § 66-A.4. (N.Y. 2013); H.B. 1556, § 3.F (Okla. 2013); H.B. 2710, § 1.(4) (Or. 2013) and S.B. 524, § 1(4) (Or. 2013); Gen. Assemb., Ch. 5.3, 12-5.3.-2.(h) amending title 12 of General Laws (R.I. 2013); H.B. 540/S.B. 16, amending § 1 20 V.S.A. Ch. 205 as, § 4622(c)(1) (Vt. 2013); H.B. 1771, § 4 (Wash. 2013).

[51] Assemb. No. 3157, § 2.e (N.J. 2012).

[52] S.B. 1664, § 1, amending Ch. 272 of Gen. Laws as 99C(d)(3) (Mass. 2013); H.B. 1373, § 4.3 (N.D. 2013) and H.B. 2997, § 1-7-4(c) (W.Va. 2013).

[53] *See* H.B. 1904, § 1(b)(2), 89th Gen. Assemb. Reg. Sess. (Ark. 2013); S.B. 2563B-2(d) (Haw.);

collecting agency.[54] That said, some states require dissemination, in the form of notice, to the subject of drone monitoring.[55] On the other hand, the majority of bills address retention. The primary theme on retention is to delete information collected unlawfully or on non-targets within twenty-four hours of collection.[56] Other states have retention limits on information lawfully collected on a target of surveillance, unless needed for a criminal investigation or prosecution.[57] Only California seems to understand the need for operators, whether military or civilian, to train to their required task by allowing images to be kept beyond their normal time limit for "training purposes."[58] To the extent the desired endstates for drone operations consist of both privacy protection and operational effectiveness, training for such operations is a critical necessity.

S.P. 72, § 4502.3.C., 1st Reg. Sess. (Me. 2013); S.B. 1664, § 1(d)(2) (Mass. 2013); H.B. 4455 § 5(e) (Mich. 2013); A.O. 6541, § 66-A.4, 2013-2014 Leg., Reg. Sess. (N.Y. 2013-2014); H.B. 312, § 15A-232.(d), 2013 Gen. Assemb. (N.C. 2013); S.B. 853 § 4.1, 77th Leg. Assemb. (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 540, § 4622(c)(3) (Vt. 2013); H.B. 1771, § 6(3), 63rd Leg. Sess. (Wash. 2013).

[54] *See, e.g.,* S.B. No. 15, § 5, amending Title 14, of the Penal Code 14350(b) (Cal. 2013) (stating that a law enforcement agency cannot receive drone information from another agency unless they have a warrant); A.B. 1327, § 14350(e)(3) (Cal. 2013) ("Data collected pursuant to this subdivision shall not be disseminated outside the collecting agency . . . ."); S.B. 1587, § 25 (Ill. 2013) (forbidding disclosure to another government agency unless there is evidence of criminal activity or evidence relevant to an ongoing investigation or trial); H.B. 1357, § 99C(e) (Mass. 2013) (disallowing disclosure of non-target information for any purpose without written consent); H.B. 2997, Art. 7, § 1-7-6(c) (W. Va. 2013) (permitting distribution only where data collected is evidence of a crime and complies with evidentiary rules).

[55] *See* S.B. 2563B-5 (Haw.) ; S.P. 72, § 4505(1), 1st Reg. Sess. (Me. 2013); S.B. 1664, § 99C(h) (Mass. 2013); H.B. 4455, § 11(1) (Mich. 2013); S.B. 853, § 9.(1), (3), 77th Leg. Assemb. (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 1771, § 6(5) and S.B. 5782, § 6(5), 63rd Leg. (Wash. 2013)

[56] *See* H.B.1904, § 1.12-19-105(a)(1) (Ark. 2013); S.B. 263B-3(a) (Haw. 2013); S.P. 72, § 4503 (Me. 2013); S.B. 1664, § 99C(e) (Mass. 2013); H.B. 4455, § 7(1) (Mich. 2013); A.O. 6541, § 66-B (N.Y. 2013); Assemb. No. 3157, 215th Leg. § 2.d, (N.J. 2013); H.B. 312, § 15A-232(g) (N.C. 2013); H.B. 1373, 63d Leg. Assemb., Reg. Sess. § 6.3 (N.D. 2013); H.B. 1556, 54th Leg, 1st Sess. § 3.F (Okla. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; S.B. 796, 108th Gen. Assemb., Reg. Sess. §1(f) (Tenn. 2013); H.B. 540(c)(2)(B) (Vt. 2013); H.B. 1771, § 11 (Wash. 2013); H.B. 2997, § 1-7-6(b) (W. Va. 2013).

[57] *See, e.g.,* A.B. 1327, § 1, Title 14, 14353 (Cal. 2013); S.B. No. 15, § 5 (Cal. 2013); S.B. 1587, § 20(1)-(2) (Ill. 2013); H.B. 1373, 63rd Leg. Assemb., § 6.2 (N.D. 2013); H.B. 2710, 77th Or. Leg. Assemb. Reg. Sess. § 3.(1)(a) (Or. 2013); S.B. 524, 77th Or. Leg. Assemb., Reg. Sess. § 1(5) (Or. 2013); S.B. 796, 108th Gen. Assemb., Reg. Sess. §1(f) (Tenn. 2013); H.B. 1771, § 12 (Wash. 2013); H.B. 2997, § 1-7-6(c) (W. Va. 2013).¶

[58] *See* A.B. 1327, § 1, Title 14, 14353(a) (Cal. 2013); S.B. No. 15, § 5, Title 14, 14354(b) (Cal. 2013).

iii. Oversight and Reporting Regimes

Oversight of information collected and transparency of operations are reasonable safeguards to protect civil liberties. However, a majority of bills contain documentation, oversight, and reporting requirements that test the limits of reasonableness. For example, even in emergent circumstances, many states require responders to file a sworn statement or warrant application, stating the grounds for the emergency drone use within 24 to 48 hours.[59] Most have reporting rules that require law enforcement, the Attorney General, the judiciary and court administrators, or a combination of these to file extensive reports on drone activities annually.[60] Other proposals are more moderate, such as those from Maine, North Dakota, Washington and West Virginia for example, which explicitly require record keeping on drone operations.[61] Oversight is also exercised through public transparency. A handful of states require public notice of drone operations, images, and government agency drone reports filed.[62] Care must be taken in any public disclosure to ensure that investigations or operations are not compromised and that personal privacy is not - ironically - violated, in the name of transparency.

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[59] States with post-emergency documentation requirements include: H.B. 1904, § 1, Ch. 19, 12-19-104.(a)(2)(B)(i) (Ark. 2013); S.B. 263B-4(a)(4) (Haw. 2013); S.B. 1587, §15(3) (Ill. 2013); S.P. 72, § 4503.1.B. (Me. 2013); S.B. 1664, § 1(c)(3)(ii) (Mass. 2013); H.B. 4455, § 5(b)(i)-(ii) (Mich. 2013); H.F. 990, 103 Leg., 88th Sess. § 3, Subd. 5 (Minn. 2013); H.B. 312, § 15A-232.(c)(3)b. (N.C. 2013); H.B. 1556, § 3.B.3. (Okla. 2013); S.B. 853, § 6(2) (Or. 2013); Title 12 R.I. Gen. Laws, Ch. 5.3, 12-5.3.-2.(h), amended by R.I. Gen. Assemb. Jan. 2013; H.B. 540, § 4623(a)(2) (Vt. 2013); H.B. 1771, § 6(2) (Wash. 2013).

[60] *See e.g.,* H.B.1904, §12-19-106(a) (Ark. 2013); A.B. 1327, § 14351(b) (Cal. 2013); S.B. 263B-7 (Haw. 2013); S.B. 1587, § 35 (Ill. 2013); S.P. 72, § 4507 (me. 2013); S.B. 1664, § 1 (Mass. 2013); H.B. 4455, § 15(1)-(3) (Mich. 2013); A.O. 6541, § 66-D (N.Y. 2013); H.B. 312, § 15A-232.(h) (N.C. 2013); S.B. 71 § 4(1) (Or. 2013); S.B. 853, § 10 (Or. 2013); H.B. 2710, § 8 (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of General Laws, Ch. 5.3, 12-5.3.-12; H.B. 912, § 423.008 (Tex. 2013); H.B. 540 (Vt. 2013); H.B. 1771, § 15-18, 21 (Wash. 2013); S.B. 5782, § 15-18, 22 (Wash. 2013).

[61] *See* ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.4; ND HB 1373, § 7; WA HB 1771, § 20 and WV HB 2997, § 1-7-7.

[62] CA Assembly Bill 1327, § 1, Title 14, 14352 and § 14352 and CA SB No. 15, amending Penal Code 14354(c); IL SB 1587, § 35; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4507.3; NJ Assembly No. 3157, § 3.a.; NY AO 6541, § 66-D; NC HB 312, § 15A-232.(h); OR SB 853, § 10 and OR 2710, § 8 and WA HB 1771, § 19, 21 and WA SB 5782, § 15-18.

iv. Unique Conditions

Besides the more common language discussed above, some states have unique drone requirements. California and Michigan require marking the body of a drone in some distinctive manner.[63] Oklahoma contains a non-liability clause that protects drone manufacturers and sellers.[64] Oregon and Virginia direct drone operating agencies to adopt policies for their use that establish training requirements for operators; criteria for when drones will be used; a description of the areas in which drones will be used; and a procedure for informing the public of those policies.[65]

This disjointed state approach, regulating everything from whether an aircraft can be equipped with weapons, to forbidding the transfer of the information it collects to other agencies, to unique oversight and reporting regimes, goes well beyond the standard warrant requirement.

D. *Violation Ramifications*

State drone proposals contain a wide range of ramifications for violating their provisions, including exclusionary rules, personal liability provisions, and forward-leaning preventive measures which could have direct as well as second and third order impacts on drone operators. Given that the focus of most of the state drone legislative proposals is on law enforcement activities, the most common ramification for violating state drone provisions is excluding information or evidence collected in violation of state procedures from admission in court. More than half of the state bills contain a criminal exclusionary rule.[66] Slightly more than a third contain provisions excluding

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[63] S.B. 15, § 5 amending 14356 of Penal Code (Cal. 2013); H.B. 4455, § 3(5) (Mich. 2013).

[64] H.B. 1556, § 6 (Okla. 2013).

[65] H.B. 2710 (Or. 2013), § 1.(7)(a)-(d) and SB 853, § 11 (1); VA HB 2012, 1. § 1.1.

[66] States with criminal exclusionary rules include AL SB 317, § 1(d); AK HB 159a, § 3(a); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § C; AR HB1904, amending AR Code Title 12, as 12-19-105(b); FL SB 92, § 1(5); HI SB, 2563B-3(b); IL SB 1587, § 30; IN SB 20, Sec (5); IA HF 427, §1.5; KS HB 2394 § 1(e); KY HB 454, § 5 and KY 14 RS BR 1, § 1(5); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4503; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.3.; MD HB 1233, 1-203-1(D); MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f) and MA HB 1357, § 99-C(f); MI HB 4455 § 7(2); MN HF SF 1506, § 1, Sub 5, MN 1620/1706, § 3, Sub. 5 and MN HF 990, § 1, Subd. 7; MO HB 46, § 305.641.2; MT SB 196, § 1(1)(b); NE LB 412, § 6; NJ Assembly No. 3157, §2.d. and NJ AB 3929, ¶ 3; NM SB 556, § 5.B.; NY AO 6370/SO 4537, § 1, S 52-A.4.B., NY AO 6244, § 1. S 700.16, ¶ 3 and NY AO 6541, § 66-B.2.; NC HB 312, § 15A-232.(f); ND HB 1373, § 6.1; OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. and § 4.E.; OR HF 2710, § 11, OR SB 71, § 4(3) and OR SB 853, § 4(2)(a) and 8(2)(a); RI Gen. Assembly Jan. 2013, amending title 12 of General Laws, Ch. 5.3, 12-5.3.-8, .9 and 11.; RI LC00564, § 12-5.3.2; SC H 3415, § 2(D); TN HB 591, § 1(f) and TN SB 796, § 1(g)(2); TX HB 912, Ch. 423, § 423.005(1); VT HB 540/SB 16,

information gathered by drones from civil or administrative hearings.[67] Several bills contain a "fruit of the poisonous" tree exclusionary rule, which prohibits use of information and evidence derived from information gathered by drones.[68] Montana and Oregon expressly ban the government from including information acquired by drones in an affidavit to obtain a warrant.[69]

More than half of the state bills create civil liability for violators.[70] Many

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amending § 1 20 V.S.A. Ch. 205 as, § 4622(d); WA HB 1771/WA SB 5782 § 10; WI SB 196/AB 203, § 5, amending § 972.113; WV HB 2732, Art. 7, § 1-7-6., WV HB 2997, § 1-7-6(a); WY HB 0242, 7-3-1005. Even if the State fails to include a specific criminal exclusionary provision in their bill, it is safe to assume that the courts would still exclude the evidence consistent with their constitution or other law if law enforcement did not obtain a warrant, unless a judicial exception to the warrant requirement applied.

[67] For civil or administrative exclusionary rules see: AK HB 159a, § 1(a); AZ HB 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § C; AR HB1904, amending AR Code Title 12, as 12-19-105(b); GA HB 560, § 2(e); HI SB, 2563B-3(b); IL SB 1587, § 30; IN SB 20, Sec (5); KY HB 454, § 5; ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4503 and KY 14 RS BR 1, § 1(5); ME SP 72, amends § 1, 25 MRSA Pt. 12, § 4506.3.; MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f) and MA HB 1357, § 99-C(f); MI HB 4455 § 7(2); MN HF 990, § 1, Subd. 7; MO HB 46, § 305.641.2; MT SB 196, § 1(1)(b); MT SB 196, § 2(3); NM SB 556, § 5.B.; NY AO 6370/SO 4537, § 1, S 52-A.4.B. and NY AO 6541, § 66-B.2.; NC HB 312, § 15A-232.(f); OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. & 4.E.; OR HF 2710, § 11, OR SB 71, § 4(3) and OR SB 853, § 4(2)(a) and 8(2)(a); RI LC000564, § 12-5.3-2; TX HB 912, Ch. 423, § 423.005(1); VT HB 540/SB 16, amending § 1 20 V.S.A. Ch. 205 as, §4622(d); WA HB 1771/WA SB 5782 § 10 and WV HB 2997, § 1-7-6(a).

[68] Derivative evidence exclusions include AR HB1904, amending AR Code Title 12, as 12-19-105(b); GA HB 560, § 2(e); IN SB 20, Sec (5); KS HB 2394 § 1(e); MA SB 1664, § 1, amending Ch. 272 of General Laws as 99C(f); MI HB 4455 § 7(2); NJ Assembly No. 3157, §2.d.; NY AO 6370/SO 4537, § 1, S 52-A.4.B.; OH HB 207, § 4561.50(B); OK HB 1556, § 3.E. & 4.E.; OR HF 2710, § 11, OR SB 853, § 4(2)(a); RI LC000564, § 12-5.3-2; WA HB 1771/WA SB 5782 , § 10.

[69] S.B. 196, § 2(3), 63rd Leg., Reg. Sess. (Mont. 2013).; H.B. 2710 , § 11(2), 77th Leg., Reg. Sess. (Or. 2013); S.B. 853, § 2(1)(b), 77th Leg., Reg. Sess. (Or. 2013).

[70] The following bills create civil liability for drone users who violate State provisions: H.B. 2574, amending § 1, Title 13, Ch. 30 ARS, 13-3007, § E, 51st Leg. Reg. Sess. (Ariz. 2013); Assemb. B. 1327, § 1, Title 14, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92 § 1(5), Reg. Sess. (Fla. 2013); S.B. 15, § 2 amending § 1708.8, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 1134, § 1.21-213(3)(a), 62d Leg., Reg. Sess. (Idaho 2013); H.F. 427, § 1.4, 85th Leg., Reg. Sess. (Iowa 2013); H.B. 2394, § 1(d), Reg. Sess. (Kan. 2013); H.B. 454, § 4, Reg. Sess. (Ky. 2013); S.P. 72, § 1, 25 MRSA Pt. 12, § 4505, 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(C), Reg. Sess. (Md. 2013); H.F. 1506, § 1(4), 88th Leg., Reg. Sess. (Minn. 2013); S.F. 1620, § 3(5), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(b), 88th Leg., Reg. Sess. (Minn. 2013); H.B. 46, § 305.641.1-.3, 97th Leg., Reg. Sess. (Mo. 2013); L.B. 412, § 5, 103d Leg., Reg. Sess. (Neb. 2013); S.B. 556, § 5(A), Reg. Sess. (N.M. 2013); A.O. 3929, § 2, Reg. Sess. (N.J. 2013); A.O. 6370, § 1, S 52-A(4)(C), Reg. Sess. (N.Y. 2013); A.O. 6244, § 1 S 700.16(3), Reg. Sess. (N.Y. 2013); H.B. 312, § 15A-232.(e), Reg. Sess. (N.Y. 2013); H.B. 1373, § 4, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 207, § 4561.50(C), Reg. Sess. (Ohio 2013); H.B. 1556, § 3(D), 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 14-15, 77th Leg., Reg. Sess. (Or. 2013); RI Gen. Assemb. Jan. 2013, amending title 12 of Gen. Laws, Ch. 5.3, 12-5.3.-10.; H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 591, § 1(e), Reg. Sess. (Tenn. 2013); H.B. 912, § 423.006(2-3), Reg. Sess. (Tex. 2013); H.B. 1771, § 13,

include civil equitable relief, including injunctions to preclude drone use in advance of employment or to prevent the use of information collected.[71] Many bills contain a wide spectrum of potential civil penalties ranging from actual damages, to punitive and treble damages.[72] Almost thirty percent of states make it a crime, ranging from misdemeanor to a felony, to use drones in violation of their provisions.[73] A few bills even provide for administrative discipline for such violations.[74]

Exclusionary rules, and concomitant disciplinary measures, are time-honored remedies in a Fourth Amendment setting, yet bills that lack the full panoply of Fourth Amendment exceptions are fatally flawed.

III. DEPARTMENT OF DEFENSE POLICIES

DoD policies take a nuanced approach that maximizes drone use without sacrificing civil liberties. The disjointed state approach to drone operations is a striking contrast to DoD policies. Even before the DoD operated drones, a

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63d Leg., Reg. Sess. (Wash. 2013); H.B. 2732, § 1-7-5, Reg. Sess. (W. Va. 2013); H.B. 2997, § 1-7-5, Reg. Sess. (W. Va. 2013).¶

[71] Injunctive relief provisions include: S.B. 317, § 1(c), 2013 Leg., Reg. Sess. (Ala. 2013); H.B. 2574, § 1, 13-3007(e), 51st Leg., Reg. Sess. (Ariz. 2013); Assemb. B. 1327, § 1, 14352, 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 15, § 2(h), 2013-14 Leg., Reg. Sess. (Cal. 2013); S.B. 92, § 1(5), Reg. Sess. (Fla. 2013); H.B. 2394, § 1(d), Reg. Sess. (Kan. 2013); H.B. 454, § 4, Reg. Sess. (Ky. 2013); S.P. 72, § 4506, 126th Leg., Reg. Sess. (Me. 2013); H.B. 1233, § 1-203-1(c), Reg. Sess. (Md. 2013); MN 1620/ 1706, § 3, Sub. 5; H.B. 46, § 305.641.1, Reg. Sess. (Ohio 2013); S.B. 556, § 5(A), 51st Leg., Reg. Sess. (N.M. 2013); Assemb. O. 3929, § 2, Reg. Sess. (N.J. 2013); Assemb. O. 6370, § 1 S 52-A.4C, Reg. Sess. (N.Y. 2013); Assemb. O. 6370, § 1 S 700.16(3), Reg. Sess. (N.Y. 2013); H.B. 1373, § 4, 63d Leg., Reg. Sess. (N.D. 2013); H.B. 3415, § 2(c), 120th Leg., Reg. Sess. (S.C. 2013); H.B. 912, § 423.006(1), Reg. Sess. (Tex. 2013); H.B. 1771, § 13, 63d Leg., Reg. Sess. (Wash. 2013); H.B. 2732, § 1-7-5, Reg. Sess. (W. Va. 2013); H.B. 2997, § 1-7-5, Reg. Sess. (W. Va. 2013).

[72] For specific information on civil damages, see provisions outlined in footnote 82.

[73] *See* H.B. 159, § 2(d), 28th Leg., Reg. Sess. (Alaska 2013); H.B. 2574, § 1, title 13, Ch. 30, 13-3007(f), 51st Leg., Reg. Sess. (Ariz. 2013); S.B. 15, § 3(j), 2013-14 Leg., Reg. Sess. (Cal. 2013); H.B. 560, § 2(b-d), Reg. Sess. (Ga. 2013); S.B. 20, § 4(b), 118th Leg., Reg. Sess. (Ind. 2013); H.B. 4455, § 17, Reg. Sess. (Mich. 2013); H.B. 1620, § 3(2), 88th Leg., Reg. Sess. (Minn. 2013); H.F. 990, § 1(6)(a), 88th Leg., Reg. Sess. (Minn. 2013); S.B. 196, § 1(1)(c), 63d Leg., Reg. Sess. (Mont. 2013); H.B. 619, § IV(a); Reg. Sess. (N.H. 2013); Assemb. B. 3157, § 5, 215th Leg., Reg. Sess. (N.J. 2013); S.B. 556, § 5(c), 51st Leg., Reg. Sess. (N.M. 2013); Assemb. O. 6370, § 1, S 52-A.4.A, Reg. Sess. (N.Y. 2013); H.B. 312, § 15A-232(e), Reg. Sess. (N.C. 2013); H.B. 1556, § 4(d), 5(b), 54th Leg., Reg. Sess. (Okla. 2013); H.B. 2710, § 13(1), 77th Leg., Reg. Sess. (Or. 2013); S.B. 71, § 2-3, 77th Leg., Reg. Sess. (Or. 2013); H.B. 912, § 423.004, Reg. Sess. (Tex. 2013); S.B. 5782, § 13, 63d Leg., Reg. Sess. (Wash. 2013); S.B. 196, § 3, Reg. Sess. (Wis. 2013).

[74] Administrative disciplinary provisions can be found in S.B. 263B-3(c), 263B-6, 27th Leg., Reg. Sess. (Haw. 2013); H.B. 4455, § 13(1), , Reg. Sess. (Mich. 2013).

series of Intelligence Oversight (IO) policies were created to govern the intelligence capabilities when collecting images and information.[75] The DoD has a wide range of national security responsibilities that may require collection of imagery domestically using manned and unmanned airborne vehicles, including drones.[76] However, in general, the DoD cannot do so unless some very specific conditions are met. These conditions are codified in a host of IO and other policies and rules.[77]

Executive Order (EO) 12333, *United States Intelligence Activities,* applies to all intelligence platforms that domestically collect information on U.S. persons (USPER) using airborne assets.[78] EO 12333 guides the conduct of intelligence activities[79] within a strict framework that balances the need for effective intelligence with the "protection of constitutional rights" through collection, retention, dissemination, and oversight processes.[80] Under this framework drones can only collect information on USPER in limited circumstances.[81] In

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[75] *See* Executive Order (EO) 12333, United States Intelligence Activities (As amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008), http://www.archives.gov/federal-register/codification/executive-order/12333.html. DoDD 5200.27, Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, applies to non-intelligence capability (IC) collection of information on persons and organizations not affiliated with the DoD. The National Guard has adopted a similar IO rules. Chief National Guard Bureau Manual 2000.01,National Guard Intelligence Activities, 26 November 2012, *available at* http://www.ngbpdc.ngb.army.mil/pubs/CNGBI/CNGBM2000_01_20121126.pdf.

[76] For example, the DoD needs to train using drones for combat proficiency, to give support to civil authorities during crisis situations or to protect the people, facilities and equipment under their charge. Whereas support to civil authorities is not a primary mission of the Services, organizing, training and equipping combat ready forces to be prepared to fight our nation's wars is a statutory duty. 10 U.S.C. § 8013 (2006).

[77] Drones are an Intelligence, Surveillance and Reconnaissance (ISR) platform and, as such, are considered an intelligence capability to which IO rules apply. This article focuses only on IO policies. However, other mission-specific and drone-centric policies are described in greater detail in Col. Dawn M. K. Zoldi, USAF, Protecting Security and Privacy: An Analytical Framework for Airborne Domestic Imagery, forthcoming, 70 AIR FORCE LAW REV. (forthcoming Spring 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379141.

[78] *See* U.S. Intelligence Activities, 73 Fed. Reg. 45, 325 (Aug. 2008), *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-08-04/pdf/E8-17940.pdf.

[79] U.S. DEP'T OF DEF., DIR. 5240.01-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982), *available at* www.dtic.mil/whs/directives/corres/pdf/524001r.pdf (describing how the EO defines intelligence activities as countering foreign threats but DoD and Service directives broaden this definition to "intelligence related activities.").

[80] *See* U.S. Intelligence Activities, 73 Fed. Reg. 45,325, 2 (Aug. 2008), *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-08-04/pdf/E8-17940.pdf.

[81] U.S. DEP'T OF DEF., DIR. 5240.01-R, ¶ C2.3, at 16; U.S. DEP'T OF AIR FORCE, INSTR. 14-104, ¶ A2.3 (explaining how under the EO 12333, USPER "means a United States citizen, an alien known by

contrast to many state legislative proposals, DoD policy clearly states that collection of USPER information by intelligence assets "shall be accomplished by the least intrusive means."[82] DoD policy also contains specific guidance on retaining USPER identifying data. If properly collected, USPER data may be retained. Otherwise, with limited exception, USPER information "acquired incidentally" will be retained only temporarily, for no more than ninety days, unless it indicates involvement in activities that may violate Federal, State, local or foreign law.[83] Once properly collected and retained, USPER information may only be disseminated to limited government recipients for the "performance of a lawful governmental function."[84] Any other dissemination requires approval of the DoD component's legal office, the Department of Justice, and the DoD General Counsel.[85]

Under IO rules, the approval authority to collect USPER information varies depending on which special collection procedure is used.[86] Most activities or

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the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." DoD can only collect on USPER if information is obtained with the individual's consent; is publically available; constitutes foreign intelligence or counter intelligence (FI/CI); concerns potential intelligence sources or agents; is needed to protect intelligence sources or methods; is related to threats to or to protect the physical security of IC-affiliated persons, installations; is needed to protect intelligence and CI methods, sources, activities from disclosure; is required for personnel security or communications security investigations; is obtained during the course of a lawful FI/CI or international narcotics or terrorism investigation; is necessary for administrative purposes; is acquired by overhead reconnaissance not directed at USPER and is incidentally obtained that may indicate involving in activities that may violate Federal, State, local or foreign laws.

[82] U.S. DEP'T OF DEF., DIR. 5240.01-R, ¶ C2.4.1.- C2.4.2 (discussing how collection rules are contained in "Procedure 2" of DoD 5240.1-R. This means, generally, to the "extent feasible" that information should be collected from publically available sources or with the consent of the person concerned. Should publically available information or consent not be feasible or sufficient, other means of obtaining the information include: collection from cooperating sources, through the use of other lawful investigative techniques that do not require a warrant or approval of the Attorney General or by obtaining a judicial warrant).

[83] *Id.* at ¶ C3.3.4. and C3.3.2.4 (discussing how the 90 day period is "solely for the purpose of determining whether that information may be permanently retained under" the DoD procedures. Other exceptions for retaining USPER data are outlined in Procedure 3).

[84] *Id.* ¶ at C4.2 (describing how the "performance of a lawful government function" is also called "Procedure 4." This includes DoD employees and contractors; Federal, State or local government law enforcement (if the information involves activities that may violate the laws for which they are responsible to enforce); intelligence agencies; authorized Federal Government agencies or foreign governments when pursuant to an agreement with them).

[85] *Id.* at ¶ C4.3.

[86] *Id.* at ¶ C5.1.2 (conducting, in non-emergent situations, electronic surveillance, referred to as a "Procedure 5," may only be conducted pursuant to a warrant under the Foreign Intelligence

missions involving a drone outside of DoD-controlled airspace require approval from the Secretary of Defense (SecDef) or his delegee.[87] Conducting surveillance on specifically identified USPER with a drone is prohibited, absent explicit SecDef approval.[88] For training, use of drones outside of DoD-controlled airspace requires notification to the Chairman of the Joint Chiefs of Staff (CJCS).[89] This notice includes a Proper Use Memorandum (PUM) and a Federal Aviation Administration (FAA) Certificate of Authorization (CoA) or license.[90] A license requires sufficient information on the suspected activity to permit an informed judgment of its propriety. Violation or "questionable activity" regarding of any of these stringent directives, policies, orders, or procedures may trigger special notifications, investigations and reporting to the SecDef and to Congress.[91]

Collectively, these mission-centric DoD IO policies allows drones to be used to their full potential while also protecting privacy through useful collection, dissemination, retention and oversight processes. States should consider these policies as templates for legislative action.

IV. A Proposed Model for Drone Legislation

The stated purpose of state drone legislation is critical. A logical starting point for analyzing any drone proposal is to review its purpose. As mentioned,

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Surveillance Act of 1978 (FISA). Only the SecDef, DepSecDef, the Service Secretaries or the Director of the National Security Agency can submit a such a FISA request. DoD 5240.1-R, ¶ C5.1.2.

[87] Memorandum from The Sec'y of Def., U.S. Dep't of Def., subject: Interim Guidance for the Domestic Use of Unmanned Aircraft Systems (28 Sept. 2006); *See also* U.S. Dep't of Def., Instr. 3025.22, The Use of the National Guard for Defense Support of Civil Authorities (26 Jul. 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302522p.pdf.

[88] *Id.* at ¶ 9,6,2.

[89] Memorandum from the Sec'y of Def. at 2.

[90] Air Combat Command's (ACC) Operations Center's Dynamic/Immediate ISR/Non-Traditional ISR Request (DIIR) includes these requirements in an 8-line Request form for U.S. Missions and Off-Installation Training. The ACC 8-line is *available at* https://acc.eim.acc.af.mil/org/A3/A3O/A3O3OP/default.aspx._PUMs are required by regulation and signed by an officer in a position of authority, normally after legal review, who certifies the legitimacy of proposed DI requirements and the appropriateness of use parameters as well as legal and policy compliance. AFI 14-104, ¶ 9.5, Attachment 1 Terms and Attachment 4. Additionally, airborne assets used for training in conjunction with ground forces "off federal real property" also have unique approval authorities and notification procedures based on the risk associated with the event. DoDI 1322.28, Realistic Military Training (RMT) Off Federal Real Property. DoDI 1322.28, *supra*.

[91] *See* DoD 5240-1R and DepSecDef Directive-Type Memorandum (DTM) 08-052 – DoD Guidance for Reporting Questionable Intelligence Activities and Significant or Highly Sensitive Matters (June 17, 2009), *available at* http://www.dtic.mil/whs/directives/corres/pdf/DTM-08-052.pdf, which outlines required information for such QIA reports.

the state drone bills introduced thus far purport to protect citizens' privacy and bolster the right to be free from "unwarranted" surveillance. To do this, states restrict law enforcement drones use for collecting and gathering information. These restrictions are generally prohibitive unless a warrant is obtained or a stated exception applies. These restrictions are reinforced by significant penalties for violations, which may even include criminal liability for law enforcement officers.

Many drone bills contain language that policy makers should pursue. Many however, miss the mark in their stated purpose which will have significant second and third order impacts. They selectively revise Fourth Amendment Constitutional and judicial protections that are already in place for criminal matters. Worse yet, some take a cookie cutter approach in applying these criminal law processes to drone users regardless of whether the information collected is for a law enforcement, intelligence, or legitimate military purpose. Often, the penalty is disproportional to the violation. Finally, many bills fail to adequately focus on the privacy-centric issues of collection, retention, and dissemination. The collective result of these disjointed state policies is that suspects will likely benefit from procedural windfalls; lives and property may be lost for fear of personal liability; and military training and operations will be degraded to the detriment of our greater society. This section of the article elaborates on these flaws and provides guiding principles for future drone legislation.

A. *Principle #1: Apply the Fourth Amendment As Written – Agnostically*

The Fourth Amendment of the U.S. Constitution should be applied as written and as interpreted by the courts. All state bills reviewed apply to government actors, primarily to law enforcement. All the bills, except that from Nebraska, prohibit law enforcement agencies from using drones to gather evidence absent a warrant or court order or in other limited, and generally exigent, circumstances. While on the surface these procedures appear to provide new privacy protections, in reality, they merely reiterate Fourth Amendment, Constitutional and jurisprudential protections that already exist. The troubling point here is that many drone bills selectively choose to use some, but not all, Fourth Amendment principles. Although state legislation can place restrictions on government action in addition to what is constitutionally required, the question here is why? The answer appears to be the mere fact that the tool used for the search is a drone. The result of selectively applying Fourth Amendment principles leads to unnecessary privacy restrictions and decreased safety protections. The solution is to apply the Fourth Amendment

agnostically, just as it is written in the Constitution and applied by the courts. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized…[92]

The Fourth Amendment warrant requirement applies to government action that amounts to a search. The test to determine whether or not a search has occurred (or will occur) can be traced back to the U.S. Supreme Court's decision in *Katz v. United States*: whether the person has a subjective expectation of privacy in the area to be searched and whether society is prepared to deem that expectation reasonable.[93] If the answer to the *Katz* questions are both affirmative, the Fourth Amendment requires the government to obtain a warrant, unless a specifically established and well-delineated exception to the warrant requirement applies.[94] These exceptions include, but are not limited to, exigent circumstances, consent searches, and plain view.[95] The Supreme Court has deemed exigent circumstances exist in the case of imminent danger to life, where a felon or suspect is fleeing and where the destruction of evidence is imminent.[96]

The remedy for violating the Fourth Amendment is the exclusionary rule and its corollary, the fruit of the poisonous tree doctrine.[97] The fruit of the

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[92] U.S. CONST. amend IV. The focus will remain on the U.S. CONST., which is applicable to the federal government, but which has been applied to the states through the Due Process clause of the Fourteenth Amendment through the selective incorporation doctrine.

[93] Katz v. United States, 389 U.S. 347, 351 (1967).

[94] *Id.*

[95] *See* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1920)("[I]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'"); Schmerber v. California, 384 U.S. 757 (1966); consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and for plain view as it relates to aerial surveillance, California v. Ciraolo, 476 U.S. 207, 213 (1986);Florida v. Riley, 488 U.S. 445, 448 (1989).

[96] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967)("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"); Tennessee v. Garner, 471 U.S. 1 (1985)(law enforcement may us non-lethal force to deter a fleeing felon); Roaden v. Kentucky, 413 U.S. 496, 505 (1973)("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation").

[97] The seminal case on the exclusionary rule is Weeks v. United States, 232 U.S. 383 (1914) and

poisonous tree doctrine extends the exclusionary rule to evidence that was illegally obtained.[98] The stated purpose of the exclusionary rule, and its corollary doctrine, is to deter police from engaging in misconduct, or at least conduct that violates our Constitution.

Just as the warrant requirement has exceptions, so too does the exclusionary rule. The good faith exception permits the admission of evidence that law enforcement, in good faith, gathered based on a warrant that is later deemed facially invalid.[99] The rationale being that excluding evidence where there was no law enforcement misconduct would not advance the purpose of the exclusionary rule, which is to deter. Likewise, the inevitable discovery doctrine allows evidence to be admitted if the evidence would have been discovered "inevitably" by other lawful means.[100] The rationale for this doctrine is the same as that for the good faith doctrine. Accordingly, police misconduct is not deterred where the prosecution is in no better position than it would have been absent law enforcement's conduct.

State drone privacy policies should be consistent with well-established privacy laws. The requirement that law enforcement obtain a warrant before searching for evidence where there is a reasonable expectation of privacy is well established. Similarly, permitting law enforcement to search without a warrant in exigent circumstances, where there is consent or where information is in plain view constitutes Black-letter law. However, when it comes to drones, states unevenly apply these well-established Fourth Amendment principles. Case in point, the *least* common exception in any drone bill is an explicit proviso to permit drone use where "judicially recognized exceptions to the warrant requirement" would otherwise apply. Likewise, less than a quarter of states would permit law enforcement to use a drone even when a suspect has consented, despite longstanding Fourth Amendment jurisprudence that consent constitutes an exception to the warrant requirement.

Bills such as those from Arizona, Indiana, Kansas, Nebraska, New Jersey, Pennsylvania, and West Virginia fail to include an imminent danger to life exception and very few states carve out exceptions for search and rescue operations or natural disaster response assessment.[101] Several state bills that

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as applicable to State authorities, Mapp v. Ohio, 367 U.S. 643 (1961). "Fruit of the poisonous tree" doctrine was first applied in Silverthorne Lumber Co., Inc., et al. v. United States, 251 U.S. 358 (1920) (copies of tax records were ruled inadmissible for being derivative of illegally seized evidence).

[98] Silverthorne, 251 U.S. 385; Mapp,367 U.S. 643..

[99] United States v. Leon, 468 U.S. 897 (1984). Generally, facially invalid warrants are ones that lacked sufficient probable cause by mistake, as opposed to law enforcement's misrepresentation.

[100] Nix v. Williams, 467 U.S. 431 (1984).

[101] *See supra* notes 28 & 31.

include an emergency response exception then require law enforcement to obtain a judicial warrant within 48 hours after-the-fact. Presumably all of these states would permit their law enforcement to fly a helicopter with a full motion video capability in the same exact circumstances, and without these procedures.

The seventy-seven state proposals that would require a warrant to view a person walking in an open or public field with a drone erode the plain view doctrine. Specifically with regard to domestic aerial surveillance with manned aircraft flying within navigable airspace, the Supreme Court has held this is tantamount to the plain or public view exception, for which a search warrant is not required.[102] This same logic would, and should, apply to unmanned aircraft. The fact that states like Arkansas and eight like-minded others felt the need to include a public land exception speaks volumes about the extent to which legislators have selectively chosen to utilize long-held Fourth Amendment principles.[103] In short, the full panoply of Fourth Amendment requirements should apply to drone use for law enforcement purposes.

Admittedly, drones are an emerging technology and there may be special considerations in their use, as the Supreme Court alluded to in the *United States v. Jones* and *Kyllo v. United States* decisions.[104] Potential reasonableness factors that emerge from these cases include: review of exact location of the search, such as a home, open spaces, and public places; the sophistication of the technology used; whether commonly available or pre-technology; the length of time an individual is kept under surveillance or duration of the activity; pervasiveness in the form of the breadth of data collected through surveillance; as well as society's conception of privacy and fairness.[105] This focus on time, place, and manner is much a more constructive path for drone legislators than whole-cloth or piecemeal revision of the Fourth Amendment.

State restrictions that protect non-public places from law enforcement's intrusion on private areas, such as the home and the curtilage surrounding it,

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[102] *See* California v. Ciraolo, 476 U.S. 207, 213 (1986); Florida v. Riley, 488 U.S. 445, 448 (1989).

[103] *See* sources cited *supra* note 43 (regarding public land use exceptions).

[104] Kyllo v. United States, 533 U.S. 27, 29-30 (2001) (Government agents' use of thermal imaging while standing outside a house to infer what is going on inside the house constituted a search; technology not in "general public use" enabled the government to gather information about activities inside the home that would not have otherwise been obtainable except by entering the home.); United States v. Jones, 132 S.Ct. 945 (2012) (Government agents placed a global positioning system (GPS) on a car and tracked the car's movements over a period of a month, constituting an unreasonable search. Justice Alito concurred but said the reasonable expectation was based on the fact that that government used "pre-technology" – a technology that the government had, but that others did not.)

[105] Richard A. Thompson III, Legis. Att'y, Cong. Research Services Rep., Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses (Sept. 6, 2012).

are consistent with the Fourth Amendment's protections, and frankly, are expected.[106] The 48-hour operational execution windows arguably constitute reasonable duration limitations.[107] The manner of clearly marking the drone as required by both California and Michigan makes sense if the aircraft is not a classified test prototype.[108] Oregon, for example, has taken an approach to drone legislation that should be emulated. In Oregon the legislature has directed its agencies to adopt policies that focus on drone use. These policies are akin to DoD policies that establish training requirements for operators, criteria for drone use, descriptions of the areas in which drones will be used, and procedures for informing the public of these policies.[109] Likewise, as will be discussed, the few States that focus on regulating the manner of collection, retention and dissemination, are on the right track. On the other hand, those that distort the Fourth Amendment under the banner of protecting personal liberties erodes the very liberties they are intended to be preserve.

B. *Principle #2: Take a Nuanced Approach to Operational Purpose*

States must consider the impact on law enforcement, the intelligence community and the DoD before passing drone legislation. A nuanced approach would not just differentiate between different actors, it would both permit drone use across the full spectrum of operations *and* protect personal privacy. Before discussing collection, dissemination, and retention regimes, it is important to appreciate that different agencies have different purposes for collecting information, whether using a drone or not. Law enforcement,

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[106] *See* sources cited *supra* note 51 (detailing a list of place restrictions).

[107] S.B. 783, 27th Leg., Reg. Sess., § 1, ¶ (3)(B)(Haw. 2013) (allowing the ability to receive a judicial order to operate drone for "no period greater than 48 hours" and within 30 days of issuance); S.B. 1587, 2013 Leg., 98th Sess., § 15(2)-(3) (Ill. 2013) (describing that a search warrant "limited to period of 45 days" and renewable; emergency operations limited to 48 hours); S.P. 72, 126th Leg., 1st Reg. Sess. (Me. 2013) (amending § 1, 25 MRSA Pt. 12, § 4502.2. E (court order…"may not allow operation for a period greater than 48 hours"…but not to exceed 30 days)); H.B. 4455, 97th Leg., Reg. Sess., § 5(d) (Mich. 2013) (enforcing court orders valid for 48 hours, with possibility of extension up to 30 days); H.B. 312, 2013 Gen. Assemb., Reg. Sess., § 2(3)(c)(b) (N.C. 2013) ("no later than 48 hours" from the date drone was used); H.B. 1771, 63rd Leg., Reg. Sess., § 6.(4) (Wash. 2013) ("Warrants shall not be issued for a [surveillance] period greater than 48 hours…for no longer than 30 days ").

[108] H.B. 4455, 97th Leg., Reg. Sess., § 3(5) (Mich. 2013); S.B. 15, 2013 Leg., Reg. Sess. (Cal. 2013) (amending Penal Code § 14356).

[109] H.B. 2710, 77th Leg., Reg. Sess., § 1.(7)(a)-(d) (Or. 2013) (showing how similarly, Va. H.B. 2012, § 1.1 requires the Va. Department of Criminal Justice and Office of AG to develop "model protocols for use of UAS by LEA and report findings to the Governor and General Assembly" by November 1, 2013).

intelligence, and military training operations are not the same. A one-size-fits-all approach should be eschewed in favor of a more nuanced one.

The intelligence community (IC) and law enforcement have different focuses. Law enforcement focuses on criminal evidence-gathering in furtherance of punishing past acts; the purpose of intelligence collection is to prevent future ones.[110] The IC needs "to be able to do more than connect the dots when we happen to find them; we need to be able to find the right dots in the first place."[111] It is for this reason that, while the Fourth Amendment still applies, the IC, including the DoD IC, has its own legal framework that includes and IO policies discussed above. To the extent that drone proposals like those in California, Hawaii, Missouri, Rhode Island, Washington and others apply to all persons or U.S. officers, they fail to distinguish between law enforcement and intelligence paradigms.[112] This matters. For example, in California, Senate Bill 15, which is currently under advisement, states "an unmanned aircraft system may not be equipped with a weapon." Doing so is punishable by a fine and imprisonment.[113] The proposal contains no military exemption, yet California is replete with military ranges, bases and test sites for the Active, Reserve and Guard components of virtually all the military Services.[114]

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[110] William Lietzau, Deputy Assistant U.S. Sec'y of Def. for Detainee Policy, Twenty-First Century Detention for Terrorists (Feb. 18, 2011), *available at* http://www.law.harvard.edu/news/2011/02/18_understanding-detention-predicting-prosecutions.html.

[111] Robert S. Litt, ODNI Gen. Counsel, Office of the Dir. Of Nat'l Intelligence, Privacy, Technology and National Security: An Overview of Intelligence Collection (Jul. 19, 2013), *available at* http://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/896-privacy,-technology-and-national-security-an-overview-of-intelligence-collection.

[112] *See supra* note 11 (citing drone proposals).

[113] S.B. 15, § 14351 (Cal. 2013).

[114] *See* Thomas J. McLaughlin, Mary P. Gaston, and Jared D. Hager, Navigating the Nation's Waterways and Airways: Maritime Lessons for Federal Preemption Airworthiness Standards, 23 THE AIR & SPACE LAWYER 2 (2010), *available at* http://www.perkinscoie.com/files/upload/10_27_ABAArticle.pdf; *See also* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 639, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) and Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S.Ct. 950, 88 L.Ed. 1283 (1944) (Jackson, J., concurring). Some may argue that State drone laws are pre-empted by federal law. The topic of federal pre-emption of State drone law's merits its own article and is beyond the scope of this one. Even assuming pre-emption applies, as a practical matter, a federal officer would have to be summoned into court, request DoJ substitution or representation, and then litigates pre-emption. The better course of action would be for States to exclude federal officers from their laws from the inception, especially the U.S. military. Apparently, numerous States believe they can legislate federal and military actors' drone use. However, suffice it to say that a plausible argument for preemption would be that the Federal Aviation Act (FAA) of 1958, its supplements, including the 2012 FAA Modernization and Reform Act, when combined with

Whether or not state drone laws directly or indirectly apply to the DoD, most state proposals will nevertheless impact military training and operations. By way of example, Air Force Instruction (AFI) 14-104, *Oversight of Intelligence Activities*, requires Air Force intelligence components to report "incidentally acquired information… reasonably believed to be a violation of law," whether Federal, State, local or foreign, to the appropriate civilian law enforcement agency, through the Air Force Office of Special Investigations (AFOSI).[115] The AFI also requires reporting of incidentally acquired information relating to "potential threats to life or property (whether DoD personnel, installations or activities, or civilian lives or property)…" to "appropriate authorities."[116] It is not difficult to imagine a case in which a United Sates Air Force (USAF) drone incidentally acquires information about threats or the commission of a crime. In a State that prohibits local law enforcement agencies from receiving information or evidence acquired by a drone, such as MI House Bill 4455, the service would be forced to violate its own regulations.[117] More disturbingly, lawfully acquired information relating to a threat or crime might go unheeded by State agencies in a position to take action.

These are but a few reasons why a military exemption is critical. Yet, with one notable exception, the language contained in the bills that thus far address the topic do not go far enough. By focusing on the National Guard, the Washington and Virginia bills neglect to address the Total Force as defined by Secretary of Defense, James Schlesinger,[118] including the Active Duty and

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comprehensive FAA regulations found at 14 CFR illustrate Congress's intent that the FAA occupy the entire field of aircraft safety.

[115] U.S. DEP'T OF AIR FORCE, INSTR. 14-104, OVERSIGHT OF INTELLIGENCE ACTIVITIES, ¶ 11.12.1, 11.12.2.2 (Apr. 23, 2012), *available at* http://static.e-publishing.af.mil/production/1/af_a2/publication/afi14-104.pdf.

[116] *Id.* at ¶ 12.

[117] H.B. 4455, 97th Leg., Reg. Sess., § 3(3) (Mich. 2013) ("Except as provided in section 5, a law enforcement agency of this state or a political subdivision of this state shall not disclose or receive information acquired through the operation of an unmanned aerial vehicle." Section 5 of the bill contains exceptions based upon consent, imminent threat to life, search warrant, court order or for non-evidentiary or non-intelligence purposes. It is difficult to imagine why a law enforcement agency would want to receive drone information that has no evidentiary or intelligence value).

[118] Sec'y. of Def. James Schlesinger declared the Total Force concept as policy in 1973, which included the comparable structuring of units, equal training and evaluation standards for active and reserve forces, and an integrated approach to equipping, supporting, and exercising all units. See AIR FORCE RESERVE COMMAND HISTORY, 1969-1989, *available at* http://www.afrc.af.mil/library/history/1969-1989/index.asp. Lt. Col. USAF, Richard Toner, A Total Force Concept: An Air Force View, AIR U. REV. (June 1, 2004), *available at* http://www.airpower.au.af.mil/airchronicles/aureview/1972/nov-dec/toner.html.

Reserve components.[119] New Jersey's "disorderly persons offense" for the purchase, ownership or possession of a drone exempts the Total Force "while on duty or traveling to or from an authorized place of duty;" but military members do not "possess or own drones," they operate them.[120] The Oklahoma bill, which also applies to the Total Force, protects military equities by specifically allowing armed drones, over-flight of private land between military installations and testing and training over public land.[121] It also permits the military to test and train with weaponized drones. States that prohibit this create a huge barrier for statutorily mandated military requirements.[122] Even the Oklahoma bill, which is the most permissive towards military operations, precludes drone use across the potential full range of DoD missions, including DSCA, SAR, support to civil law enforcement, and force protection, to name a few.

Oregon's approach strikes the right balance with regard to the DoD and is worth emulating as regards to its military exemption. It explicitly exempts the "United States Armed Forces," defined as including: the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; Reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard of the United States; and the National Guard of the United States and the Oregon National Guard.[123] By exempting the Total Force from its drone bill provisions, Oregon is one of the few states that permits critical military training to occur unimpeded and bolsters readiness for combat and other missions. Conversely, the "one-size-fits-all" state approach which fails distinguish between drone users has unintended consequences for our national security by impeding critical training and operations.

C. *Principle #3: Renew Focus on Collection, Dissemination and Retention*

States should also take a more privacy-centric approach to drone legislation that focuses on how users collect information, with who they may share it and for how long they can keep it. Some state bills approach privacy protection through collection, dissemination, retention and oversight rules similar to, but distinguishable from, DoD IO policies, like those which require drone operators

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[119] *Id.*
[120] S.B. 3157, § 2.a., Gen. Assemb. (N.J. 2012), ¶ 5.
[121] H.B. 1556, Section 5.C; § 4.A, 54th Leg., 1st Sess. (Okla. 2013).
[122] *See* footnote 45, *supra*, for lethal and non-lethal weapons restrictions. 10 U.S.C. § 8013 (b) (2010) is the "organize, train and equip" authority of the Service Secretaries and charges them to prepare combat-ready forces to aid in our nation's defense.
[123] H.B. 2710, § 16, 77th Sess., Reg. Sess. (Or. 2013).

to focus on the target of the collection and avoid or minimize data collection on other individuals, homes, or areas.[124] This is a positive development and should be further pursued. Like the DoD, some also address retention by requiring the deletion of information improperly collected, or collected on non-targets.[125] For a law enforcement paradigm, this makes sense unless incidentally, within the legitimate scope of the collection, law enforcement captures images of another crime in progress. Envision a situation where law enforcement has a drone warrant to image a drug dealer but then cannot use the same video feed against the drug buyer. Without rehashing the Fourth Amendment discussion above, requiring the deletion of this information does more societal harm than good.

The DoD IO policy's incidental collection rules are slightly broader and allow retaining images of criminal acts captured consistent with official records disposition schedules.[126] USPER information acquired incidentally can also be retained for up to ninety days to determine if there is a legitimate purpose to keep it under the IO rules.[127] Perhaps for drone legislation, the line to retain incidental information lies somewhere more than 24 hours but less than 90 days. Retention criteria for incidentally acquired information should also include criminal acts.[128] California's provisions that allow images to be kept for "training purposes" is a necessity for the military and worth repeating.[129]

Similarly, most drone bills prohibit dissemination of information gathered on non-targets. The DoD IO dissemination policy, that USPER information may be disseminated to limited government recipients for the "performance of a lawful governmental function" is a useful approach.[130] Requiring extensive approvals from high-level legal counsel for any other dissemination is a practice that can be duplicated in equivalent State legal counsel offices.[131] In addition, many bills prohibit use of facial recognition or other biometric matching

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[124] *See* footnotes 48-50, *supra,* for state collection restrictions.
[125] *See* footnotes 54-56, *supra* for retention rules.
[126] In the Air Force, the applicable instruction is AFI 33-364, Records Disposition – Procedures and Responsibilities (Dec. 22, 2006), *available at* http://www.e-publishing.af.mil/index.asp by reference to its number.
[127] DoD 5240.1-R, ¶ C3.3.4. One legitimate reason to retain incidental information would be where it indicates involvement in activities that may violate federal, state, local, or foreign law. Other exceptions for retaining USPER data are outlined in Procedure 3.
[128] S.B. 1587, § 25. (Ill. 2013), permits a supervisor to disclose to another government agency information collected if there is reasonable suspicion it contains evidence of a crime or is relevant to ongoing investigation or pending criminal trial (and thus retain at least for this purpose).
[129] H.B. 1327, 2013 Assemb., Reg. Sess. (Ca. 2012).
[130] DoD 5240.1-R, ¶ C4.2., also called "Procedure 4."
[131] *Id.* ¶ C4.3.

technology on non-target information.[132] This may be understandable in a law enforcement context, but in an intelligence environment, this is unduly restrictive. The same can be said for dissemination, in the form of notice, to the subject of the drone monitoring, which is workable for law enforcement, but not for intelligence professionals.[133]

Documentation, oversight and reporting requirements is a given in this arena. It applies in a DoD context, to the IC and unquestionably should apply to law enforcement use of drones in the States.[134] The public and media expect transparency. States that require public notice of drone operations, images, and government agency drone reports filed are likely ahead of the power curve on that issue.[135] Exceptions must be made for sensitive or classified intelligence and military operations.

D. *Principle #4: Mold the Remedy to the Violation*

States must also rethink the remedies prescribe for drone bill violations. In addition to selectively using particular exceptions to the warrant requirement, many proposed drone bills compound this error by including non-compliance ramifications. Non-compliance ramifications often fail to distinguish between government and private actors, are redundant of existing law or are otherwise draconian in effect.

As previously mentioned, the remedy for law enforcement's violation of the Fourth Amendment search and seizure provision is to exclude the evidence, or information derived from it, at a criminal trial.[136] These provisions are problematic only insofar as the parent bill fails to include the full spectrum of Fourth Amendment exceptions, like the good faith and inevitable discovery doctrinal exceptions to the exclusionary rule. For example, the Alabama bill only contains allows for drone use in these circumstances: when a warrant has been obtained; a terrorist attack is imminent; there is danger to life; or to pursue a fleeing suspect. Thus, in a case where law enforcement obtains consent and uses a drone, an Alabama court would be required, under the bill, to exclude it.[137] Likewise, if no enumerated drone bill exception applies, but the Alabama State Police would have inevitably discovered the information by means other than a drone, the proposed bill would also exclude its admission. This type of separation of the remedy from its historical purpose, to deter law

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[132] *See supra* note 51.
[133] For notice provisions see *supra* note 53.
[134] *See supra* note 60 (discussing oversight and reporting requirements).
[135] *See supra* note 58-60 (discussing recordkeeping and public reporting requirements).
[136] *See supra* note 64 (discussing criminal exclusionary rule citations).
[137] S.B. 317, 148624-2, 2013 Reg. Sess. (Ala. 2013).

enforcement misconduct, creates an unnecessary windfall for criminal suspects. The windfall of disconnected remedy and purpose is not just limited to criminal suspects. Some states preclude admission of drone information from civil and administrative hearings.[138] Generally speaking, evidence obtained in violation of the Fourth Amendment's warrant requirements does not preclude admission in civil cases.[139] This is a basic due process tenant. In criminal cases, where life and liberty are at risk, the stakes are higher and protections greater than in civil cases – or even lower on the sliding scale, administrative cases—that typically involve property.

Several state drone bills also create civil and criminal liability against law enforcement agencies or individual officers for failing to abide by their requirements. These provisions may very well have a chilling effect on public safety. Imagine the decision making process of a Missouri police officer faced with the choice of flying his unmanned drone or a manned helicopter over an evacuated housing area in the direct path of a raging wildfire. To obtain better situational awareness of the incident, he either risks the life of his pilot, flies a drone in the face of being dragged into civilian court for wrongfully imaging private property without consent or he does nothing.[140] A less enviable situation would be that of the state or, as written, federal law enforcement agent in Georgia who, to save a life, uses a drone without a warrant and subsequently gets convicted of a misdemeanor.[141]

This latter point highlights a significant flaw in the majority of drone bills reviewed. They tend to focus on government actors. However, government actors are already bound by the constraints of the Constitution. Private actors are not. Only California, Hawaii, Rhode Island, Texas and Washington extend their bills to persons or individuals.[142] Even these conflate the duties imposed on government and private actors using drones. For example, Hawaii purports make it unlawful for an "individual" to operate a drone absent consent or pursuant to a warrant or order, yet the remainder of the bill's requirements applies to, "agents of the state or any political subdivision thereof."[143] Only California Senate Bill No. 15 clearly delineates between governmental and

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[138] *See supra* note 69.

[139] U.S. v. Janis, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976)(holding that a determination of whether the exclusionary rule should be applied in a civil proceeding involved weighing the deterrent effect of application of the rule against the societal costs of exclusion. Up to that point, the Court had never applied the exclusionary rule to exclude evidence from a civil proceeding, federal or state).

[140] H.B. 46 §§ 305.641.1-.3, 97th Gen. Assemb., First Reg. Sess. (Mo. 2013).

[141] H.B. 560, § 2(b)-(c), 68th Reg. Sess. (Ga. 2013) (any LEA of the US or GA who uses a drone without a warrant, or assists them, "shall be guilty of a misdemeanor").

[142] *See supra* note 17.

[143] S.B. 783, § 2563B-2(b), 27th Leg., Reg. Sess. (Haw. 2013).

private drone users.[144] As mentioned, of all the bills surveyed, only the New Hampshire bill focuses exclusively on private actors.

V. CONCLUSION

A review of state drone bills, current DoD domestic IO policies and existing Constitutional principles highlighted that the focus of legislative activity remains on government actors, with an emphasis on law enforcement. There is with little regard for the second and third order effects of others with significant equities in domestic drone use, particularly the U.S. Armed Forces. The way ahead for future law and policy is simple: differentiate between users; focus on the purpose of the collection; and apply already existing relevant principles. In the case of law enforcement drone collection, apply the full range of Fourth Amendment protections and remedies. Furthermore, it is critical that state legislatures propose nuanced language that appropriately distinguishes law enforcement, the intelligence community, the military and the private sector. The ground rules for each type of actor should be stated unambiguously. The exemptions for statutorily mandated military training and operations should be clearly stated and free of the threat of litigation. The intelligence community and the DoD have tried and true mission-centric intelligence oversight policies that allow drones to be used to their full potential and also protect privacy through rules focused on collection, dissemination, retention and oversight. States should emulate them. Getting drone legislation right is critical because failing to do so could have significant consequences that could negatively impact on our lives property, liberty and our national security.

[144] S.B. No. 15, 2013 Leg., Reg. Sess. (Cal. 2013) (discussing the offense of "Illegal Use of Unmanned Vehicle or Aircraft to Capture Image" in terms of any "person" who commits the offense).

ARTICLE

Biodefense and Constitutional Constraints

Laura K. Donohue[*]

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I. INTRODUCTION

The United States and United Kingdom both frame the threat posed by pandemic disease and biological weapons as a national security concern. The United States' most recent *National Security Strategy*, for instance, released in May 2010, highlights the dangers posed by weapons of mass destruction, pandemic disease, natural disasters, terrorism, transnational crime, and large-scale cyber attacks.[1] The United Kingdom's first *National Security Strategy*, released in March 2008, similarly recognizes that the Cold War threat has been replaced by concerns about "international terrorism, weapons of mass destruction, conflicts and failed states, pandemics, and trans-national crime."[2] The Cabinet Office explains,

> Over recent decades, our view of national security has broadened to include threats to individual citizens and to our way of life, as well as to the integrity and interests of the state. That is why this strategy deals with trans-national crime, pandemics and flooding – not part of the traditional idea of national

[1] THE WHITE HOUSE, UNITED STATES NATIONAL SECURITY STRATEGY, 18 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.
[2] CABINET OFFICE, THE NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM: SECURITY IN AN INTERDEPENDENT WORLD, 2008, Cm 7291, at 3, [hereinafter UKNSS2008] *available at* http://www.official-documents.gov.uk/document/cm72/7291/7291.pdf.

> security, but clearly challenges that can affect large numbers of our citizens, and which demand some of the same responses as more traditional security threats, including terrorism.[3]

In both countries, moreover, identifying and responding to the threat posed by, on the one hand, naturally occurring disease and, on the other, man-made biological agents or weapons, are linked. The reasons for this are straightforward. According to the UK, substantial loss of life may accompany any outbreak of disease—regardless of its origin.[4] The scale and speed of the risk each threat poses could result in equally devastating consequences.

> [O]ur approach to them – to assess and monitor the risks, to learn from experiences at home and overseas, to develop capabilities to minimise the risks and the potential harm, and to absorb whatever harm does occur and then return to normality as soon as possible – is similar to our approach to other national security challenges, including terrorism.[5]

Institutions used in response thus provide a dual function. In 2000, the Royal Society explained, "Detection of BW attacks should be based on the existing civil arrangements in the United Kingdom for dealing with natural outbreaks."[6]

Statutes and policy documents in the United States similarly link disease and weapons in terms of institutions, authorities, and approach. The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, for example, focuses on preparedness for public health emergencies *and* biological terrorism.[7] Homeland Security Presidential Directive 10 claims that the traditional public health approach is no longer sufficient. Health care providers and public health officials are among the first lines of defense to counter the biological weapons threat.[8] A new biodefense program thus combines (and strengthens the state's ability to respond to) natural disease and biological

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[3] *Id.* at 3–4.

[4] *Id.* at 15 ("We estimate that a pandemic could cause fatalities in the United Kingdom in the range 50,000 to 750,000, although both the timing and the impact are impossible to predict exactly.").

[5] *Id.*

[6] THE ROYAL SOC'Y, MEASURES FOR CONTROLLING THE THREAT FROM BIOLOGICAL WEAPONS, vii (2000), [hereinafter MCTBW] *available a t*http://royalsociety.org/Measures-for-controlling-the-threat-from-biological-weapons-full-report/.

[7] Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 294 [hereinafter PHSBPRA] (codified in scattered sections of 7 U.S.C., 18 U.S.C., 21 U.S.C., 29 U.S.C., 38 U.S.C., 42 U.S.C., and 47 U.S.C.).

[8] Press Release, Office of the Press Secretary, Homeland Security Presidential Directive 10: Biodefense for the 21st century (Apr. 28, 2004) [hereinafter HSPD 10] *available at* http://www.fas.org/irp/offdocs/nspd/hspd-10.html.

weapons.[9] National Security Presidential Directive 33, released in April 2004, similarly focuses on "21st Century Biodefense." Included in the concept are improvements to capabilities "not only against threats posed by terrorists, but for medical response in the wake of natural catastrophes and in response to naturally-occurring biological hazards such as SARS."[10] Myriad further examples present themselves.[11]

Where the United Kingdom and the United States part ways is in what they see as the role of the central government and most effective response to the twin threats. U.S. federal law and policy anticipates the federal imposition of quarantine and isolation.[12] The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, for instance, streamlines and clarifies quarantine provisions.[13] In 2003 the Department of Health and Human Services amended its regulations to incorporate any quarantinable disease

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[9] *Id.*

[10] Press Release, Office of the Press Secretary, Fact Sheet: President Bush Signs Biodefense for the 21st Century (Apr. 28, 2004), *available at* http://www.fas.org/irp/offdocs/nspd/biodef.html.

[11] *See, e.g.,* DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK, at 74 (2008), *available at* http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf (noting that both the National Institutes of Health and the National Biodefense Analysis and Countermeasure Center at the Department of Homeland Security will focus on biological weapons as well as pandemic disease); HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 1, 10, 16, 27, *available at* http://www.hsdl.org/?view&did=479633 (bundling biological weapons and pandemic disease); Press Release, Office of the Press Secretary, Press Briefing on National Strategy for Pandemic Influenza Implementation Plan One Year Summary (Jul. 17, 2007), *available at* merlin.ndu.edu/archivepdf/hls/WH/20070717-13.pdf (remarks of Dr. Jeff Runge, DHS Chief Medical Officer on Pandemic Preparedness) (quoting "we at DHS are focused on multi-use institutions that we can put into place for whatever emergencies arise.").

[12] The federal government also has provided the lead to state governments in updating and strengthening their laws governing quarantine and isolation. The President's 2002 National Strategy for Homeland Security listed review of quarantine authority as a priority for state governments. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 49–50 (2002), *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf. The CDC, in turn, funded the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities to develop a Model State Emergency Health Powers Act. Model State Emergency Health Powers Act (Ctr. for Law & the Pub.'s Health at Georgetown & Johns Hopkins Univs., Draft for Discussion 2001), *available at* http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf. By 2006 the Act had been introduced in whole or part via 171 bills or resolutions in forty-four (44) states, the District of Columbia, and the Northern Mariannas Islands. Ctr. For Law & the Pub.'s Health,, Legislative Status Update (Jul. 15, 2006), *available at* http://www.publichealthlaw.net/ModelLaws/MSEHPA.php.

[13] PHSBPRA, *supra* note 7, § 264 (making quarantine applicable at an earlier stage by replacing language that previously required that the disease be "in a communicable stage" with a measure allowing quarantine "in a qualifying stage").

listed by Executive Order, bypassing rulemaking requirements.[14] CDC's proposed regulations establish new periods of quarantine and the procedure to be followed in the event of its implementation.[15] The agency explains:

> Quarantine of exposed persons may be the best initial way to prevent the uncontrolled spread of highly dangerous biologic agents such as smallpox, plague, and Ebola fever….Quarantine may be particularly important if a biologic agent has been rendered contagious, drug-resistant, or vaccine-resistant through bioengineering, making other disease control measures less effective.[16]

CDC, accordingly, expanded the number of domestic quarantine stations.[17]

Quarantine similarly lies at the core of the U.S. Pandemic Influenza Strategy Implementation Plan, which was issued by HHS as a blueprint for how agencies will respond in the event that Avian Influenza becomes human-to-human transferrable—despite the document's admission that influenza is one disease for which quarantine is likely to be particularly ineffective. Nevertheless, it refers to quarantine 138 times, and in a manner of consequence, detailing the use of quarantine both at ports of entry and in the execution of geographic quarantine (*cordon sanitaire*).[18] The criteria adopted for determining whom to quarantine is broad: anyone showing signs or symptoms of pandemic influenza, or who may have been exposed to influenza within 10 months.[19] The framework calls for the use of local law enforcement to execute quarantine.[20] Where states may be unable either to implement quarantine or

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[14] 42 C.F.R. §§ 70.6, 71.3 (2003). The White House expanded the list of quarantinable diseases to include SARS (April 2003) and pandemic influenza (April 2005). Exec. Order No. 13,295, 68 Fed. Reg. 17, 255 (Apr. 9, 2003); Exec. Order No. 13,375,70 Fed. Reg. 17,299 (Apr. 5, 2005).

[15] Control of Communicable Diseases, 70 Fed. Reg. 71,892-71,948 (Nov. 30, 2005) (to be codified at 42 C.F.R. Pt. 70 and 71).

[16] *Id.* at 71,892.

[17] CDC's Airport Quarantine Stations Designed to Halt Disease Epidemics, 12 Airport Security Report (2005). *See also* COMM. ON MEASURES TO ENHANCE THE EFFECTIVENESS OF THE CDC QUARANTINE STATION EXPANSION PLAN FOR U.S. PORTS OF ENTRY, INST. OF MEDICINE OF THE NAT'L ACADS., QUARANTINE STATIONS AT PORTS OF ENTRY PROTECTING THE PUBLIC'S HEALTH, *available at* *h*ttp://www.nap.edu/catalog/11435.html (calling for a stronger quarantine regime at ports of entry).

[18] U.S. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (May 2006), *available at* http://www.whitehouse.gov/homeland/nspi_implementation.pdf [hereinafter NSPIIP]. *See also* U.S. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA 7 (recommending the isolation of ill and the quarantine of non-ill passengers); *Id.* at 77–78 (recommending that inbound flights be funneled to facilitate the mass quarantine of travelers); *Id.* at 159 (discussing domestic travel restrictions); *Id.* at 108 (anticipating the use of cordon sanitaire).

[19] *Id.* at 91.

[20] *Id.* at 12.

to maintain law and order, the government will fall back upon federal law enforcement and the military.[21] Even if unsuccessful, "delaying the spread of the disease could provide the Federal Government with valuable time to activate the domestic response."[22]

The influenza framework introduces a range of initiatives that demonstrate how seriously quarantine is considered a potential response.[23] It builds the execution of quarantine into incident command.[24] It directs state, local, and tribal entities to prepare to "address the implementation and enforcement of isolation and quarantine."[25] Within 72 hours of the initial outbreak, HHS will issue guidance on geographic quarantine.[26] HHS, along with DHS, DOD, and mathematical modelers, are to complete research on strategies for home quarantine.[27] The plan considers the impact of *cordon sanitaire*, discussing the interruption of transportation, distribution of food and medicine, and other essential services.[28] Consular communication is taken into account.[29] Private industry and schools are to consider mitigation strategies to counter prolonged absences.[30] The document goes so far as to address the mental health concerns that may arise in the event that quarantine is used.[31] Such provisions, considered at such length in regard to influenza, are even more relevant for other types of biological threats, particularly where highly virulent or no known vaccination may exist.[32]

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[21] *Id.* at 13, 153.

[22] *Id.* at 108. The decision whether or not to cordon off certain geographic areas would depend on a number of variables, such as the area and population affected, whether implementation is feasible, the likely success of other interventions, the ability of authorities to provide for the needs of the quarantined population, and other geopolitical considerations. *Id.* at 109.

[23] *See, e.g.,* NSPIIP, *supra* note 18, at 47, 131 (listing school closures, snow days, and quarantines as examples of social distancing measures). *See also, Id.* at 100, 37 (advocating social distancing measures and noting that the immediate response for overseas outbreaks will be to activate domestic quarantine stations and to begin quarantining passengers).

[24] *Id.* at 155.

[25] *Id.* at 130. HHS, coordinating with DHS, DOT, Education, DOC, DOD, and Treasury, is to give State, local, tribal entities guidance for execution of quarantine during emergency. *Id.*,

[26] *Id.* at 131.

[27] *Id.*

[28] *Id.* at 80.

[29] *Id.* at 52–53.

[30] *Id.* at Appendix A, at 183, 185, 188, 192.

[31] *Id.* at 111.

[32] *Id.* at 109. Notably, the Department of Homeland Security—not the Department of Health and Human Services—has taken a leading role. See, e.g., Homeland Security Act of 2002 § 421, Pub.L. 107–296, 116 Stat. 2135, 2182 (amending 6 U.S.C. § 231 to transfer agricultural, entry inspection functions previously given to Secretary of Agriculture under Animal Health Protection Act, to DHS; these provisions can be used to stop humans as well.); *See also* Memorandum of Understanding Between Dep't of Health and Human Serv. and the Dep't of

In contrast to the United States, the United Kingdom, from the perspective of both law and policy, does *not* appear to consider the national imposition of quarantine to be a viable option. Government Ministers, although recently granted more legal authority, still do not have the same breadth of power to implement quarantine as that provided to their U.S. counterparts.

The United Kingdom's legal stance is grounded in history: more than a century ago, Great Britain removed explicit quarantine power from its public health laws, as the 1896 Public Health Act repealed the Quarantine Act of 1825.[33] The statute remained largely unchanged until the Public Health (Control of Disease) Act of 1984 and the Public Health (Infectious Disease) Regulations of 1988.[34] Updated by the Health and Social Care Act of 2008, the statute gives the Secretary the authority to place international travelers in quarantine. But it prevents the national government from taking local action. Instead, the provisions require that a Justice of the Peace, on application from a Local Authority, sign any Order requiring an individual to submit to medical examination, be removed to or detained in a hospital or other suitable place, or be kept in isolation or quarantine.[35] The decision ultimately rests with local officials.[36]

It is not just British statutes that depart from the American model: as a matter of policy, despite considerable concern in the United Kingdom about

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Homeland Sec., (Oct. 19, 2005) (signed by HHS and DHS to coordinate border screening activities/information for sharing contact tracing during outbreak of communicable disease (preliminary to quarantine provisions)), *available at* http://www.aclu.org/pdfs/privacy/hhs_dhs_mou.pdf. It could be argued that the contemporary emphasis in the United States on quarantine is simply an effort to clarify quarantine authorities – that quarantine is, essentially, a relic of the past and that, perhaps even as evidenced by the recent Avian influenza outbreak, the government has no intention of actually imposing widespread measures. I am not convinced by this argument. It is irrelevant to claim that such powers will never be used. During high-level exercises, frequent recourse to quarantine is made: in the TOPOFF exercises in Denver, Colorado, for instance, CDC advised for the entire state to be cordoned off "to limit [the] further spread of plague throughout the United States and other countries. Colorado officials express[ed] concern about their ability to get food and supplies into the state."; Thomas V. Inglesby et al., A Plague on Your City: Observations from TOPOFF 32 CLINICAL INFECTIOUS DISEASES 436, 438 (2001). The fact that such powers are on the books, moreover, and expanding, justifies taking a closer look at these authorities. And even if the current office holders do not intend to use them (although this could be questioned), different individuals will eventually come to office, in which case such powers will be available.

[33] 1896, 59 & 60 Vict. c. 19, [hereinafter Public Health Act 1896] (repealing 1828, 6 Geo. IV, c. 78).

[34] Health (Control of Disease) Act, 1984, c.22 (U.K.); Public Health (Infectious Disease) Regulations, 1988, S.I. 1546 (U.K.).

[35] Health and Social Care Act, 2008, c. 14, § 45(G) (U.K).

[36] *But see* Civil Contingencies Act, 2004, c. 36, § 19(1) (U.K.).

pandemic disease and biological agents, for neither threat is quarantine looked to as a first line of defense. In 1999, for instance, the Ministry of Defence issued a paper, *Defending Against the Threat from Biological and Chemical Weapons*.[37] It highlighted specific steps to respond to biological weapons threats, without once discussing the potential use of quarantine or isolation.[38] Three years later, the Secretary of State for Foreign and Commonwealth Affairs presented a report to Parliament on how to counter the threat from biological weapons. The document focused, *inter alia*, on strengthening the Biological and Toxin Weapons Convention and creating a new Convention to criminalize the use of biological weapons.[39] Despite the UK's international treaty obligations, it did not consider quarantine.[40]

Even for influenza which, according to the UK's National Security Strategy, "could cause fatalities in the United Kingdom in the range 50,000 to 750,000"[41], ministers explicitly reject quarantine. "Mandatory quarantine and curfews," the Department of Health writes, "are generally not considered necessary and are not currently covered by public health legislation."[42] The government explains,

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[37] MINISTRY OF DEFENSE, DEFENDING AGAINST THE THREAT OF BIOLOGICAL AND CHEMICAL WEAPONS, 1999 (U.K.), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.mod.uk/issues/cbw/index.htm. *See also* SECRETARY OF STATE FOR DEFENCE, STRATEGIC DEFENCE REVIEW, 1998 (U.K.), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.mod.uk/issues/sdr/ wp_contents.htm.

[38] *Id.* (discussing the development of vaccines, procurement of the next generation of equipment for detecting, identifying and monitoring biological hazards, and establishing a joint nuclear, biological and chemical regiment). *See also* THE ROYAL SOC'Y, SCIENTIFIC ASPECTS OF CONTROL OF BIOLOGICAL WEAPONS, (1994), *available at* http://royalsociety.org/WorkArea/DownloadAsset. aspx. (omitting reference to quarantine); MCTBW, *supra* note 6 (omitting reference to quarantine).

[39] SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, STRENGTHENING THE BIOLOGICAL AND TOXIN WEAPONS CONVENTION: COUNTERING THE THREAT FORM BIOLOGICAL WEAPONS, 2002, Cm 5484, (U.K.) *available at* http://www.brad.ac.uk/ acad/sbtwc/other/fcobw.pdf.

[40] *Id.; See also*, HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, THE BIOLOGICAL WEAPONS GREEN PAPER, FIRST REPORT OF SESSION 2002-3, H.C. 150, at 5–6, *available at* http://www.parliament.uk/business/committees/committees-archive/foreign-affairs-committee/fac-pn-19-0203-/.

[41] UK NATIONAL SECURITY STRATEGY, *supra* note 2 at 14–15.

[42] CABINET OFFICE AND DEPARTMENT OF HEALTH, PANDEMIC FLU: UK INFLUENZA PANDEMIC CONTINGENCY PLAN, 2005, [hereinafter UKIPCP], at 49, *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_10_05_bird_flu.pdf; *See also* DEPARTMENT OF HEALTH, PANDEMIC FLU: A NATIONAL FRAMEWORK FOR RESPONDING TO AN INFLUENZA PANDEMIC, 2007, § 7.3, at 75 (arguing against both home quarantine and cordon sanitaire); *See also* 2008 UK Int'l Preparedness Strategy, 13, at http://www.dh.gov.uk/en/Publications andstatistics/Publications/PublicationsPolicyAndGuidance/DH_089527 (discussing the humanitarian implication of quarantine).

> There is some evidence that big gatherings of people encourage spread, and measures to flatten the epidemic curve can helpful [sic.] in easing the most intense pressure on health services. In general, however, quarantine has been ineffective, at the most postponing epidemics of influenza by a few weeks to 2 months and even the most severe restrictions on travel and trade have gained only a few weeks.[43]

For influenza and "other forms of infectious disease", documents emphasize other responses, such as the use of vaccines, international disease monitoring, and resilience.[44]

Why is it that the two countries, both of which consider pandemic disease and biological weapons to be a national security concern—and, indeed, link them in terms of potential identification and response—have such different approaches to the threat? This article suggests that the answer is deeply historical, shaped by each country's unique experiences with disease, as well as each country's constitutional framework. Careful examination of the evolution of public health law suggests that the two countries have followed distinct—and essentially reverse—trajectories, which continue to influence the manner in which current law and policy has evolved in respect to pandemic disease and biological weapons. Constitutional constraints played a key role throughout.

In the United States, what started during the colonial period as a decidedly local authority evolved, post-Revolution, to be both a local and a state authority. For more than a century, the federal government proved reluctant to interfere. It was not that disease did not pose a severe threat – or, indeed, that it was never used as a weapon. To the contrary, the colonies and, later, the states, had significant concerns about the effects of disease and, even during the Revolutionary War, there was evidence and widespread belief that the British used smallpox as a weapon. During the Civil War as well, there were several reported efforts by the Confederates to use biological weapons against Union forces. But the federal government did not adopt quarantine laws. Quarantine was widely regarded as a central tenet of state police powers.[45] It was so decidedly local, that many states explicitly gave towns the authority to exclude any persons or goods believed to carry sickness—even if they traveled or were transported from other U.S. cities or states. Towns and local health boards could indefinitely imprison anyone within their bounds. They could coerce doctors, nurses, and caregivers into treating those who fell ill, and they could introduce a range of other measures to try to stem the advance of disease.

During the late nineteenth century, however, the balance of power subtly

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[43] UKIPCP, *supra* note 42, at 117.
[44] *See, e.g.,* UKNSS2008, *supra* note 2, ¶¶4.56–4.59, pp. 42–43.
[45] Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

shifted. The federal government avoided a direct Commerce Clause assertion and, instead, began to use the power of the purse to buy up local and state ports, transferring their operation to federal control. Federal statutory and regulatory authorities followed. By the end of the twentieth century, federal quarantine law—at least in respect to inter-state travelers and those entering or leaving the country—had become firmly established. By the early 21st century, policy documents had begun to refer to the potential use of quarantine to respond either to pandemic or targeted attacks, shifting the discussion from Commerce Clause considerations to Article II and foreign affairs. National security demanded a federal, not a state, response. Post-Hurricane Katrina, an even more visible discussion emerged, tied to the precise role of the military in enforcing domestic provisions.

The United Kingdom, in contrast, developed in the opposite direction. The first recorded quarantine orders, issued under Henry VIII, demonstrate a monarch willing to use the military to exercise his Royal Prerogative. As the constitutional structure of the country changed, the manner in which quarantine was accomplished altered. With the Stuarts' realization that quarantine could be wielded as a powerful political tool, use of the provisions led to greater friction with Parliament. The Privy Council reformed its approach, seeking statutory authorization prior to issuing orders. The demise of the Council and transfer of public health authorities to Parliament led to the abandonment of broad quarantine power. Commercial interests lobbied it out of existence. Aided by medical treatises, the 19th century sanitation movement, and the growth of a professional bureaucracy, local port authorities and public health provisions took their place. Accordingly, by the early twenty-first century, no broad quarantine laws existed, and such policy documents as were issued to outline the government's response in the event of biological weapons or pandemic disease specifically noted that quarantine would not be used.

These important differences have almost entirely escaped academic notice. Secondary materials that discuss the history of quarantine law *qua* quarantine law tend to draw broad brush-strokes over its appearance globally.[46] There are very few works that carefully consider the evolution of quarantine law on either side of the Atlantic, much less in juxtaposition to the other country.[47]

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[46] *See, e.g.,* Joseph B. Topinka, Yaw, Pitch, and Roll: Quarantine and Isolation at United States Airports, 30 J. LEGAL MED. 51, 53–57 (2009) (discussing broadly the appearance of quarantine provisions in Egypt, Marseilles, and Venice); Brock C. Hampton, Development of the National Maritime Quarantine System of the United States, 55 PUB. HEALTH REP. 1241, 1242 (discussing the development of a quarantine station in Marseilles and Venice).

[47] *See, e.g.,* Krista Maglen, The First Line of Defence: British Quarantine and the Port Sanitary Authorities in the 19th Century, 15 SOC. HIST. MED. 413, 414 (2002) ("[T]he policies and practices

Instead, accounts tend to be regional and episodic: they focus on particular states, regions, or quarantine stations,[48] or on particular plagues or pandemic diseases, drawing attention to the virulence of the disease, the state's immediate response, and the political, social, and economic consequences.[49] There are no accounts available on the US response to biological weapons that connect the history of quarantine provisions to the contemporary response; nor are there similar studies on the British side. Resultantly, not only have key differences between the countries been missed, but no explanation as to why such differences mark the two states' approaches has been suggested.

This article presents a new and detailed history of quarantine provisions in the two countries, offering in the process a novel explanation as to why we continue to see disparate approaches to the use of quarantine for natural disease as well as deliberate attack. It may be that there are other explanations for the current biodefense stance in both countries. Indeed, the simple conjunction of historical precedent and contemporary approaches would, alone, be insufficient explanation. It is my argument, however, that there is considerably more than this in the historical record and the influence

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which operated to intercept the importation of infectious diseases at the ports have attracted little more than a handful of articles and sections of book chapters.").

[48] *See, e.g.,* Howard Markel, A Gate to the City: The Baltimore Quarantine Station, 1918–28,110 PUB. HEALTH REP. 2, 218 (1995); Jo Ann Carrington, Impact of Yellow Fever on Life in Louisiana. 4J. OF THE LA. HIST. ASS'N., 1 (1963); Susan Wade Peabody, Historical Study of Legislation Regarding Public Health in the States of New York and Massachusetts, 6 J. OF INFECTIOUS DISEASES 1 (1909), *available at* http://books.google.com/books/about/Historical_study_of_legislation_regardin.html; M. DUREY, THE RETURN OF THE PLAGUE: BRITISH SOCIETY AND THE CHOLERA, 1831-2, (1979); N. LONGMATE, KING CHOLERA: THE BIOGRAPHY OF A DISEASE (1966).
For works on specific time periods, see P. BALDWIN, CONTAGION AND THE STATE IN EUROPE, 1830-1930 (1999); JOHN BOOKER, MARITIME QUARANTINE: THE BRITISH EXPERIENCE C 1650-1900 (2007); G.C. COOK, FROM THE GREENWISH HULKS TO OLD ST. PANCRAS: A HISTORY OF TROPICAL DISEASE IN LONDON (1992); Anne Hardy, Public Health and the Expert: London Medical Officers of Health, 1856-1900, in, GOVERNMENT AND EXPERTISE—SPECIALISTS, ADMINISTRATORS AND PROFESSIONALS, 1860-1919 128–42 (R. MacLeod ed., 1988); A. Hardy, Cholera, Quarantine and the English Preventative System, 37 MED. HIST. 250, 250–269 (1993); Maglen, *supra* note 47 at 413–428.

[49] *See, e.g.,* D. M. REESE, OBSERVATIONS ON THE EPIDEMIC OF 1819, AS IT PREVAILED IN A PART OF THE CITY OF BALTIMORE (1819); Carrington, *supra* note 48; J. H. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793 (1949), John B. Blake, Yellow Fever in Eighteenth Century America, 44 BULL. N.Y. ACAD. MED. 6 (1968); H.R. CARTER, YELLOW FEVER: AN EPIDEMIOLOGICAL AND HISTORICAL STUDY OF ITS PLACE OF ORIGIN (1931). But see Alfred J. Sciarrino: The Grapes of Wrath & the Speckled Monster (Epidemics, Biological Terrorism and the Early Legal History of Two Major Defenses—Quarantine and Vaccination), Part I, 7 MICH. ST. UNIV. J. MED. & L. 119 (2002–03); The Grapes of Wrath, Part II, 8 MICH. ST. UNIV. J. MED. & L. 1 (2003–04); The Grapes of Wrath and the Speckled Monster, Part III: Epidemics, Natural Disasters and Biological Terrorism—the Federal Response, 10 MICH. ST. U.J. MED. & L. 429 (2006).

of constitutional constraints on either side of the Atlantic, which continues to shape the contemporary dialogue. Threading through each account is the importance of the type of threat faced. For the specific diseases each country confronted, which differed, played a key role in shaping subsequent measures. The United States struggled with yellow fever, smallpox, and cholera. The United Kingdom developed its law primarily in response to plague. This influenced the contours of the measures and the groups most impacted by quarantine, leading to a tolerance of such provisions on the American side of the Atlantic, and a rejection of the same on British shores.

II. STATE POLICE POWERS AND THE FEDERALIZATION OF U.S. QUARANTINE LAW

Prior to the founding, the American colonists routinely used both land and maritime quarantine to respond to disease. Three key observations about these measures can be made. First, such early efforts often were not successful, leading many of the colonial and early state statutes to begin by lamenting the continuing and devastating effect of disease.[50] This lack of effectiveness proved critical in generating later support for federal control.

Second, the components of disease which now place it within a national security framework were present from the founding: disease took an incredibly high toll in terms of human life and, at times, threatened the very foundation of government. It also was used as a weapon—by criminals and by other countries. Thus, despite scientific advances that contribute to the current biological weapons threat (such as biological engineering), the idea of disease as a weapon, which could be used against individuals or the country itself, is not new and was considered and confronted by early American measures.

Third, unlike English law, which was shaped primarily by concern about plague, colonial—and later state—measures tended to focus on smallpox and other contagious disease.[51] By 1721, quarantine became paired with inoculation as response to smallpox in particular.[52] When Yellow Fever became epidemic in late 18th century, it quickly became linked to sanitation, spurring new legislation to mitigate nuisances and continuing the use of quarantine. Cholera later became epidemic.[53] This is not to say that plague

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[50] *See, e.g.,* Act of 1700, ch. 62, reprinted in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 61 (Philadelphia, John Bioren 1810), *available at* http://archive.org/details/lawsofcommonwe1810_1penn; *See also* Blake, Yellow Fever in Eighteenth Century America, *supra* note 49, at 674.

[51] Peabody, *supra* note 48, at 46.

[52] *Id.* at 47.

[53] *See, e.g.,* JOSEPH K. BARNES ET AL. THE CHOLERA EPIDEMIC OF 1873 IN THE UNITED STATES (Washington

played no role; it did have some impact. But plague provisions often merited their own legal response, while the core provisions continued to be shaped, in the main, by other infectious diseases. This mattered because the emphasis was on individuals carrying the disease, and *not* on items of commerce, such as silk, wool, and linens—widely believed to carry plague and thus subject, across the Atlantic, to disinfection procedures that often destroyed the goods in question. As a practical matter, what this meant was that the strong commercial lobby in Britain that opposed the use of quarantine provisions was not mirrored on the American side of the Atlantic. To the contrary, it was the immigrant community, and not shipping interests, that was most often affected by the provisions. A tacit acceptance of the measures followed.

A. Early Colonial Quarantine Provisions

The American colonies maintained quarantine provisions to counter the threat of disease. Massachusetts Bay,[54] New York,[55] the Province of Pennsylvania,[56] New-Castle upon Delaware,[57] Maryland,[58] and Rhode Island[59] entertained provisions that imposed harsh penalties—such as death without benefit of Clergy—on those refusing to abide by the law. Such measures

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D.C., U.S. Government Printing Office 1875).

[54] *See, e.g.,* 2 MASSACHUSETTS, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1642-1649 (Boston, W. White 1853) [hereinafter 2 MASS. RECORDS]; BOSTON BOARD OF HEALTH, ACTS RELATING TO THE ESTABLISHMENT OF QUARANTINE OF MASSACHUSETTS FROM THE SETTLEMENT OF THE COLONY OF MASSACHUSETTS BAY TO THE PRESENT TIME 5 (Boston, Rockwell & Church 1881), *available at* http://books.google.com/books/about/Acts_relating_to_the_establishment_of_qu.html.

[55] *See, e.g.,* Act of 1755, ch. XIII, *reprinted in* JOHN HOLT, LAWS, STATUTES, ORDINANCES, AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED BY THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW-YORK, CONVENED IN COMMON COUNCIL FOR THE GOOD RULE AND GOVERNMENT OF THE INHABITANTS AND RESIDENTS OF THE SAID CITY 84 (New York, John Holt 1768).

[56] See, e.g., An Act to prevent sickly Vessels coming into this Government, ch. 62, reprinted in THE LAWS OF THE PROVINCE OF PENNSILVANIA COLLECTED INTO ONE VOLUMN, BY ORDER OF THE GOVERNOUR AND ASSEMBLY OF THE SAID PROVINCE 19 (Philadelphia, Andr. Bradford 1714), *available at* http://archive.org/details/thelawsofprovinc00penn.

[57] An Act to prevent sickly Vessels coming into this Government, Laws of the Government of New-Castle, Kent and Sussex, Upon Delaware, 1752, *67.

[58] *See, e.g.*, Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND TO WHICH ARE PREFIXED THE ORIGINAL CHARTER, WITH AN ENGLISH TRANSLATION, THE BILL OF RIGHTS AND CONSTITUTION, 936 (1799) [hereinafter THE LAWS OF MARYLAND] *available at* http://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003150/html/index.html. *See also* RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE: 1798-1950 at 63 (1951).

[59] *See, e.g.,* An Act to Prevent the Spreading of Infectious Sickness, 1712, Acts and Laws of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, at 63-64 (on file with author).

tended to be reactive and temporary. Initially they focused on maritime trade, as reports of disease abroad resulted in orders placing vessels under quarantine. Local quarantine proved the first (and last) line of defense; accordingly, steep penalties accompanied failure to observe the law. With Britain's trading interests implicated by commercial delays that ensued, the Privy Council in England did not always look kindly on provisions originating in the new world.

i. Massachusetts Bay

From the earliest days, townsmen in Boston passed orders regulating the town's internal health.[60] Yet initially neither the government of Boston nor the colony's General Court took steps to prohibit the landing of vessels carrying infectious disease or arriving from infected ports.[61] In 1647, however, the colony of Massachusetts Bay received reports that the "plague, or like grievous [in]fectious disease" had broken out in the West Indies.[62] John Winthrop, who that year became governor of Massachusetts Bay Colony, described the devastation:

> After the great dearth of victuals in [the West Indies] followed presently a great mortality, (whether it were the plague, or pestilent fever, it killed in three days,) that in Barbados there died six thousand, and in Christophers, of English and French, near as many, and in other islands proportionable. The report of this coming to us by a vessel which came from Fayal, the court published an order, that all vessels, which should come from the West Indies, should stay at the castle, and not come on shore, nor put any goods on shore, without license of three of the council, on pain of one hundred pounds nor any to go aboard, etc., except they continued there, etc., on like penalty.[63]

The General Court subsequently passed an order instituting maritime quarantine against all vessels arriving from the West Indies.[64] The order

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[60] 2 MASS. RECORDS, *supra* note 54; BOSTON MA BOARD OF HEALTH, *supra* note 54, at 5.

[61] 2 MASS. RECORDS, *supra* note 54.The government of Boston was a separate municipal entity, subordinate to the colony of Massachusetts Bay. The General Court served simultaneously as a legislative, executive, judicial, and administrative body.

[62] *Id.* at 237.

[63] 2 JOHN WINTHROP, JOHN WINTHROP: HISTORY OF NEW ENGLAND FROM 1630–1649 321 (James Kendall Hosmer, ed. 1908) (Winthrop chosen Governor in 1647); *Id.* at 329 (Quarantine order issued).

[64] *Id.* There is discrepancy in the secondary literature about the exact date of the Massachusetts Bay order, some put it at 1647, others at 1648; *Compare, e.g.,* RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE: 1798-1950 at 65 (1951); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 205–06 (2000); Richard A. Goodman, et al., The Structure of Law in Public Health Systems and Practice in LAW IN PUBLIC HEALTH PRACTICE 46–51,

required:

> [A]ll (our own) and other vessels come from any pts of ye West Indies to Boston harbor shall stop (and come to an) anchor before they come at ye Castle, under ye penalty of 100£, & that no pson comeing in any vessel from the West Indies shall go ashore in any towne, village, or farme, or come within foure rods of any oth^r pson, but such as belongs to the vessels company thee or shee came in, or any wayes land or convey any goods brought in any such vessels to any towne, village, or farme aforesaid, or any other place within this jurisdiction, except it be upon some iland where no inhabitant resides, without license from ye councell, or some three of them, under ye aforesaid penalty of a hundred pound for every offence.[65]

Not only were individuals on board ship prohibited from coming ashore, but all persons residing within Massachusetts Bay Colony were prohibited from boarding any ships or vessels arriving from the West Indies, or from buying any goods or merchandise from such vessels, without a valid license.[66] The penalty for violating the order was £100.[67] Infractions fell subject to the law.[68] The colony repealed the order May 2, 1649, when the yellow fever epidemic ceased.[69]

263(Richard A. Goodman et al, eds. 2007); Charles V. Chapin, History of State and Municipal Control of Disease, in A HALF CENTURY OF PUBLIC HEALTH 133 (Mazÿck P. Ravenel ed., 1921). The original writes "March 1647-1648." At the time, the start of Britain's governmental year did not line up with the Gregorian Calendar (dating from 1582), but, instead, it coincided with the Julian Calendar, which began each year on March 25. By implication, this suggests that the discussion regarding quarantine and the subsequent order took place between January 1, 1648 and March 24 1648, making 1648 the more likely date of the first quarantine order issued by the American colonies. The English government did not switch to the Gregorian Calendar until 1752. See HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY 6–11 (C.R. Cheney ed., 1978); *See also* 2 MASS. RECORDS , *supra* note 54 at 237; BOSTON MA BOARD OF HEALTH, *supra* note 54, at 5.

[65] BOSTON BOARD OF HEALTH, *supra* note 54, at 5–6; *See also* 2 MASS. RECORDS, *supra* note 54, at 237; Hampton *supra* note 46 at 1245. Hampton cites to John Winthrop's History of New England and Susan Wade Peabody's "Historical Study of Legislation Regarding Public Health in the States of New York and Massachusetts." J. INFECTIOUS DISEASE, Suat No. 4, Feb. 1909. According to Hampton, the New York colony may have also implemented quarantine in the same year. For other sources citing the MA Bay Colony order, See Sidney Edelman, International Travel and our National Quarantine System, 37 TEMPLE LAW QUARTERLY 28, 29 (1963).

[66] BOSTON BOARD OF HEALTH, *supra* note 54, at 6; *See also* 2 MASS. RECORDS, *supra* note 54, at 237.

[67] 2 MASS. RECORDS, *supra* note 54, at 237. The Order made arrangements for promulgation locally and to any vessels affected by its provisions.

[68] 2 JOHN WINTHROP, *supra* note 63, at 329. Winthrop recounts that Goodman Dell of Boston, having been informed of the order, simply lied, saying he had not been in the West Indies. He was later found out and bound over to court to answer for contempt.

[69] BOSTON BOARD OF HEALTH, *supra* note 54, at 7 ("The Courte doth thinke meete that the order concerning the stoping of West India ships at the Castle should hereby be repealed,

It was not until October 1665 that the settlement again imposed quarantine on vessels, this time in response to the "great plague" in London (later determined to be typhus).[70] The order required that permission be obtained from the governor or council to land either passengers or goods arriving from England.[71] Like the first order, it was intended to be temporary in nature, and in October 1667 the General Court repealed the provision.[72]

Following the outbreak of yellow fever in Philadelphia in 1699, Massachusetts tried to deal with the threat posed by the disease by passing a permanent and particularly stringent Quarantine Act.[73] No vessel carrying smallpox, or any other contagious sickness, would be allowed within half a mile of shore, without first obtaining a license from the governor or commander-in-chief of the province, or from two justices of the peace if the harbor was located more than ten miles from the governor's home.[74] Neither goods nor passengers could be conveyed to land without such a license, with any violation of the provision earning the master of the vessel a £100 fine.[75] The 1699 statute required the captain of the vessel to inquire into the health of all passengers and to keep a record of any sicknesses on board.[76] Any passenger or sailor breaking quarantine would be isolated and imprisoned, held responsible financially for any costs thereby incurred by the colony, and fined a

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seeing it hath pleased God to stay the sicknes there.") £100 in 1647 amounts to 114.46 times that amount in 2009; i.e., ~£11,446. Roughly translated at the current exchange rate of 0.65, this comes to $17,609. For rates of inflation and exchange; *See* http://www.measuringworth.com/datasets/ukearncpi/result.php. In terms of earnings and purchase power, however, the number increases to some $244,000 today. Susan Wade Peabody, an early 20th century scholar, identifies the epidemic as yellow fever. *See* Peabody, *supra* note 48, at 41.

[70] 4 MASSACHUSETTS, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASS. BAY IN NEW ENGLAND, 1661-1674 280 (Boston, W. White 1854) [hereinafter 4 MASS. RECORDS] *available at* http://archive.org/details/recordsofgoverno42mass.

[71] BOSTON BOARD OF HEALTH, *supra* note 54, at 7–8.

[72] 4 MASS. RECORDS, *supra* note 70, at 345. *See also* BOSTON BOARD OF HEALTH, *supra* note 54, at 8. The Records of the Governor and company of the Massachusetts Bay in New England, edited by Dr. Shurtleff, terminated in 1686. There was a period of six years before the Governor authorized publication of the Acts and Laws of Massachusetts Bay. For much of the intervening period, there are few records, and none, in the State Library, that contain reference to quarantine law. *See* BOSTON BOARD OF HEALTH, *supra* note 54, at 8.

[73] Act of July 18, 1699, ch. 7 (Massachusetts-Bay), in BOSTON BOARD OF HEALTH, *supra* note 54, at 9 (reprinting Act in full). The act itself singled out smallpox, but included other infectious disease, whether carried by persons or goods; its introduction was specifically in response to the Yellow Fever outbreak. *Id.* at 7.

[74] Act of July 18, 1699, ch. 7, § 1. (Massachusetts-Bay).

[75] *Id.*

[76] *Id.* at § 2.

further £20.[77]

England did not always acquiesce in the colonial provisions. The charter of 1691 retained a check on Massachusetts Bay. The Privy Council had three years from the moment it obtained a copy of the colonial measures, to declare them void.[78] Quarantine here proved particularly vexing: it fed into a broader concern held by English statesmen that "the uncontrolled manner in which the Colony was exercising its powers was becoming increasingly detrimental to the economic welfare of England and the Empire."[79] Being able to retain a ship, indefinitely, simply because of the presence of any contagious disease, coupled with a significant fine for failing to observe such measures, fell beyond the Pale.[80] At the request of the Lords of Trade, the Privy Council refused to allow the 1699 statute to stand.[81] The Lords of Trade, however, did not long prevail.

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[77] *Id.* at § 3.

[78] 1 BENJAGMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC CHARTERS OF THE UNITED STATES 952 (1877), *available at* http://archive.org/details/federalstatecons01poor. For most of the other colonies, there was no limit to the time period within which the Privy Council must either accept or disallow new laws. The effect of an Order in Council disallowing a statute was to repeal it, effective from the time the colonial governor received notice of the order. See Dudley Odell McGovney, The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto, 94 U. PA. L. REV. 59, 73–74 (1945-1946); *See also* 2 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1680-1720 v–xl (W.L. Grant and James Munro eds., 1910) (discussing Privy Council's relationship with the colonies from the earliest time through 1910); H. E. Egerton, The Seventeenth and Eighteenth Century Privy Council in Its Relations with the Colonies, 7 J. COMP. LEGIS. & INT'L L. 3d Ser. 1 (1925) (looking at the Privy Council's 17th and 18th C relationship with the colonies). Some five hundred American colonial statutes disallowed by the Privy Council have been identified by scholars. *See, e.g.*, RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL109-202 (1915); Odell McGovney, The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto, 94 U. Pa. L. Rev. 59, 73–74 (1945–1946).

[79] Egerton, *supra* note 78, at 7.

[80] The creation of the Lords of Trade and Plantations (more commonly referred to as the Board of Trade) in 1696 broadly coincides with the introduction of the quarantine provision and signals particular concern about trade and relations with the colonies. *See* DICKERSON, AMERICAN COLONIAL GOVERNMENT, 1696-1765 (1912). One of the purposes of the board was "to examine into and weigh such Acts of the [colonial] Assemblies…as shall from time to time be transmitted", reporting on "the Usefulness or mischief thereof to our Crown, and to our Kingdom of England, or to the Plantations themselves." RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 48 (1915).

[81] Disallowed by the Privy Council Oct. 22, 1700. See BOSTON BOARD OF HEALTH, *supra* note 54, at 9; *See also* Peabody, *supra* note 48, at 42 (stating"There is no such act as this (that we know of) in any other of his Majesty's plantations; And by the uncertain interpretation that may be put upon the terms Contagious, Epidemical and Prevailing Sickness, we think it may be liable to great abuses; The penalties thereby inflicted seem to us too high. And we are therefore humbly of opinion that the inconvenience thereby intended to be prevented may be better provided against by order of the Governor and Council from time to time than by any standing

In 1701 the General Assembly passed another statute that became the basis for Massachusetts' quarantine law.[82] Instead of applying to *any* contagious disease, the act targeted plague, smallpox, and pestilential or malignant fever.[83] The statute contained two parts. The first focused on *cordon sanitaire*, the removal of individuals from towns, and isolation of the ill.[84] It authorized selectmen to remove and isolate any persons either ill or "late before have been visited" with plague, smallpox, pestilential or malignant fever, "or any other contagious sickness, the infection of which may probably be communicated to others."[85] A justice of the peace was to produce a warrant to secure housing, nurses, and other necessities. Expenses, where possible, were to be paid by patient; otherwise, by the town in which the ill person lived.

The second part of the statute focused on maritime quarantine.[86] The act empowered justices of the peace to prevent persons coming on shore from any vessel on which sickness was present.[87] Information about the sicknesses were to be transmitted to the Governor, or commander in chief, who was empowered "with the advice and consent of the council, to take such further orders therein as they shall think fit for preventing the spreading of the infection."[88]

Although the 1701 statute provided a general authority to quarantine individuals coming from places where plague was or had been present, the colony at times passed measures focused on certain countries or regions. In 1714, for instance, the General Assembly passed an act specifically targeting all ships coming from France and other parts of the Mediterranean.[89] In keeping with European standards of the day, upon arrival in Massachusetts Bay, the ships were to be isolated for forty days.[90] Severe penalties met any commander refusing to observe the period of quarantine: namely, death.[91] Anyone coming ashore without express license from the Governor and council

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Act of the General Assembly.").

[82] Act of June 25, 1701, ch. 9 §§1-3 (Massachusetts Bay), reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 11.

[83] *Id.* at § 4.

[84] Peabody, *supra* note 48, at 42.

[85] *Id.; See also,* Chapin, *supra* note 64, at 134.

[86] Peabody, *supra* note 48, at 42.

[87] Act of June 25, 1701, ch. 9, in 1 THE ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 469 (Boston, Wright & Potter 1869), *available at* http://archive.org/details/actsresolvespass9214mass.

[88] *Id.*

[89] Act of Sept. 2, 1721, ch. 3, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 18.

[90] *Id.*

[91] *Id.*

would be imprisoned for three years.[92]

Prior to this time, the province of Massachusetts Bay had not maintained a quarantine hospital.[93] Accordingly, on June 11, 1716, a committee began investigating where such a facility ought to be built.[94] Five months later, the committee concluded that one was, indeed, necessary, and recommended a suitable site.[95] The House of Representatives voted to purchase the land outright and to allot an additional sum of £150 to build the appropriate facilities.[96] The measure proved to be controversial. Inhabitants of Dorchester, Braintree, and Milton strongly objected to the erection of a facility for infectious disease in their midst.[97] The House of Representatives thus withdrew its order to purchase the land, and in April of 1717 formed a new committee to consider anew where, exactly, such a facility should be located.[98] By August the treasurer had conveyed £100 for the purchase of the southerly end of Spectacle Island.[99]

Troubles continued to assault efforts to build a new hospital. The project ran over budget.[100] In the interim, passengers landed for purposes of quarantine burdened landowners and destroyed adjacent properties.[101] But in 1717 new legislation continued to rely on quarantine to answer the threat of disease.[102] To encourage complicity with the statute's provisions, any informer

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[92] *Id.*

[93] BOSTON BOARD OF HEALTH, *supra* note 54, at 12.

[94] *Id.*

[95] *Id.* (Indicating to the General Court that either Spectacle Island or Squantum Neck would prove appropriate; as both areas were already owned, however, and the owner of Spectacle Island refused to sell, the committee advised that the province buy an acre in the latter.)

[96] *Id.* at 12–13.

[97] *Id.*at 13.

[98] *Id.*

[99] *Id.*at 13–14; *See also* NATHANIEL B. SHURTLEFF, A TOPOGRAPHICAL AND HISTORICAL DESCRIPTION OF BOSTON 512–515 (Boston, City Council 1871), *available at* http://books.google.com/books?id=UWkUAAAAYAAJ&ots=uaoKo0zNTk&dq=Shurtleff%E2%80%99s%20Topographical%20and%20Historical%20Description%20of%20Boston&pg=PP1#v=onepage&q&f=false.

[100] BOSTON BOARD OF HEALTH, *supra* note 54, at 14 (noting that the costs had already run to £173, while further funds would be required to build a fence and well).

[101] *Id.*at 14-15.

[102] Act of Feb. 14, 1718, ch. 14, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 15. The Keeper of the Lighthouse and the commanding officer of Castle William had the responsibility of notifying and directing the masters of all vessels "wherein any infectious sickness is or hath lately been" to anchor; *Id.*§ 1. Failure to refrain from coming ashore, or from preventing any passengers or goods from doing the same, would earn the master of the vessel a fine or £50 or six months' imprisonment; *Id.* §2. For any person breaking quarantine, the act levied a fine of £10 or two months' imprisonment; *Id.*§3.

would be granted one-third of the fines paid to the Province.[103]

The act, set to expire in May 1723, was to continue in force for five years.[104] Upon expiration, however, the act was continued for a further five years, and in 1728 it was continued until 1738 "and no longer".[105] In the interim, the province made provision for its judicial and legislative bodies to convene outside infected areas, in the event that smallpox took hold.[106]

The 1717 act was not adequate to cover all circumstances—namely, those presented by plague. When the disease did appear, it fell subject to separate, and particularly harsh, measures. The primary threat came from ships having contact with the Mediterranean. Thus, in September 1721 the General Court enacted a new statute that again required ships coming from France or the Mediterranean to undergo 40 days' quarantine.[107] As in 1714, failure to observe the rules carried the penalty of death.[108] Any individual breaking quarantine would be imprisoned for three years without bail—considerably longer than the two months that operated under the non-emergency provisions.[109] The penalty for unloading goods was £500, with half of the proceeds paid to any informer, plus an additional three years' imprisonment without bail.[110] The statute was to be in force for three years.[111]

Massachusetts Bay, like many colonies, continued to maintain a quarantine hospital. The location of the hospital, and the authorities extended to hospital and health personnel, shifted over time.[112] Each time the quarantine hospital

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[103] *Id.*at § 4.

[104] *Id.* at § 7.

[105] *Id.*at § 6–7; Act of June 19, 1728, ch. 8, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54,at 20.

[106] 4 & 5 Geo. 2, c. 177 (1731), reprinted in GENERAL COURT OF MASSACHUSETTS, THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 486 (Boston, T. E. Wait & Co. 1814), *available at* http://books.google.com/books?id=sBswAAAAYAAJ&ots=AYiqNoXK63&dq=The%20Charters%20and%20General%20Laws%20of%20the%20Colony%20and%20Province%20of%20Massachusetts%20Bay&pg=PR1#v=onepage&q&f=false.

[107] Act of Sept. 2, 1721, ch. 3, §1, reprinted in BOSTON MA BOARD OF HEALTH, *supra* note 54, at 17. The statute also applied to any ships or vessels arriving from other ports which, at any time within the preceding six months, had been to any port in France or any port infected with the plague; *Id.*at §4.

[108] *Id.*at 18.

[109] *Id.*

[110] *Id.*at 19. Such fines were significant: looked at in the contemporary environment, they amounted to more than $1 million; *See* discussion, *supra* note 69.

[111] BOSTON BOARD OF HEALTH, *supra* note 54, at 20. Assumedly, the statute terminated in 1723, as state records do not contain a reenactment.

[112] Massachusetts, for instance, continued to use the Spectacle Island Hospital until 1737, when it was re-located to Rainsford's Island; *Id.* Just over a decade later, the hospital and quarantine grounds were transferred to Deer Island. *Id.* 22–23.

moved, new legislation outlined the appropriate authorities and penalties for violation, consistent with the acts of 1701 and 1718.[113] Gradually, the quarantine provisions became more detailed, providing, for instance, for medical personnel for care of the sick.[114] Although in most cases the measures were temporary, they tended to be renewed until made indefinite.[115]

Massachusetts Bay also continued to pass new quarantine measures targeting vessels arriving from specific regions or particular diseases that caused concern. These measures took on an intensely local character. In 1739, for instance, the General Assembly passed an act to prevent the spreading of smallpox.[116] This measure required any individual coming from any region where smallpox was rampant to report within two hours of their arrival to one or more Select Men or the Town Clerk. Failure to do so carried a fine of £20.[117] Smallpox presented a particular threat and was dealt with through temporary means. In 1742, for instance, a similar statute, which was to remain in force "for the Space of seven Years, and no longer."[118] This statute, re-printed in 1746, gave the Justice of the Peace within the county, or the Select-Men of the Town, the power to obtain a warrant to remove any persons arriving from "infected Places".[119]

As for individuals *within* the colony who fell ill, special duties were placed on the Head of the Family:

> [I]mmediately upon Knowledge thereof, the Head of the Family in which such Person is sick, shall acquaint the Select-Men of the Town therewith, and also hang out a Pole at least six Feet in length, a red Cloth not under one Yard long and half a Yard wide, from the most Publick Part of the infected House.[120]

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[113] Compare Act of June, 29, 1738, ch. 8, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 23 with the Act of Feb. 14, 1718, ch. 14, §§ 2–3, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 15; *See also* Act of June 29, 1738, ch. 8, § 4, reprinted in BOSTON BOARD OF HEALTH, *supra* note 54, at 26–28 (explicitly providing for recourse to the act of 1701 in the event that the vessel was unable to proceed to the quarantine station).

[114] *See, e.g., Id.* at § 5.

[115] *See, e.g., Id.* at § 6 (limiting the statute to five years); *Id.* § 7 (extending the statute until a specified date); *Id.* at 26–28 (largely continuing the same statute through 1756); *Id.* at 33 (Reenacting the statute of 1749-50, making it indefinite).

[116] Act of June 15, 1739, ch. 1, reprinted in 2 The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay 987 (Boston, Wright & Potter 1874), *available at* http://archive.org/details/actsresolvespubl_c02mass.

[117] *Id.*

[118] An Act to Prevent the Spreading of the Small-Pox and Other Infectious Sickness, and to Prevent the Concealing of the Same, Feb. 21, 1746, Meeting of the Select-Men of Boston (on file with author).

[119] *Id.*

[120] *Id.*

The flag was to remain in place "'till the House in the Judgment of the Select-Men is thoroughly [sic.] aired and cleansed, upon Penalty of forfeiting and paying the Sum of *fifty Pounds* for each Offence, one Half for the Informer, and the other Half for the Use of the Poor of the Town where such Offence shall be committed."[121] Refusal or inability to pay the fine was punishable by whipping, up to thirty stripes.[122] In the event that more than twenty families in the town had contracted smallpox, however, the requirements were lifted.[123]

ii. New York

Other colonies—even from their earliest days—considered and adopted quarantine provisions. Like the Massachusetts Bay measures, these laws were intensely local in nature and became increasingly extreme over time.

Secondary sources suggest that in 1647, under Dutch rule, New York took steps to adopt its first restrictive measures.[124] Further orders appear to have been issued under English rule, by the Governor and Council.[125] By the late 17th century, concern throughout the colonies had expanded from smallpox to yellow fever. Epidemics of the disease broke out in Boston, Charleston, and Philadelphia.[126] When yellow fever reached New York in 1702, isolation efforts proved unsuccessful.[127]

Yellow fever, along with smallpox and other infectious diseases, proved formative in New York's quarantine law. In 1755 the legislature introduced a colony-wide maritime statute.[128] The legislation required that any vessels with smallpox, yellow fever, or other contagious diseases anchor at Bedlow Island to be quarantined, with heavy penalties for disobedience.[129] Any person coming ashore could be compelled to return to the vessel or "dispose[d] of…in some other Place, in order to prevent the Infection."[130]

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[121] *Id.*
[122] *Id.*
[123] *Id.* Massachusetts Bay passed other measures to deal with the consequences of disease—e.g., allowing courts and legislative bodies to reconvene outside infected areas. See, e.g., 4 Geo. 2, c. 5 (1730), reprinted in THE GENERAL COURT, *supra* note 1066, at 486–87.
[124] *See* Peabody, *supra* note 48, at 3.
[125] Occurrence of such orders in 1702, 1714, 1716, 1725, 1738, 1742. Peabody, *supra* note 48, at 3.
[126] Blake, *supra* note 49, at 674.
[127] *Id.*
[128] Act of May 3, 1755, ch. 973, reprinted in 3 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 1071 (Albany, James B. Lyon 1894), *available at* http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html.
[129] *Id.*
[130] *Id.*

The following year the colony introduced a subsequent measure to ensure that all individuals, regardless of how they had fallen victim to disease, could be treated in a like manner.[131] Similar provisions were continued in 1757, to be in continuance for five years.[132]

iii. The Province of Pennsylvania and County of New-Castle

Like Massachusetts Bay and New York, from its earliest days the Province of Pennsylvania, granted to William Penn and his assigns, made use of quarantine. The measures initially adopted though seem to have been somewhat softened by the views of the colony's founder.[133] Nevertheless, close inspection shows a pattern consistent with the other colonies in regard to both the intensely local nature of the provisions and the increasingly stringent measures adopted.

Penn himself had witnessed the savage destruction of disease as well as the devastating impact of strict quarantine law.[134] He was a student at Lincoln's Inn when the great plague hit London.[135] Death rates rapidly escalated and commerce came to a halt. "[T]he streets," one historian recounts, "were filled with mournful cries—of the painfully stricken, the grief stricken…"[136] The Crown's Draconian quarantine measures served to increase the suffering:

> Families with plague cases were boarded up into their houses for forty days without sufficient resources. Door upon door bore the great placard with its red cross and the plea, "Lord have mercy upon us!" The spotted death swept through the city killing so many so rapidly that there weren't enough burying grounds; great pits had to be dug wherever there was waste ground and bodies brought in great wagon loads. The madness of pain and fever, mass hysteria ruled London life that summer…The Great Plague claimed an estimated seventy thousand Londoners before it receded.

Penn saw the impact of quarantine laws on the poor, and witnessed the role

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[131] Act of Nov. 9, 1762, ch. 1010, reprinted in 4 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 76 (Albany, James B. Lyon 1894), *available at* http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html.

[132] Act of March 24, 1758, ch. 1061, reprinted in 4 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 236 (Albany, James B. Lyon 1894), *available at* http://books.google.com/books/about/The_colonial_laws_of_New_York_from_the_y.html.

[133] For the legal framework see WILLIAM PENN, FRAME OF GOVERNMENT OF PENNSYLVANIA (1682), *available at* http://avalon.law.yale.edu/17th_century/pa04.asp.

[134] CATHERINE OWENS PEARE, WILLIAM PENN: A BIOGRAPHY 48–51 (1957).

[135] *Id.* at 50

[136] *Id.*

played by Quakers in administering to those in need, despite continued religious persecution of the sect by the Crown.[137]

His experience with disease continued. On his first voyage to America, his ship, the *Welcome*, fell subject to smallpox, in the process losing one-third of those it carried.[138] Penn, immune owing to childhood contact with the disease, cared for those aboard who fell ill.[139] For the next two decades, Penn continued to help and financially support the sick.[140] He felt it his duty, writing in his *Reflections and Maxims*, "They that feel nothing of charity are at best not above half of kin to the human race."[141]

In 1684 Penn returned to England. In his absence, the provincial assembly grew in power, perhaps contributing to its later willingness to adopt broader laws.[142] Penn himself found in London a healthy dose of *realpolitik* and returned to his colony in 1699—having escaped the Tower and barely gained the favor of William of Orange—determined to answer charges of failing to pass strong enough laws.[143] His arrival coincided with that of the "pestilential fever"—a disease believed to have been imported from the West Indies.[144] Quickly dubbed the "Barbados distemper", the yellow fever outbreak killed 6-8 people per day for several weeks.[145]

To counter this dreaded disease, in 1700 the General Assembly at New Castle introduced *An act to prevent Sickly vessels coming into this Government*.[146] The new provisions sought to minimize the devastation, but they did not go so far as to shut people in their homes, as the English measures to which Penn had been a witness—or, indeed, the Massachusetts Bay and New York measures—had done. Instead, the statute focused on maritime provisions. It prohibited "vessels coming from any unhealthy or sickly place whatsoever" from coming closer than a mile from land, absent a clean bill of health.[147] Passengers or cargo could only come ashore with a permit from the

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[137] *Id.* at 51.
[138] HANS FANTEL, WILLIAM PENN: APOSTLE OF DISSENT 2 (1974).
[139] *Id.*
[140] WILLIAM HEPWORTH DIXON, WILLIAM PENN: AN HISTORICAL BIOGRAPHY 298 (1851).
[141] WILLIAM PENN, FRUITS OF SOLITUDE IN REFLECTIONS AND MAXIMS (1682).
[142] JOSEPH E. ILLICK, WILLIAM PENN THE POLITICIAN: HIS RELATIONS WITH THE ENGLISH GOVERNMENT 171 (1965).
[143] HARRY EMERSON WILDES, WILLIAM PENN 286–313 (1975); FANTEL, *supra* note 140, AT 199.
[144] Edelman, *supra* note 65, at 29.
[145] Hampton, *supra* note 46, at 1245.
[146] Act of 1700, ch. 62, reprinted in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 61 (Philadelphia, John Bioren 1810) (preventing vessels without bills of health from coming within one mile of shore or landing passengers without license from the Governor and Council, or two justices of the peace, with a penalty of £100).
[147] Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND TO WHICH ARE PREFIXED THE ORIGINAL CHARTER, WITH AN ENGLISH TRANSLATION, THE BILL OF RIGHTS AND CONSTITUTION, 936 (1799).

local authorities.[148]

As with all laws passed by the province, such measures had to be laid before the Privy Council within five years of their passage; upon receipt, the council had six months to declare such measures void.[149] The council made liberal use of its veto power in regard to the private colony, disallowing in excess of fifty provisions within just a five year period (1700-1705)—including one measure requiring all masters and commanders of vessels to report at New-Castle.[150] Such decisions appear to have been influenced in part by complaints emanating from the Board of Trade that Pennsylvania, one of the most important colonies, was engaged in illegal trade.[151] Coupled with the colony's failure to crack down sufficiently on piracy,[152] trade concerns prompted the crown to retain control of all matters relative to military power, admiralty, and customs.[153]

Despite its concerns, however, the Privy Council left the 1700 quarantine law intact.[154] The statute remained in force for nearly three-quarters of a century, without amendment, until its repeal in 1774.[155] That year, a new statute took its place.[156] Finally, upon the Declaration of Independence, the General Assembly of Pennsylvania passed a statute continuing all the laws in force on May 14, 1776.[157]

iv. Rhode Island

The General Assembly of Rhode Island and Providence Plantations at Newport also passed colonial quarantine measures that demonstrate the decidedly local nature of such laws. The measures targeted contagious disease

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[148] *Id.; See also* Edelman, *supra* note 65, at 29–30.
[149] Edelman, *supra* note 65, at 29–30.
[150] Disallowances of Feb. 7, 1705, enumerated in Laws of the Commonwealth of Pennsylvania, from Oct. 24, 1700 to Mar. 20, 1810, Vol. 1 (1810), at p. lvil.
[151] ILLICK, *supra* note 141, at 146-158, 195-199.
[152] Calendar of State Papers, Colonial Series, America and the West Indies, 1697-98, § 265.
[153] ILLICK, *supra* note 141, at 264.
[154] Disallowances, *supra* note 149 at lvil.
[155] *See* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA ix–xli (Philadelphia, John Bioren 1810). The records of the Privy Council, which record some 627 interim provisions, are bereft of any reference to quarantine between the statute's introduction and its repeal on Jan 22, 1774.
[156] 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA xli (Philadelphia, John Bioren 1810) (stating that Pennsylvania's 1774 act to prevent infectious diseases was repealed).
[157] 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 429 (Philadelphia, John Bioren 1810). An ACT to revive and put in force such and so much of the late laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned; passed at a session which commenced Nov. 28, 1776 and ended Mar. 21, 1777.

broadly. They, too, steadily became more extreme. And they demonstrated a provincialism that would persist beyond the country's founding, empowering local towns to exclude individuals from other American colonies based on the threat of disease.

A 1719 act prevented any vessels carrying any contagious disease from anchoring within one mile of any landing place.[158] The statute required license to land from the Governor of the Colony, or in his absence, from one or more justices of the peace, with failure to obtain such a license before landing carrying a penalty of £100.[159] In the event that passengers or sailors came ashore, the Justice of the Peace was empowered to confine them "to any such Place, as to him shall seem convenient, for to prevent the spreading of any Infection."[160] Like the Massachusetts Bay act of 1699 (rejected by the Privy Council), such individuals would be subject to a further fine of £20.[161] The statute empowered the Naval Officer became to send medical personnel aboard any ship believed to have sickness on board to investigate.[162] The ship bore the responsibility of paying for any costs thus incurred.[163]

Smallpox in particular continued to be a problem for Rhode Island—and not just when imported from abroad. In 1721 the colony responded to an outbreak of smallpox in Boston by passing a statute that targeted goods and passengers from Massachusetts Bay.[164] All goods, wares, and merchandise originating in the diseased colony was to be transferred to islands offshore to be exposed to the elements for six to ten days, before being permitted to enter the colony.[165] Criminal penalties applied.[166] The law also required innkeepers to report ill lodgers, the justice of the peace being authorized to remove the sick "to any such Place as they shall think needful to prevent the spreading of

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[158] An Act, to Prevent the Spreading of Infectious Sickness, Feb. 27, 1711, reprinted in THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719 201–02 (1977). This act appears verbatim in 1719, again, without a terminal date. See ACTS AND LAWS OF HIS MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS IN AMERICA, 1719 65 (Providence, Sydney Rider 1895), *available at* http://archive.org/details/thecharteractsla00rhod.
[159] *Id.* at 202.
[160] *Id.*
[161] *Id.* at 66, 202.
[162] *Id.*
[163] *Id.*
[164] An Act to Prevent the Small Pox Being Brought into this Colony from the Town of Boston, &c., Aug. 10, 1721, reprinted in THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA 119 (Newport, James Franklin 1730).
[165] *Id.* at 120.
[166] *Id.*

the same."[167] In 1722 the General Assembly continued this act.[168]

Less than a decade later, the colony issued another statute to stem the spread of "Contagious Distempers", preventing any vessels carrying smallpox, or originating in *any* region (including the Americas) in which contagious distemper "is brief or prevalent" to anchor their ship one mile from shore.[169] Any person coming ashore without explicit license from the Justice of the Peace could be returned to the vessel or "to any such Place, as to [the Justice of the Peace] shall seem convenient, for to prevent the spreading of any Infection."[170] The person transferred would be required to reimburse the colony and to pay an additional £20 fine.[171] The statute authorized Naval Officers to board vessels and to assign a doctor to do the same in the course of medical investigations.[172] Unlike the earlier law, the 1730 act also made provision for individuals initially allowed into the colony, who later took ill, to be removed by the local Justice of the Peace "to such convenient Place, as shall to them appear to be necessary, to prevent the spreading thereof."[173] The cost, again, would be borne by the individual who fell ill, unless such person was a slave, in which case the owner would pay.[174]

Despite these provisions, disease continued to plague Rhode Island generally and Newport in particular. The laws came to be seen as too intricate and convoluted. And their effectiveness left something to be desired: disease proved devastating for trade, deadly for the colonists, and expensive.[175]

Accordingly, in 1743 the colony repealed and re-issued substantially revised

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[167] *Id.* at 121–22.

[168] An Act for Continuing an Act, Entituled, An Act to prevent the Small Pox from being brought into this Colony from the Town of Boston, &c., May 1, 1722, reprinted in THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA 119 (Newport, James Franklin 1730).

[169] An Act to Prevent the Spreading of Infectious Sickness, reprinted in THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA 66–68 (Newport, James Franklin 1730).

[170] *Id.* at 67.

[171] *Id.* Alternatively, they could be put to work by the judge trying their case to pay off their debt.

[172] *Id.*

[173] *Id.* at 67–68.

[174] *Id.* at 68.

[175] An ACT to prevent the Spreading of the Small Pox and other contagious Sickness in this Colony, 1743, *274, reprinted in THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA 273 (Newport, James Franklin 1730) ("Whereas the Small Pox and other Contagious Distempers have been several Times brought into this Colony, by Masters of Ships and other Vessels coming from infected Places; which has proved of pernicious Consequence to the Trade, and greatly endangered the Lives of many of the Inhabitants of this Colony, and occasioned a very great Expense to the Town of Newport in particular.").

quarantine provisions.[176] No ship, from *any* port, with *any* person ill from any contagious disease would be allowed within one mile of shore.[177] The standard penalty of £100 for the master of the vessel and £20 for any individual breaking the quarantine applied.[178] The governor and justices of the peace had the authority to send medical personnel aboard any vessel to confirm the health of the passengers.[179] Town councils would secure the vessel and control all communications with shore, as well as direct the goods and merchandise to undergo 6-10 days of cleansing in the islands off Newport.[180] A full two-thirds of any penalty exacted for breaking quarantine would be given to any informers who alerted the authorities.[181] All costs associated with addressing sickness on board the vessel—including the cost of ammunition for guns firing at the vessel to prevent it from coming into the harbor—was to be paid for by the vessel itself.[182]

As for the health of the towns on shore, the owners of public inns became required to report on the health of their inhabitants, whom the justices of the peace could then remove. Furthermore, *any* individual ill with smallpox *could be taken from their own home* by a Justice of the Peace and placed in the local quarantine facility, "or any other convenient Place, in order to prevent the Spreading of the Infection, or otherwise at their Discretion, to place a Guard round the Dwelling House of the infected Person, as to them shall seem necessary."[183] This measure effectively established the mechanisms to impose geographic quarantine within the colony. The restrictions went both ways: not only were guards to be placed to keep those within the dwellings from leaving, but, under the law, no person could enter such homes without a license from the town council or two or more Justices of the Peace.[184] A fine accompanied any infractions, with half to be paid to any informers.[185]

The Newport colony also evinced concern about the deliberate spread of disease, reserving the post serious punishments for such acts. It became a crime to willfully or purposely spread smallpox within the colony.[186] Anyone found guilty of the offense would be put to death, without the benefit of

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[176] *Id.* at 308. The Charter was printed to accompany the 1745 edition of the Acts and Laws with which it is here reproduced.
[177] *Id.* at 274–75.
[178] *Id.* at 275.
[179] *Id.* at 275.
[180] *Id.* at 276.
[181] *Id.* at 277.
[182] *Id.*at 278.
[183] *Id.*at 279.
[184] *Id.*
[185] *Id.* at 279–80.
[186] *Id.* at 280.

clergy.[187] Any *attempt* to spread disease would be countered by thirty-nine lashes, six months imprisonment, and hard labor.[188]

B. The Revolutionary War and its Aftermath

Massachusetts Bay, New York, Pennsylvania, and Rhode Island were not unique in their introduction of quarantine provisions, despite the fact that many of the colonial quarantine initiatives were reactive, temporary, incomplete, and not particularly effective. In part this was because some of the diseases at which the measures were directed were simply endemic to the new world.[189]

Smallpox, in particular, continued to batter the colonies, becoming epidemic during the War of Independence, in the course of which more than 130,000 colonists died from the disease.[190] Historian Elizabeth Anne Fenn reports on the widespread belief at the time that the British deliberately engineered the outbreak.

> Many on the American side believed that the expulsion of the black loyalists was a deliberate British attempt to spread smallpox to the continental forces, the militia, and the civilian population. Whig sympathizers had accused the British of utilizing biological warfare as early as the siege of Boston, and in Virginia it seemed that their fears were finally realized. On June 24, 1781, the Connecticut soldier Josiah Atkins stated his opinion that Cornwallis had 'inoculated 4 or 500 [blacks] in order to spread *smallpox* thro' the country, & sent them out for that purpose."…The eviction of pox-covered black loyalists from Yorktown in October drew similar charges. James Thacher, a surgeon's mate in the Continental army, believed the terrified former slaves had "probably" been sent to the American lines "for the purpose of communicating the infection to our army."[191]

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[187] *Id.*

[188] *Id.* These provisions raise question about the extent to which the criminal spread of disease, such as that common with the graisseurs in Europe, who targeted wealthy individuals by spreading disease on their doorways, subsequently robbing the homes, may have been an issue in early colonial America. The language of the statute suggests more than just the negligent spread of disease that might be entailed in generally exposing others to such sickness. Instead, it must be willfully or purposely spread, with wicked intent to transfer the disease to others. Without further historical support, however, it is difficult to assess the contours of this concern.

[189] In 1721, for instance, more than half of those living in Boston contracted smallpox, with hundreds dying of the disease on a cyclical basis. Peabody, *supra* note 48, at 44.

[190] ELIZABETH ANNE FENN, POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775-82 273 (2001). In autumn 1777, Valley Forge became the site for general inoculation. FRANCIS RANDOLPH PACKARD, THE HISTORY OF MEDICINE IN THE UNITED STATES 264, 283, 315 (1901).

[191] FENN, *supra* note 1900, at 131.

The charge that the British were using Smallpox as a weapon echoes in contemporary accounts. The *Pennsylvania Gazette*, for instance, wrote, "Lord Cornwallis's attempt to spread the smallpox among the inhabitants in the vicinity of York, as been reduced to a certainty, and must render him contemptible in the eyes of every civilized nation."[192] Benjamin Franklin referenced the same in his *Retort Curteous*.[193] Fenn writes, "It would be easy to dismiss these accusations as so much American hyperbole. But evidence indicates that in fact, the British did exactly what the Americans said they did."[194] Robert Donkin, for instance, a British officer in New York, explicitly directed the use of Smallpox as a weapon, writing "Dip arrows in matter of smallpox and twang them at the American rebels, in order to inoculate them; this would sooner disband thee stubborn, ignorant, enthusiastic savages, than any other compulsive measures. Such is their dread and fear of that disorder!"[195] Later in the war, General Alexander Leslie sent a letter to Lord Cornwallis, indicating his plan to distribute sick soldiers throughout the "Rebell Plantations."[196]

The colonies responded by issuing public statements meant to shame Britain in the eyes of other nations, and by introducing new measures to take advantage of what little was scientifically known about the disease. In Massachusetts, for instance, laws were passed by the legislature to empower justices of the court of general sessions in any county to allow for inoculating hospitals to be established.[197] A special statute focused on Boston: after a certain period, those who had not contracted the disease were forbidden to enter, until Boston was declared free from the disease.[198]

In Rhode-Island a similar statute permitted for widespread inoculation for smallpox.[199] The disease was decimating the Revolutionary Army at a critical

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[192] *Id.* (quoting the Pennsylvania Gazette).
[193] *Id.; See also* Benjamin Franklin, The Retort Courteous, in 10 THE WRITINGS OF BENJAMIN FRANKLIN, at 111 (Albert Henry Smyth, ed., 1907), *available at* http://archive.org/details/writingsofbenjam10franuoft.
[194] FENN, *supra* note 1900, at 132.
[195] *Id.* at 132.
[196] *Id.* at 132.
[197] Act of July 9, 1776, ch. 7, *available at* http://archives.lib.state.ma.us/actsResolves/1776/1776acts0007.pdf.
[198] Act of July 16, 1776, ch. 8, *available at* http://archives.lib.state.ma.us/actsResolves/1776/1776acts0008.pdf
[199] An Act permitting Inoculation for the Small-Pox to be practiced in this Colony, Colony of Rhode-Island &c. in General Assembly, June Session, 1776, *available at* http://iiiprxy.library.miami.edu:2125/WebZ/FSPage?pagetype=return_frameset:sessionid=fsapp6-41408-hbpa3cu7-awftdw:entitypagenum=11:0:entityframedurl=http%3A%2F%2Ffind.galegroup.com%2Fecco%2Finfomark.do%3FcontentSet%3DECCOArticles%26docType%3DECCOArticles%26bookId%3D15

time.[200] The new statute authorized the erection of one hospital in each country in the colony. Guards would be placed two hundred yards outside such hospitals in every direction to prevent anyone from entering or leaving hospital grounds.[201] Once admitted for inoculation, criminal penalties applied for leaving without a doctor-issued certificate of health. The physicians themselves would be held responsible for anyone leaving with a certificate, who subsequently spread smallpox to others (either by way of personal contact or through his or her belongings).[202] Every item of clothing, linen, or sheets removed from the hospital also had to be accompanied by a certificate.[203] The statute gave particularly broad authority to Towns establishing such hospitals.[204] Any measure thus passed would have the same force and validity as if it had been enacted by the General Assembly.[205]

Concern about the devastating effects of disease continued well beyond the Revolutionary War. Major port cities, such as Baltimore, Boston, New York, and Philadelphia warranted special attention. The states in which these ports were located devolved broad authorities down to a local level, giving effect to two major legal frameworks: quarantine and sanitation. In both spheres public health trumped commercial considerations. States and local governments became empowered to exclude all people and goods from elsewhere in the United States, solely on the grounds of public health.

Closer examination of the four states governing the largest ports on the Eastern seaboard (Maryland, Massachusetts, New York, and Pennsylvania), coupled with Connecticut's somewhat unique approach, provide an example of both the depth and breadth of the newly-minted country's approach to disease. They also illustrate the degree to which quarantine law lay at the heart of state police powers.

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[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* ("[A]ny Town which shall establish an Hospital as aforesaid, be, and hereby is empowered, to make such further Regulations, to prevent communicating the Infection from the Hospital in such Town, and to lay such Fines and Penalties upon the Offenders, as they shall think proper.")

[205] *Id.*

i. Maryland

Following the Revolution, states transferred colonial regulations governing quarantine into state law – some going so far as to enshrine the authorities into their state constitutions. Maryland proves a good example. The colony, which had introduced quarantine regulations in 1766, continued its measures in 1769, 1773, 1777, 1784, 1785, 1792, and 1799.[206] Maryland also wrote quarantine authorities directly into its state Constitution.[207]

Even with the carry-over, concern quickly arose as to whether its quarantine provisions were sufficient to meet any exigency that might arise.[208] Subsequent legislation thus expanded the governor's authority: from 1793 the governor's powers in regard to any malignant contagious disease included the authority not just to stop vessels, goods, or individuals from coming into port or reaching shore, but to prevent "all intercourse or communication", over land or water, between Maryland and *any* region where such sickness was present—*either in the United States or overseas*.[209] This effectively gave the governor the power to cut off relations with other states and localities. Quarantine was not just outside the federal domain. It was so decidedly local that it overrode national interests.

Even as it established its broad authority to isolate the state from other cities and states, Maryland made arrangements for the appointment of a local health officer in Baltimore.[210] The officer could impose quarantine of people and goods 10-20 days, with additional extensions of up to 10 days each.[211] The penalty for masters violating quarantine was set at $1000, with any effort to conceal sickness on board the vessel set at $300.[212] The statute further authorized the creation of a hospital for individuals placed in quarantine.[213]

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[206] The original act, Act of Nov. 1766, ch. 25, reprinted in 1 THE LAWS OF MARYLAND, *supra* note 60, at 936, was to continue in force for three years. It was renewed by the Act of Nov. 1769, ch. 4, reprinted in 1 THE LAWS OF MARYLAND , *supra* note 60, at 951; continued again in Act of June 1773, ch. 2, reprinted in 1 THE LAWS OF MARYLAND , *supra* note 60, at 978; continued for seven years by the Act of Feb. 1777, ch. 17, reprinted in 1 THE LAWS OF MARYLAND , *supra* note 60, at 1036; continued until the end of the next session by the Act of Nov. 1784, ch. 83, reprinted in 1 THE LAWS OF MARYLAND , *supra* note 60, at 1337; continued for seven years by the Act of Nov. 1785, ch. 77, reprinted in 2 THE LAWS OF MARYLAND , *supra* note 60, at 1390; and again continued to Oct. 30, 1799 by the Act of Nov. 1792, ch. 77, reprinted in 2 THE LAWS OF MARYLAND , *supra* note 60, at 1712.

[207] Md. Const. art. 33 (amended 1990).

[208] Act of Nov. 1793, ch. 43, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1728.

[209] *Id.*

[210] Act of Nov. 1793, ch. 56, reprinted in 2 THE LAWS OF MARYLAND, *supra* note 60, at 1750.

[211] *Id.*

[212] *Id.*

[213] *Id.*

Local ordinances rounded out the state authorities. Thus, the City of Baltimore passed measures in 1797, 1798, and 1800, making extensive provision for both the authority to quarantine people and goods, as well as to establish a lazaretto to perfect the same.[214]

ii. New York

New York followed a similar pattern in responding to the threat posed by disease. Like Maryland, the state legislature incorporated colonial provisions directly into law. It then expanded its authorities, giving rise to two bodies law: an increasingly robust quarantine establishment, and an ever more stringent sanitary regime. Even as the two sets of authorities evolved within the broad limits set by the state, each remained decidedly local in character. For the city of New York, as for other port cities subject to significant human and commercial traffic, the state legislature passed special measures.

Following the war, in 1784 the state legislature re-enacted and expanded colonial quarantine measures.[215] Quarantine was to be performed wherever, and in whatever manner, the Governor directed.[216] The governor became empowered to appoint a physician to inspect all vessels suspected of having disease on board.[217] Any attempt to interfere with the physician in the

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[214] *See e.g.,* An Ordinance to preserve the health of the city, and to prevent the introduction of pestilential and other infectious diseases into the same, Apr. 7, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Supplement to the ordinance, entitled "An ordinance to preserve the health of the city, and to prevent the introduction of the pestilential and other infectious diseases, into the same", July 17, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Further Supplement to the ordinance entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", Sept. 4, 1797 (repealed by an Ordinance passed Feb. 27, 1799); A Further additional Supplement to the ordinance, entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", Feb. 28, 2798, (repealed by an Ordinance passed Feb. 27, 1799); A Supplement to the ordinance entitled "An ordinance to preserve the health of the city and to prevent the introduction of the pestilential and other infectious diseases into the same", July 15, 1800 (repealed by an Ordinance passed Mar. 20, 1801), reprinted in Ordinances of the Corporation of the City of Baltimore, with the Act of Incorporation and Supplement thereto prefixed, 1801, 300-317.

[215] An Act to prevent the bringing in and spreading of infectious Distempers in this State, Passed May 4, 1784. Laws of the State of New-York, Seventh Session, 1784, ch. LVII, at 82-83; *See also* 1 GREENLEAF'S LAWS OF NEW YORK 117.

[216] *Id.* The new statute placed a £200 penalty on any masters or commanders of ships failing to accurately report any disease on board.

[217] *Id.* Although American currency can be traced back to before the Revolutionary War, the U.S. dollar as a unit of currency was not formally approved by Congress until a resolution of Aug. 8, 1786. See RICHARD DOTY, AMERICA'S MONEY, AMERICA'S STORY: A COMPREHENSIVE CHRONICLE OF

exercise of his duties carried a penalty.[218] The statute authorized the governor to take over Nutten Island—also known as "Governor's Island"—for quarantine purposes.[219]

The end of the 18th century saw a sudden upswing in attention to disease. In 1794 the New York legislature passed a measure giving the Governor the authority to build a hospital on the island.[220] Then, starting in 1796under John Jay's governorship, the legislature passed six laws in six years, each focused on stemming the spread of disease. These measures, local in nature, steadily expanded the coercive nature of state authorities and introduced further innovations related to geographic, seasonal, and merchandise-related quarantine.

The series began in 1796 with legislation that repealed the earlier act.[221] The new statute created a more robust regime, providing for the appointment of a health officer and health commissioners for New York City, authorizing construction of a lazaretto, enabling the governor and health officers to enact maritime and domestic quarantine, and eliminating nuisances.[222] The law required that all vessels carrying forty or more passengers, having on board any person with a fever, arriving from a place where sickness where an infectious disease at the time of departure prevailed, or having lost anyone en route due to sickness, to undergo quarantine.[223] The statute also gave the governor the authority to designate specific regions, such that any vessels arriving from these areas would automatically undergo quarantine until cleared by the health officer for entry.[224]

Like Maryland, New York gave its governor the power to cut off commerce and travel connecting the state with the rest of the Union—again emphasizing the local character of quarantine.[225] Full authority was given to the health officer to direct where quarantine would be performed, who would undergo quarantine, and what articles would be quarantined, cleaned, or destroyed.[226]

AMERICAN NUMISMATIC HISTORY 21-66 (1998).

[218] *Id.*

[219] New York State Supreme Court Judge Birdseye, in 1856, later refers to the 1784 act as "the germ" of New York's quarantine system.

[220] Act of Mar. 27, 1794, amending Act of 1784, 3 GREENLEAF'S LAWS OF NEW YORK 146.

[221] An Act to Prevent the Bringing in and Spreading of Infectious Diseases in this State, April 1, 1796, Laws of the State of New-York, 19th Session, Chapter 38, 309 (repealing the Act of 1784); *See also* 3 GREENLEAF'S LAWS OF NEW YORK 305.

[222] The statute gave the governor the authority to appoint a practicing physician to serve as health officer for the city of New York. Act of April 1, 1796, ch. 38, 1796 N.Y. Laws 305.

[223] *Id.* at 306.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 306–07.

Failure to answer the health officer's inquiries honestly amounted to perjury.[227] The 1796 statute also created a health surveillance system: it required physicians to report any fevered patient considered to be infectious; a penalty of £50 accompanied each infraction.[228] The statute also gave broad powers to the Mayor, Aldermen, and Commonalty of the City of New York, convened in common council, to introduce sanitary provisions to alter any lots within the city, to clean streets, alleys, passages, yards, cellars, vaults, and other places, and to regulate a range of industries giving rise to sanitary concerns (e.g., glue, leather, soap, candles, and the like).[229] Owners and businesses would be compensated for any losses; failure to reach agreement would result in the empanelment of a jury, within three weeks, to set the amount.[230]

The year after passing this broad quarantine act, the legislature amended it to restrict the number of health commissioners from seven to three.[231] Quarantine would henceforward continue "for as many days as the commissioners shall deem necessary."[232] It also established specific areas within which certain industries, involving starching, fermenting, melting fat or tallow, boiling soap, or curing hides, would not be allowed.[233] No vessel arriving in the port of New York, which would otherwise be subject to quarantine, could be exempted by reason of having previously entered any other port in the United States, unless such ship had remained in port for certain number of days.[234]

In 1798, the state passed a new omnibus law, expanding the commissioners' authority and appointing a physician to serve as health officer for the city of New York.[235] The statute dealt with urban nuisance and maritime quarantine, even as it explicitly reserved traditional remedies against nuisance under common law.[236] To the Governor of the State or the Mayor of New York went further powers to issue orders relating to domestic quarantine.[237] The act also provided for the construction of a lazaretto on

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[227] *Id.* at 307.
[228] *Id.* at 308.
[229] *Id.*
[230] *Id.* at 309.
[231] Act of Feb. 10, 1797, ch. 16, 1797 N.Y. Laws 367.
[232] *Id.* at 368.
[233] *Id.* at 369.
[234] *Id.* at 368.
[235] Act of Mar. 30, 1798, ch. 65, 1798 N.Y. Laws 227.
[236] *Id.*
[237] *Id.* at 230–31. Violations of the statute would be treated as a misdemeanor, with fines attached.

governor's island.[238] Any persons or things within the city of New York, infected by or tainted with "pestilential matter", could be sent by the health commissioners to the lazaretto.[239] In 1799, the legislature designated Staten Island—six miles away—to be home to anchorage grounds and a new Marine Hospital.[240] To the health officer was conveyed full authority to confine and release individuals from the medical facility.[241] By 1801 the quarantine establishment was completed. It remained there for 60 years.[242]

New York law not only allowed the governor to discriminate against persons and goods from other countries or, indeed, elsewhere in the U.S., but it created an annual schedule for doing so. The 1799 statute introduced graduated geographic quarantine with seasonal constraints: all vessels arriving from the East or West Indies, Africa, the Mediterranean, the Bermuda Islands, or any other place in the south Seas *or south of Georgia*, between the end of May and the end of October, would automatically be subject to quarantine and examination.[243] All vessels arriving south of Sandy Hook from any other domestic port would be subject to quarantine from the first of June until the first of October.[244]

In 1800 the New York legislature passed yet another measure, which directly targeted commercial goods.[245] The statute straight out banned certain items (i.e., cotton, hides, coffee, or peltry) from being brought into the city of New York between June and November.[246] Any goods sent into the city in violation of the statute could be seized by the health commissioners, with the proceeds going to the benefit of the health office.[247] Indeed, all fines paid under the legislation would be used to offset the health office's expenses.[248]

Finally, in 1801, the legislature passed provisions requiring that the health officer reside at Staten Island, the resident physician in New York City, and the other commissioner at or near the Marine Hospital or in the city.[249] That act effectively completed New York's quarantine system, which remained in place,

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[238] *Id.* at 231.
[239] *Id.* at 232. Anyone so removed would be liable for their own board and medication.
[240] Act of Feb. 25, 1799, ch. 20, 1799 N.Y. Laws 319.
[241] *Id.* at 321.
[242] Quarantine at New York, HARPER'S WEEKLY, Sept. 6, 1879, at 706 (stating that the quarantine station was later moved to Swinburne Island (1860), and then to Hoffman Island (1873)).
[243] *Id.*
[244] *Id.*
[245] Act of Apr. 7, 1800, ch. 120, 1800 N.Y. Laws 579, at 580.
[246] *Id.* at 580.
[247] *Id.*
[248] *Id.* at 581.
[249] Act of Mar. 30, 1801, ch. 86, 1801 N.Y. Laws 176.

with minor amendments, until 1850.[250]

Having established broad state power, the legislature then began to push decision-making authority down to a local level.[251] Commercial considerations paled in the face of public health. Section 3 of the 1850 act, for instance, gave local boards the power "To regulate and prohibit or prevent all communication or intercourse by and with all houses, tenements and places, and the persons occupying the same, in which there shall be any person who shall have been exposed to any infectious or contagious disease."[252]

From a constitutional perspective, the fact that state measures should so directly impact inter-state commerce was of little consequence. Justice Grier explained in 1854 that internal police powers, which included every law introduced for the preservation of public health, "are not surrendered by the states, or restrained by the Constitution of the United States, and that consequently, in relation to these, the authority of a state is complete, unqualified, and conclusive."[253] No federal regulation could "supersede or restrain their operations, on any ground of prerogative or supremacy."[254] And quarantine, whatever its impact on commerce, lay at the core of state police power:

> [Q]uarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society….All these things are done not from any power which the states assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservations of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation according to the exigency which requires their interference."[255]

The exigencies of the social compact required that such state laws "be

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[250] *See* Act of Apr. 8, 1811, ch. 175, 1811 N.Y. Laws 246. It was later revised and reenacted See subsequent measures: Act re: Quarantine in New York Laws of 1811, chapter 175; amended by Act of Mar. 26, 1813, ch. 202, 1813 N.Y. Law 334; amended by Act of Apr. 14, 1820, ch. 229 1820 N.Y. Laws 247; amended by Act of Mar. 21, ch. 71, 1823 N.Y. Laws 64, repealed by Act of Apr. 10, 1850, ch. 324, 1850 N.Y. Laws 690.
[251] Act of Apr. 10, 1850, ch. 324, 1850 N.Y. Laws 690.
[252] *Id.* at 691.
[253] Thurlow v. Com. Of Mass., 46 U.S. 504, 631 (18847) (Grier, J., concurring).
[254] *Id.*
[255] *Id.*

executed before and above all others."[256] Thomas Cooley later explained, "Numerous …illustrations might be given of the power in the States to make regulations affecting commerce, and which are sustainable as regulations of police. Among these," he continued, "quarantine regulations and health laws of every description will readily suggest themselves, and these are or may be sometimes carried to the extent of ordering the destruction of private property when infected with disease or otherwise dangerous."[257] Such regulations, at least with regard to Commerce Clause considerations, "generally passed unchallenged."[258]

Where limits did apply, however, was in the local execution of state provisions. For while the state authorities were broad, they constrained the extent to which local entities—operating on the basis of enumerated authorities—could act. One of the most important New York cases on this point came in 1856, when Judge Birdseye entertained a petition for a writ of *habeas corpus* from an individual restrained under a local health regulation.[259] While the ensuing decision limited the local exercise of public health law, it did not question the state's authority to legislate in this realm; nor did it entertain the possibility of federal preemption, despite open acknowledgment of the effect of such provisions on commerce.

The facts of the case proceeded thus: the town of Castleton, having established a *cordon sanitaire,* forbade all persons from passing from within the enclosure to any other part of the town.[260] One Peter Roff had apparently knowingly and willfully violated the relevant regulation. Facing criminal charges and lacking sufficient funds to post bail, Roff was jailed and filed a writ of habeas corpus to challenge his imprisonment. Judge Birdseye examined the relevant provisions of the revised statutes, which provided that any two Justices of the Peace could remove individuals to whatever place was deemed appropriate for the preservation of the public health.[261] Birdseye found that while the powers granted to the local authorities were constitutional, the manner in which the board had exercised its authorities brought it into conflict with the state, thus voiding the local regulation.[262] Specifically, the prohibition on passing from the quarantine enclosure into other parts of the town proved

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[256] *Id.*

[257] THOMAS M. COOLEY, A TREATISE OF THE CONSTIUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 722 (Boston; Little, Brown, and Co. 1883).

[258] *Id.*

[259] People v. Roff, N.Y. TIMES, Aug. 23, 1856 (N.Y. Sup. Ct. Aug. 16, 1856), *available at* http://query.nytimes.com/gst/abstract.html?res=F30913F8385D147493C1AB1783D85F428584F9.

[260] *Id.*

[261] *Id.*

[262] *Id.*

too sweeping: north and east of Castleton lay the main channel of the bay and harbor of New York, making it hard to ascertain what portion of the lands and waters covering them, between the shore and the middle of the channel, fell within the enclosure. Ships thus directed by the state officers to proceed through this channel would be acting in accordance with state measures, but fall afoul of local regulations.[263]

Birdseye dwelled on the indefinite nature of "the public good" as a rationale for such severe measures—noting that allowing the definition to rest on the shoulders of a handful of people in every town risked bringing state public health mechanisms—and, indeed, commerce—to a standstill.[264] Those working in the hospital or reporting to the quarantine officers upon arrival would be prevented from entering Castleton.[265] Yet the state statute required their movement, in order to fulfill their obligations under the law.[266] The problem was also one of precedent:

> "And where shall this state of things stop? Clearly, if it may exist in Castleton, it may in every town between that and Canada. The result shows the entire absurdity of the attempt to assume such powers. It shows that the decision of the proper officers in Quarantine is final and conclusive."[267]

Birdseye then turned to rights considerations—not on federal commerce clause authorities—as a limit on the exercise of quarantine itself:

> [The local] regulation sentences all persons, well or sick, whether exposed to infection or not, to an unlimited imprisonment. That imprisonment, too, it may be added, is not such a one as any quarantine law can adjudge to be valid. For it is one where the restraining power does not take, and cannot by possibility take, any measure whatever either to support the life or improve the health of the party confined, or to free him from infection; that at some future period he may again enjoy the privileges of a member of society.[268]

The local approach stood in stark contrast to that adopted by the state, which had demonstrated a commitment to the comfort of patients and attention "to their prompt restoration to sound health and to their duties in society."[269] The local approach was "at war with the whole policy of the State from its foundation."[270] To sustain the assumptions of the local ordinances

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[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*

would be "to create in every town in the commonwealth an irresponsible tribunal, whose only rule of action shall be what *in their opinion 'the public good requires.'*"[271] Birdseye explained,

> The public health is doubtless an interest of great delicacy and importance. Whatever power is in fact necessary to preserve it, will be cheerfully conferred by the Legislature, and carried into full effect by the Courts. But it can never be permitted that, even for the sake of the public health, any local, inferior board or tribunal shall repeal statutes, suspend the operation of the Constitution and infringe all the natural rights of the citizen.[272]

Limits existed in the local exercise of quarantine law; but those very limits were established by the states, thus underscoring the extent of state sovereignty in this public health domain.

iii. Massachusetts

A decade after the Constitutional Convention, Massachusetts introduced legislation to provide for maritime quarantine and the domestic removal and isolation of any sick persons by the Selectmen of the town.[273] Removal had to be given effect in the "best way" possible, "for the preservation of the inhabitants, by removing such sick or infected person or persons, and placing him or them in a separate house or houses, and by providing nurses, attendance, and other assistance and necessaries for them."[274]

Like Maryland and New York, Massachusetts drew a line between the state and the rest of the country. Towns could require out-of-state visitors coming from infected regions to report to the Selectmen within two hours of their arrival, under threat of a $100 fine.[275] Justices of the Peace could return visitors to the state whence they arrived, with a $400 penalty in the event that the individual returned without permission.[276] Any inhabitant who entertained a visitor for more than two hours after the warrant to depart had been issued would be fined $200.[277] Massachusetts gave similar powers to local authorities to prevent any diseased goods from entering, or remaining within, local bounds.[278] Inter-state commerce was not a part of the legislature's calculus.[279]

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[271] *Id.*
[272] *Id.*
[273] Act of June 22, 1797, ch. 16, 1797 Mass. Acts 365, *available at* http://archives.lib.state.ma.us/actsResolves/1797/1797acts0016.pdf.
[274] *Id.* at 356–57.
[275] *Id.* at 357.
[276] *Id.*
[277] *Id.*
[278] *Id.* at 357–58.

Massachusetts emphasized the importance of local authorities with regard to quarantine and, like Maryland and New York, passed special measures for its largest port city. The newly-formed board of health in Boston was to inquire into all nuisances "and such sources of filth as may be injurious to the health of the inhabitants of said town."[280] After obtaining a warrant, members of the board could forcibly enter dwellings to carry out their duties.[281] The manner of quarantine was left entirely in the board's hands.[282] Criminal penalties for failing to abide by the board's determinations applied.[283] The statute further required that keepers of lodging houses report sick travelers to the Board of Health within twelve hours of them falling ill.[284]

While Boston warranted special attention, Massachusetts extended similar authorities to Salem.[285] Soon powers of both maritime and domestic quarantine extended to the selectmen of other seaports and towns.[286] Similar penalties for refusing to acknowledge local ordinances applied.[287]

iv. Pennsylvania

Pennsylvania took a course similar to New York. Most of its measures contained sunset clauses, but more often than not, the state legislature simply reintroduced—and expanded—the relevant authorities.[288] By 1799 the state had created a detailed quarantine regime and sanitary framework, targeted at preventing smallpox and yellow fever from taking hold.[289] Like Massachusetts, the state created a robust board of health, as well as health commissioners and

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[279] *See Id.*
[280] Act of June 20, 1799, ch. 10, 1799 Mass. Acts 327, *available at* http://archives.lib.state.ma.us/actsResolves/1799/1799acts0010.pdf
[281] *Id.*
[282] *Id.* at §8.
[283] *See Id.* at 333 (stating that the penalty was capped at a $500 fine and/or six months' imprisonment).
[284] *Id.* at §11.
[285] Act of June 16, 1800, ch. 19, 1800 Mass. Acts 27 (Empowering Salem to construct a board of health and to authorize commissioners to remove and prevent nuisances), *available at* http://archives.lib.state.ma.us/actsResolves/1800/1800acts0019.pdf.
[286] Act of Feb. 26, 1800, reprinted in The Perpetual Laws of the Commonwealth of Massachusetts, from the Establishment of its of its Constitution in the year 1780, to the end of the year 100, Vol. III, containing the Laws from January 1799 to November 1800, March 1801, at 70–71.
[287] *Id.* § 2.
[288] *See, e.g.,* Act of Apr. 22, 1794, ch. CCXXXIX; 1794 Pa. Laws 553; Act of Apr. 4, 1796, ch. XXXVII; 1796 Laws 70; Act of Apr. 4, 1798; ch. CXLI, 1798 Pa. Laws 70; Act of Apr. 11 1799, ch. CCXXVIII; 1799 Pa. Laws 489 (to remain in force for three years).
[289] 1799 Pa. Laws 489.

a quarantine master.[290] The board was to govern the marine hospital and to create a new lazaretto for the performance of quarantine.[291]

Like the city of New York, Philadelphia created a temporal maritime regime, requiring every ship arriving between April and October to submit to examination.[292] All vessels carrying contagious disease became required to obtain a certificate of health before passengers and goods could come ashore.[293] To the physician and the quarantine master were given the broad authority to detain and purify both passengers and cargo.[294] Far from avoiding any impact on inter-state commerce, to the Board of Health was given further authority to make regulations preventing the transport of specified commercial goods into the city of Philadelphia—regardless of their origin.[295]

Quite apart from the port city's regime, the state itself maintained a geographic maritime quarantine, requiring all vessels arriving from specified places, between mid-May and early October, to discharge their cargoes and ballast, together with the bedding and clothing, to be cleaned and purified.[296] In parallel provisions, Pennsylvania did not distinguish between foreign and domestic travelers and goods. Between specified dates, *all* persons, goods, merchandise, bedding, and clothing entering the state was to undergo at least 30 days quarantine, under penalty of $500 and forfeiture of goods and merchandise, with half of the resources thus obtained to be given to the informer.[297]

Pennsylvania, again like New York, instituted a public health surveillance system, further requiring the board of health to inquire into any outbreaks of contagious disease in the United States, or on the continent of America, and to report their findings to the Mayor of Philadelphia.[298]

Gone was William Penn's more measured approach. Citizens could be shut up in their own homes, refused any visitors, and removed at the board of health's discretion.[299] Substantial criminal penalties applied.[300] All fines

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[290] *Id.* at §1.
[291] *Id.* at §2.
[292] *Id.* at §3.
[293] *Id.* at §4.
[294] *Id.*
[295] *Id.* at §§10–11.
[296] *Id.* at §5.
[297] *Id.* at §§6–7.
[298] *Id.* at §18.
[299] *Id.* at §19. ("[A]ll communication with the infected house or family, except by means of Physicians, nurses or messengers to convey the necessary advise [sic.], medicines and provisions to the afflicted, accordingly as the circumstances of the case shall render the one or the other mode, in their judgment, more conducive to the public good with the least private injury.")

thereby obtained would be used to finance the board of health.[301] The statute explicitly addressed the potential conflict of interest that might arise: no citizen would be disqualified from sitting as judge or juror, or from giving testimony, in cases that might arise under the act "by reason of his, her or their common interest in the appropriation of the sum or penalties imposed for such offence."[302] Pennsylvania also established sanitary provisions, dealing with "all nuisances which may have a tendency [in the opinion of the board of health] to endanger the health of the citizens."[303] The statute provided for the construction of a new lazaretto, which would be supported by a new tax.[304]

v. Connecticut

Some state measures went well beyond the quarantine laws introduced in Maryland, New York, Massachusetts, and Pennsylvania. Connecticut provides a good example and merits brief discussion, if for no other reason than it illustrates the seriousness with which the new states treated the threat of disease.

In 1711, for instance, the state legislature passed *An Act Providing in Case of Sickness*, empowering the Selectmen of any town, with a warrant from two justices of the peace, to remove sick or infected persons.[305] The statute applied to any person who "may justly be suspected to have taken the Infection" of Smallpox or any other contagious sickness, where such infection "may probably be communicated to others."[306] Where suitable "nurses or tenders" might not be present, a warrant could issue from the infected town to *other* towns in Connecticut, requiring them to provide the necessary assistance.[307] Refusal to nurse individuals back to health carried a fine.[308]

Whenever any individual within the state became infected with smallpox, *or any other contagious disease,* it became the duty of the head of the family, or master of the vessel, to mount a white cloth signaling the presence of disease.[309] Such signal could only be removed by a Justice of the Peace or a

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[300] *Id.* at § 20 (stating that a failure to abide by regulations set by the Board of Health carried a $500 fine and a term of imprisonment at hard labor between one and five years).
[301] *Id.* at §20.
[302] *Id.* at §21.
[303] *Id.* at §23.
[304] *Id.* at §§ 2, 24–25.
[305] AN ACT PROVIDING IN CASE OF SICKNESS, 1784, ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, 227-31. (New London, Timothy Green, 1784).
[306] *Id.* at 227.
[307] *Id.* at 228.
[308] *Id.* at 229.
[309] *Id.*

Selectmen of the town.[310] Domestic pets received their fair share of attention: the state went so far as to *require*, wherever infectious disease raged, that "all owners of Dogs shall destroy their Dogs or cause them to be killed; and in Neglect thereof, it shall be lawful for any person to kill the said Dogs."[311] Any person bringing goods, wares, or merchandise infected with disease into any town in Connecticut, either by land of water, would be fined.[312] It fell entirely to the Selectmen to determine the length and manner of airing all commercial items.[313]

The 1794 act also criminalized the direct or indirect transfer of Smallpox between individuals, even as it shifted the burden of proof to the individual thus accused.[314] The statute allowed, however, for the accused to counter the accusation by swearing to the court that he or she did not voluntarily, directly, or indirectly give or receive the infection.[315] Smallpox inoculation required a certificate from the civil authority—but such programs first required a two-thirds vote of the selectmen to begin.[316]

In summary, while some states, like Connecticut, took public health measures to an extreme, the salient point is that following the Revolution, public health was firmly in the hands of state legislatures. Like Maryland, New York, Massachusetts, Pennsylvania, and Connecticut, Delaware,[317] South Carolina,[318] Rhode Island, and Virginia[319] introduced quarantine laws. The state legislatures, in turn, delegated considerable authorities to the local entities, in whose hands lay not just the decision to quarantine individuals entering their bounds (either by land or sea), but the contours of *how* to give effect to quarantine. While some state provisions limited the extent of criminal culpability for breaking quarantine, they almost universally left the prosecution and operation of quarantine in the hands of local towns and municipalities. Local authorities were so firmly in the lead, that many states gave cities and towns the authority to cut off all communication and commerce

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[310] *Id.* at 229.
[311] *Id.* at 229.
[312] *Id.* at 230.
[313] *Id.*
[314] *Id.* at 231. ("[W]henever any Person shall be brought to Trial for Breach of this Act, in communicating or receiving the Small-Pox, aiding or assisting therein, such Person shall be deemed and adjudged guilty thereof, although the complainant shall not be able to produce any other Proof than to render it probable.").
[315] *Id.*
[316] *Id.* at 230.
[317] *See, e.g.,* 2 Del. Laws 136 (1797); 3 Del. Laws 17 (1799) (supplementing the act).
[318] *See, e.g.,* 1794 S.C. Acts 20.
[319] *See, e.g.,* 1793 Va. Acts 19.

with *any* part of the United States.[320]

C. Federal Forays

With the strong local character of quarantine in mind, it is perhaps unsurprising that the federal response to the yellow fever epidemic at the end of the eighteenth century (particularly when it hit Philadelphia) was to duck. The 1794 statute authorized the President to convene Congress outside of the Capitol in the event that "the prevalence of contagious sickness" or "other circumstances…hazardous to the lives or health of the members" should occur.[321]

In other words, Congress' first response to the devastating epidemic was not to take charge or even to act in the realm of public health. Indeed, that same year, in accordance with Constitutional restrictions on the states, Congress acquiesced in the appointment of a health officer in Maryland for the Port of Baltimore and approved the levy of a tonnage tax for a limited period to allow Maryland to offset the cost.[322] But it was a state appointment, keeping public health firmly in the state domain. Federal involvement was limited to the revenue questions thereby incurred.

It was not until twenty years after the Revolution that Congress introduced a federal statute addressing quarantine.[323] Repealed three years later, the legislation subordinated the federal government to state authority: it merely empowered the President to offer assistance to states in enforcing quarantine, *if they requested it*.[324] The legislation was preceded by much hand wringing in Congress about the extent of states' rights and concerns about giving too much authority to the Executive.[325]

The offensive language that sparked the debate would have created a "National Executive power to locate all quarantine stations." Members of the

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[320] *See, e.g.,* 3 Del. Laws 17 (1799).

[321] Act of Apr. 3, ch 17, 1 Stat. 353 (1794). See 2 U.S.C. § 27 (1958) (providing a current version of the statute).

[322] Act of June 9, ch. 61, 1 Stat. 393 (1794) (providing congressional consent to an act of the state of Maryland).

[323] Act of May 27, ch. 31, 1 Stat. 474 (1796) (repealed 1799); *See also* 6 ANNALS OF CONG. 2916 (1796-97). For discussion of the Yellow Fever epidemic raging at the time; *See* POWELL, *supra* note 49.

[324] Act of May 27, ch. 31, 1 Stat. 474 (1796) (repealed 1799); *See also* Edwin Maxey, Federal Quarantine Laws, 43 AM. L. REV 382 at 384 (1909).

[325] See 5 ANNALS OF CONG. 87 (1796) (committing "An act relative to quarantine" to Mssrs. Rutherfurd, Bingham and Langdon, to consider and report to the Senate); 5 ANNALS OF CONG. 1359 (1796). *See also* Goodman, *supra* note 64 (noting the tenor of the debates).

House strongly objected to taking such authority away from the states.[326] The question was not the role quarantine played role in commerce, but the impact it had on public health.[327]

> [T]he regulation of quarantine had nothing to do with commerce. It was a regulation of internal police. It was to preserve the health of a certain place, by preventing the introduction of pestilential diseases, by preventing persons coming from countries where they were prevalent. Whether such persons came by land or by water, whether for commerce or for pleasure, was of not importance. They were all matters of police.[328]

And practical reasons undergirded leaving such authority in the hands of the states. Georgia, for instance,

> was one thousand miles from the seat of Government, and from their situation with respect to the West Indies, they were very subject to the evil of vessels coming in from thence with diseases; and if they were to wait until information could be given to the President of their wish to have quarantine performed, and an answer received, the greatest ravages might in the mean time, take place from pestilential diseases.[329]

It was precisely because of such practical concerns that states had long been "in the habit of regulating quarantine, without consulting the General Government."[330] States, on the front line of defense, were "better calculated

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[326] 5 ANNALS OF CONG. 1350 (1796) (statement of Milledge) ("spoke...of the power of regulating quarantine being in the State Governments.").

[327] *See Id.* at 1352 (Statement of W. Lyman) ("[T]hought the individual States had the sole control over the regulations of quarantine. It was by no means a commercial regulation, but a regulation which respected the health of our fellow-citizens."); *Id.* at 1354 (statement of W. Lyman) ("Quarantine was not a commercial regulation, it was a regulation for the preservation of health. If commerce was incidentally affected, it ought so to be, when the object was the preservation of health and life. The United States, it was true, could prevent the importation of any goods, whether infected or not, but it did not thence follow that they could permit the landing of infectious goods contrary to the laws of any State. The several States possessed the sole power over this subject. They were the best judges of the due exercise of it."); *Id.* at 1357 (statement of Page) ("the right of the people to preserve their health…was one of the first rights of Nature.").

[328] *Id.* at 1353 (Statement of Gallatin); *Id.* at 1354 (Statement of W. Lyman) ("The right to preserve health and life was inalienable. The bill was not only unnecessary and improper, but it was an injudicious interference with the internal police of the States."); *Id.* at 1358 (Statement of Holland) ("[T]he Constitution being silent with respect to health laws, he supposed the passing of them was left to the States themselves."); *Id.* (Statements of Brent) (suggesting that "the constitution did not authorize" such federal interference with state police powers).

[329] *Id.* at 1351 (Statement of Milledge).

[330] *Id.*

to regulate quarantine."[331] Such power was akin to the states' right to self-preservation.[332] And history proved instructive: the very fact that the states had already acted in this area demonstrated that quarantine was a state power.[333] Representatives were uneasy at the prospect of the Executive overriding state decisions as to where and when to execute quarantine and the manner in which it would be implemented.[334]

The few Representatives that spoke in favor of stronger independent federal authorities located quarantine within Congress' commerce powers.[335]

> Gentlemen might as well say that the individual States had the power of prohibiting commerce as of regulating quarantine: because, if they had the power to stop a vessel for one month, they might stop it for twelve months. This might interfere with regulations respecting our trade, and break our Treaties.[336]

For them, only the federal government had the coercive authority—and resources—to enforce such measures.[337] In the end, the House of Representatives decided 46-23 to strike the "National Executive power" language, requiring instead that the federal government act in aid of the States in their performance of quarantine.[338]

The federal government's subservient approach continued. Two years

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[331] *Id.* at 1348 (Statement of Heister); *Id.* (Statement of Kittera) ("[E]ach State . . . understood its own concerns better than the General Government, and therefore the regulation [of quarantine] might be safely left with them.").
[332] *Id.* (Statement of Giles).
[333] *Id.* at 1350 (Statement of Swanwick).
[334] *See Id.* at 1351–52 (Statement of S. Smith) (suggesting that such concerns were "unworthy").
[335] *See Id.* at 1348 (Statement of S. Smith) ("the performing of quarantine was in the direction of the General Government: it was a commercial regulation."); *Id.* at 1350 (Statement of Bourne); *Id.* (Statement of Sitgreaves) ("[T]he strongest and best reason for a law, such as the one proposed, is, that it is a matter of very serious doubt whether, upon this subject, the States had any authority at all, and whether all such power is not vested by the Constitution in the congress, under their general authority to regulate commerce and navigation.").
[336] *Id.* at 1352–53 (Statement of Hillhouse).
[337] *See Id.* at 1348 (Statement of S. Smith) ("[States] could not command the officer of a fort to use force to prevent a vessel from entering their port. The authority over him was in the General Government."); *Id.* (Statement of S. Smith) ("[T]he Constitution did not give to the State Governments the power of stopping vessels from coming into their ports."); *Id.* at 1350 (Statement of Sitgreaves) ("It was true, the State of Pennsylvania had made some regulations on the subject of quarantine; but, without the aid of the United States, they could not carry them into effect. They may direct, by their Governor and board of Health, quarantines to be performed, but they could not force any vessels to observe their directions, without the aid of the General Government.").
[338] *See Id.* at 1352 (Statement of Williams).

after the national executive power controversy, President John Adams signed a law creating the first hospital as part of the U.S. Marine Hospital Services.[339] The legislation placed the hospitals under local control.[340] In 1799 Congress repealed the Act and gave the Secretary of the Treasury the power to direct that officers of the United States abide by rules and assist in executing quarantine laws consistent with State health laws.[341] Subsequent orders issued by the Secretary of the Treasury reiterated that Marine Hospital Service Officers, customs officials, and revenue officers were to cooperate in enforcing local quarantine law and regulations.[342]

With the federal government clearly in a support role, debates in Congress did not revolve around states' rights.[343] Instead, new measures focused on areas where the federal government exercised plenary power. The 1799 statute specifically noted, for instance, that any changes with regard to duties of tonnage would require Congressional approval.[344] It also created a federal inspection system for maritime quarantine.[345] This system allowed the federal government to begin gathering information about illness. Treasury provided financial assistance and direction. The statute empowered the federal government to purchase and erect warehouses to examine goods and merchandise entering any port.[346] Five years after granting the same powers to the legislature and Congress, the legislature ensured that the federal government could remove federal officers, prisoners, and executive and judicial officers, and re-locate them, in the event of an epidemic.[347]

i. Foreign Affairs, Commerce, and Efficacy Concerns

However much quarantine powers might be central to the state's ability to protect the health and welfare of its citizens, the economic impact of quarantine—as a domestic matter and as a dent in U.S. foreign trade

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[339] Elizabeth Fee, Public Health and the State: the United States, in THE HISTORY OF PUBLIC HEALTH AND THE MODERN STATE 224, 233 (Dorothy Porter, ed., 1994).
[340] Sciarrino, *supra* note 49, at 432–33.
[341] Act of Feb. 25, ch. 12, 1Stat. 619 (1799) (current version at 42 U.S.C. § 97 (1958)). For discussion of this statute, see Maxey, Federal Quarantine Law, 23 POL. SCI. Q. 617, 617–18 (Dec. 1908).
[342] Hugh S. Cumming, The United States Quarantine System During the Past Fifty Years, in A HALF CENTURY OF PUBLIC HEALTH 118, 120–21(Mazÿck P. Ravenel ed., 1921).
[343] *See* Debates and Proceedings of the Congress of the United States, 5th Congress, May 15, 1797-Mar. 3, 1799 (1851), at 2792-95.
[344] Act of Feb. 25, ch. 12, 1 Stat. 619 (1799) (current version at 42 U.S.C. §97 (1958)).
[345] *Id.*
[346] *Id.* at § 3.
[347] *Id.* at §§ 4-7.

(particularly when other countries imposed quarantine on U.S. vessels)—could hardly be ignored. Faced by foreign retribution, federal interest in expanding its role in the quarantine realm grew.

The states' failure to stem yellow fever towards the end of the 18th Century, for example, prompted a series of orders in England targeted at U.S. vessels.[348] These measures significantly disrupted foreign trade. In 1793, for instance, the Privy Council issued an order imposing two-week quarantine on all ships arriving from Philadelphia, Delaware, and New Jersey.[349] Soon seen as unnecessary, the Council subsequently revoked the order.[350] In its place, England adopted sanitary measures, requiring airing and cleansing of the vessels and the destruction of the personal effects of any person who died during the voyage. The following year, the Privy Council again responded to the American yellow fever epidemic with fourteen days' quarantine for ships arriving from Baltimore.[351] As the yellow-fever scare subsided, the Council revoked the order.[352] Thus began a pattern that continued through 1799: in response to outbreaks of disease in the U.S., the Privy Council would issue orders targeting certain ports and delaying or destroying the transport of U.S. goods.[353]

New legislation specifically targeted at the United States rode the crest of these regulations and entered into law. The problem was the nature of the disease: the application of existing English law to yellow fever was questionable. The governing statutes authorized orders to be issued in response to "plague," the definition of which had to be substantially relaxed to incorporate different diseases. The Privy Council sought to avoid a conflict by simply referring in their orders to a fever "of the Nature of the Plague." Initially, this sleight-of-hand did not cause much concern. As one historian explains, "the national mood was to put the health of the public before

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[348] BOOKER, *supra* note 48, at 256.
[349] *Id.*
[350] *Id.* at 257.
[351] *Id.* at 258. The Order referred to fever "of the Nature of the Plague" similar to the one in Philadelphia in 1793. *Id.* at 258–59.
[352] *Id.* at 259.
[353] In October 1795, the Privy Council issued a new order, setting quarantine against all ships from New York and Norfolk. *Id.* at 259. Three months later, it lifted the Order. *Id.* at 260. In October 1797 another order issued against arrivals from Philadelphia. *Id.* The Privy Council revoked it less than three months later. *Id.* at 261. The following September the Privy Council reintroduced quarantine against Philadelphia. *Id.* at 260-61. The following month saw it expanded the order to include New York and Boston. *Id.* at 262. Two months later, the Privy Council lifted the measure. *Id.* In October 1799, the Privy Council re-imposed a quarantine order against Philadelphia and extended it to New York. *Id.* And in 1800, the Privy Council responded to reports of infectious fever in Virginia and Maryland with an order against arrivals from either state. *Id.* Five weeks later, the Privy Council rescinded the orders. *Id.*

ambiguities of language."[354] But when the Master of an American ship, Thomas Calovert, under letter of the law, answered in the negative as to whether plague was onboard, the Law Officers of the Crown indicated to the Privy Council that they could not enforce penalties against him: "A paradoxical situation had therefore been reached in which quarantine regulations were justified by virtue of the vague meaning of 'plague', but that same imprecision provided a perfect defence against allegations that the rules had been breached."[355]

The Privy Council immediately wrote to George Rose, secretary to Treasury, requesting that Parliament entertain a bill that would widen the definition of diseases against which quarantine might be enforced.[356] Accordingly, on April 5, 1798, the government introduced new quarantine legislation specifically to meet American yellow fever concerns.[357]

The United States complained loudly and frequently to England about the use of quarantine against American ships. Britain remained unmoved: the country did not trust American bills of health. The government had received reports that people traveling from the West Indies to Philadelphia had been allowed to land, while possibly diseased vessels were quickly turned around and sent toward Britain.[358]

Congress thus confronted two problems: first, as a matter of foreign relations, friction with European powers as to whether domestic provisions were sufficient to stem the spread of disease—with significant economic costs to the country. Second, on the domestic front, the continuing yellow fever epidemics demonstrated the gross inadequacy of state quarantine regulations.[359] Members of the House began to lament the tendency of local entities to assume that disease was imported, and never native in origin.[360] They denounced state authorities as provincial and scientifically-backwards. Illness on board vessels had more to do with sanitation than with where the ships might have visited on their travels.[361]

Considering the magic influence of names, it were to be wished that the term

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[354] *Id.* at 258–59.
[355] *Id.* at 259.
[356] *Id.*
[357] Composite Act, 1798, 38 Geo. 3, c. 33, cited in BOOKER, *supra* note 48, at 261.
[358] BOOKER, *supra* note 48, at 368.
[359] Maxey, *supra* note 3416, at 617–18
[360] Report from Mitchell to the House of Representatives (Feb. 25, 1803), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 531, 532 (Washington, Gales & Seaton, 1832), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4.
[361] *Id.*

> quarantine should be erased from the statute books of the Union, and of each particular State. Regulations, precise and explicit, should, in the opinion of your committee, be formed to prevent foul and infectious vessels, with sickly crews, from entering our ports, or proceeding on any voyage in that situation.[362]

The solution was not to allow each state to respond in the manner they deemed most expedient, but to establish uniform federal regulations which ensured that all sea vessels be subject to sanitary and hygienic procedures, thus greatly reducing incidents of disease—and preempting foreign actions against U.S. trade.[363]

Thus far, in the Constitutional realm, police powers had trumped commerce. But quarantine and proper sanitary provisions, cost money.[364] Treasury was to prove the thin end of the wedge, as Congress steadily allocated ever-greater resources to stop the spread of disease.[365]

ii. The Growing Debate

Even as Treasury began to direct more resources towards stopping the spread of disease, disagreement about whether quarantine should be in state or federal hands grew.[366] Consistent with the earliest debates in Congress, states claimed quarantine authority under their police powers, while federal authority derived from its authority to regulate interstate commerce.[367] Federal and state courts initially weighted the scales in favor of state power. Thus, in 1824, Chief Justice Marshall famously enumerated quarantine as at the heart of those authorities reserved to the state:

> That immense mass of legislation, which embraces every thing within the territory of a

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[362] *Id.* at 532.
[363] *Id.*
[364] *See, e.g.,* Letter from Albert Gallatin to the House of Representatives (Feb. 17, 1806), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 622–23 (Washington, Gales & Seaton, 1832), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4.
[365] *See, e.g.,* Report from Mitchell to the House of Representatives (Feb. 25, 1803), in 7 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 531, 532 (Washington, Gales & Seaton, 1832), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=014/llsp014.db&recNum=4.
[366] Joseph Barbera et al, Large-Scale Quarantine following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences, 286 J. AM. MED. ASS'N 2711, 2712 (2001).
[367] Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 377–88 (1902) (Upholding quarantine law in question and implementation as appropriate exercise of state police power); Gibbons v. Ogden, 22 U.S. 1, 205–06 (1824).

> State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State…[368]

Marshall's position in *Gibbons v. Ogden* came to dominate the federal interpretation of state police powers. Indeed, five years later, when the Secretary of the Treasury asked the Attorney General, John M. Berrien, whether Treasury could itself issue quarantine regulations, Berrien replied that, under *Gibbons*, it could not.[369] Until the close of the Civil War, this position remained unchallenged. State judicial bodies shared Marshall's view. The Supreme Judicial Court of Maine, for instance, focusing on the City of Rockland's quarantine provisions, held that while the town officers could not appropriate a vessel and turn it into a hospital, it was entirely within their authority to place it in quarantine.[370]

As a practical matter, a number of local boards of health controlled quarantine. Philadelphia (1794), New York (1796), and Boston (1799) provide salient examples.[371] But not all localities had boards. Between 1800 and 1830, for instance, there were only five permanent boards of health. Nevertheless, the trend had begun. By 1873, more than 30 boards of health had formed, with the power to exercise quarantine, mitigate nuisances, and pursue sanitary reform.[372] Sped by the writings of prominent medical reformers such as

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[368] Gibbons v. Ogden, 22 U.S. 1, 205–06 (1824).

[369] John Berrien, Quarantine at Alexandria, in 2 Official Opinions of the Attorneys-General of the United States, 263, 263–66 (Washington, Robert Farnham, 1852), *available at* http://books.google.com/books?id=w8xDAAAAIAAJ&pg=PA190&lpg=PA190&dq=opinion+of+the+attorney+general+of+the+united+states+1829&source=bl&ots=TXihf3s7-3&sig=5oOnOD9cRiMNxdKb4uvMTv_j3X0&hl=en&sa=X&ei=ycrYUM7-NKiO0QGJj4GAAw&ved=0CEsQ6AEwBQ.

[370] Mitchell v. City of Rockland, 45 Me. 496 (1858).

[371] Act of June 20, 1799, ch. 10, 1799 Mass. Acts 327, *available at* http://archives.lib.state.ma.us/actsResolves/1799/1799acts0010.pdf

[372] Chapin, *supra* note 85, at 137–38. In 1869 the first permanent state board of health was established. DOROTHY PORTER, HEALTH CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES 155 (1999) (noting that Louisiana introduced the first state board of health in 1855, but it failed to effectively exercise its quarantine authorities.) Massachusetts again proved the first in this regard, but the idea of creating a state entity that would oversee sanitation and disease monitoring took some time to take hold. *See, e.g.,* LEMUEL SHATTUCK, BILLS OF MORTALITY, 1810-1849, CITY OF BOSTON, WITH AN ESSAY ON THE VITAL STATISTICS OF BOSTON FROM 1810 TO 1841 (1849). The District of Columbia followed Massachusetts' lead in 1870, and California and Virginia in 1871. MazŸck P. Ravenel, The American Public Health Association, Past, Present, Future, in A HALF CENTURY OF PUBLIC HEALTH, 14 (Mazÿck P. Ravenel ed., 1921). By 1876, twelve states had boards of health. *Id.* It was not until 1921, though, that an equivalent body could be found in every state. Chapin, *supra* note 85, at 155.

Benjamin Rush, dirt and disease became increasingly linked. Accordingly, states began integrating sanitary reform into law. The Massachusetts Public Health Act of 1797 became a model for other states—almost none of whom, at the close of the 18th Century, had public health organizations.[373] For the next seventy-five years, municipal cleanliness was seen as the key to public health.[374]

Miasmic theories of disease transmission paralleled the sanitary reforms.[375] Nevertheless, the use of quarantine—and the enforcement of local quarantine provisions—did not disappear. They continued to be an automatic (and reactive) response to public health emergencies. In 1804, for instance, New Orleans appointed a board of health.[376] When the emergency ended, the state abolished the board. In 1818 New Orleans re-constituted the board, again giving it the power to impose quarantine,[377] again abolishing it in 1819, and again resurrecting the board in 1821 to counter yellow fever.[378] By 1825 the city's business lobby had again succeeded in obtaining the board's dismissal.[379]

The local boards of health were not above using their powers to target other cities and ports in the United States—and, based on dubious scientific understandings, were often unsuccessful in their efforts to stem the advance of disease. In 1821, for instance, Andrew Jackson established a Board of Health at Pensacola "'to take active oversight of the quarantine and health regulations.'"[380] The following year, the Pensacola Board of Health announced the existence of yellow fever, and warned "'all inhabitants to remove, to retire to the country.'" The Pensacola *Floridian* cited the "[e]xposure to the sun, consumption of green fruit, and intemperance" as "among the causes for the fever cases originating locally." In addition, the paper indicated that "fear itself was the most contributing cause of fever."[381] By 1825, the Pensacola Board of

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[373] PORTER, *supra* note 377 ,at 148.

[374] Chapin, *supra* note 85, at 135; *See also; Id.* at 140.

[375] The miasmic theory of disease—that atmospheric conditions created disease—was certainly not new. Hippocrates, for instance, theorized that polluted air caused pestilence. But the debate took hold in the 19th century on both sides of the Atlantic. Some scholars point to this debate as contributing to the strength of sanitary reformers in the United States and the demise of quarantine law. Dorothy Porter, for instance, points to Walter Reed's success in launching a quasi-military campaign against Yellow Fever in Cuba (1900) and Panama (1914), as inspiration for the sanitary shift in focus in Louisiana and elsewhere. PORTER, *supra* note 46, at 155, 157.

[376] *Id.* at 148.

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] George F. Pearce, Torment of Pestilence: Yellow Fever Epidemics in Pensacola, 56 FLA. HIST. Q. 448 (1978).

[381] *Id.*

Heath had imposed quarantine measures against all vessels arriving in the port from Mobile and New Orleans.[382] By October 1825, yellow fever was rampant in the region.[383] Further outbreaks in 1830, 1846, and 1847 occurred.[384]

The system, of questionable effectiveness and significant cost, could not be sustained. A series of National Quarantine and Sanitary Conventions accompanied the march to Civil War.[385] The purpose of the conventions was to reform the current system of quarantine. The question was what direction to take.

The two principal reform groups at the time, otherwise diametrically opposed, shared a strong interest in establishing a national quarantine system. Contagionists, believing that disease spread through contact between individuals, sought a more uniform, national system to halt public exposure.[386] Anti-contagionists, believing that disease spread by other means and that sanitation was far more important, sought an end to what were perceived as ineffective, and possibly harmful, local laws.[387] Both looked to the federal government for the final word. The Commerce Clause provided a hook. Reporting in 1860, the Committee on External Hygiene explained:

> We consider that quarantine from its close connection with the U.S. Revenue Department, and the important bearing which it has upon commerce (which Congress alone can regulate) and upon travellers soon to be disperse throughout different and distant States of the Union, is a national, rather than a State concern, and we cannot conceive that a uniform system of quarantine can be established throughout the Union unless it be organized…as a national institution.[388]

Of particular concern was the politicization of local measures. Lamenting the state of New York, one reformer argued:

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[382] *Id.* (citing Pensacola Gazette and West Florida Advertiser, August 6, 1825.)
[383] *Id.* at 453.
[384] *Id.* at 453–54.
[385] *See, e.g.,* NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE SECOND NATIONAL QUARANTINE AND SANITARY CONVENTION, HELD IN THE CITY OF BALTIMORE, (John D. Toy, Baltimore, 1858) [hereinafter SQSC]; NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE THIRD NATIONAL QUARANTINE AND SANITARY CONVENTION, HELD IN THE CITY OF NEW YORK, APRIL 27TH, 28TH, 29TH, AND 30TH, 1839 (Edmund Jones & Co., New York, 1859) [Hereinafter TQSC]; NATIONAL QUARANTINE AND SANITARY CONVENTION, PROCEEDINGS AND DEBATES OF THE FOURTH NATIONAL QUARANTINE AND SANITARY CONVENTION, JUNE 14, 15, AND 16, 1860 (Geo. C. Rand & Avery, Boston, 1860) [Hereinafter FQSC].
[386] Michael Les Benedict, Contagion and the Constitution: Quarantine Agitatio from 1869 to 1866, 25 J. HIST. MED. 177, 178 (1970).
[387] *Id.*
[388] FQSC, *supra* note 385, at 170.

> They all tend in one direction; they all look towards the increase of perquisites, and the increase of that personal and political power which is sure to be abused. …Our Quarantine laws are inconsistent, they are more than barbarous; they are oppressive; they are not arranged, in any respect, with reference to the exact and absolute necessities for sanitary protection, much less for commercial and public convenience.[389]

Before the reformers could enter the political arena to advance their cause, however, the Civil War broke.

The course of the war underscored the extent to which the states were dependent on other localities to stem the tide of disease.[390] Naturally-occurring disease, however, was not the only threat. Reports suggest that Confederate forces attempted to use disease against soldiers and civilian populations.[391] In 1862-63, plans to use bodies and garments infected with yellow fever to spread disease among the northerners emerged.[392] Other plots involved infecting clothing with smallpox and then selling the clothes to the Union soldiers.[393] On several occasions Confederate forces contaminated wells and ponds with poisons and dead animals.[394] The northern forces refused to follow suit: War Department General Orders No. 100, issued in 1863, stated, "The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare."[395]

The war underscored the country's vulnerability to disease as well as the difficulty of amassing, at a state level, the resources necessary to combat it. When cholera hit in 1865, New York failed in its effort to obtain assistance from the Secretary of the Navy.[396] A number of states refused to introduce quarantine. And so a wartime bill took the bull by its horns, seeking the transfer of quarantine to federal hands.[397] The bill would have empowered the Secretary of War, with the assistance of the Secretaries of the Navy and Treasury, to enforce quarantine at all ports of entry, as well as to establish *cordon sanitaire* in the interior.[398]

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[389] TQSC, *supra* note 385, at 38, quoted in Benedict, *supra* note 38691, at 179.
[390] *Id.* at 181.
[391] Jeffery K. Smart, Chemical and Biological Warfare Research and Development During the Civil War, U.S. Army Soldier and Biological Chemical Command, at 5, *available at* http://www.wood.army.mil/ccmuseum/ccmuseum/Library/Civil_War_CBW.pdf.
[392] *Id.*
[393] *Id.*
[394] *Id.* at 5.
[395] *Id.*
[396] TQSC, *supra* note 385, at 38, quoted in Benedict, *supra* note386, at 182-183.
[397] *Id.* at 185. *See also* Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875),93 COLUM. L. REV. 1833, 1865 (1993).
[398] CONG. GLOBE, 39 Cong., 1st Sess. at 1201 (Mar. 6, 1866), *available at*

Senators balked. Henry B. Anthony (R-RI) pressed Senator Zachariah Chandler, chair of the Commerce Committee on the extent of the Secretaries' authorities to enforce quarantine. "[A]ll the powers at their command may be used if necessary," Chandler replied.[399] Shocked, Anthony asked if they could impose martial law. Chandler answered that they could "use any power requisite to stop the cholera." Anthony protested, "I would rather have the cholera than such a proposition as this."[400]

Even in the wake of war, with the enemy forces employing disease as a weapon, legislators proved reluctant to transfer state authority to the federal government. Despite calls for more vigorous national action, as Historian Les Benedict explains, "most Americans still regarded general police regulation—the ordinary day-to-day legislation affecting crime, health, sanitation, personal property, etc.—to be the responsibility primarily of the states."[401] State quarantine authority existed separate and apart from Congress' enumerated powers.[402] Lot M. Morrill (R-ME) adopted the prevailing view, "All sanitary regulations touching the health of this country within the jurisdictional limits of the several States are matters of police regulations."[403] The Civil War thus may have marked an important shift in the development of American federalism, but it was not one immediately reflected in the quarantine realm.

D. Shifting Federal Role

Immediately following the Civil War, the national government still had to walk a fine line. It remained constrained by state police powers, but it nevertheless began to expand into the realm of infectious disease and to begin drawing on its spending power to encourage states to turn over quarantine facilities to federal control.

In 1878 Congress introduced a new statute, for the first time creating federal authorities with regard to infectious disease.[404] The statute gave the Marine Hospital Service the power to adopt rules and regulations to govern vessels arriving from overseas.[405] Such measures must still defer to state

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http://memory.loc.gov/ammem/amlaw/lwcglink.html

[399] CONG. GLOBE, 39 Cong., 1st Sess. at 2444–45 (May 8, 1866), *available at* http://memory.loc.gov/ammem/amlaw/lwcglink.html .

[400] *Id.* at 2445.

[401] Benedict, *supra* note 386, at 188.

[402] *Id.* at 189.

[403] CONG. GLOBE, 39 Cong., 1st Sess. at 2521 (May 10, 1866), *available at* http://memory.loc.gov/ammem/amlaw/lwcglink.html.

[404] Act of Apr. 29, 1878, ch. 66, 20 Stat. 37 (1878).

[405] *Id.*

law.[406] The statute also created a worldwide surveillance system, requiring consular officers to send weekly reports on the state of health in foreign ports and to inform the Supervising Surgeon General of any infectious or contagious diseases abroad.[407] The statute further reflected the growing emphasis on science prevalent in the reformers' movements: Congress made appropriations for "investigating the origin and causes of epidemic diseases, especially yellow fever and cholera, and the best method of preventing their introduction and spread."[408]

The following year, Congress repealed the sections of the statute empowering the Marine Hospital Service to make rules and regulations independent of state boards.[409] The repeal, however, was scheduled to sunset after four years, at the close of which the repealed provisions of the 1878 act went back into effect.[410] The 1879 statute created criteria for sanitation on board ships and expanded the number of federal quarantine stations.[411] It also created a national board of health. Again, its powers were circumscribed: the members were to cooperate with and to help the local and state boards of health—not supplant them. Their remit was limited to cholera, smallpox, and yellow fever, for which they were to consider the need for a national quarantine system. A subsequent resolution freed up resources for the federal government to take a stronger national lead: it required that the Secretary of the Navy place vessels not required for other purposes at the disposal of the commissioners of quarantine, when requested by the National Board of Health.[412] The statute also authorized the appointment of medical officers to overseas consulates and to supervise the enforcement of sanitary measures for ships leaving for U.S. ports.[413]

Perhaps most importantly, quarantine stations were expensive to operate and maintain, and following the Civil War, few states had extra resources at their disposal. The solution was at once elegant and powerful; the 1879 statute made it possible for local ports to relinquish their quarantine facilities to the federal government, which would then reimburse them and take

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[406] *Id.*
[407] *Id.* at 333, § 2.
[408] Cumming, *supra* note 3427, at 121.
[409] Act of Mar. 3, 1879, ch. 202, 20 Stat. 484, (1879) § 10; *See also* Act of July 1, 1879, ch. 61, 21 Stat. L. 47 (amending the 1879 act and designating a disbursing agent).
[410] Act of Mar. 3, 1879, ch. 202, 20 Stat. 484, (1879) §10; Government Officers Anxious: the Power of the Federal Authorities in Quarantine Matters, N.Y. TIMES, Sept. 1, 1989, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=F60C1EF 83C5F1B738DDDA80894D1405B8285F0D3.
[411] 20 Stat at 484.
[412] S.J. Res. 6, 46th Cong., 21 Stat. 50 (1879).
[413] Cumming, *supra* note 3427, at 121.

responsibility for preventing the importation of disease. This provision proved central in paving the way for the transfer of state power to federal hands. The statute also gave the federal government the authority to make additional rules regulating inter-state quarantine, in the event that local regulations were found to be inadequate. In 1882, Congress further enabled federal expansion in this area, creating a fund for state and local entities to obtain assistance for suppressing epidemics.[414] The President could, at his discretion, respond to an actual or threatened epidemic by appropriating up to $100,000.[415]

With these changes, the federal government found itself in a new role in which it appeared to perform better than the states could acting alone. The Marine Hospital Service (MHS) proved a to be a rising star, with a series of highly visible successes. In 1882, for instance, Texas found itself threatened by a yellow fever epidemic. MHS provided assistance to maintain a *cordon sanitaire* around Brownsville, calming concerns in the bordering areas. Widely hailed as a success, in 1883 the service established quarantine stations for the detention and treatment of infected ships at Ship Island (for Gulf Quarantine) and Sapelo Sound (for South Atlantic Quarantine).[416] It expanded in 1887 to build a laboratory on Staten Island, an institution that gradually morphed into what is now the National Institutes of Health.

i. Regional Initiatives

Regional initiatives soon emerged with a goal of standardizing quarantine laws and ensuring notification across state and international lines. These conferences played a key role in developing a broader consensus about the form quarantine ought to take and the appropriate role for the federal government. Their occurrence was aided by the ascendancy of the theory of contagion and growing agitation within the medical community for better standards.

One of the earliest meetings took place in 1886, when the International Conference of the Boards of Health met in Toronto, Canada, and resolved that each state and provincial board of health, and where no state board of health existed, the local board, would notify the other boards in the event of cholera, yellow fever, or smallpox.[417] Responding to concerns that accurate reporting

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[414] Gov't Officers Anxious: the Power of the Federal Authorities in Quarantine Matters, N.Y. TIMES, Sept. 1, 1892, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=F60C1EF83C5F1B738DDDA80894D1405B8285F0D3.
[415] *Id.*
[416] Cumming, *supra* note 342, at 122.
[417] Int'l Conference of Bds. Of Health, Resolutions, (1886), reprinted in PROCEEDINGS OF THE QUARANTINE CONFERENCE HELD IN MONTGOMERY, ALABAMA, ON THE 5TH, 6TH, AND 7TH DAYS OF MARCH, 1889

might be influenced by commercial interests, the conference resolved that, where rumors suggested the presence of pestilential disease in any State or Province, and definite information one way or the other could not be obtained from the proper health authorities, "the health officials of another State are justified in entering the before-mentioned State or Province for the purpose of investigating and establishing the truth or falsity of such reports."[418] The following year the International Conference of State Boards of Health met in Washington.[419] This meeting reaffirmed the Toronto principles, further resolving the following:

> That in the instance of small-pox, cholera, yellow fever and typhoid fever, reports be at once forwarded, either by mail or telegraph, as the urgency of the case may demand; and further, that in the instance of diphtheria, scarlatina, typhoid fever, anthrax or glanders, weekly reports, when possible, be supplied, in which shall be indicated, as far as known, the places implicated, and the degree of prevalence.[420]

Similarly, in 1889 Alabama called for a regional conference to harmonize southern quarantine laws.[421] The meeting took place in the shadow of a recent, devastating yellow fever epidemic in Florida.[422] Alabama invited delegates from Texas, Florida, Louisiana, Mississippi, South Carolina, North Carolina, Georgia, Tennessee, Kentucky, and Illinois.[423] With the Civil War fresh in the minds of participants, papers prior to the conference evinced concern about preserving state rights.[424] But the papers also expressed concern that the southern states were particularly vulnerable: inconsistent laws and

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41–42, (Mongomery, Brown Printing Co. 1889) [hereinafter PQCHMA] *available at* http://books.google.com/books?id=UH8zSLjH4cAC&pg=PA42&lpg=PA42&dq=%22international+conference+of+state+boards+of+health%22&source=bl&ots=PIQTKDDlhO&sig=8EJsNgnKwmbl4S7j9C2DyT2F2b0&hl=en&sa=X&ei=mhLbUITnH-en0AGR_4CwDw&ved=0CEMQ6AEwAg#v=onepage&q=%22international%20conference%20of%20state%20boards%20of%20health%22&f=false.

[418] *Id.*

[419] Int'l Conference of State Bds. Of Health, Resolutions, (1886), reprinted in PQCHMA, *supra* note 422, at 42–43.

[420] *Id.*

[421] PQCHMA, *supra* note 422, at 4.

[422] *ID.* at 60.

[423] *Id.* at 4 (establishing that there were visiting guests from Michigan, Maryland, Havana, Marine Hospital Service).

[424] *Id.* at 47. From New York, for instance, Dr. A. N. Bell commented, "Every organized government, State or local, has the right of protecting itself against the introduction of infectious or contagious diseases, and, to this end, of excluding any person or thing and of prohibiting communication by or with any country or place deemed likely to introduce infectious or contagious diseases of any kind."

commercial corruption blighted the system. Variation in maritime measures resulted from politics—not geography, climate, or science.[425]

Geographic quarantine and enforced isolation generated particularly heated debate. There was little patience for giving the government the authority to take people from their own homes. Further, efforts to depopulate entire areas might lead to panic.[426] Accordingly, the conference resolved:

> In the beginning of an outbreak of yellow fever there is no need of depopulation at all, except of infected houses, or infected districts; but if people who are able to afford the expense desire to leave they should do so quietly and deliberately, and no obstacles should be placed in their way; and those who leave healthy districts of the city or town should go wherever they please, without let or hindrance.[427]

Those departing should only be allowed to leave "under such restrictions as will afford reasonable guarantees of safety to the communities in which they find asylum."[428] Where depopulation may be necessary, detention should be limited to ten days.[429] To address corruption, the conference shifted the emphasis from local authorities to state authorities.[430] And it adopted standard rules for regulation of railroads, balancing the interests of commerce against the demands of public health.[431]

Finally, the conference made specific demands of the Federal government. First, that the Federal government disinfect all mail.[432] Second, that the Secretary of the Treasury increase revenues for the patrol service on the coast of Florida to the extent necessary to prevent smuggling.[433] Third, the conference requested that the U.S. government enter into negotiations with Spain with view towards placing U.S. sanitary inspectors at Spanish ports with such legal jurisdiction as would be necessary for the enforcement of health regulations.[434] Delegates were particularly concerned about the threat of yellow fever from Cuba, the "fountain head" of the disease.[435]

In concert with regional meetings, calls for federal regulation began echo within the fields of medicine and industry. Discoveries by Louis Pasteur,

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[425] *Id.* at 58–59.
[426] *Id.* at 16–18.
[427] *Id.* at 18.
[428] *Id.* at 19.
[429] *Id.*
[430] *Id.* at 21.
[431] *Id.* at 39–41.
[432] *Id.*
[433] *Id.* at 35.
[434] *Id.* at 36.
[435] *Id.* at 38.

Ferdinand Cohn, and Robert Koch gave birth to modern microbiology, in the process verifying the germ theory of disease.[436] These advances propelled quarantine from being seen as a reactive, politically-sensitive model, to one driven by rationality.[437] Attention expanded to those who had come into contact with the ill.[438] Prominent medical personnel argued that by aligning detention to the incubation period of the disease, and by instituting sterilization of medical tools, efforts to contain sickness would obtain more success.[439]

In 1888 the Philadelphia College of Physicians issued an influential report, asserting that a national system of maritime was the only way to secure the United States against the importation of disease.[440] Resources mattered: "Such necessary uniformity can be obtained by no other arrangement, for the reason that the National Government is alone able to defray the expense of complete quarantine establishments at every port, according to the requirement of each and without regard to the revenue derived from the shipping of any."[441]

The College of Physicians identified a number of problems with the current system. First, as both a substantive and a procedural matter, the rules were reactive: "They have seldom or never been drafted with a full recognition of the need of adequate and constant protection of the health of the general public."[442] Moreover, the national government depended upon states requesting assistance, which meant that they did not become involved until the middle of an emergency, rather late in the game to prevent an epidemic.[443] Second, health laws were focused on local interests and corrupted by "the commercial interests of rival ports, the partisan struggles of opposing political factions, and the heedless parsimony with which money has been doled out for the execution of such health laws as exist."[444] Third, the failure of ports of entry to stop disease ended up hurting the inland areas the most—which

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[436] *See* Frederick P. Gorham, The History of Bacteriology and its Contribution to Public Health Work, in A HALF CENTURY OF PUBLIC HEALTH 66, 69 (Mazÿck P. Ravenel, ed. 1921); *See also* COLL. OF PHYSICIANS OF PHILA., AN ADDRESS FROM A SPECIAL COMMITTEE OF THE COLLEGE OF PHYSICIANS OF PHILADELPHIA TO THE MEDICAL SOCIETIES OF THE UNITED STATES: CONCERNING THE DANGERS TO WHICH THE COUNTRY IS EXPOSED BY THE INEFFECTUAL METHODS OF QUARANTINE AT ITS PORTS, AND IN REGARD TO THE NECESSITY OF NATIONAL CONTROL OF MARITIME QUARANTINE 23 (1887).
[437] Cumming, *supra* note 342, at 120.
[438] *Id.*
[439] *Id.*
[440] COLL. OF PHYSICIANS OF PHILA., *supra* note 437, at 1.
[441] *Id.* at 14.
[442] *Id.* at 2–3.
[443] *Id.* at 16.
[444] *Id.* at 3. *See also Id.* at 19.

meant that the ports did not have any direct incentive to observe strict measures.[445] Fourth, the current federal authorities were inadequate. While sanitation mattered, it was also insufficient.[446] Reference to the United Kingdom would be misplaced: Great Britain had fewer people, a smaller territory, significant resources, fewer immigrants, and atmospheric conditions not favoring disease.[447] Fifth, as for the commercial impact, the problem in America was people, not cargo.[448] Much would be gained by detaining the "immigrant classes", who, in light of the advantages they were about to receive—could hardly begrudge the small sacrifice.[449]

It is important to note here that in the communities most affected by quarantine provisions, the United States differed greatly from the United Kingdom.[450] In England in particular, the primary concern had historically been with plague—a disease carried by wool, silk, and other goods. Thus *it was the merchant class, not the immigrant class, which was most affected by restraints on travel and trade*.[451] Resultantly, the English shipping industry took a strong interest in the question of quarantine and, as soon as it was constitutionally viable, lobbied national quarantine authority out of existence.[452] In contrast, no organized lobby stood ready to defend immigrants arriving in the United States.[453] Indeed, the almost redemptive quality of cleansing came to justify and reinforce quarantine at the borders.[454]

The College of Physicians noted the advantages of a national approach.[455] A federal system would create uniformity and distribute the costs evenly among the states.[456] In this manner, the federal government could afford better training.[457] By stopping disease at the ports, a national system would prevent inter-state quarantines, which hurt trade in the interior.[458] The government could shift resources between ports when necessary, in the

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[445] *Id.* at 13. During the 1873 cholera outbreak, it had been Ohio, Minnesota, and the Dakotas that had suffered the most, as the railroad swept immigrants from the ports to the interior. In 1887, when the small port of Tampa, Florida, had failed to stop a yellow fever outbreak, it, too, had swept through the south.
[446] *Id.* at 14.
[447] *Id.* at 5–6.
[448] *Id.* at 7.
[449] *Id.*
[450] *Id.* at 3–4.
[451] *Id.* at 5.
[452] COLL. OF PHYSICIANS OF PHILA., *supra* note 436, at 23.
[453] *Id.* at 5.
[454] *Id.* at 5–6.
[455] *Id.* at 14.
[456] *Id.* at 14–15.
[457] *Id.* at 16.
[458] *Id.* at 17.

process freeing quarantine from local politics.[459] The physicians were not unaware of state concerns about federalism, but necessity overrode the traditional police powers reserved to the states.[460] Congress must pass new legislation.[461]

Industry, like the medical community, came to support the shift, and gradually the states, too, began to come around.[462] Many of them had already begun transferring their quarantine stations to federal control.[463] A paper from New Orleans, circulated to the Southern states, explained: "[T]he time has come when Federal Resources and Federal power should be organized and exercised to regulate and control Inter-state as well as foreign quarantine, and to prevent the introduction and extension of contagious and infectious diseases in the United States."[464] Congress should pass legislation for the appointment of a Chief Commissioner of Health, charged with the collection and distribution of infectious disease information.[465] A new federal health commission would divide into six sections, each focused on the prevention of a different disease: yellow fever, cholera, typhoid, scarlet fever, small-pox, and diphtheria.[466]

The Federal Government quietly drove the discussion, encouraging regional agreement and standardization.[467] The Alabama conference, for instance, may have been technically organized by a state—indeed, only state delegates had a vote.[468] But the role of the Surgeon General could hardly be ignored: it was he who set the agenda.[469]

ii. Judicial Reflection: Morgan's Steamship

In the midst of these developments, a timely case led the courts to uphold quarantine as within state police powers, but it also raised the possibility of federal preemption. The case stemmed from the Louisiana legislature's decision in 1882 to authorize the construction of a quarantine station in New

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[459] *Id.* at 20.
[460] *ID.* at 44.
[461] *Id.* at 21.
[462] *See, e.g.,* J.C. Clark, Quarantine Regulations, in PROCEEDINGS OF THE QUARANTINE CONFERENCE HELD IN MONTGOMERY, ALABAMA, ON THE 5TH, 6TH, AND 7TH DAYS OF MARCH, 1889 69–70.
[463] *Id.* at 86.
[464] *Id.*
[465] *Id.*
[466] *Id.* at 87.
[467] *Id.* at 5.
[468] *Id.*
[469] *Id.* at 49.

Orleans.[470] A subsequent statute required vessels and passengers entering the Mississippi River through the station to pay a fee and undergo examination.[471] Morgan's Steamship Company challenged the statute, saying that it violated the Constitution by imposing tonnage duties and interfering in the federal regulation of commerce.[472]

The Supreme Court disagreed.[473] The precautions taken by Louisiana were "part of and inherent in every system of quarantine."[474] They differed "in no essential respect from similar systems in operation in all important seaports all over the world, where commerce and civilization prevail."[475] Justice Miller, writing for the Court, added, "If there is a city in the United States which has need of Quarantine laws it is New Orleans."[476] Not only was the city on the front line of defense, but New Orleans served as a funnel through which trade to the interior flowed. While quarantine laws impacted interstate commerce, it was better to reserve such matters to the states—*at least until invalidated by Congress*:

> [I]t may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on this subject will be abrogated, at least so far as the two are inconsistent. But until this is done, the laws of the State on this subject are valid.[477]

The court noted that for nearly a century, Congress had refrained from directly regulating quarantine; nor had it passed "any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad."[478] Nevertheless cholera and yellow fever raged.

> During all this time the Congress of the United States never attempted to exercise this or any other power to protect the people from the ravages of these dreadful diseases. No doubt they believed that the power to do this belonged to the States. Or, if it ever occurred to any of its members that congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of

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[470] Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455 (1886).
[471] *Id.*
[472] *Id.* at 456.
[473] *Id.* at 459.
[474] *Id.*
[475] *Id.* at 458.
[476] *Id.* at 459.
[477] *Id.* at 464.
[478] *Id.* at 466.

the States who were familiar with the matter.[479]

The Court found it unlikely that this practice, widely accepted for a century, violated the Constitution.[480] While the states might still have quarantine authority, however, the possibility of federal preemption now presented itself.

iii. Federal Legislation in the wake of Morgan's Steamship

For the next five years, federal quarantine measures followed *Morgan's Steamship*, almost on an annual basis. The first one, in 1888, was relatively minor: it simply introduced penalties for the violation of quarantine laws and regulations.[481] In 1890, however, Congress began to flex its muscles, passing a statute that authorized the Secretary of the Treasury to develop rules and regulations to prevent the interstate spread of disease.[482] Hitherto such authorities applied only to the nation's ports.[483] The statute specified cholera, yellow-fever, small-pox, and plague, stating that whenever the President was satisfied as to its presence, "he is hereby authorized to cause the Secretary of the Treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one State or Territory into another…"[484] The concentration of these authorities in the Secretary of the Treasury underscored the nexus between commerce and disease. The statute made it a misdemeanor for any officer or agent of the U.S. at any quarantine station, or any other person employed to help prevent the spread of disease, to violate quarantine laws, with a fine of up to $300 and imprisonment up to 1 year upon conviction.[485] Common carriers were treated more severely, with any violation earning a fine of up to $500 or imprisonment for up to two years.[486]

In 1891 a new Immigration Act expanded border inspection and quarantine authority.[487] This did not, however, mean that the national government could not introduce new regulations where none existed; nor did it mean that Federal regulations could not be more stringent than local regulations.[488]

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[479] *Id.*
[480] *Id.*
[481] Act of Aug. 1, 1888, ch. 727, 25 Stat. 355 (1888).
[482] Act of Mar. 27, 1890, ch. 51, 26 Stat. 31 (1890).
[483] 25 Stat. at 355.
[484] 26 Stat. at 31.
[485] *Id.* § 2.
[486] *Id.* § 1.
[487] Act of Mar. 13, 1891 ch. 551, 26 Stat. 1084 (1891); *See also* Goodman, *supra* note 64, at 46–51, 263.
[488] 20 U.S. Op. Att'y Gen. 468 (1892).

Stricter measures would not, in the Solicitor General's view, "conflict with or impair" local sanitary regulations:

> A State might be without the machinery to enforce a safe quarantine; its officer might through mistaken opinions or corrupt motives fail in his duty. It is not to be tolerated that an entire people possessing a government endowed with the powers I have enumerated should be exposed to the scourge of contagion and pestilence through such causes.[489]

So, where state measures were found inadequate, the federal government could act.

Accordingly, in 1893, Congress repealed the 1879 legislation, expanded the Marine Hospital Service responsibilities and provided for further federal authorities in support of state quarantine efforts.[490] The supervising Surgeon-General of the Marine-Hospital Service became required to examine all state and municipal quarantine regulations and, under the direction of the Secretary of Treasury, to cooperate with and help state and municipal boards of health in the execution and enforcement of their rules and regulations—as well as Treasury's rules and regulations—to prevent introduction of contagious and infectious diseases into the United States or between U.S. states or territories.[491] All quarantine laws in force would be published.[492]

The 1893 statute neither eliminated nor took over the state role, but it gave the Secretary of the Treasury the authority to enact *additional* rules and regulations to prevent the introduction of diseases, foreign and interstate, where local ordinances either did not exist or were inadequate.[493] The regulations must apply uniformly.[494] State and local officers would enforce federal measures where they were willing to act; if they refused or failed to do so, the federal government would assume control.[495] Warehouses, purchased by Treasury, would be used for merchandise subject to quarantine "pursuant to the health-laws of any State".[496] The Secretary of the Treasury could

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[489] 20 U.S. Op. Att'y Gen. 474–75 (1892). This read of Congressional action in introducing the Act of 1878 did not comport with the view taken by the Supreme Court in Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455 (1886).
[490] Act of Feb. 15, 1893, ch. 114, 27 Stat. 449 (1893).
[491] *Id.* at § 4.
[492] *Id.*
[493] *Id.* at § 2.
[494] *Id.* at § 3.
[495] *Id.* at §3 (authorizing the President to "execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose.").
[496] Treas. Reg. §§ 4794–95 (1893).

prolong the period of retention, subject to state law.[497] As in earlier legislation, where contagious disease raged and presented a danger to officers of the revenue, the Secretary of the Treasury had the authority to remove them to a safer location so they could continue their duties.[498]

The 1893 statute was the first national legislation to require a bill of health from all vessels arriving in the United States—centuries after the same had been required in England. Failure to arrive with a clean bill of health carried a fine of up to $5,000 per ship.[499] Subsequent regulations required that bills of health be obtained for vessels arriving from European, Asiatic, African, South American, Central American, Mexican, and West Indian ports.[500] They exempted domestic vessels engaged in trade on the North American coast and inland waters, as long as the ports were free from infection.[501] The bills were somewhat detailed, although not as specific as their corresponding British regulations.[502] Inspection had to be conducted within six hours of departure.[503]

The statute also strengthened the country's international disease surveillance program, requiring consular officers to make weekly reports to the Treasury on the state of disease abroad—instead of only reporting epidemics once they had taken hold.[504] The consular reports would, in turn, be provided to home ports.[505] When infected vessels arrived in the United States, the Treasury could remand the vessel, at its own expense, to the nearest quarantine station.[506] The President obtained the further power to designate countries gripped by infectious or contagious disease and to prohibit the introduction of persons or property from such regions.[507] Finally, the

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[497] *Id.* at § 4796.

[498] *Id.* at § 4797. Similarly, the President, in the face of an epidemic, could order the removal of all public offices "to such other places as he shall deem most safe and convenient for conducting public business." *Id.* § 4798.

[499] Act of Feb. 15, 1893, ch. 114, 27 Stat. 449, at § 1.

[500] Treas. Reg. Art. 1 (1893).

[501] *Id.*

[502] *Id.* U.S. bills of health required the name of the vessel, nationality, tonnage, iron or wood, the number of compartments for cargo/passengers, crew members, the names of captain and medical officer, the number of passengers, the port of departure, any sicknesses during law voyage, the last port of call, sanitary conditions, the source and potability of the water and food supplies, the nature and condition of the cargo, diseases prevalent at the port of origin and the surrounding country, and the number of cases/deaths from yellow fever, Asiatic cholera, plague, smallpox, typhus fever, over past two weeks.

[503] *Id.* at Art. III.

[504] *Id.* at § 4.

[505] *Id.* at § 5.

[506] *Id.* at § 6.

[507] *Id.* at § 7. It is not clear how often this power was used. By 1921, however, the authority

legislation further smoothed the material transfer of quarantine structures to the federal government, authorizing the Treasury to receive buildings and disinfecting apparatus and to pay reasonable compensation to the state.[508]

E. Police Powers, Preemption and the Spending Clause

By the turn of 20th century, the federal government had made some advances into the quarantine realm, but it had yet to preempt the states. State quarantine was alive and well. In December 1899, for instance, plague broke out in Chinatown and other parts of Honolulu.[509] Eventually, the city of Honolulu was placed under quarantine and, at one point, the local board of health ordered that an entire city block, facing the trade winds, be burned.[510] The quarantine did not end until May 1900.[511]

Efforts to challenge state authority on constitutional grounds fell short, with the judiciary further underscoring its position in *Morgan's Steamship*.[512] In 1898, for instance, in the face of a yellow fever epidemic, the Louisiana State Board of Health issued an order declaring New Orleans and other parts of the state under geographic quarantine.[513] The Board prohibited entry of all persons, whether "acclimated, unacclimated or said to be immune."[514] Shortly before the order was issued, the French liner *Brittania* arrived in New Orleans with 408 passengers and a clean bill of health.[515] Before the passengers could disembark, however, the Board of Health directed the ship to leave Louisiana—threatening to extend quarantine to any place the ship landed.[516] After days of dispute, the liner sailed to Pensacola, Florida, and the company brought suit on the grounds that the State Board of Louisiana had violated the Act of February 15, 1893.[517]

Compagnie Francaise v. Louisiana State Board of Health reiterated the key findings in *Morgan's Steamship*. Justice White, writing for the court, held that the state had the authority to enact and enforce laws "for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious

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was viewed as based on unsound science. See Cumming, *supra* note 342, at 122.

[508] Treas. Reg. § 8 (1893).

[509] Wong Chow v. Transatlantic Fire Ins. Co., 13 Haw. 160, 161 (1900).

[510] *Id.*

[511] *Id.*

[512] Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455, 467 (1886).

[513] Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902).

[514] *Id.* at 385.

[515] *Id.* at 381.

[516] *Id.* at 382.

[517] *Id.* at 383.

diseases."[518] The Louisiana Board of Health had, with this purpose, passed a resolution preventing anyone from entering a place in the state where quarantine had been declared.[519] "[T]hat from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question."[520] But like Justice Miller in *Morgan's Steamship*, Justice White left open the possibility of Commerce Clause preemption:

> [W]henever Congress shall undertake to provide…a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent.[521]

Until Congress exercised its power, however, "such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the constitution."[522]

Three years later, the Court again underscored state authority to legislate in the realm of public health. *Jacobson v. Massachusetts* centered on compulsory vaccination.[523] Justice Harlan upheld state authority to enact such laws, explaining, "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[524] Like quarantine, compulsory smallpox vaccination was held to be a legitimate exercise of state's police power to protect public health and safety.[525] Local boards of health had been the ones to determine whether mandatory vaccination was required.[526] Their decision had therefore been neither unreasonable nor arbitrary.[527]

State legislatures and courts continued to regard quarantine law as firmly within the state domain.[528] By 1913, however, the shifting tide had begun to

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[518] *Id.*
[519] *Id.* at 398.
[520] *Id.* at 387. *See also* Asbell v. Kansas, 209 U.S. 251 (1908) (holding that the Federal Quarantine Act of 1905 was treated as totally irrelevant to the question of the power of the state to enforce its inspection laws, which were held not to conflict with the inspection provisions of the act of 1903).
[521] Compagnie Francaise de Navigation a Vapeur, 186 U.S. at 388.
[522] *Id.* at 387.
[523] Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[524] *Id.* at 27.
[525] *Id.* at 28 (citing R.R. Co. v. Husen, 95 U.S. 465, 472 (1877).
[526] *Id.* at 27.
[527] Wendy E. Parmet et al, Individual Rights versus the Public's Health—100 years after Jacobson v. Massachusetts, 352 NEW ENG. J. MED. 652 (2005).
[528] *See, e.g.,* Wong Wai v. Williamson, 103 F. 1 (C.C.N.D. Cal. 1900) (challenging a San Francisco

gain momentum.[529] That year, the Supreme Court recognized that states were free to adopt quarantine regulations *that did not conflict with Federal statutory or regulatory initiatives*.[530] The subtle undertones of the decision suggested not that the states had the ultimate authority, but that it was only by leave of Congress that they could act in this area.[531]

During this period, the federal government continued to assist the states, while quietly accepting transfer of authority and equipment in what one mid-20th century scholar referred to as "a process of accretion and erosion."[532] In 1921, the last state transferred its holdings and the authority to regulate them, to the federal government, bringing the total to approximately 100 quarantine stations. [533] The Surgeon General reflected:

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ordinance requiring Chinese residents of the city to be administered a bubonic plague vaccine on grounds of equal protection); Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900) (challenging the same ordinance on equal protection grounds); Ex Parte Company, 139 N.E. 204, 206 (Ohio 1922) ("[T]he power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily."); Ex parte Johnson, 180 P. 644, 644–45 (Cal. Dist. Ct. App. 1919) (all judges concurring) ("[T]he adoption of measures for the protection of the public health is a valid exercise of the police power of the state, as to which the Legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing their spread."); Barmore v. Robertson, 302 Ill. 422 (Ill. 1922) (finding "it is not necessary that one be actually sick, as the term is usually applied, in order that the [state] health authorities have the right to restrain his liberties by quarantine regulations.").

[529] The Minnesota Rate Cases, 230 U.S. 352, 406 (1913).

[530] *Id.*

[531] *Id.* at 408–09.

[532] Sidney Edelman, International Travel and our National Quarantine System, 37 TEMP. L. Q. 28, 35 (1963). In 1905 a Yellow Fever outbreak in New Orleans caused panic. Health workers soon found that the situation had gotten out of hand. The governor declared a state of emergency. Federal public health officials helped to contain the epidemic—and head off friction between Mississippi and Louisiana (derived from the former's allegation that Louisiana was concealing the extent of the yellow fever outbreak so as not to hurt interstate commerce). *See also* ALAN M. KRAUT, GOLDBERGER'S WAR: THE LIFE AND WORK OF A PUBLIC HEALTH CRUSADER 56–57 (2003); Sciarrino, Part I, *supra* note 49, at 167–8. In 1911, the Marine Hospital Service worked with the Port of New York to prevent the entry of cholera from abroad. *See e.g.,* JOHN M. LAST, PUBLIC HEALTH AND HUMAN ECOLOGY 311 (1998); Cumming, *supra* note 342, at 128. Congress continued to facilitate the transfer of quarantine stations, previously operated by state or local governments, to federal authorities. *Id.* at 123. The quarantine of women with venereal disease in World Wars I and II, while driven by the federal government, took place under state laws. *See* MARILYN E. HEGARTY, VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES: THE REGULATION OF FEMALE SEXUALITY DURING WORLD WAR II (2008); John Parascandola, Presidential Address: Quarantining Women: Venereal Disease Rapid Treatment Centers in World War II America, 83 BULL. HIST. MED. 431–59 (2009); DAVID J. PIVAR, PURITY AND HYGIENE: WOMEN, PROSTITUTION, AND THE "AMERICAN PLAN" 1900–1930 (2002).

[533] Neuman, *supra* note 397, at 1865.

> The transition of a quarantine system, composed of units operated by the municipal or state authorities, to a compact federal organization has been gradual, but persistent. One after another cities and states have transferred their quarantine stations to the national Government, so that, with the passing of the New York Quarantine Station from state to national control on March 1, 1921, the Public Health Service now administers every station in the United States and in the Hawaiian Islands, the Philippines, Porto Rico, and the Virgin Islands.[534]

At that point, the federal government was inspecting some two million passengers and crew, and 20,000 vessels each year.[535]

Centralized control brought with it a number of advantages. As reformers anticipated, it allowed maritime quarantine to be uniformly administered, so as not to favor one port over another.[536] It generated a higher quality of quarantine officers, as the United States could now create a trained corps that could be moved between stations.[537] It also allowed for greater cooperation between medical authorities, customs, and immigration services.[538] It placed the country in a stronger position to comply with its international treaties (and to demand that foreign countries reciprocate).[539] It ensured that the costs would be distributed among the states, all of whom benefitted from preventing the introduction of disease at the ports of entry.[540] Perhaps most importantly, it pulled quarantine from the grasp of local politics, and placed it in the hands of qualified medical personnel.[541] Surgeon General Hugh Cumming proclaimed it as the triumph of science over politics.[542]

F. Contemporary Quarantine Authorities

In 1939 the U.S. Public Health Service moved from the Treasury to the Federal Security Agency.[543] Five years later, Congress introduced the Public Health Service Act, which became the first of two pillars on which current federal quarantine authority rests.[544] The other is the 1988 Robert T. Stafford

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[534] Cumming, *supra* note 342, at123.
[535] *Id.* at 131.
[536] *Id.* at 123.
[537] *Id.*
[538] *Id.*
[539] *Id.* at 123–24.
[540] *Id.* at 124.
[541] *Id.*
[542] *Id.* at 119.
[543] Goodman, *supra* note 64, at 46–51, 263.
[544] Codified as amended at 42 U.S.C. §§ 264–72 (2002).

Disaster Relief and Emergency Assistance Act.[545]

i. Public Health Service Act of 1944

Consistent with Commerce Clause considerations, the 1944 Public Health Service Act limits federal quarantine authority to disease introduced at ports of entry or inter-state movement of goods or services.[546] The statute gives the Secretary of Health and Human Services (HHS) the authority to make and enforce any regulations as in her judgment may be necessary "to prevent the introduction, transmission, spread of communicable diseases from foreign countries into the states or possessions, or from one State or possession into any other State or possession."[547] Quarantine is limited to the communicable diseases in Executive Order 13295.[548] Since 1983, this list has included cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, and viral hemorrhagic fevers.[549] In April 2003, the Bush Administration added SARS and the following year influenza causing, or having potential to cause, a pandemic.[550] The HHS Secretary has the authority to apprehend and examine any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (1) moving or being about to move between states, or (2) a probable source of infection to individuals who may be moving between states.[551] If, after inspection, an individual is found to be infected, the Secretary of HHS can detain the individual for such a time, and in such as manner as may be reasonably necessary.[552]

In 2000, authority transferred from the Secretary of HHS to the Director of the CDC, authorizing her to take whatever measures may be necessary to prevent the spread of communicable disease from one state to any other state

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[545] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2007) (amending the Disaster Relief Act of 1974, Pub. L. 93–288).

[546] 42 U.S.C. §§ 264–72.

[547] 42 U.S.C. § 264(a); 42 C.F.R. §§ 70-71 (2000); *See also* 21 C.F.R. § 1240.3 et seq. In 1953 the Eisenhower Administration launched the Department of Health, Education and Welfare (HEW) under the Executive's then-existing authority to form new bureaucratic entities absent legislative veto. President Dwight D. Eisenhower, Reorganization Plan No. 1 of 1953, Transmitted to Congress Mar. 12, 1953, *available at* http://www.presidency.ucsb.edu. In 1980 HEW became the Department of Health and Human Services. *See e.g.,* 20 U.S.C. § 3508 (Redesignation of Department of Health, Education, and Welfare).

[548] Exec. Order No. 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003).

[549] *Id.*

[550] *Id.; See also* Exec. Order No. 13375, 70 Fed. Reg. 17299 (Apr. 1, 2005).

[551] 42 U.S.C. § 264(d). "Qualifying stage" means disease is in communicable stage, or is in a precommunicable state, if the disease would likely cause a public health emergency if transmitted to other individuals; 42 U.S.C. § 264(d)(2).

[552] 1944 Public Health Services Act, 58 Stat. 682, § 361 (1944) (codified at 42 U.S.C. § 264(d)).

where local health authorities have not taken adequate steps to prevent the spread of the disease.[553] Regulations prohibit infected people from traveling across state lines without explicit approval or a permit from the health officer of the state, if applicable under their law.[554] Further restrictions can be placed on individuals who are in the "communicable period of cholera, plague, smallpox, typhus or yellow fever, or who having been exposed to any such disease, is in the incubation period thereof."[555] Regulations also establish CDC control over foreign arrivals.[556]

The authority claimed in 1921 to be obsolete—executive power to prohibit persons or goods from designated areas from entering the United States—continues to be in effect (the authority has not been delegated to the Surgeon General).[557] And special quarantine powers apply in times of war, whereupon the HHS Secretary, in consultation with the Surgeon General, may indefinitely detain individuals reasonably believed to be infected or a probable source of infection.[558] Unlike peacetime authorities, it is not necessary for an individual to be in a qualifying stage of infection.[559]

The Surgeon General exercises control over all U.S. quarantine stations and can establish additional stations as necessary.[560] The consular reporting requirements have been retained under such rules as established by the Surgeon General.[561] U.S. Customs and the Coast Guard must assist in executing federal quarantine law.[562] Bills of health continue to be required for all vessels entering or leaving U.S. water and air space.[563] Violation of general federal quarantine provisions is punishable by a fine of up to $1,000, by imprisonment of not more than one year, or both.[564] Violations of specific federal quarantine or isolation orders is a criminal misdemeanor, punishable by a fine of up to $250,000, one year in jail, or both.[565] Organizations violating such orders are subject to a fine of up to $500,000 per incident.[566] Federal District Courts may enjoin individuals and organizations from violation of CDC quarantine

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[553] *See* 65 FR 49906; 42 C.F.R. 70.2.
[554] 42 C.F.R. 70.3.
[555] *See* 42 C.F.R. 70.5–70.6 (restricting travel primarily for communicable disease).
[556] 42 C.F.R. § 71.
[557] 42 U.S.C. § 265 (2012).
[558] *Id.* at § 266.
[559] *Id.*
[560] *Id.* at § 267.
[561] *Id.* at § 268(a).
[562] *Id.* at § 268(b).
[563] *Id.* at §§ 269-270.
[564] *Id.* at § 271.
[565] *Id.*
[566] *Id.*

regulations.[567]

Most recently, the Centers for Disease Control have proposed the adoption of new regulations that would, *inter alia*, impose stronger reporting requirements on airlines and ships regarding their passengers. *Figure 1*, below, outlines the proposed information to be collected from all travelers prior to embarkation. The proposed regulations also require travel permits for qualifying diseases. The detention of carriers and the screening of any passengers considered ill are also included, as are measures for imposing "provisional quarantine". This last measure targets individuals who refuse to be quarantined, and would be authorized by the CDC Director of Global Quarantine for a period of three business days.

Data elements required by CDC NPRM	Currently collected by airlines	Required by DHS/APIS for international flights
Name	Yes	Yes.
Emergency contact	Intermittent to rarely for domestic flights, more frequently for international flights.	No.
Flight information	Yes	Yes.
Phone number	Intermittent	No.
Email address	Intermittent—usually only for Internet, phone, or travel agent reservations.	No.
Current home address	Intermittent—usually only for Internet or travel agent reservations.	No.
Passport or travel document number and country (for foreign nationals for domestic and international flights).	Only for international flights	Yes.
Traveling companions	No	No.
Returning flight information	Usually only if booked at same time or with same airline	No.

Figure 1

The proposed regulations demonstrate the key role science has come to play: the length of detention is determined by the incubation period of each disease. An opportunity to contest quarantine would be provided by administrative hearings. These proposed regulations have yet to be passed; they remain in the consultative phase.

In 1963 the federal authority to quarantine was challenged.[568] At that time, the World Health Organization had declared Stockholm to be a smallpox-infected area.[569] When a passenger from Stockholm arrived in the United States and was not able to produce documentation proving prior vaccination, the Public Health Service quarantined the passenger for fourteen days.[570] The District Court, upholding the detention, noted that the federal government had acted in good faith, that the individual had had a history of unsuccessful vaccinations, and that detention during the incubation period was required to

[567] *See* 28 U.S.C. § 1331 (2012).
[568] *See* United States ex rel. Siegel v. Shinnick, 219 F. Supp. 789, 790–91 (E.D.N.Y. 1963).
[569] *Id.* at 790.
[570] *Id.*

determine whether the individual had been infected.[571]

Other judicial challenges to the current federal quarantine provisions have not arisen; however, there are a number of issues ripe for consideration. The courts, for instance, have yet to rule on whether federal *cordon sanitaire* would withstand constitutional challenge. Following *United States v. Lopez*, it appears that the courts are willing to recognize some limits on the Commerce Clause authorities.[572] And, as discussed throughout this article, quarantine law has historically been regarded as at the core of state police powers, reserved through the 10th Amendment. On the other hand, the Supreme Court's recent decision in *United States v. Comstock* raises question about whether a necessary and proper claim could equally well uphold federal action in this realm.[573] Justice Breyer, writing for himself and four other justices, compared the civil commitment statute upheld in *Comstock* to medical quarantine. At least two justices, however, Justice Alito and Justice Kennedy, who voted to uphold the law, did not adopt the breadth of Breyer's decision. Kennedy, in particular, stated that the majority did not give the Tenth Amendment due weight.

Due process challenges might also surface, particularly in regard to whether the procedures and the grounds for quarantine are sufficient; for while due process standards have evolved over the 20th and into the 21st century, the legislative framing for quarantine has remained relatively constant. The proposed regulations would tailor the period of quarantine more carefully to each disease, as well as provide for an administrative hearing to contest quarantine. Whether these are sufficient is merely speculative, as they have yet to be adopted. They do improve, however, upon the system in place since 1944.

ii. Robert Stafford Disaster Relieve and Emergency Assistance Act

The second pillar of federal quarantine authorities is the Robert T. Stafford Disaster Relief and Emergency Assistance Act.[574] This legislation provides federal assistance to state and local governments in the event of an emergency. The Disaster Mitigation Act of 2000 amended the Stafford Act to further encourage state, local, and tribal areas to coordinate disaster

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[571] *Id.* at 791.
[572] *See e.g.,* United States v. Lopez, 514 U.S. 549 (1995).
[573] *See e.g.,* United States v. Comstock, 130 S. Ct. 1949, (2010).
[574] Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707 (1988) (codified as amended at 42 U.S.C. §§ 5121-5206 (2000)); Disaster Relief Act of 1974,Pub. L. No. 93-288.

management planning and implementation.[575] Like the early Congressional initiatives in the quarantine realm, the legislation places the federal government solely in a supportive capacity.[576]

There are two main types of Stafford Act declarations: (1) a major disaster declaration under Title IV, and (2) an emergency declaration under Title V. A major disaster declaration is predicated upon a formal request by the Governor for federal assistance.[577] The type of incident that qualifies is limited: it may only be used in response to "any natural catastrophe…or, regardless of cause, any fire, flood, or explosion."[578] In other words, it does not apply to non-natural incidents (e.g., criminal activity, terrorist attacks, or acts of war). It would, however, cover any fire, flood, or explosion arising from such incidents. To obtain federal assistance, the state must have a mitigation plan in place, creating an incentive for increased coordination and integration of mitigation activities.[579] The President is not *required* to grant the state's request, but, instead, is given the *option* of responding.[580] Although the statute does not directly mention quarantine, it authorizes the President to provide health and safety measures (which would, presumably, include medical detention).[581] The statute does *not* provide a cap for the amount of monetary assistance available to an affected area under a major disaster declaration.

In contrast to the major disaster declaration, an emergency declaration, which falls under Title V, may be made *either* pursuant to the request of a state governor, *or* the President may unilaterally declare an emergency for an incident involving a primary federal responsibility.[582] As with the major disaster declaration, the President retains the discretionary authority of deciding when to act.[583] For an emergency declaration pursuant to a state

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[575] Disaster Mitigation Act of 2000Pub. L. No. 106-390) (codified as amended at Stafford Act at 42 U.S.C. ch.68).

[576] 42 U.S.C. § 5121 (2012). The contours of federal activity include revising and broadening the scope of existing disaster relief programs; encouraging the development of comprehensive state and local disaster preparedness and assistance plans; helping to coordinate responses between different states and localities; and encouraging hazard mitigation measures to reduce losses from disasters; *See also* Pub. L. 93–288, title I, § 101, May 22, 1974, 88 Stat. 143; Pub. L. 100–707, title I, § 103(a), Nov. 23, 1988, 102 Stat. 4689.

[577] 42 U.S.C. § 5170.

[578] *Id.* at § 5122(2).

[579] *Id.* at § 5170a.

[580] *Id.*

[581] *Id.* at § 5170a(3)(D) ("In any major disaster, the President may . . . provide technical and advisory assistance to affected State and local governments for . . . provision of health and safety measures.").

[582] *Id.* at § 5170.

[583] *Id.* at § 5191.

governor request, "any occasion or instance" may suffice.[584] The process for making the request is substantively similar to the request for a major disaster declaration.[585] But unlike major disaster assistance, emergency declaration response is capped at $5 million, unless the President explicitly determines a continuing need.[586] The emergency declaration is thus both broader (covering a wider range of incidents) and narrower (owing to financial limits) than a major disaster declaration.[587]

Where an emergency involves matters of federal primary responsibility, the President is free to act absent a governor's request.[588] The statute, though, does not define "primary responsibility"; instead, it provides a broad category: "subject area[s] for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."[589] Typically, emergencies declared pursuant to the primary responsibility clause involve incidents on federal property, such as the 1995 Oklahoma City Bombing or the 2001 attack on the Pentagon (although in both of these cases, later requests from state governors commuted them to major disaster declarations). Financial and physical assistance is then provided directly through FEMA, arguably sidelining the DHS Secretary to no role whatsoever in the response.

G. Continued Expansion in the Federal and Military Realm

While the Public Health Services Act and the Stafford Act provide the pillars for the current federal quarantine structure, the area continues to be in flux. To a significant extent, these changes have been influenced by the bundling of pandemic disease and biological weapons—highlighted at the start of this article. Along with this shift has come growing attention to the role of the military in enforcing such provisions.

HSPD 10, for instance, considers the military to be central to U.S. strategy.[590] In large measure this stems from the biological weapons component of the threat. In enacting the 2002 Homeland Security Act, Congress explained:

> [B]y its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law

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[584] *Id.*
[585] *See Id.*
[586] *Id.* at § 5193(b)(1).
[587] *See* § 5193; *See also* ALAN COHN, DISASTER PREPAREDNESS, Book Manuscript (forthcoming).
[588] 42 U.S.C. § 5192.
[589] 42 U.S.C. § 5191(b).
[590] *See* HSPD 10, *supra* note 8.

> enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the constitution to respond promptly in time of war, insurrection, or other serious emergency. […] Existing laws, including [the Insurrection Act and the Stafford Act] grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destructions, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

Such broad language suggests that the federal government could use the military in response to any national emergency, including natural disasters.

Congress contemplated a similar role for the federal government—and the military—following Hurricane Katrina. The storm hit the U.S. Gulf Coast in August 2005 and precipitated the destruction of the levees surrounding New Orleans. The 2007 Defense Authorization Act subsequently addressed the role of the military in the event of natural disaster, pandemic, or biological weapons attack (again, coupling pandemic disease and the biological weapons threat).[591] One of the chief criticisms levied against the federal government was that they had dragged their feet in mounting an appropriate response. For example, thirty-six hours after the hurricane hit, Michael Chertoff, Homeland Security Director, finally issued a memo declaring it an "incident of national significance," thereby shifting the responsibility to FEMA.[592] President Bush wanted to federalize the Louisiana National Guard, but Louisiana Governor Kathleen Blanco refused. The President considered and rejected a proposal to federalize the Guard over her objection.[593]

To clarify federal authority in the future, the 2006 Administration convinced Congress to amend the Insurrection Act for the first time in more than 200 years, re-naming it "Enforcement of the Laws to Restore Public Order."[594] The new language expanded the statute, almost exclusively used in

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[591] 10 U.S.C. 15, §§ 331–335.

[592] *E.g.,* Jonathan S. Landay, Alison Young & Shannon McCaffrey, Chertoff Delayed Federal Response, MEMO SHOWS, KNIGHT RIDDER NEWSPAPERS, Sept. 13, 2005, *available at* http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines05-0914-04.htm; *See also* SARAH A. LISTER, CONG. RESEARCH SERV., RL 33096,HURRICANE KATRINA: THE PUBLIC HEALTH AND MEDICAL RESPONSE (2005*), available at* http://fpc.state.gov/documents/organization/54255.pdf; BIPARTISAN COMMITTEE CREATED BY HOUSE RESOLUTION 437; A FAILURE OF INITIATIVE: FINAL REP. OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA,H. R. REP. NO.109-377 (2006), *available at* http://www.gpoaccess.gov/serialset/creports/katrina.html.

[593]*See e.g.,* US CONST, art. II, § 2, cl. 1; DEP'T OF DEF. DIRECTIVE 5525.5 at E4.1.2.4, (1986) *available at* http://www.fas.org/irp/doddir/dod/d5525_5.pdf; DEP'T OF DEF. DIRECTIVE 3025.12 (1994) *available at* http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf.

[594] John Warner National Defense Authorization Act for Fiscal year 2007, Pub. L. No. 109-364, §

the past to restore civil order, to cover instances of "domestic violence" where public order was disrupted due to a "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition."[595] The statute authorized the President to use federal troops to "restore public order and enforce the laws of the United States" *without* a request from the governor or legislature of the state involved, in the event s/he determines that local authorities are unable to maintain public order where either equal protection of the laws is impeded or the execution of federal law and related judicial process is obstructed. The legislation required that the President notify Congress as soon as practicable, and every fourteen days thereafter, until ordinary law enforcement was restored.[596] Congress passed the bill over the strong objection of all fifty-one governors.[597]

The governors objected to giving the President the authority to impose martial law in the event of a public health crisis or biological weapons attack, without any contact or collaboration with the states.[598] In one fell swoop, the legislation overturned more than two centuries of practice. The locus of the new powers were both legislative and executive war powers—not commerce clause considerations. The way in which the provisions had been introduced proved particularly concerning. The *New York Times* pointed out that the new

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[595] 10 U.S.C. § 333 (2006), amended by 10 U.S.C. § 333 (2008).

[596] *Id.*

[597] In February 2006, National Governors met with Rumsfeld to emphasize that any changes to the role of the National Guard would have to be agreed to by the governors. See letter from Janet Napolitano, Governor; Tim Pawlenty, Chair NAG; Michael F. Easley; and Mark Sanford, to the Hon. Donald Rumsfeld, Secretary, Department of Defense, (Aug. 31, 2006) (on file with the National Governors Association). The Administration largely ignored the governors' concerns and introduced the bill into Congress, prompting letters from the National Governors Association; See, e.g., Letter from Mike Huckabee, Governor and Janet Napolitano, Governor, to the Hon. Duncan Hunter, Chair, Comm. on Armed Services, U.S. House of Reps. and the Hon. Ike Skelton, Ranking Member, Comm. on Armed Services, U.S. House of Reps. (Aug. 1, 2006) (on file with the National Governors Association); Letter from multiple United States Governors to the Hon. Bill First [sic], Majority Leader U.S. Senate, the Hon Harry Reid, Minority Leader, U.S. Senate, the Hon. J. Dennis Hastert, Speaker, U.S. House of Representatives, the Hon. Nancy Pelosi, Minority Leader, U.S. House of Representatives, (Aug. 6, 2006) (on file with the National Governors Association); letter to Majority and Minority Leader of the Senate, Speaker and Minority Leader of the House of Representatives. (Bill Frist, Harry Reid, Dennis Hastert, Nancy Pelosi), August 32, 2006; Letterfrom Governor Janet Napolitano, Chair NAG, Tim Pawlenty, Michael F. Easley, and Mark Sanford, to the Hon. Donald Rumsfeld, Secretary, Department of Defense (August 31, 2006).

[598] Letter from Governors Michael F. Easley, Co-lead on the National Guard and Mark Sanford,Co-lead on the National Guard, to the Hon. Patrick J. Leahy, U.S. Senate and the Hon. Christopher "Kit" Bond, U.S. Senate (Feb. 5, 2007) (on file with the National Governors Association).

powers had been "quietly tucked into the enormous defense budget bill without hearings or public debate. The president," moreover, "made no mention of the changes when he signed the measure, and neither the White House nor Congress consulted in advance with the nation's governors."[599]

The following year Senators Patrick Leahy (D-VT), Christopher Bond (R-MO) introduced a bill to repeal the changes to the Insurrection Act, returning it to its original form.[600] An impressive list of state interests lined up in support: the National Governors Association, National Sheriffs' Association, Enlisted Association of the National Guard, Adjutants General of the United States, National Guard Association, National Lieutenant Governors Association, National Conference of State Legislatures, and Fraternal Order of Police all sought a return to the Insurrection Act.[601] Leahy and Bond attached their rider to the National Guard Empowerment Reform Bill, passed by Congress December 14, 2007, and signed into law by President Bush January 30, 2008.[602]

Despite the restoration of the Insurrection Act language, use of the military—Title 32 troops and Title 10 forces—to respond to public health crises has Congressional and academic support.[603] Even without the statute, the deployment of military in Katrina was largest military deployment in domestic bounds since the Civil War.[604] And the policy documents currently in place support the use of the military to enforce quarantine.[605] Such use of the military feeds into the broader issue of the role of the military on domestic soil—an area that has attracted increasing attention post-9/11.[606]

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[599] Editorial, Making Martial Law Easier, NY TIMES, Feb. 19, 2007.

[600] *See* Statement of Sen. Patrick Leahy on Legislation to Repeal Changes to the Insurrection Act (S. 513) (Feb. 7, 2009), *available at* http://votesmart.org/public-statement/239998/statement-of-sen-patrick-leahy-on-legislation-to-repeal-changes-to-the-insurrection-act.

[601] *Id.*

[602] H.R. 4986, 110th Cong. § 1068 (as enacted on Jan. 30, 2008) (repealing the rider attached to National Guard Empowerment Reform Bill, passed by Congress Dec. 14, 2007 and signed into law by Bush Jan. 30, 2008).

[603] *See, e.g.,* Bipartisan Report, *supra* note 592; STEVE BOWMAN, LAWRENCE KAPP, & AMY BELASCO, CONG. RESEARCH SERV., RL 33095, HURRICANE KATRINA: DOD DISASTER RESPONSE, Sept. 19, 2005; Sciarrino, Part III, *supra* note 49, at 426.

[604] Bipartisan Report, *supra* note 592, at 201.

[605] *See, e.g.,* Influenza Implementation Plan, *supra* note 11, at 12.

[606] *See, e.g.,* Memorandum from John Yoo, deputy Assistant Attorney General for the Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel fro the Department of Defense (Oct. 23, 2001) *available at* http://www.justice.gov/olc/docs/memomilitrayforcecombatus10232001.pdf (determining the application of the Fourth Amendment to military conduct within the United States); Memorandum from John Yoo, Deputy Assistant Attorney General for the Office of Legal Counsel, to William J. Haynes II, General Counsel for the Department of Defense (March 14, 2003) *available at* http://www.justice.gov/olc/docs/memomilitrayforcecombatus10232001.pdf (referring to the

There are practical reasons for the current state of play. At the most basic level, the link between biological weapons and pandemic disease makes sense: it may be very difficult to determine, at the outset, whether emerging disease is natural, biologically engineered, or the result of deliberate attack. Regardless of origin, natural or engineered diseases may have equally devastating consequences and require similar response mechanisms to limit their spread. Mitigation measures may equally be required – and effective. Isolation and quarantine, in turn, may be the only defense the government has against either emerging disease or engineered weapons. As for the use of the military, biological weapons research has historically been in the purview of the armed forces, making it perhaps the most prepared and effective entity in responding to such attacks. It may also be the only agency with the necessary technologies, resources and manpower to be able to respond in the event of an emergency, regardless of whether it results from an attack or from natural causes.

But practical explanations aside, these provisions raise troubling questions relating to state police powers, federalism, individual rights, and the use of the military on domestic soil.[607] They also run directly counter to the experiences of the United Kingdom where quarantine authorities initially were exercised by the king, using the military. As the Constitutional structure changed, however, first the Privy Council and then Parliament gained control, at which point commercial interests lobbied national quarantine law out of existence, pushing it down to a state and local level.

III. THE DEVOLUTION OF QUARANTINE LAW IN THE UNITED KINGDOM

British history is punctuated by devastating bouts with disease, the most feared of which were referred to as the "three exotics": plague, yellow fever, and cholera. Of these, plague, caused by bacillus *Pasteurella pestis* or *Yersinia pestis*, is the oldest.[608] It also was the most influential in shaping Britain's approach to disease. Records show that as early as 1349 plague hit England,

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application of the Fourth Amendment to military conduct with the United States; Memorandum from John Yoo. Deputy Assistant Attorney General forth Office of Legal Council, to Tim Flanigan (classified material) ("[T]he legality of the use of military force to prevent and deter terrorist activity inside the United States.") (referenced by Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals 47 (2008); Tim Golden, After Terror, a Secret Rewriting of Military Law, N.Y. TIMES, Oct. 24, 2004.

[607] *See* George J. Annas, Bioterrorism, Public Health, and Civil Liberties, 346 NEW ENG. J. MED. 1337-42 (20020; Julie Bruce, Bioterrorism Meets Privacy: An analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule, 12 ANNALS. HEALTH L. 75 (2003).

[608] PORTER, *supra* note 47. Yellow fever only appeared in late 18th century Europe, cholera some four decades later.

killing approximately one-third of the country's population.[609] Over the next 400 years epidemics swept through Europe, with profound political, social, and economic effects.[610]

The nature of this threat shaped English quarantine law in three important ways. First, plague was seen as an import, not bred in Britain or, for that matter, on the Continent.[611] Resultantly, maritime provisions, and authorities focused on the ports and borders, provided the country's primary defense.[612] England placed considerably less emphasis on domestic measures until yellow fever and cholera appeared. Second, concern about outbreaks abroad encouraged the government to make extensive use of its international network to obtain advance notice of inbound disease. The empire thus established global disease monitoring significantly prior to the United States. Third, and most importantly, although it was not known at time that fleas carried plague, observers noted that the disease tended to be transferred via porous goods. Orders thus tended to target wool, silk, cotton, and animal hides, subjecting them to weeks of repeated submersion in ocean water followed by airing. Individuals, moreover, could come into contact with others suffering from plague and not contract the disease. The contagion theory of transfer thus stood in great doubt—creating an opportunity for reformers to replace quarantine with an improved sanitation regime. A very different situation thus confronted England than that faced on the American side of the Atlantic.

A. Early English Provisions

English trade with the Mediterranean ports heralded an increased risk for disease. In 1511 England began trading in the Levant seas.[613] Within seven

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[609] DEREK FRASER, THE EVOLUTION OF THE BRITISH WELFARE STATE: A HISTORY OF SOCIAL POLICY SINCE THE INDUSTRIAL REVOLUTION 33 (3d ed., 2003); *See also* PORTER, *supra* note 374, at 40.

[610] *See, e.g.,* JOHN F. D. SHREWSBURY, A HISTORY OF BUBONIC PLAGUE IN THE BRITISH ISLES, (1971); Alan D. Dyer, The Influence of Bubonic Plague in England 1500-1667,MEDICAL HISTORY (1978), 308-326; PORTER, *supra* note 46.

[611] *See, e.g.,* PATRICK RUSSELL, TREATISE ON THE PLAGUE (1791), p. 333; RICHARD MEAD, A SHORT DISCOURSE CONCERNING PESTILENTIAL CONTAGION, AND THE METHODS TO BE USED TO PREVENT IT (1720) (blaming Asia for plague); THE MEDICAL WORKS OF RICHARD MEAD, VOL. II (1715) (blaming Africa for plague). Later observers hinted that fear and xenophobia underlie these claims. See, e.g., THOMAS HANCOCK, RESEARCHES INTO THE LAWS AND PHENOMENA OF PESTILENCE: INCLUDING A MEDICAL SKETCH AND REVIEW OF THE PLAGUE OF LONDON, IN 1665, AND REMARKS ON QUARANTINE 198 (1821).

[612] Peter Froggatt, The Chetney Hill Lazaret, 79 ARCHAELOGIA CANTIANA, 1 (1964) (stating I use"maritime quarantine" in a manner consistent with Peter Frogatt's definition, which is "the enforced detention and segregation of vessels, persons, and merchandise, believed to be infected with certain epidemic diseases, for specified periods at or near ports of disembarkation.").

[613] CHARLES MACLEAN, REMARKS ON THE BRITISH QUARANTINE LAWS (1823), *available at*

years, the first recorded quarantine orders issued under Henry VIII—or, more accurately, Thomas Wolsey, the Lord Chancellor of England, in whose hands the king, at least initially, left matters of state.[614]

In keeping with the order, local authorities toed the line. Sir Thomas More, for instance, instituted the king's orders in Oxford, insisting on street cleaning and forbidding others from using the clothes and bedding from infected houses. More tried to prevent the transfer of disease by isolating the sick and marking those who were infected. Other towns followed suit. In provincial districts, plague houses were established outside town walls or victims were segregated in pest-houses. By 1550, such practices had become widespread.[615]

In 1576, another plague outbreak took place. Eighteenth century historian George Hadley attributed the spread of the disease to the authorities' failure to enforce quarantine laws, suggesting that such laws, at least, were in place.[616] Much attention was drawn to the ports. In 1580 the Lord Treasurer ordered the Port of London to prevent Portuguese ships from Lisbon, where there was a plague outbreak, from coming up river until they had been properly aired.[617] The Privy Council requested that the Lord Mayor of London help the port authority to prevent similarly diseased ships from proceeding into the country.[618] More orders almost immediately followed.[619]

Such orders must be assessed within their political and constitutional framework. Henry VII, who came to the throne when Richard III was slain during the Battle of Bosworth, established the Committee of the Privy Council as an executive advisory board, and the Star Chamber as a means to involve the Crown more deeply in judicial affairs.[620] Parliament may have been the supreme authority, "[b]ut Parliaments came and went."[621] The Privy Council managed the legislature by influencing elections and directing parliamentary business.

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http://pds.lib.harvard.edu/pds/view/6735355?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no; *See also* RUSSELL, *supra* note 611, at 330 (noting that from 1581 English merchants had been established in Turkey).

[614] PORTER at 40.

[615] PORTER, *supra* note 46, at 41.

[616] BOOKER, *supra* note 48, at 1.

[617] Acts of the Privy Council at 61 (New Series 1580-81) (London 1896).

[618] BOOKER, *supra* note 48, at 1. The length of detention or manner of embargo are not known.

[619] RUSSELL, *supra* note 611, at 478. *See also* RUSSELL, *supra* note 611, at 478.

[620] See A.F. Pollard, Council, Star Chamber and Privy Council under the Tudors. II, The Star Chamber, 37 ENGLISH HISTORICAL REVIEW (1922), at 530; *See also* CORA L. SCOFIELD, THE COURT OF STAR CHAMBER, 27 (1900).

[621] SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, 113 (9th ed., 1969).

The Privy Council had direct control over areas central to quarantine. Matters related to foreign relations, defense, and public safety, were reserved to the Council—as were concerns that impacted the state's coffers.[622] For "[t]he essential prerequisite for the effective exercise of royal authority was the improvement of the Crown's position."[623] The crown's financial strength was determined by land, feudal dues, and, most importantly, customs, making the Council's control over external trade unquestioned. Monopolies and charters thus came within the Privy Council's control. It gradually annexed even internal trade from local merchant courts—leading to friction with Parliament and common law.[624] Added to this, were the Tudors' interest in maritime affairs and the declining importance in the 15th century of the Court of Admiralty, which led to the transfer of maritime matters to the Council.

It was unquestioned that the Privy Council would issue quarantine regulations. Henry VIII, and later, Elizabeth I, were particularly sensitive to England's position vis-à-vis Europe, where quarantine was linked to social and political sophistication.[625] To take their place among civilized nations meant, in part, to have quarantine laws. Elizabeth I thus ordered her chief minister, William Cecil, to adopt European plague controls and, via the Privy Council, to issue a new set of orders. [626] She similarly directed that the Privy Council issue the first order to compel sick persons to be confined.[627]

Proclamations, designed to communicate the monarch's commands, provided the main device via which the Privy Council exercised their authority. Issued under the Great Seal, such proclamations could be used to address deficiencies in common law and statutory law, which were neither sufficiently strong nor swift enough to address emerging issues faced by the state. The Privy Council thus supplemented the existing statutory and common law, "using for the purpose a prerogative which none denied or was concerned to seek limits for."[628] Such proclamations had the full force of law, and, while they could not contradict an Act of Parliament, the *lex regia* of England rapidly expanded and had to be obeyed.[629] To the Council thus fell the responsibility of acting swiftly and directly in the public interest.

During the Tudor reign, only the Privy Council issued quarantine provisions.

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[622] HOLDSWORTH, IV., 70-105 (providing examples of work done by the Privy Council).
[623] KEIR, *supra* note621, at 10.
[624] HOLDSWORTH, I, *supra* note 622, at 141.
[625] PORTER, *supra* note 46, at 41.
[626] The orders issued in 1578 and remained in place until the mid-17th century. *Id.*
[627] RUSSELL, *supra* note 611, at 478. *See also* MACLEAN, *supra* note 613, at 434.
[628] KEIR, *supra* note621, at 115.
[629] *See* E.R. Adair, The Statute of Proclamations, 32 ENGLISH HISTORY REVIEW 34; *See also* Elton, The Statute of Proclamations, 75 ENGLISH HISTORY REVIEW, 208.

The proclamations tended to be inconsistent, in no small measures due to the competing interests pulling the council in different directions. Such orders reflected the tension between maritime law, war powers/national security, domestic police powers, and commercial/economic matters. And these orders had profound implications for distribution of power within the state, as the Privy Council's jurisdiction gradually expanded to include maritime matters, as well as all internal and external trade.[630]

The evolution of quarantine measures marks the shift from medieval to modern England. The use of Royal Prerogative generally—and quarantine in particular—did not just reflect England's constitutional structure. It shaped the constitutional conventions. The proclamations undermined the role of Parliament. They undermined the role of the courts. And they undermined local administration—which, during the time of Tudor England, was really a function of its judicial organization. The Privy Council relegated many local bodies "almost entirely to the conduct of administrative business."[631] Simultaneously, the Privy Council helped to centralize power. While the monarch's authority was at its height when measures proceeded through Parliament, frequently, in case of quarantine, the Council did not deem it necessary. As the Council persisted in exercising its authority outside of Parliament, it became stronger, and Parliament was gradually, sidelined. In this manner, liberty of action for the public good became preserved outside of common law or the Parliament via Royal Prerogative—implemented through the Privy Council.[632]

Under the Stuarts, the conventions changed. During the final years of Queen Elizabeth's reign, her Royal Prerogatives regarding monopolies were increasingly called into question.[633] James I, having ruled the northern kingdom almost since birth, came to the Crown with a fully-developed theory of kingship—a form of enlightened absolutism.[634] Under his control, quarantine provisions became more coercive, codified in statute.

In 1603 a major plague outbreak occurred in England.[635] Seen as a threat to social stability, the disease caused panic and hunger and mass disruption of local communities.[636] James I immediately issued a detailed Order in Council

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[630] XVI HOLDSWORTH, I, *supra* note 622, at 141.
[631] KEIR, *supra* note 621, at 35.
[632] *Id.* at 154.
[633] *Id.* at 156-157.
[634] *See* James I, THE TRUE LAW OF FREE MONARCHIES; THE RECIPROCAL AND MUTUAL DUTY BETWIXT A FREE KING AND HIS NATURAL SUBJECTS (London, T. Creede 1598), *reprinted in* JOSEPH ROBSON TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, 1602-1625 187 (1930).
[635] See 5 ENCYCLOPEDIA BRITANNICA i2-A-i (8th ed. 1853-1860) (depicting a horrifying account of the epidemic).
[636] PORTER, *supra* note 46, at 41.

to combat the spread of infection.[637] It was clear that, even then, the contagion theory of disease with respect to plague was being questioned: Article 16 strictly prohibited "all ecclesiastics, and others, from publishing an opinion that the plague was not infectious, or that it was a vain thing not to resort to the infected."[638] In concert with the order, the Privy Council directed that quarantine provisions established by London's Lord Mayor be published.[639]

James I did not stop with the Order in Council. In 1604 he followed it with a new statute, which marked the first time that royal regulations on quarantine had been supported by an express legislative instrument.[640] The bill passed, following opposition and amendments in the House of Lords to exempt universities from being subject to its provisions. The legislation empowered the head officer of every town within England to confine individuals with the plague to their homes and to set a watchman to guard the ill.[641] It indemnified the watchmen should any harm come to the plague victim if he or she tried to escape.[642] Furthermore, it made it a felony to be found overseas with an infectious (meaning contagious) sore—although it was not clear what proof was required or who would judge it to be so.[643] The Act required the Justices of the Peace to meet every three weeks during an epidemic to report on the progress of the disease, and it allowed local authorities to raise taxes to take care of the sick.[644] All clothes and bedding of the plague victims was to be burned and funerals were to take place at dusk (to reduce the number in attendance).[645] Any criticism of orders issued isolating individuals was to be punished.[646]

The Act was initially limited to the first session of the following Parliament; however, it was subsequently continued and made permanent during Charles I's reign, "from thenceforth until some other act of parliament be made touching its continuance or discontinuance."[647] Far from stemming the advance of disease or quieting the unrest that had swept the country, these

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[637] MACLEAN, *supra* note 613, at 434–38.
[638] *Id.* at 435.
[639] *See Id.*
[640] *Id.; See also* 4 WILLIAM BLACKSTONE, COMMENTARIES 162–62 (discussing King James I's policies regarding the plague of 1604).
[641] MACLEAN, *supra* note 559, at 435.
[642] *Id.*
[643] *Id.; See also,* 4 WILLIAM BLACKSTONE, COMMENTARIES 161 (discussing King James I's policies regarding the plague of 1604).
[644] RUSSELL, *supra* note 557, at 480.
[645] *Id.*
[646] *Id.*
[647] MACLEAN, *supra* note 613, at 435.

provisions stimulated violent opposition and contributed to increasing disorder.[648]

B. The Politicization of Quarantine

When James I's son, Henry, died, Charles I became successor to the throne. He was an ardent believer in the divine right of kingship.[649] Charles responded to mounting opposition by acting outside the common law and Parliament, and by making more extensive use of Royal Prerogative. Opponents emphasized that the crown's authority derived from Parliamentary sanction. The subtleties of the Tudor era lost, and "[u]nable to agree amicably as to the working of their government, men began to debate its very foundations."[650]

Quarantine provisions during this time became less formalized. At times the Privy Council did not even issue an order or proclamation; instead, it would simply write a letter directly to the farmers of the customs, directing them not to land goods, allow people to come ashore, or permit vessels to land.[651] At other times, formal orders in accordance with the Royal Prerogative issued. It was through such a device that in 1635 the Crown established the first stated period of quarantine.[652] Plague had broken out at The Hague, Amsterdam, and Leyden, prompting the Council to issue a proclamation regarding vessels from France and Holland, arriving from infected ports.[653] For twenty days, they were to remain isolated.[654]

At the time, eighty percent of all of England's foreign trade traveled through London. [655]England, moreover, was a key economic player worldwide. This meant that what England did with its trade restrictions mattered. Equally important was what other ports did to England. Accordingly, Charles II quickly realized that quarantine could undermine free trade—and be used as a devastating political weapon. The Spanish, for instance, 1662-63, claimed that plague had emerged at Tangier, where English ships were trading. Spain subsequently refused to allow English ships to land in Spain. Afraid that similar steps would be taken in other, more important ports—like Leghorn and Genoa, England had to work vigorously through its Venetian ambassador to counter

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[648] PORTER, *supra* note 46, at 41.
[649] KEIR, *supra* note 621, at 158.
[650] *Id.* at 160.
[651] BOOKER, *supra* note 48, at 4.
[652] *Id.* at 2.
[653] *Id.; See also,* 4 WILLIAM BLACKSTONE, COMMENTARIES 162-61 (discussing King James I's policies on the plagues).
[654] *Id.*
[655] 2 EPHRAIM LIPSON, THE ECONOMIC HISTORY OF ENGLAND: THE AGE OF MERCANTILISM 249–50 (1943).

the rumors.[656] Money exchanged hands.[657]

The Dutch, in turn, considered English quarantine provisions to be an over-reaction—just another English ploy against the Dutch, with whom England did not have great relations. It is hard to deny their allegations. On March 30, 1664, for instance, the States General sent a resolution to Charles asking for repeal of quarantine. The English ended up *increasing* the length of detention from thirty to forty days.[658] The Dutch ambassador protested that the ships were being stopped "under pretence" of infection, but actually to obstruct trade. "He insisted that the strictness be relaxed. Charles replied expressing sorrow for the affliction, but pointed out that England had been the last neighbor of the United Provinces to make restrictions, and commerce would now have to be suspended altogether."[659] Diplomatic tension, not medical necessity, drove the decision.

In 1665 another devastating plague epidemic, famously described in the *Diary of Samuel Pepys*, again hit England.[660] In London alone, more than 70,000 people died, while all other diseases combined claimed fewer than 40,000 lives.[661] The toll eclipsed earlier outbreaks of plague, with more than twice the number succumbing than died during the 1625 epidemic.[662] The House of Commons appointed a committee to prepare new legislation to close gaps left by the Act of 1604. The effort failed. Although the bill passed the House of Commons, the House of Lords inserted amendments to protect their special interests. (The Lords wanted to prevent pest houses and burying grounds from being stationed near their homes, and they sought a special exemption to prevent peers' homes from being shut up at the discretion of constables.) The Commons refused to agree to the changes and, following several conferences between the two houses, the end of the session terminated further consideration of the bill. The internal regulations from the 1604 statute remained in force. It was later proposed that the wealthy who

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[656] BOOKER, *supra* note 48, at 12.
[657] *Id.*
[658] Compare Privy Council Proclamation quarantining vessels from France/Holland coming from infected ports, Nov. 1, 1635; and Privy Council Order increased detention from 30 days to 40 days after States General asked for a repeal of the measures, Mar. 30, 1664.
[659] BOOKER, *supra* note 48, at 5.
[660] *See* IV THE DIARY OF SAMUEL PEPYS, CLERK OF THE ACTS AND SECRETARY TO THE ADMIRALTY 434, 438, 450-52 (Henry B. Wheatley ed. with additions) (photo reprint 1928) (London, G. Bell and Sons, LTD. 1895) (denoting plague references in the diary); IV THE DIARY OF SAMUEL PEPYS, CLERK OF THE ACTS AND SECRETARY TO THE ADMIRALTY 434, 438, 450-52 (Henry B. Wheatley ed. with additions) (photo reprint 1928) (London, G. Bell and Sons, LTD. 1895) (denoting plague references in the diary).
[661] HANCOCK, *supra* note 611, at 67, Table 1.
[662] *Id.*

took ill should simply retreat to their country homes.[663]

Playing on the political power of quarantine, a proposal to create a permanent quarantine office, from March 1665, began circulating. Arguments supporting it echoed one of the chief concerns of the Tudors: to adopt procedures that existed in "most other well governed Kingdomes and Republicks professing Christianity."[664] But the proposal was ultimately about power and control. Of chief concern was not the medical benefit of such provisions, but the contingent (read: political and economic) advantages. Good relations between a quarantine office and the farmers of Customs would help to ensure that duties were paid. Importers would no longer win simply by being first to arrive; instead, by making it known which ships and cargoes were in detention, the Crown could control both importers and prices. The measures also would allow the Crown to more closely monitor individuals arriving in England, giving the state the ability to distinguish more readily between spies and regular travelers.[665]

Continental Europe, too, began wielding quarantine as a weapon. The Spanish stopped all trade with England, Scotland, and Ireland.[666] France prohibited all commerce with England. Britain retaliated in 1668, quarantining ships from parts of France with Plague. As historian John Booker observes, "the hard lesson was being taught, if not learnt, that in a state of war disease found various ways to side with the enemy."[667]

The manner in which the Crown exercised quarantine reflected and contributed to serious constitutional questions: Did the law limit the monarch's discretionary power? Could the Crown's authority be abridged by statute? Could the King sidestep the Common Law courts on matters relating to Royal Prerogative? What were the limits of the crown's prerogative in regard to foreign policy, maritime law, and both internal and external trade?[668] Sir Edward Coke came to see some of the most prominent cases of the time as seeking an answer to these crucial questions.[669] The English Restoration, starting in 1660, fell back upon the compromise that marked the Tudor regime:

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[663] RUSSELL, *supra* note 611, at 493.
[664] BOOKER, *supra* note 48, at 13.
[665] *Id.*
[666] *Id.* at 9.
[667] RUSSELL, *supra* note 611, at 441.
[668] *See also* KEIR, *supra*, note 567, at 160–61 (discussing the Constitutional questions prevalent at the time).
[669] *See, e.g.,* An Information Against Bates, (1606) 145 Eng. Rep. 267 (exch.) (1220-1865); Mich. 4 Jac. Bates' Case, Lane 22 (1606) (holding that the king has prerogative power to regulate trade as an aspect of foreign affairs); KEIR, *supra* note 567 at 198–99 (looking at the Ladd, Fuller and Chauncey cases); Case of Proclamations, EWHC (KB) J22, (1610) 77 Eng. Rep. 1352 (1378 – 1865); Mich. 8 Jac. 1 (1610) (defining some limitations on the roayal preogativ at the time).

"A Crown reinvested at least in its essential prerogatives, a Parliament confirmed in its sovereignty and its privileges, once more appeared as the indelible marks of the English governmental system. But the conciliar authority which had so long held the central position in the State had been irreparably destroyed."[670] English Constitutional historians generally describe this period a battle between Parliament and the courts of Common Law. But equally repugnant to both was the discretionary authority of the Crown—perhaps nowhere more apparent than in quarantine.

C. Constitutional Limits

The abolition of the conciliar courts confined the power of legislating by Proclamation within the limits imposed by the *Case of Proclamations*: "[T]he King cannot change any part of the common law, nor create any offence, by his proclamation, which was not an offence before, without parliament."[671] Sir Edward Coke, then Chief Justice of the Common Pleas explained, "the King hath no prerogative, but that which the law of the land allows him."[672] Constitutional scholars reflecting on this period conclude that "English constitutional law was therefore bound, sooner or later, to assume a bias, appropriate to the Common Law tradition, in favour of individual rights and property, and on the whole adverse to the claims of the State to a freedom of action determined by considerations of public policy."[673] Indeed, the Bill of Rights of 1689 required that in certain matters the Crown obtain the consent of the governed through Parliament.[674] The Triennial Act of 1694 secured a more active role for the legislature, requiring it to meet annually and hold elections once every three years.[675] And the Act of Settlement of 1701 established Parliamentary authority over succession to the throne itself.[676]

Quarantine authorities sat uneasily in this context, and from 1642 forward, the Privy Council's unfettered discretion in this realm became more limited.

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[670] KEIR, *supra* note 567, at 162.

[671] Case of Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.); 12 Co. Rep. 74, 74, *available at* http://www.bailii.org/ew/cases/EWHC/KB/1610/J22.html (defining some limitations on the royal prerogative at the time).

[672] *Id.*

[673] KEIR, *supra* note 567, at 233–34.

[674] An Act Declaring the Rights & Liberties of the Subject & Settling the Succession of the Crown (Bill of Rights), 1688, 1 W. & M., c. 2 (Eng.); *See also* KEIR, *supra* note 567, at 268.

[675] An Act for the Frequent Meeting and Calling of Parliaments, 1694, 6 & 7 W. & M., c. 2 (Eng.) (requiring Parliament to meet annually and hold general elections once every three years); *See also* KEIR, *supra* note 567, at 268 (noting the same).

[676] Act of Settlement of 1701, 1701, 12 & 13 Will. 3, c. 2 (Eng.); *See also* KEIR, *supra* note 567, at 269–70.

The Privy Council continued to be involved in the intimate details of quarantine, but it turned to statutory validation.

In 1709, for example, plague erupted in the Baltic region. The disease quickly reached Danzig (East Prussia), a town with which England had frequent commercial exchange. By the end of 1710 the epidemic extended to Stralsund, with reports that it had broken out on the German North Sea cost, near Hamburg.[677] The Privy Council responded with a series of orders. In August 1709, the council issued an order preventing any goods, seamen or passengers from Danzig being landed in London or in English outports "until they be under the Care of the Officers of the customs who are to take Care…according to the Intention of this Order."[678] The following month, the Privy Council issued a second order saying that landing could only occur at places "provided for airing the…Persons and goods for 40 Days appointed for performing their Quarantain".[679] Nine days later, the council issued a third order—designating infected area as the "Baltick Seas".[680] A fourth order followed on September 16, 1709, specifying where ships were to be held, stating that after 40 days, if no disease had presented itself, passengers could alight at the Customs officers' discretion, and, after a week, the goods could be released.[681] Suspicious articles had to be reported to the Privy Council to await further instruction.[682] The same day, a fifth order issued.

It soon became clear that quarantine was not being performed correctly: those who had been quarantined were ignoring the orders, and local villages and authorities were refusing to allow the establishment of quarantine stations near their homes and businesses.[683] The Privy Council responded by issuing a proclamation in November 1709, threatening that failure to conform to orders would be treated with utmost severity of the law. It lamented that some of those detained, "have Presumed to come on Shoar, and have Appeared in the Publick Streets, and Mingled Themselves with Our Subjects"—others had been selling the goods that ought to have been aired. The order threatened that those refusing to conform would do so "upon Pain of being Proceeded against with the utmost Severity that the Law will Allow …"

The difficulty with the Privy Council's threat is that it had no teeth: the law did *not* carry severe penalties. Indeed, there was no statute at the time that would have made it an offense to break Privy Council orders regarding

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[677] BOOKER, *supra* note 48, at 40.
[678] *See* Privy Council Order of Aug. 22, 1709.
[679] *See* Privy Council Order of Sept. 5, 1709.
[680] *See* Privy Council Order of Sept. 14, 1709.
[681] *See* Privy Council Order of Sept. 16, 1709.
[682] *Id.*
[683] BOOKER, *supra* note 48, at 31.

quarantine. The council was thus driven to seek parliamentary support. The importance of Parliament as a check at the time ought not to be over-emphasized: the bill received Royal Assent "in less than eight days from the time the bill was ordered."[684] In light of the Whig and Tory battles that marked political discourse, though, and the statute's provisions—which essentially acknowledged Royal Prerogative—the result was remarkably swift: quarantine would be "in such…places for such time and in such manner as hath been or as shall be from time to time be directed…by Her Majesty or her successors."[685] It speaks, perhaps to the great fear of disease and the newness of limits on royal prerogative.[686]

The resulting legislation became Britain's central quarantine statute. It did not address matters internal to the country, instead expressly relating to cases of foreign infection.[687] Writing at the end of the 18th century, Russell suggested that statute strengthened Privy Council's hand:

> Considering the circumstances under which the bill was drawn up, it is the less to be wondered that it should have been very defective; but by expressly empowering the Crown, in case of any foreign places being infected, to issue such orders for quarantine as might appear necessary, it, at least, conferred a sanction in future on the Royal Proclamations, relating to quarantine, which they had not before; and rendered the breach of orders more immediately an object of legal punishment.[688]

Indeed, there were advantages to be gained by leaving the operation of quarantine in the hands of the Privy Council. Disease might require a swift and efficient response—one more likely to be gained through the council than through a parliamentary body. The sanctions created in the statute also increased the likelihood that people would comply with the council's directives.

But while the legislation, in some ways, placed the Privy Council in a stronger position, its existence underscored growing parliamentary power in the constitutional evolution of the British state. It suggested that the Privy Council could not act without legislative sanction. Parliament held the purse strings. And punishment could not be taken too far: doing so would risk courts refusing to enforce the measures. The Attorney-General, for instance, wanted to make breaking quarantine a capital crime, for which the death penalty would be imposed. (Mediterranean ports at the time had adopted this

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[684] RUSSEL, *supra* note 557, at 441.
[685] An Act to Oblige Ships Coming from Places Infected More Effectually to Perform Their Quarentine, 1710, 9 Ann., c. 2, (Eng.) [hereinafter Queen Anne Act].
[686] BOOKER, *supra* note 48, at 31.
[687] Queen Anne Act, *supra* note 632.
[688] RUSSELL, *supra* note 611, at 442.

approach.) The Privy Council strongly objected on the grounds that with such severe penalties, no one would be prosecuted for the offence. Parliament instead prescribed imprisonment and a fine for any violation.[689] Captains allowing passengers to come ashore would forfeit the vessel.[690] Customs officers fell subject to a fine of £100, with half the amount allocated to informers.[691] Anyone visiting the vessel during quarantine would be required to remain for the balance of the time allotted.[692] The legislation also required a 24-hour watch system to be established by the local magistrates, with the airing of goods to be governed by proclamation.[693]

D. Commercial Interests Take Hold

Ironically, in strengthening the impact of quarantine orders, the Queen Ann Act heralded an end to the quarantine regime. The provisions, and their enforcement, earned the enmity of Britain's commercial interests as well as its trading neighbors abroad, helping to generate momentum to dispense with such provisions. Glimmers of this began to emerge soon after the passage of the statute.

In the Baltic crisis, for instance, merchant adventurers trading with Hamburg began lobbying the Privy Council to repeal a new proclamation that extended quarantine measures to Hamburg.[694] Soon thereafter, the Eastland Company, trading with Danzig, began lobbying the Privy Council (with the help of some Members of Parliament) to repeal the order. Although plague had disappeared, the Privy Council issued a new order in August 1713. Finally, in April 1714, after diplomatic representations to the Queen, and further lobbying, the Privy Council lifted the restrictions.[695]

Part of the problem was that the Privy Council was out of its depth: it was not a scientific body. From 1720 to 1723, the Marseilles Plague, for example, proved devastating. Almost half the population of Marseilles died from it.[696] What made this extraordinary was that Marseilles' measures were considered amongst the most sophisticated in all of Europe. But French efforts to establish a *cordon sanitaire* failed. Disquiet spread. The Privy Council, slow to

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[689] Queen Anne Act, *supra* note 686.
[690] *Id.*
[691] *Id.*
[692] *Id.*
[693] *Id.*
[694] Privy Council Proclamation, Requiring Quarentine [sic.] to be Performed by Ships coming from the Baltick Sea, and other Places &c., Sept. 6, 1711 (on file with author). The Privy Council did not lift the orders until June 1712. Privy Council Proclamation, June 1712.
[695] BOOKER, *supra* note 48, at 44.
[696] *See* RUSSELL, *supra* note 611, at 442; Booker, *supra* note 48, at 85-88.

respond, then issued frenzy of orders and proclamations, followed by three new statutes.

News of the epidemic hit London on August 10, 1720. King George I, who was in Hanover at the time, directed customs to give "proper directions" to the outports to stop any Mediterranean ships from putting ashore,[697] which bought time to draft a proclamation. With French provisions having failed to stem the tide of the disease, the Privy Council sought professional advice. The council consulted with Dr. Richard Mead, a prominent physician.[698] The Lords Justice requested that he publish his thoughts on the history of the plague and make recommendations for the best means of preventing its introduction into England.

Mead's writings became a mainstay in the British quarantine system. He posited that porous and fibrous materials were more likely to carry plague and argued that it could be transmitted between humans through the air.[699] For ships carrying the more virulent form of plague, Mead recommended burning everything on board, as well as the ship.[700] Smuggling presented a particular concern.[701] Once an outbreak occurred, treatment should emphasize" compassionate care", not discipline and punishment.[702] The worst course of action, Mead suggested, would be to shut up houses, thus creating "seminaries of contagion."[703] *Cordon sanitaire*, on the other hand, would be acceptable—but not to prevent all people from leaving a city, as it had been exercised in France. Mead saw this as "an unnecessary Severity, not to call it a Cruelty."[704] Instead, after twenty days' quarantine, citizens should be allowed to leave.[705]

Within a year, seven editions of *Mead's Discourse* had been published. The eighth, with further additions, came out the following year.[706] This work proved highly influential. The advantage of publishing it in conjunction with the Privy Council orders was that it added medical weight to its decisions. The drawback of basing the quarantine system on it, however, was that other medical personnel might disagree with Mead. Indeed, the treatise opened an intense and contentious public debate on contagion that continued for more

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[697] BOOKER, *supra* note 48, at 88.
[698] For biographical information on Richard Mead see ANITA GUERRINA, MEAD, RICHARD (1673–1754), in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004) *available at* http://www.oxforddnb.com/view/article/18467?docPos=5.
[699] RICHARD MEAD, DISCOURSE ON THE PLAGUE (London, 9th ed. 1744).
[700] *Id.*
[701] *Id.*
[702] *Id.* at 101.
[703] *Id.* at 104.
[704] *Id.* at 142.
[705] *Id.*
[706] MEAD, *supra* note 647.

than a century. George Pye, for instance, almost immediately responded with his own discourse, announcing that quarantines were useless, that they gave smugglers an incentive, and that they imposed "a very great Injury to a trading Nation".[707] Their social impact could hardly be ignored, he noted, for they "propagate and keep up Fears and Frights amongst the People."[708] Patrick Russell, a prominent 18th century physician and naturalist, and Gavin Milroy, a well-known, early 19th century physician and epidemiologist, also were sharply critical of Mead.[709] Thomas Hancock pointed out Mead's many contradictions.[710] Others attacked Mead's insistence that air, and not contact alone, spreads plague, as well as the role of cotton in carrying the disease—which raised questions as to why there had not been outbreaks of plague previously, with significant amounts of cotton coming to England from the Levant.[711]

As for the immediate concern, due to the Marseilles' plague, consistent with Mead's analysis, the Privy Council resurrected the orders issued during the Baltic Crisis and expanded the goods for which special permission would have to be sought for importation.[712] Sufficiently concerned about the threat posed by this particularly virulent epidemic, the Privy Council issued documents inveighing that its orders be taken seriously.[713] The Council quarantined all ships arriving from the Mediterranean, the Levant, the Isle of Man, and the Channel Islands, announcing that anyone assisting smugglers would incur the King's "Highest Displeasure" and severe penalties.[714]

The incident brought to the surface a gap in the Privy Council's authority. The Queen Anne Act only related to infection coming from abroad—not disease on domestic soil. The Privy Council, however, also wanted to stop plague from spreading once it reached Great Britain. This gap forced the Privy

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[707] GEORGE PYE, A DISCOURSE OF THE PLAGUE; WHEREIN DR. MEAD'S NOTATIONS ARE CONSIDER'D AND REFUTED (London, J. Darby 1721).
[708] *Id.*
[709] RUSSELL, *supra* note 611 (also stating that Mead was too critical of James I); *See also* GAVIN MILROY, THE INTERNATIONAL ASPECTS OF QUARANTINE LEGISLATION, TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCES871 (London, 1863) (noting that Mead had no personal experience with lazarettos or plague and that his medical views were based on hearsay). *See e.g.,* Lives of the Fellows of the Royal College of Physicians of London, 1826-1925, Vol. IV, compiled by G.H. Brown (London, 1955) [Munk's Roll, 1955, p.71-72]; Dictionary of National Biography, Vol. XXXVIII, Sidney Lee (ed.) (London, 1894) [DNB, 1894, at22-23]; Obituary - Gavin Milroy, 1 THE LANCET 425(1886); Obituary - Gavin Milroy, 1BRITISH MEDICAL JOURNAL 425,425-426 (1886).
[710] HANCOCK, *supra* note 611.
[711] *See, e.g.,* BOOKER, *supra* note 48, at 43.
[712] BOOKER, *supra* note 48, at 88.
[713] *See* Proclamation of Aug. 25, 1720.
[714] *See* Privy Council Order of Oct. 27, 1720.

Council back to Parliament.[715]

In December 1720, the Attorney General and the Solicitor-General jointly introduced a new bill, which temporarily replaced the Queen Anne Act as the main quarantine statute.[716] The legislation extended quarantine authorities to domestic infection, giving the Crown the power to remove people from their homes and to draw lines around infected areas.[717] Neighboring parishes became equally responsible for patrolling the lines.[718] Violence could be used to recover individuals breaking quarantine, with penalties for violation to include death without clergy present.[719]

The merchants, strongly opposed to the bill, lobbied hard against it. The Levant Company submitted a petition "To the honorable the Commons of Great Britain in Parliament assembled," drawing attention to the adverse impact quarantine would have on domestic trade.[720] Quarantine applied to all ships from Turkey, regardless of whether the port from which they departed was infected.[721] The petition suggested that where HM ambassador at Constantinople gave the ship a clean bill of health, the vessel should not be placed in quarantine—particularly where journey took a minimum of three months, often even more than that, and sickness had not broken out on board.[722] It further pointed out that the law affected goods of interest to Parliamentarians.[723] The Crown largely ignored the representations as biased: the company was too interested a party in the outcome.

The Levant Company, though, was not the only opposition. The city of London also petitioned against the bill.[724] The impact on individual rights and the economic costs drew particular concern.[725] The House of Lords, however, rejected the city's petition by a vote of 63 to 22, leading to a fight in Parliament.[726] The rights involved were of great consequence. Such flippant dismissal of petitions, moreover, might discourage future representations to

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[715] *See* 19 JOURNAL OF THE HOUSE OF COMMONS 1721 at 398 ff; and JOURNAL OF THE HOUSE OF LORDS,1721, at 383 ff.

[716] An act for repealing an act (Queen Anne's) for the better preventing the plague being brought from foreign parts into Great Britain, or Ireland, or the Isles of Guernsey, &c. &c., and to hinder the spreading of infection", 7 Geo. I, c. 3, Jan. 25, 1721.

[717] Quarantine Act, VII George; UL Rare books room, Gg.3.12(7), at 1-2.

[718] *Id.*

[719] *Id.*

[720] MACLEAN, *supra* note 613, at 421 (hereinafter Levant Company Petition).

[721] *Id.*

[722] *Id.*

[723] Levant Company Petition, reprinted in MACLEAN, *supra* note 613, at 421.

[724] The Petition of the City of London to the House of Lords, Dec. 6, 1721, UL Rare books room, Gg.3.12.(7).

[725] *Id.* at 2; *See also* 21 JOURNAL OF THE HOUSE OF LORDS, at 622-23.

[726] *Id.*

Parliament, with long-term implications for the rights of British subjects.[727] And *cordons sanitaire* were simply impractical: they would take too many soldiers to enforce, particularly around London and Westminster.[728]

The Lords subsequently introduced a bill to repeal the clauses in the Quarantine Act that empowered the Crown to impose *cordon sanitaire* and to remove individuals from their homes.[729] Of particular concern was the role the military, not civil magistrates, were to play:

> Because such Powers as these are utterly unknown to our *Constitution*, and repugnant, we conceive, to the Lenity of our mild and free Government, a tender Regard to which was shewn by the Act Jac. I which took care only to confine infected Persons within their *own Houses*, and to support them under that *Confinement*, and lodg'd the Execution of such Powers solely in the *Civil Magistrate*; whereas the Powers by us excepted against, as they are of a more extraordinary Kind, so they will probably (and some of them must necessarily) be executed by *Military Force*: And the *violent* and *inhuman* Methods which on these Occasions may, as we apprehend, be practiced, will, we fear, rather draw down the Infliction of a new Judgment from Heaven, than contribute anyways to remove that, which shall then have befallen us.[730]

Worse yet, such methods were being copied from France, "a Kingdom whose Pattern, in such Cases, *Great Britain* should not follow; the Government there, being conducted by *Arbitrary Power* and supported by *Standing Armies.*"[731] Even in France, the measures had been "as *unsuccessful* as they were *unprecedented.*"[732] Removing such authorities would not leave the Crown without any options; other authorities existed. The offending clauses, however, would do untold mischief, not least in keeping "the Minds of the People perpetually *alarm'd* with those Apprehensions under which they now labour."[733]

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[727] *See also* 21 JOURNAL OF THE HOUSE OF LORDS, at 3.
[728] *Id.*
[729] 13 Dec. 1721, Gg.3.12(7), at 3-4.
[730] *Id.*
[731] *Id.* Russell later argued, "That the government in France was conducted by arbitrary power, might be true; and it was the business of the legislature in Britain, in framing the act, to guard the execution of it, agreeably to the principles of a free government. But, under proper and express limitations, the British constitution, seemed to be no more affected by the clauses in question, than it is by the present quarantine laws, in respect to ships, most of which laws were borrowed from arbitrary governments. The influence of these clauses was indeed more extensive as the object in view was of more general importance to the kingdom, but the principle, in respect to the British constitution, would appear to be the same, in both cases." *See also* RUSSELL, *supra* note 611, at 504.
[732] *Id.*
[733] *Id.* Russell later wrote of the Lords' representations, "The arguments produced in the above Protest of the Lords, may be presumed to have been among the strongest that were employed

The Lords ultimately resolved the question in the negative, 39 to 20, leaving the interim measure intact.[734] Within a month, a similar motion was introduced into the House of Commons, which divided 115 to 95, in favor of giving leave to allow a bill to be brought forward to repeal portions of the previous act.[735] The bill passed in January, receiving Royal Assent on February 12, 1721.[736] It recognized that "the execution of the powers and authorities mentioned in the said recited clauses" had been found "very grievous to the subjects of this kingdom."[737] Concern about implications of the law for the rights of British subjects endured. A century later, anti-contagionist crusader Dr. Charles MacLean opined,

> The arbitrary power of shutting sick people up in their houses, given by the act of James I., and that of removing them by compulsion from their habitations, conferred by the 7th of Geo. I., were equally a violation of the principles of public liberty, and of the British constitution, which would have been unjustifiable if contagion had been proved to exist, and these measures had been proved to be a remedy. Such a despotism no circumstances could justify. But, to enact laws so arbitrary, without previous proof of the existence of the alleged evil, or of the efficiency of the proposed remedy, must be admitted to be the most extraordinary legislation.[738]

In his *Discourse on the Plague*, Richard Mead emphasized not just human-to-human transmission of the plague, but its transfer via goods. The Crown consequently sought greater authority in the commercial realm. A statute passed on the same day of the repeal of §§2 and 4 of the quarantine act gave the King the authority, for one year, to prohibit commerce with any country infected with plague.[739] Its purpose was to allow the country to respond quickly to any resurgence of plague in France. The legislation was extreme and attracted strong opposition from shipping interests. It essentially gave the Crown, through the Privy Council, an almost unlimited power over trade.[740] In

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against the objectionable clauses of the act. They are highly deserving of attention, and, may suggest amendments in framing any future act."; *See also Id.* at 503.

[734] *See* 21 JOURNAL OF THE HOUSE OF LORDS 3, 622-30.

[735] *See* 19 JOURNAL OF THE HOUSE OF COMMONS, 712.

[736] An Act for repealing such Clauses in the Act passed in the 7th Year of his Majesty's Reign (relating to Quarantine and the Plague) as gives Power to remove Persons from their Habitations, or to make Lines about Places infected, 7 Geo. I, c. 8, Feb. 12, 1722. (repealing §§ 2,4 of the previous statute).

[737] *Id.*

[738] MACLEAN, *supra* note 613, at 437.

[739] 7 & 8 Geo. I, c. 10, Feb. 12, 1722. An Act to enable his Majesty Effectually to Prohibit Commerce, for the Space of One Year, with any country that is, or shall be, infected with the plague and for shortening the continuance of an Act passed in the 7th year of his Majesty.

[740] *See* MACLEAN, *supra* note 613, at 423.

return, Parliament limited the provision to one year and attached a rider, which shaved a year off of the general quarantine law that had been passed in 1721, ensuring that the authorities would cease as of March 1723—a full year before originally decreed.[741]

Mead's emphasis on smuggling also took statutory form. After the House of Lords rejected a similar bill, the Crown managed to push temporary provisions through the House.[742] The new statute, in addition to increasing the penalties associated with smuggling, increased tonnage duties, expanded penalties to including burning the ship or selling the products on board, and prevented the importation of alcohol.[743] Its effect was to strengthen the Privy Council's hand with respect to Parliamentary sanction.

While this legislation was evolving, the Privy Council took steps to use the powers at their disposal. The council gave warships to Customs officers to command and stationed guards along the coastlines.[744] When the council ordered two ships from Cyprus to be burned, the matter—which quickly evolved into a major diplomatic row and threatened trade with the Levant—reached Parliament.

The Levant Company increased their pressure on the political representatives. Commercial entities frequently had to petition to get their wares out of quarantine. The administrative burden on them was not insignificant: the Privy Council required bills of lading, bills of health letters of advice, invoices, and business correspondence; where such documents could not readily be produced, the goods would be send to the airing houses where damp conditions often ruined the cargo.[745] Under such pressure, there was little impetus to continue to support the more stringent provisions. All three of the statutes introduced in response to the Marseilles plague were temporary. Upon their expiration, Queen Anne's act came back into force.[746]

E. The Beginning of the End

Within a few years, the Privy Council again faced the threat of plague. Accordingly, in May 1728 the Privy Council issued an order, requiring 40 days'

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[741] 8 Geo. 1, c. 8, s. 6, shortening An Act for repealing an Act and for Better Preventing the Plague being Brought from Foreign Parts into Great Britain or Ireland, or the Isles of Guernsey, &c., and to hinder the Spreading of Infection. *See also* 7 Geo. I, c. 3, Jan. 25, 1721.

[742] 7 & 8 Geo. I, c. 18, Mar. 7, 1722. (amending 7 Geo. I, c. 3). An Act to prevent the Clandestine Running of Goods, and the Danger of Infection thereby, and to prevent ships breaking their Quarantine.

[743] *Id.*

[744] BOOKER, *supra* note 48.

[745] *Id.* at 110-11.

[746] 7 Geo. I, c. 3 expired and 9 Anne, c. 2 came back into force, Mar. 25, 1723.

quarantine of all ships from the Ionian Islands and Morea, and within five days, a new bill was before Parliament.[747] The legislation revived many of the same clauses from the Marseilles statutes, with a few alterations: the power of prohibiting commerce for one year was included directly in the statute, as was the authority of the Crown to prohibit British subjects from trade with specific countries or regions.[748] Violations would be considered a felony, with ships and goods forfeit and importers fined thrice the value of the ship or goods received.[749] Although intended to be temporary, an ongoing threat of plague forced their renewal in 1733.[750]

The hold of the merchants over Parliament was growing. This statute was the last act to insist that goods be opened and aired for a period of quarantine; it also omitted any mention of enumerated goods.[751] Nevertheless, Privy Council Proclamations and Orders in July of that year listed quarantinable items.[752] It is not clear whether these orders were *ultra vires* the governing legislation, or whether Parliament was simply trying to dodge political bullets—i.e., leaving it to the council to make unpopular commercial decisions. Merchants were particularly unhappy about the Privy Council's orders. Petitions for relief to minimize the length of quarantine and airing of cargo followed. There was particular concern that British trade was being crippled, leaving its rivals free to profit. The Levant Company thus petitioned for an end to quarantine for ships with clean bills of health, so that trade "may be upon as easy terms as that of our Neighbours"—i.e., the Dutch.[753] Despite deep

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[747] May 9, 1728, leave given to bring in bill; May 10, Second Reading and committed to a committee; passed on 24th, agreed to by Lords without Amendment, received Royal Assent May 28, 1728.

[748] 1 Geo. II, c. 13, May 28, 1728. An act for the better preventing the plague being brought from foreign parts into Great Britain, or Ireland, or the Isles of Guernsey, &c. &c., and to hinder the spreading of infection; *See also* Journal of the House of Commons, Vol. 21, at 157, 166-9, 172, 177-9, 181-2.

[749] *Id.*

[750] 6 Geo. II, c. 34, June 14, 1733; An Act for reviving so much of the Act made in the First Year of his Majesty's Reign, entitled, &c.—as relates to the performing quarantine, and the preventing the spreading of infection, and to enable his Majesty to prohibit commerce with any country or place infected with the plague, for a certain time therein limited. In 1735 6 Geo. II, c. 34 expired and 9 Anne, c. 2 came back into force. Bill ordered June 4th,presented, read twice, and committed same day; reported and ordered to be engrossed the next day, and passed on the 6th. No amendments by Lords, Royal Assent on the 13th. Was to continue in force for two years, from June 2, 1733, and from then to the next Session of Parliament.

[751] *Id.*

[752] *See, e.g.,* Privy Council Order and Proclamation of July 4, 1728 (declaring 40 days' quarantine against Levant, particularly Smyrna, and islands of the Archipelago, as well as Morea and Ionian Islands); Privy Council Order of July 9, 1728 (extending quarantine to Channel Islands and the Isle of Man).

[753] BOOKER, *supra* note 48, at 153.

suspicion of the accuracy of such bills of health, the Privy Council caved, issuing an order in February 1730, allowing all ships with clean bills to be released from quarantine.[754]

As for the statutory authorities, the renewal act of 1733 was the last time that Parliament gave the monarch the authority to prohibit contact with infected regions. The authority was never used.[755] It is notable here that, in contrast, this period coincides with the beginning of the introduction and use of such authorities in the American colonies.

The following decades witnessed continued outbreaks of plague, in the context of which the 1710 statute provided the base and sporadic Privy Council orders issued.[756] In 1752 Parliament again turned to discussion of quarantine, as the House of Commons resolved to form a committee "to consider the most proper and effectual manner of performing Quarantine."[757] This was the first time that quarantine measures had been considered by Parliament outside the demands of an immediate emergency.[758]

In January of 1753 Viscount Barrington and five other Members of the House of Commons were appointed to bring forward a quarantine bill.[759] Barrington's role, in particular, could hardly be overlooked: as a commissioner of the Admiralty, his interest signaled concern that the Navy might be less than satisfied with the Privy Council's actions. The statute focused on the foreign importation of disease—not its domestic spread.[760] It required that infected ships dock in the Isles of Sicily, whence customs would contact the mainland. The ship would remain there until released by the Crown, under penalty of death.[761] The statute limited the impact on commercial goods, ensuring that there would be no airing subsequent to quarantine and imposing treble damages, as well as the full costs, on any officer who "shall embezzle, or shall willingly damage, any goods performing quarantine under his discretion."[762]

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[754] *Id.* at 154.
[755] NA PRO 30/8/259, vols. 340, 343, cited in BOOKER, *supra* note 48, at 156, n.39.
[756] *See* RUSSELL, *supra* note 611, at 446.
[757] 26 JOURNAL OF THE HOUSE OF COMMONS, at 432, 447.
[758] *See* RUSSELL, *supra* note 611, at 447-48.
[759] 26 JOURNAL OF THE HOUSE OF COMMONS at 532.
[760] *See* 26 Geo. II, c. 6, April 17, 1753. An act to oblige ships more effectually to perform their quarantine, and for the better preventing the plague being brought from foreign parts into Great Britain or Ireland, or the isles of Guernsey, Jersey, Alderney, Sark, or Man Note the absence of "and for preventing the spreading of infection" in the title, in contrast with earlier initiatives.
[761] *Id.* An act to oblige ships more effectually to perform their quarantine; and for the better preventing the plague being brought from foreign parts into Great Britain or Ireland, or the isles of Guernsey, Jersey, Alderney, Sark, or Man.
[762] *Id.*

Further, the act's implementation was delayed one year, to allow companies the time necessary to obtain the documentation required to avoid quarantine, where applicable.[763] Accompanying parliamentary consideration of the bill, moreover, was a second initiative, which sought to relax conditions for the Levant Company, without throwing trade open entirely.[764]

With the monarch and the Privy Council forced to work more closely with Parliament, it was perhaps inevitable that British shipping interests—well represented in the legislature—would carry ever-greater sway in subsequently diminishing the impact of quarantine regulations. By the 1763 Peace of Paris, England had "undisputed command of the seas".[765] Quarantine provisions ran directly counter to the country's economic interests. "All that prevented trade from growing," merchants argued to the Board of Trade, was "the quarantine imposed in Britain."[766] Subsequent measures sought to address the problem.[767]

Parliament was sensitive to the political and economic repercussions of limiting trade. The advent of free market ideals, promulgated through the writings of Adam Smith and others, brought ever more attention to trade restrictions. But disease presented a very real threat—one that had decimated the country in earlier times. Giving the Privy Council full reign, however, raised the specter of Royal Prerogative. Parliament's short-term response was to split the difference: to issue governing statutes, thereby establishing its authority and the limits of Royal Prerogative, while granting the Privy Council the flexibility necessary to respond to disease—and, in the process, dodging any political fallout that may ensue.

i. Gradual Transformation of the Quarantine Regime

Quarantine provisions themselves came to reflect the Enlightenment ideals that shaped the 18th century, as society began questioning the traditional institutions. In contrast to the Tudor age, when quarantine was seen as the height of European political sophistication, it gradually came to be seen as backwards. Two treatises in particular had a profound influence. The first, by

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[763] *Id.*

[764] *See* 26 Geo. II, c. 12, May 15, 1753. An Act for Enlarging and Regulating the Trade Into the Levant Seas, NB: Starting to see free market ideas/Adam Smith take hold.

[765] KEIR, *supra*, note621, at 291.

[766] *See* NA PC 1/8/20; communication from British consul at Leghorn, backed by 25 local merchants, to Henry Seymour Conway (successor to Lord Halifax), 1788; *See also* BOOKER, *supra* note 48, at 196.

[767] *See, e.g.,* 39 Geo. III, c. 99, July 12, 1799. An act to encourage the trade into the Levant seas, by providing a more convenient mode of performing quarantine, &c.

John Howard, pointed out how politics interfered with the execution of quarantine.[768] His work underscored the expense and injustice that permeated British trade with the Mediterranean.[769]

The second, by Patrick Russell, carefully dissected the clinical aspects of plague, the method of cure, the doctrine of contagion, and operation of lazarettos.[770] Russell argued that, as a domestic matter, the constitutional authorities were unclear: the line between Royal Prerogative for international ships arriving and Parliamentary control for the spread of the disease blurred. Russell contemplated the role of the civil magistrate.[771] He looked carefully at the police powers to be exercised in relation to the different stages of plague, calling for the establishment of a Council of Health, with discretionary authority.[772] Such a body would resolve many of the weaknesses of the Privy Council, pushing the decision to quarantine down to a local level and providing a greater medical and scientific basis for the decision.[773] It also would be superior to the current quarantine regulations used by shipping companies—who could hardly be considered disinterested.[774]

Russell's recommendations reflected the broader movement towards the professionalism of advice rendered to the government, as well as the growing role of medical personnel in setting policies affecting public health. In 1799 Parliament passed a statute to allow the Privy Council to convene a body of experts to consider and prepare regulations to govern quarantine.[775] The body reported in 1800, recommending that a Board of Health be established, which could consult with all British consuls in foreign parts and which should have original responsibility for any domestic measures.[776]

The Privy Council adopted many of the committee's recommendations, but it rebuffed the proposed creation of a board of health to which its quarantine authorities would be transferred.[777] Instead, the committee would continue in a consultative capacity. By insulating the committee from the commercial interests that had provided a check on the Privy Council, though, its recommendations became heavily weighted towards public health—in effect,

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[768] John Howard, An Account of the Principal Lazarettos in Europe, 1789.
[769] *Id.*
[770] RUSSELL, *supra* note 611.
[771] *Id.* 508-9.
[772] *Id.* at 506-7.
[773] *Id.; See also,* comment on Russell in MACLEAN, *supra* note 613, at 429.
[774] RUSSELL, *supra* note 611, at 344-350.
[775] 39 Geo. III, c. 99, July 12, 1799. An act to encourage the trade into the Levant seas, by providing a more convenient mode of performing quarantine, &c.
[776] *See* MACLEAN, *supra* note 613, at 431.
[777] NA PC 2/153/453-51; *See also* Order in Council July 29, 1800.

prompting even more extreme measures.[778] In 1806, the Board of Health, having had no real authority, dissolved.[779]

In the interim, Parliament expanded the statutory base for quarantine to include diseases other than plague. Of chief concern was the advent of yellow fever, occasioned by trade with the Americas.[780] In moving the 1805 bill, George Rose explained that while the 1800 act had been to impose quarantine on ships coming from plague regions, "other epidemical diseases…might be dangerous to the health of this county."[781] The Privy Council developed questionnaires to obtain information from each vessel arriving in the United Kingdom.[782] Ships coming from regions where such diseases raged, even if they carried clean bills of health, would be required to perform quarantine.[783]

As in the United States, theories of contagion were not universally accepted.[784] Charles MacLean argued that no disease attack individuals twice—a position formally rejected in 1818 by a Select committee of the House of Commons, as well as the Royal College of Physicians.[785] Undeterred by the Parliamentarians' skepticism, MacLean began his *Remarks on the British Quarantine Laws*, "The code of Quarantine laws in England, and of Sanitary laws in the nations of the continent of Europe, is, perhaps, without exception,

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[778] *See, e.g.,* Journal of the House of Commons, vol. 55, at 245, 497; Journal of the House of Commons, Vol. 55, pp. 498, 575; NA PC 2/154/43.

[779] BOOKER, *supra* note 48, at 303.

[780] *See* 45 Geo. III, c. 10, Mar. 12, 1805. An Act for making farther [sic] provision for the effectual performance of Quarantine, Remained in force until 1822; *See also* printed copy in the British Library at 748.f.13(2) &at Kew at NA PC 2/167/227-68; 46 Geo. III, c. 98, July 16, 1806. Amendments to 1805 statute in An Act for making additional and further Provisions for … Quarantine in Great Britain.

[781] Hansard's, Parliamentary Debates, vol. 3, p. 222.

[782] Order in Council of Apr. 5, 1805, reprinted in DEW'S ON DUTIES OF CUSTOMS, UL Rare Books, Ant.c.28.2309, at 243-4.

[783] *Id.* at 240-3 (reprinting April 5, 1805 Privy Council Order). For a summary of quarantine regulations in place as of 1818, see A Digest of the Duties of Customs & Excise payable upon all foreign articles imported into and exported from Great Britain: duties outwards, and counter valuing duties between Great Britain and Ireland, Customs and Excise bounties…Quarantine laws…brought up to 1st Dec. 1818. London: 1818. UL Rare books Ant.c.28.2309.

[784] *See, e.g.,* Dr. Anthony White, London: 1846, at 2, UL Rare Books, IX.23.18. A Treatise on the Plague, more especially on the police management of that disease, Illustrated by the plan of operations successfully carried into effect in the late plague of Corfu, with hints on quarantine; *See also* Ackerknecht, Anticontagionism Between 1821 and 1867; BULL. OF THE HIST. OF MED., 22, 562-93 (1948); R. Cooter, Anticontagionism and History's Medical Record, in THE PROBLEM OF MEDICAL KNOWLEDGE—EXAMINING THE SOCIAL CONSTRUCTION OF MEDICINE, 87-108 (P. Wright and A. Treacher eds, 1982).

[785] MACLEAN,*supra* note 613, at 439; *See also* Catherine Kelly, "Not from the College, but Through the Public and the Legislature", Charles Maclean and the Relocation of Medical Debate in the Early Nineteenth Century, BULL. HIST. MED. 2008, 82(3): 545-569.

the most gigantic, extraordinary, and mischievous superstructure, that has ever been raised by man, upon a purely imaginary foundation."[786]

The ensuing debate was fierce. Non-contagion theory was dangerous: it put the nation at risk.[787] Foreign powers would refuse trade with an infected country.[788] Pamphlets ridiculed MacLean.[789] He replied with the none-too-subtle: *Evils of Quarantine Laws, and Non-Existence of Pestilential Contagion.* (MacLean's position was somewhat weakened when, within five days of arriving in the Levant, he fell subject to the plague.[790])

The fact that England was primarily concerned about plague proved crucial. It was not clear that plague transferred between individuals. Although it was not known at the time, the disease was carried by fleas (and rodents) and transferred when the animals bit the individual. This explained why there were various instances in which individuals had come into contact with each other and the disease had not transferred—incidents sufficient to call into question whether airborne human-to-human transmission occurred. It also explained why immersing goods in water and then placing them in the open air diminished their contagiousness: it killed the fleas, thus preventing individuals who subsequently came into contact with the furs, fabrics, and other materials from contracting the disease.

Even as contagionists and non-contagionists captured the public debate, a series of works began to show the connection between dirt and disease.[791] The real problem, scientists argued, was sanitation:

> It must surely be manifest, that foreign contagion, now usually considered the substantial germ, without with the most fearful combination of indigenous causes, famine, filth, misery, corrupt food, vitiated air and sickly seasons, can never produce a pestilence, dwindles in national important almost to a shadow in comparison. And it can scarcely be doubted that the attempt to defend ourselves by quarantine regulations, while such causes existed, would be like binding in chains a ferocious animal at a distance, when another ten-times more fierce was fondled at our doors, and suffered to roam about at pleasure.[792]

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[786] *Id.* at 416.

[787] WILLIAM MACMICHAEL, A BRIEF SKETCH OF THE PROGRESS OF OPINION UPON THE SUBJECT OF CONTAGION: WITH SOME REMARKS ON QUARANTINE (1825). UL Rare books, VII.25.47.

[788] Augustus Bozzi Granville. LETTER TO THE RT. HON. W. HUSKISSON, MP, PRESIDENT OF THE BOARD OF TRADE, ON THE QUARANTINE BILL, by A.B. Granville, M.D., London: 1825, p. 394. UL Rare Books Zz.18.25.

[789] AN ANTIDOTE TO THE THEORIES OF THE NON-CONTAGIONISTS, RESPECTING THE PLAGUE. BY AN OLD LEVANTER. (1825). UL Rare books, VII.25.47.

[790] HANCOCK, *supra* note 611, at 12.

[791] *See* HANCOCK, *supra* note 611. WILLIAM HEBERDEN, OBSERVATIONS ON THE INCREASE AND DECREASE OF DIFFERENT DISEASES, PARTICULARLY THE PLAGUE (1801) and THOMAS HANCOCK, DISSERTATION ON THE LAWS OF EPIDEMIC DISEASES (QUAEDAM DE MORBID EPIDEMICIS GENERAIA COMPLECTENS) (1806).

[792] HANCOCK, *supra* note 611, at 232.

These scientific positions created an alternative to quarantine: i.e., if quarantine was detrimental to the economic health of the country, while being questionable in its effectiveness—as highlighted in the contagionist debate; and if there were alternatives available which might be more effective—without the detrimental impact on trade—then Parliament needed to consider it.

Accordingly, on March 10, 1825, the House dissolved itself into a committee to consider all acts in force related to quarantine.[793] John Smith, one of MacLean's supporters, was given leave to read a petition from MacLean that attacked the quarantine system, calling for a withdrawal of all quarantine laws—or an investigation into pestilential contagion.[794] The House passed a new statute, which included many of the previous powers, but softened the penalties associated with violations of the law, commuting, for instance, capital punishment to a £100 fine.[795] Most importantly, it allowed ships with a clean bill of health and healthy crew, upon arriving from Mediterranean or any African or Turkish ports, to be released immediately upon docking, after formalities were observed.[796]

Within five years Britain was to face yet another epidemic, but this time from a new disease: cholera. Diplomatic intelligence reported that it had swept through the Volga valley. Accordingly, On November 11, 1830, the Privy Council introduced an order quarantining ships arriving in Britain from Russia.[797] Merchants saw these provisions as troublesome and, instead of petitioning the Privy Council directly (an act that historically had been a colossal waste of time) they went straight to Parliament.[798] Agitation in the commons was quickly followed by new Orders in Council, requiring that quarantine laws be strictly enforced.[799] The Privy Council announced the formation of a new consultative Board of Health to respond to the crisis.

The board, chaired by the President of the College of Physicians, again demonstrated the insertion of science and medicine into the quarantine debate and the professionalization of advice provided to the government. But just because scientists were now being consulted did not mean that the advice they would provide would be accurate. The *Lancet*, a revolutionary medical

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[793] 80 JOURNAL OF THE HOUSE OF COMMONS, at 185.
[794] Hansards, vol. 12, at 993-6.
[795] *See* 6 Geo. IV, c. 78, June 27, 1825. An Act to repeal the several Laws relating to the Performance of Quarantine, and to make other Provisions in lieu thereof; *See also* 80 JOURNAL OF THE HOUSE OF COMMONS, at 489-603.
[796] Quarantine Act, 1825; 6 Geo. III, c. 78, II & III.
[797] *See* Privy Council Order, Nov. 11, 1830.
[798] BOOKER, *supra* note 48, at 463.
[799] *See* Privy Council Order of May 23, 1831; Privy Council Order of June 20, 1831.

journal launched in 1823, lamented, "It is probable that a set of men more ill-informed on the subject upon which they will be called upon to report, could not be found in the ranks of the profession."[800] And the board's advice, when it did come, was not particularly welcome to the Privy Council: it recommended the creation of a system, constructed from the Local Boards of Health, by which the compulsory evacuation of the sick would be carried out, and the isolation of the upper classes ensured. Historian John Booker reflected,

> For the Privy Council, these recommendations were hardly welcome, raising all manner of questions including constitutional authority, overlap with subsisting parochial and municipal government, social discrimination, and the liberty of the individual. Furthermore, the council's own powers of control and coercion beyond the imposition of quarantine could only legally take effect once an epidemic had erupted.[801]

In October 1831 British subjects began dying within hours of the onset of symptoms. The Privy Council immediately issued regulations imposing strict quarantine at the ports—including, for the first time since the 16th century, between ports within England.[802] It determined though that a *cordon sanitaire* around North-East England was neither practicable nor judicious.[803] Parliament acquiesced by passing an emergency law to give the Privy Council more leeway.[804] The council went after quarantine with abandon: between 1826 and 1829, there had been 772 ships from foreign ports quarantined, but in 1831 alone, some 2,556 found themselves so restricted.[805]

Despite their severity, these measures proved unsuccessful. Upwards of 30,000 British subjects died in the first wave.[806] Their failure put another nail in the coffin of quarantine as an effective response to disease. William Fergusson, the Inspector General of Hospitals, roundly denounced the practice: "[W]e might as well pretend to arrest the influx of the swallows in summer, and the woodcocks in the winter season, by cordons of troops and quarantine regulations, as by such means to stay the influence of an atmospheric

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[800] The Lancet, vol. 16 (409), at 434.
[801] BOOKER, *supra* note 48, at 467.
[802] Maglen, *supra* note 47, at 418; *See also* BOOKER, *supra* note 48, at 470.
[803] *Id.*
[804] Act of Parliament, 2 Will. IV, c. 10, Feb. 20, 1832.
[805] BOOKER, *supra* note 48, at 472; *See also* Maglen, *supra* note 47, at 418.
[806] *See* F.B. Smith, the People's Health, 1830-1910 (London, 1979, p. 230 (reporting the death of 31,000 people); *See also* Report on the Mortality of Cholera in England, 1848-9, xlvii (London, 1852) (placing the number at 30,900 who died 1831-32 in England); *See also* HENRY JEPHSON, THE SANITARY EVOLUTION OF LONDON 2-3 (1907) (reporting 5,000 deaths in London).

poison."[807] The solution instead lay:

> [I]n our moral courage, in our improved civilization, in the perfecting of our medical and health police, in the generous charitable spirit of the higher orders, assisting the poorer classes of the community, in the better condition of those classes themselves, compared with the poor of other countries, and in the devoted courage and assistance of the medical profession every where.[808]

It would be ludicrous to use quarantine to step epidemic catarrh or influenza; so why should it work for other diseases?[809]

Thomas Forster, writing contemporaneous with Fergusson, considered the failure with regard to cholera to tilt the scales against quarantine writ large:

> A question of great importance has for some years divided the opinion of medical as well as commercial men, respecting the source of Pestilence and the utility of Quarantine. The point at issue seems to be this—Whether pestilential diseases, such as Cholera Morbus, Plague, and others, be of such a nature that Quarantine and Sanitary Cordons can constitute a defence against their introduction into any county; or whether, on the contrary, they depend on morbidic conditions of the air, which, during particular seasons, and for certain limited portions of time, visit various countries, like other atmospheric phenomena, and are incapable of being arrested by any human means? I am strongly of the latter opinion, and though under certain circumstances diseases may be extended to predisposed persons, by confinement in close apartments with those who are already infected; yet it seems to me, that facts do not warrant the belief that travelers, ships, or bales of goods, can convey such diseases into ports or countries where the specific malaria does not exist.[810]

Medical treatises began calling for the abolition of quarantine law altogether.[811]

Outbreaks of the disease in 1832, 1848, 1854, and 1866 followed.[812] The

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[807] See WILLIAM FERGUSSON, MD, FRSE, INSPECTOR GENERAL OF HOSPITALS; LETTERS UPON CHOLERA MORBUS, WITH OBSERVATIONS UPON CONTAGION, QUARANTINE, AND DISINFECTING FUMIGATIONS.(1832), at 10. *See also* Letter written in Windsor, Nov. 26, 1831, UL Rare books Room, VII.27.3.

[808] *Id.* at 10.

[809] *Id.* at 24.

[810] THOMAS FORSTER, FACTS AND ENQUIRIES RESPECTING THE SOURCE OF EPIDEMIA: WITH AN HISTORICAL CATALOGUE OF THE NUMEROUS VISITATIONS OF PLAGUE, PESTILENCE, AND FAMINE, FROM THE EARLIEST PERIOD OF THE WORLD TO THE PRESENT DAY, TO WHICH ARE ADDED, OBSERVATIONS ON QUARANTINE AND SANITARY RULES. (1832), iii, UL Rare Books Hunter.c.81.69.

[811] *See, e.g.,* CAPTAIN WILLIAM WHITE, (BENGAL ARMY), THE EVILS OF QUARANTINE LAWS, AND NON-EXISTENCE OF PESTILENTIAL CONTAGION: THE PRIVY COUNCIL, AND COLLEGE OF PHYSICIANS; THE MEANS OF PREVENTION AND METHOD OF CURE OF THE CHOLERA MORBUS, AND THE ATROCITIES OF THE CHOLERA PANIC, 176, (1837), UL Rare Books VII.28.18.

[812] Maglen, *supra* note 47, at 419.

last, in particular, killed seven in every 10,000 people.[813] Quarantine again proved ineffective, leading the formal government report to denounce lazarettos as superstitious—"as contemptible in the eyes of science as they are injurious to commerce."[814]

The government responded to the devastation and what appeared to be a growing scientific consensus against the use of quarantine by asking John Bowring, a medical doctor, to examine the operation of quarantine in the Levant—the nexus of British quarantine policy for centuries—and to consider the impact of quarantine regulations on Britain's international relationships and commercial interests.[815] Bowring's findings proved devastating:

> The pecuniary cost may be estimated by millions of pounds sterling in delays, demurrage, loss of interest, deterioration of merchandise, increased expenses, fluctuations of markets, and other calculable elements; but the sacrifice of happiness, the weariness, the wasted time, the annoyance, the sufferings inflicted by quarantine legislation—these admit of no calculation—they exceed all measure. Nothing but their being a security against danger the most alarming, nothing but their being undoubted protections for the public health could warrant their infliction; and the result of my experience is not only that they are useless for the ends they profess to accomplish; but that they are absolutely pernicious—that they increase the evils against which they are designed to guard, and add to the miseries which it is their avowed object to modify or to remove.[816]

Even worse was the degree to which quarantine measures had become a tool of diplomacy and state policy. "Under the plea of a regard for the public health," Bowring wrote, "all letters are opened—all travelers are arrested and imprisoned—all commodities are subject tot regulations the most unintelligible, costly and vexatious."[817] He was not unaware of the threat posed by disease but of the threat posed by the weaponization of disease. He reported information related to Turkish use of plague as a means of war.[818] But transfer of disease by animals also occurred without any intent behind them. And the power of the lazarettos sat uneasily in a democratic state dedicated to the rule of law.[819]

Across Europe, governments were beginning to discuss significant

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[813] R. Thorne Thorne, On Sea-Borne Cholera: British Measures of Prevention v. European Measures of Restriction, BRITISH MEDICAL JOURNAL, 135, 140 (Aug. 13, 1887).
[814] Report on the Mortality of Cholera in England, 1848-9 (London 1852).
[815] Edinburgh, 1838, 1-2, UL Rare Books VII.28.18. John Bowring, Observations on the Oriental Plague and on Quarantines, as a means of arresting its progress, addressed to the British Association of Science, assembled at Newcastle, in August, 1838.
[816] *Id.* at 2.
[817] *Id.* at 11.
[818] Bowring, *supra* note 815.
[819] *Id.* at 12.

modifications to their quarantine laws.[820] In 1838 the French proposed to Britain to promote the creation of a Congress of Delegates from Europe, with the Mediterranean port. Like the regional conferences in the United States, the purpose was to construct a uniform system of quarantine regulations. England readily agreed.[821] Bowring's conclusion received support from British diplomats in Malta and elsewhere.[822] The report was not without its critics.[823] But it found fertile ground in a Parliament besieged by commercial interests and doubtful as to the effectiveness of quarantine law.

ii. Broader Context

At the risk of gross oversimplification, a handful of factors can be emphasized in looking at the complex economic and political conditions that helped to shape British quarantine law in the late 18th and early 19th century. A sudden surge in agricultural productivity helped to drive the industrial revolution.[824] This meant the greater movement of people and goods and an increased emphasis on economic growth. Transportation flows accelerated, and the population flocked to the cities.[825] The resultant population density brought issues of sanitation to the fore. Calls for reform proliferated.[826]

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[820] *Id.* at 5.
[821] Milroy, *supra* note 709, at 12.
[822] *Id.* at 14.
[823] *See, e.g.,* JOHN MURRAH, THE PLAGUE AND QUARANTINE. REMARKS ON SOME EPIDEMIC AND ENDEMIC DISEASES (INCLUDING THE PLAGUE OF THE LEVANT), AND THE MEANS OF DISINFECTION: WITH A DESCRIPTION OF THE PRESERVATIVE PHIAL, ALSO A POSTSCRIPT ON DR. BOWRING'S PAMPHLET (1839), UL Rare Books Pam.6.83.31.
[824] *See* MARK OVERTON, AGRICULTURAL REVOLUTION IN ENGLAND 1500-1850 (2002); THOMAS S. ASHTON, THE INDUSTRIAL REVOLUTION (1760-1830) (1948).
[825] *See, e.g.,* P.J.G RANSOM, THE VICTORIAN RAILWAY AND HOW IT EVOLVED, (1990); HENRY BOOTH, AN ACCOUNT OF THE LIVERPOOL AND MANCHESTER RAILWAY, (1830) (Reprint of the original edition by Frank Cass, 1969); J.H. CLAPHAM, AN ECONOMIC HISTORY OF MODERN BRITAIN: THE EARLY RAILWAY AGE, 1820-1850 (1926). London went from just under one million inhabitants to 2.3 million inhabitants during the first half of the 19th century; UK The National Archives, Abstracts of the Answers and Returns: Enumeration: 1801 (140), VI.813, (112), VII.1; Population Tables I: Numbers of Inhabitants: 1852-53 (1631-1632), LXXXV,1,LXXXVI,1. Warwick more than doubled from just over 215,000 to nearly 480,000. Even large villages grew. Bedford, for instance, had hit nearly 130,000 by 1851.
[826] *See, e.g.,* THE HEALTH AND SICKNESS OF TOWN POPULATIONS, CONSIDERED WITH REFERENCE TO PROPOSED SANATORY LEGISLATION, AND TO THE ESTABLISHMENT OF A COMPREHENSIVE SYSTEM OF MEDICAL POLICE, AND DISTRICT DISPENSARIES WITH APPENDICES AND STATISTICAL TABLES (1846); William A. Guy, On the Health of Towns, as Influenced by Defective Cleansing and Drainage; and on the application of the Refuse of Towns to Agricultural Purposes. Being a Lecture delivered at the Russell Institution (1846); Hector Gavin, M.D., Health of Towns, and of London Associations. Unhealthiness of London and the Necessity of Remedial Measures; being a lecture delivered at the Western and

Simultaneously, democratic changes swept the country. The reforms of 1832 targeted the abuse of "influence" and sought to eliminate the Crown's control over Parliament.[827] The king could no longer choose ministers at his discretion, and the House of Lords lost its ascendancy. The electorate grew in strength. Personal sovereignty, then parliamentary sovereignty, yielded to the sovereignty of the people.[828] Larger and less manageable constituencies began determining the outcome of elections. The government was thus increasingly forced to address not just national defense and foreign relations, but a range of issues that accompanied urbanization.[829] New demands arose for local administration, as well as political equality. Expensive, antiquated institutions and procedures fell from favor and became the target of critique: "The opinions which became fashionable in this age required that every institution should justify its existence on practical grounds."[830]

Further influencing the transition were the ideas of Adam Smith, who, in the *Wealth of Nations*, emphasized that national greatness required minimum restraints. Thus, under William Huskisson (President of the Board of Trade, 1825-1827) and then William Gladstone (President of the Board of Trade, 1841-1845), the board took a leading role in the tariff revisions required for free trade. As competition from abroad heightened, Britain needed "plentiful supplies of raw material, cheap food, and unimpeded access to every part of an expanding world-market where they might buy and sell as widely as possible…"[831] The country had to be able to compete more effectively.

Eastern Literary and Scientific Institutions, Leicester Square (1847); HEALTH OF TOWNS ASSOCIATION. REPORT OF THE COMMITTEE TO THE MEMBERS OF THE ASSOCIATION ON LORD LINCOLN'S SEWERAGE, DRAINAGE, &C., OF TOWNS' BILL (1846); Viscount Morpeth, Sanitary Reform. Speech in the House of commons, Tuesday, 30th Mar. 1847, on Moving for Leave to Bring in a Bill for Improving the Health of Towns in England; London: 1847; John Loude Tabberner; The Past, the Present, and the Probable future Supply of Water to London, Letter to the Right Hon. Viscount Morpeth, M.P, Chief Commissioner of HM Woods and Forests (1847); John Marshall, Surgeon, Vaccination considered in relation to the public health: with inquiries and suggestions thereon. A letter addressed to the Right Honourable the Lord Viscount Morpeth, (1847); William Strange, M.D., An address to the middle and working classes on the causes and prevention of the excessive sickness and mortality prevalent in large towns. (1845); John Charles Hall, M.D. Facts which prove the immediate Necessity for the Enactment of Sanitary Measures, to remove those causes which at present increase most fearfully the Bills of Mortality, and seriously affect the Health of Towns (1847).

[827] KEIR, *supra*, note 621, at 374.

[828] *Id.*

[829] *See, e.g.,* EDWARD JENKINS, THE LEGAL ASPECTS OF SANITARY REFORM 81-82 (1867) (discussing the centralization of public health).

[830] *Id.* at 370.

[831] *Id.* at 368.

Quarantine stood in the way.[832] And, as already recognized, there was substantial question about the scientific grounds for using such regulations. Thus Gavin Milroy wrote of the body of quarantine law in 1846,

> The absurdly foolish and most ridiculous principles which they embody, the vexatious and oppressive restrictions which they impose, the wretchedness and suffering which they almost necessarily give rise to, and the great increase of mortality which, we have reason to believe, they often occasion, are surely sufficient grounds for the scrutinizing investigation that is so generally demanded."[833]

The government, however, could not just destroy the old quarantine regulations. They had to be replaced by something that would help the state to counter the threat of disease. The answer came in the form of sanitary laws. The Registrar-general explained, "internal sanitary arrangements, and not quarantine and sanitary lines, are the safeguards of nations' against the invasion of epidemic diseases."[834] Better sanitation, not archaic quarantine, was befitting of an enlightened age.[835]

Since the 16th century, there had been calls for better sanitation.[836] It was not until the 19th century, however, that the call for reform took hold. Edwin Chadwick lead the charge: "[T]he annual loss of life from filth and bad ventilation," he wrote, "are greater than the loss from death or wounds in any wars in which the country has been engaged in modern times."[837] Poor water, poor sewage, and poor ventilation lay at the root of disease.[838] The Royal Commission on the Health of Towns endorsed Chadwick's account, while reports of the Metropolitan Sewers Commission drew a bleak picture:

> I have…seen in such places human beings living and sleeping in sunk rooms with filth from overflowing cesspools exuding through and running down the walls and over the floors…The effects of the stench, effluvia, and poisonous gases constantly

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[832] *Id.* at 490-96.

[833] GAVIN MILROY, QUARANTINE AND THE PLAGUE: BEING A SUMMARY OF THE REPORT ON THESE SUBJECTS RECENTLY ADDRESSED TO THE ROYAL ACADEMY OF MEDICINE IN FRANCE: WITH INTRODUCTORY OBSERVATIONS, EXTRACTS FROM PARLIAMENTARY CORRESPONDENCE, AND NOTES. (1846), UL Rare books reading room, VII.25.16.

[834] GAVIN MILROY, THE CHOLERA NOT TO BE ARRESTED BY QUARANTINE: A BRIEF HISTORICAL SKETCH OF THE GREAT EPIDEMIC OF 1817 AND ITS INVASIONS OF EUROPE IN 1831-32 & 1847; PRACTICAL REMARKS ON THE TREATMENT, PREVENTIVE AND CURATIVE, OF THE DISEASE, (1847), UL Rare books Room, VII.30.26, at 38-39.

[835] *Id.* at 39.

[836] *See, e.g.,* JHON CAIUS, A BOKE OR CONSEILL AGAINST THE DISEASE COMMONLY CALLED THE SEATE OR SEATYNG SICKNESSE (1552).

[837] EDWIN CHADWICK: REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION OF GREAT BRITAIN (1842); *See also* PORTER, *supra* note 46, at 82; FRASER, *supra* note 609, at 78.

[838] CHADWICK, *supra* note 838.

> evolving from these foul accumulations were apparent in the haggard, wan, and swarthy countenances, and enfeebled limbs, or the poor creatures whom I found residing over and amongst these dens of pollution and wretchedness.[839]

The solution to filth and disease was better sanitation. The General Board of Health, seen as the solution to the latter, became firmly opposed to the use of quarantine, considering it "a barbarous encumbrance, interrupting commerce, obstructing international intercourse, periling life, and wasting, and worse than wasting, large sums of public money."[840] Southwood Smith, a prominent voice in the sanitation movement, similarly rejected quarantine. In 1866 he wrote:

> The sanitary regulation of the ships themselves—a measure of the utmost importance to the seafaring classes of the community—would accomplish far more than could be hoped for or pretended to be accomplished by any known system of quarantine, and would have, moreover, a beneficial effect upon popular opinion by removing the fallacious appearances which favour the belief in imported disease, while they divert attention from the true causes of disease, the removable and preventable causes that exist on the spot.[841]

Thus, in 1868 when a severe smallpox epidemic and a renewed threat of cholera swept the country, the government appointed a Royal Sanitary Commission to look into public health. The Commission recommended a complete overhaul of the country's administration, and the formation of a responsible public health authority in each district, controlled by a central department under a minister. Eventually, the Local Authorities would take over quarantine responsibilities in the ports.[842] Legislation in 1866, 1871, 1872, and 1875 defined the constitution of the central and local authorities—the last laying down the rules that still form the foundation of public health law in the United Kingdom.[843] The 1871 Act established a "phantom" board, called the Local Government Board and provided a salary for its president.[844] Its purpose was to place the supervision of all the laws relating to public health, the relief of the poor, and local government, into one body. The 1872 act created an alternative system of port prophylaxis; quarantine would be

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[839] J. Phillips, Metropolitan Sewers Commission, 63, (1847); *See also* JEPHSON, *supra* note 806, at 19.
[840] General Board of Health—Report on Quarantine, Parliamentary Papers, 1849 (1070), XXIV, 17.
[841] SOUTHWOOD SMITH, THE COMMON NATURE OF EPIDEMICS, AND THEIR RELATION TO CLIMATE AND CIVILIZATION (1866), UL Rare Books V.22.28.
[842] Second Report of the Royal Sanitary Commission, Vol. I The Report, Parliamentary Papers C.281, XXXVI.I, 133 (1871); *See also* Maglen, *supra* note 47, at 421.
[843] Sanitation Act, 29 & 30 Vict., c. 90; Local Government Board Act, 34 & 35 Vict., c. 70, 14 Aug, 1871; Public Health Act, 1872; Public Health Act, 38 & 39 Vict., c. 55, 1875. *See also* ARTHUR NEWSHOLME, THE MINISTRY OF HEALTH (1925).
[844] Local Government Board Act, 34 & 35 Vict., c. 70, 14 Aug, 1871.

maintained for the "exotics", while the new sanitary system extended to endemic diseases.[845]

The statutory authority of the Privy Council in regard to quarantine continued. But as a practical matter, dual policies had evolved: quarantine could either be administered via the central government through the Privy Council, or it could be conducted by medical inspection run by local authorities with the support of the Local Government Board.[846] The Privy Council had substantially reduced its footprint. By 1878, all but one of the quarantine grounds had been abandoned.[847] However, at times the Privy Council still acted, but it did so to much derision. In March of 1879, for instance, the council, having wind of a fresh outbreak of plague, suddenly issued an order imposing quarantine on all arrivals from the Baltic, the Black Sea, the Sea of Azoff, and the Sea of Marmara. The Lancet crowed that the "epidemic lunacy" of Europe had resulted "in reviving obsolete methods of quarantine, maritime and inland, against the compromised country [Russia], and against the uncompromised countries of each other."[848] It announced the proposal "absurdly impracticable."[849]

However archaic and impractical the authority might have been, as a legal matter, the Privy Council still had jurisdiction over the United Kingdom and the Local Government Board maintained domestic authority in England and Wales. The question was one of overlapping authority at the ports. The Law Lords ruled in November 1887 that the Local Government Board had no power over customs functions. The question would have to be put to Parliament. The resulting Public Health Act of 1896 repealed the Quarantine Act of 1825 and removed the Privy Council's involvement in the same.[850] In its place, Westminster retained authority in the Local Government Board—in part to head off criticism from abroad that Britain had left itself without any defense.

F. Rejecting Quarantine: 20th Century

Britain's concern about the impact of quarantine law on trade did not end with the elimination of domestic provisions. At the turn of the century, English ships still ruled the seas. Approximately 64% of all pilgrims arriving in

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[845] Maglen, *supra* note 47, at413-428. But see Hardy, *supra* note 48, at 260; McDonald, *supra* note 48, at28 (denying the dual theory of quarantine).
[846] BOOKER, *supra* note 48, at 539.
[847] *Id.* at 542.
[848] 1 The Lancet 688-689, (1880) cited in BOOKER, *supra* note 48, at 543, n.209.
[849] *Id.*
[850] Public Health Act, 1896, *supra* note 33.

the Hedjaz by sea were carried on British vessels.[851] The ships carried Indian, Afghan, Turkish, Chinese, Persian, Somali, African, Yemeni, Arab, and other pilgrims, thus gaining for Britain insight into the happenings at many ports.[852] When plague broke out and Jeddah imposed quarantine, the British shipping industry balked. Such provisions were considered "senseless."[853] British emissaries made repeated representations to the Ottomans, protesting the use of quarantine.[854] At the same time, diplomats sent dispatches to the Secretary of State for Foreign Affairs, describing the state of the disease in each port; he who would forward the dispatches to the President of the Local Government Board.[855] The system kept even the local authorities abreast of global health developments.

Quarantine, rejected for plague—which had been its raison d'etre—was viewed as even more inapposite for other disease. Thus the leading medical doctor, Arthur Hopkirk, wrote in 1913,

> There is really but little to be said as to the possibility of preventing influenza epidemics, because experience has shown that the disease invariably starts from some mysterious and undiscoverable nidus, and also that, once started, little can be done to prevent is dissemination, partly on account of the general predisposition of human beings to the malady, and partly because of the rapidity with which the infection is carried along all available lines of human intercourse."[856]

The solution instead would be to focus on teaching schoolchildren about personal and domestic cleanliness.[857]

When the Spanish Flu hit English shores in 1918-19, the United Kingdom did not resort to the use of quarantine.[858] The decision did not depend upon

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[851] Letter from F. G. Clemow to W. B. Townley, H.M. Chargé d'Affaires, Feb. 28, 1905, U.K. National Archives, MH 19/279. In 1905, there were 75,000 sea-borne Pilgrims.
[852] *Id.*
[853] Letter from E.D. Dickson to Sir N. R. O'Conor, Mar. 6, 1899, U.K. National Archives, MH 19/279.
[854] NA/MH 19 279: Quarantine concern with Ottoman provisions 1900.
[855] See, e.g., Letter from N.R. O'Conor to Marquess of Salisbury, K.G., May 1, 1899, U.K. National Archives, MH 19/279; Letter from N.R. O'Conor to Marquess of Salisbury, K.G., Mar. 22, 1899, U.K. National Archives, MH 19/279; Dickson, *supra* note 853; Letter from N.R. O'Conor, Constantinople, to Marquess of Salisbury, K.G., Mar. 9, 1899, U.K. National Archives, MH 19/279; Clemow, *supra* note 851; Letter from E.D. Dickson, Constantinople, to P. Currie, GCB, Apr. 9, 1898, U.K. National Archives, MH 19/279; Letter from Philip Currie, Constantinople, to H.M. Principal Secretary of State for Foreign Affairs, Apr. 13, 1898, U.K. National Archives, MH 19/278; Letter from E.D. Dickson, Constantinople, to P. Currie, GCB, Apr. 9, 1898, U.K. National Archives, MH 19/279; Letter from Dr. E.D. Dickson to Sir N.R. O'Conor, Mar. 1, 1899, U.K. National Archives, MH 19/279.
[856] ARTHUR F. HOPKIRK, INFLUENZA: ITS HISTORY, NATURE, CAUSE, AND TREATMENT 186, UL, XI.14.21, (1913).
[857] *Id.* at 187-88.
[858] *See, e.g.,* Niall Philip Alan Sean Johnson, Aspects of the Historical Geography of the 1918-19

the disease being a civil, not a military concern. Indeed, Lord Hankey, the Cabinet Secretary, initially suspected that the disease was a biological weapons attack.[859] And the death toll was substantial: within 46 weeks, some 3 ½ million cases had erupted.[860] According to the Registrar General, in the course of the epidemic nearly a quarter of a million died; many were young adults. Even these statistics are considered low.[861]But quarantine was eschewed as impractical and ineffective.[862]

Throughout the inter-war period, the United Kingdom continued to be extremely concerned about Russian and German development of biological weapons. The threat prompted the political establishment to generate its own weapons program, enlisting the aid of senior scientists. But the National Archives yield no evidence to suggest that at any point in the 20th century the political establishment contemplated the re-introduction of broad national quarantine authority as a way to respond to either to naturally-occurring disease or to biological weapons.[863]

Influenza Pandemic in Britain (Ph.D. thesis, University of Cambridge, 2001), at 149.

[859] *See, e.g.,* Letter from H.O. Statebury, Whitehall, to the Under Secretary of State, Colonial Office, 21350.M1.1919, Mar. 21, 1919, CO 123/298; Notebook 1, 52; Ministry of Health, 1927, 11.

[860] MINISTRY OF HEALTH, REPORTS ON PUBLIC HEALTH AND MEDICAL SUBJECTS NO. 4: REPORT ON THE PANDEMIC OF INFLUENZA 1918-19 548, 557 (1920).

[861] FRED R. VAN HARTESVELDT, THE 1918-19 PANDEMIC OF INFLUENZA: THE URBAN IMPACT IN THE WESTERN WORLD 3 Notebook 1, 17 (1992).

[862] School records show, for instance, that some areas were hit incredibly hard. For instance, at Rossall School in Fleetwood, 320 out of 440 boys (72.1%) infected; including 57 out of 59 in the prep School. PRO FD 1 537, 31 Jan. 1919, letter from Dr. A.H. Penistan. At Old Blundell's School in Tiverton, Devon: 180 out of 250 boarders (72%) caught influenza. PRO FD 1 537, 26 Jan 1919, letter from Dr. G. Perry) [Rossall, Felsted, Old Blundell's cited in Johnson, Thesis, p. 358. In Felsted School, Essex, between 143 and 162 cases out of ~250 boys (57.2%-64.8%) PRO FD 1 537, 6 Feb 1919, letter from Dr. J. Trmlett Wills. Leys School, Cambridge, had to be closed. Letter to Fletcher from Dr. W.H. Bown, Medical Officer, Leys School, Cambridge, Mar. 1, 1919, FD 1/537. Notebook 1, p. 35. School closure as one of the most commonly reported aspects of the pandemic. This was characteristic of all three waves. PRO FD 1 537 Report received by the MRC on 5 Feb. 1919. Schools sometimes closed for up to 3 weeks. See The Times 26 June 1918, 7; 3 Jul. 1918, 3; 4 Jul. 1918, 3; 5 Jul. 1918, 3; 8 Jul. 1918, 3; 9 Jul. 1918, 3; 11 Jul. 1918, 3; 27 Sept. 1918; 14 Oct. 1918, 3; 17 Oct. 1918, 3; 22 Oct. 1918, 3; 23 Oct. 1918, 3; 26 Oct. 1918, 7; 28 Oct. 1918, 3; 30 Oct. 1918, 9; 31 Oct. 1918, 7; 31 Oct. 1918, 8; 1 Nov. 1918, 7; 4 Nov. 1918, 5; 6 Nov. 1918, 3; 7 Nov. 1918, 3; 11 Nov. 1918, 5; 26 Nov. 1918, 3; 27 Nov. 1918, 5; 4 Dec. 1918, 4; 5 Dec. 1918 5; 7 Jan. 1919, 3; 14 Jan. 1919, 5; 7 Feb. 1919, 5; 10 Feb. 1919, 5; 11 Feb. 1919, 11; 20 Feb. 1919, 8; 21 Feb. 1919, 7; 24 Feb. 1919, 7; 1 Mar. 1919, 7; 8 Mar. 1919, 9; 11 Mar. 1919, 9; and 31 Mar. 1919.

[863] Statement based on author research at the National Archives, London.

G. Current Quarantine Law

Britain removed an explicit quarantine power from its public health laws in 1896, when the Public Health Act of 1896 repealed the Quarantine Act of 1825.[864] The law remained largely unchanged until the Public Health (Control of Disease) Act 1984 and the Public Health (Infectious Disease) Regulations of 1988.These provisions emphasize the local nature of quarantine. They allow for local authorities to obtain orders from a Justice of the Peace to order the medical examination of an individual or group of persons, and the removal of an individual or group to a hospital, if that individual is reasonably believed to have a notifiable disease, or, if not ill from the disease, to be carrying an organism that causes the disease.[865] The Justice of the Peace can then order that person to be involuntarily detained where permitting him to leave would endanger public safety.[866]

The Public Health (Control of Diseases) Act of 1984 initially included six notifiable diseases: cholera, plague, relapsing fever, smallpox, typhus and food poisoning.[867] The Public Health (Infectious Diseases) Regulations1988 added 25 more.[868] Under the 1984 statute, a local officer can request that an individual refrain from going to work, require that children exposed to infection to be excluded from school, and place restrictions on places of child entertainment. Criminal offences apply for exposing others to the risk of infection.[869] This legislation does not include detention powers for new or emerging disease.

For health laws at ports of entry, three sets of regulations issued under the 1984 legislation.[870] Here again, local authorities—not the central government—bear the main responsibility.[871] In March 2006, a major review of ports, airports, international train stations led the Health Protection Agency (HPA)to agree to take the lead to provide medical input into arrangements for port health.[872] The costs are shared by local authorities, the National Health

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[864] Public Health Act, 1896, *supra* note 33.
[865] Public Health (Control of Disease) Act of 1984, §§ 35, 36.
[866] *Id.* at § 37.
[867] *Id.* at §§ 10, 11.
[868] Public Health (Infectious Diseases) Regulations 1988, No. 1546, Sept. 6, 1988, §§ 6, 9.
[869] Public Health (Control of Disease) Act of 1984, § 11.
[870] Public Health (Aircraft) Regulations 1979; Public Health (Ships) Regulations 1979; Public Health (International Trains) Regulations 1994.
[871] But note that medical personnel are provided for local authorities by the Health Protection Agency.
[872] Health Protection Agency, Port Health and Medical Inspection Review Report from the Project Team, Mar. 2006, *available at* http://www.hpa.org.uk/web/HPAwebFile/HPAweb_C/1197021714421.

Service, and HPA, with audits conducted by the Healthcare Commission.

Additional medical examinations are possible under the Immigration Act of 1971, which allows the government to refuse entry on medical or public health threat grounds.[873] Where entry is granted, the Nationality, Immigration and Asylum Act 2002 provides a statutory basis for information regarding sickness to be transferred to the NHS or HPA.[874] HM Customs' longstanding policy is to refer individuals for medical examination whenever they seem unwell, give health as a reason for coming to the UK, claim asylum, or come from a country that is high-risk for tuberculosis(TB) and are seeking entry for more than 6 months.[875] Approximately 270,000 people per year fall within the last category, which has prompted at least two airports (Heathrow and Gatwick) to install x-ray machines to check for TB at the time of arrival.[876]

i. Health and Social Care Act of 2008: England and Wales

Recently, the Public Health Act of 1984 was subjected to extensive review. [877]In 2008, Part 2 of the statute was repealed/replaced by the Health and Social Care Act of 2008.[878] The changes suggest that there may be some movement with regard to quarantine, but the fundamental control of domestic measures remains in local hands.

This statute amended the Public Health (Control of Disease) Act of 1984, by authorizing the creation of regulations that designate how and when the quarantine of persons may be conducted. Pursuant to this authority, the Secretary of State created Regulation #9 of The Health Protection (Part 2A) Regulations 2010, which briefly mentions quarantined persons.[879] In regard to international travel, regulations can relate to preventing danger to public health from vessels arriving in or leaving England or Wales. The Secretary has the authority to include provision for medical examination, detention, isolation, quarantine of persons, provision of information from those persons,

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[873] Immigration Act of 1971, c. 77.

[874] Nationality, Immigration and Asylum Act 2002, c. 41, § 133.

[875] Health Activity Relating to People at Ports, Airports and International Train Stations in England, Department of Health, Health Protection Agency, Home Office, August 2006, at 3-4, *available at* http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4137781.pdf.

[876] *Id.* at 4.

[877] *See* www.dh.gov.uk.

[878] Health and Social Care Act of 2008, July 21, 2008, c. 14.

[879] Specifically, § 129 inserts §§ 45A-45T into the 1984 statute. §§ 45B and C confer powers on Secretary of State to make provision by Regulations with respect to health protection measures for international travel § 45(B) and domestic affairs § 45(C).

inspection/retention, destruction of things.[880] On the domestic side, regulations can impose duties on registered medical practitioners and others to record certain illnesses and to notify the government as to their appearance.[881] With regard to the domestic realm, regulations can restrict persons, things or premises where public health is threatened.[882] Such acts may include excluding a child from school, prohibiting events or gatherings.[883] The Secretary can further impose special restrictions, such as requiring an individual to undergo decontamination, wear protective clothing, or undergo health monitoring.[884]

Unlike the provisions that apply to international travel, however, the regulations may *not* require that an individual submit to medical examination, be removed to or detained in a hospital or other suitable place, or be kept in isolation or quarantine *absent an Order from a Justice of the Peace on application from a Local Authority*.[885] Such orders are referred to as Part 2A Orders, enforceable by criminal prosecution.[886] In other words, Part 2A orders are grounded in the local domain, and they reflect more than a century of placing such authorities in the hands of local government. Where considered "necessary", Part 2A orders may be issued without notice.[887] The statute establishes the standard required: the Justice of the Peace must be satisfied that (i) the person/thing in question is infected/contaminated; (ii) infection or contamination presents/could present significant harm to human health; (iii) risk of infection or contamination to other humans exists; and (iv) it is necessary to make the order to remove or reduce the risk.[888]

Parliamentary scrutiny of the Regulations takes place either via affirmative resolution or annulment by negative resolution; but prior Parliamentary approval is not required where the person making the instrument considers it necessary to make the order prior to a draft having been laid. Such orders are subject to annulment after 28 days, unless approved by each House of Parliament for England or the National Assembly for Wales.[889]

The statute broadly defines the diseases to which Part 2A Orders apply: "Any reference to infection or contamination is a reference to infection or contamination which presents or could present significant harm to human

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[880] Health and Social Care Act of 2008, July 21, 2008, c. 14, §§ 45B(1) and (2).
[881] *Id.* at § 45C(4).
[882] *Id.* at § 45(c)(3)(c).
[883] *Id.* at § 45(c)(4).
[884] *Id.* at §§ 45G(2)(e)-(k), 45(H)(2) and 45(I)(2).
[885] *Id.* at § 45(d)(3).
[886] *Id.* at § 45(O)(1)-(2).
[887] *Id.* at § 45(M).
[888] *Id.* at § 45(G)(3) and (H)(1).
[889] *Id.* at § 45R.

health."[890] Commentators suggest that this does include pandemic influenza.[891] The statute adopts a flexible approach for amending the list of diseases in the future.

While the scope of the provisions is considerably wider than what Britain previously maintained, it is also more complex. The statute also focuses on response once the threat has become clear, not prior to threat. As one scholarly article explains, "While there are provisions for monitoring and notifying outbreaks, there is far less consideration for joined-up working beyond the very local response."[892]

ii. Public Health Etc. (Scotland) Act 2008

The Health and Social Care Act of 2008 does not apply to Scotland, which passed its own Public Health Act prior to Westminster's adoption of the statute.[893] The main purpose of the Scottish statute was to modernize the legislative framework governing health protection, since most of the statutory authorities dated back to late 19th century.[894] The Scottish Executive convened the Public Health Legislation Review Group to consider the legislation and whether new provisions were necessary. The review group released its proposals in October 2006, with an analysis subsequently published in March 2007.

The legislation clarifies the roles and responsibilities of Scottish Ministers, the NHS boards, and local authorities.[895] It also devises a new system of statutory notification for diseases (notifiable diseases, notifiable organisms and health risk states—including offences in regard to notifiable organisms).[896] The act provides a framework for public health investigations, giving health officials powers related to entry to premises, the power to ask questions, the authority

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[890] *Id.* at § 45(A).

[891] Graeme T. Laurie and Kathryn G. Hunter, Mapping, Assessing and Improving Legal Preparedness for Pandemic Flu in the United Kingdom, 10 MEDICAL LAW INTERNATIONAL 111 (2009).

[892] Laurie et al., *supra* note 891, at 111.

[893] Introduced in Parliament Oct. 25, 2007. Bill passed following Stage 3 parliamentary debate, 12 June 2008. See Scottish Parliament Information Centre, Public Health etc (Scotland) Bill, *available at* http://www.scottish.parliament.uk/s3/bills/03-PublicHealth/PublicHealthetcScotlandBill.pdf.

[894] *See* Notification Act 1889 (repealing in whole the Infectious Disease Cleansing of Persons Act 1897, Public Health (Scotland) Act 1897, Public Health (Scotland) Amendment Act 1907, Public Health (Scotland) Act 1945, Health Services and Public Health Act 1968).

[895] Public Health (Scotland) Act 2008, asp 5, Part 1, *available at* http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp_20080005_en.pdf.

[896] Public Health (Scotland) Act 2008, asp 5, Part 2, Schedule 1(1).

to issue public health investigation warrants.[897] As perhaps would be expected, given the long and contentious history of quarantine, debate during consideration of the bill focused on how such measures would be given effect. Transparency in the issuance of compulsion, exclusion, and restriction orders,[898] mechanisms for appeal in the case of compulsory medical examinations,[899] and the manner in which orders could be altered all received heightened scrutiny during the debates.[900]

Much of the statute's focus is administrative: it clarifies, for instance, the public health functions of the health boards, specifying their duty to give explanation, medical examinations, exclusion orders and restriction orders, quarantine, removal to and detention in hospital, quarantine and detention, variation and extension of orders, review of orders, compensation, recall of orders granted in absence, appeal, and breach of orders and offences.[901] It also lays out the public health functions of the local authorities.[902] Other sections deal with mortuaries, international travel, sun beds, and statutory nuisances.[903]

iii. Civil Contingencies Act of 2004

It might be possible for the British government to implement quarantine under its more general emergency powers. The Civil Contingencies Act of 2004 provides the main vehicle for managing emergencies. The legislation repealed previous civil defense measures and replaced them with modernized provisions meant to take account of contemporary threats, such as terrorism, environmental degradation, and pandemic disease.[904] Recourse to this legislation, however, is considered a last resort.[905]

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[897] Public Health (Scotland) Act 2008, asp 5, Part 3.

[898] *See* SPHSC, 2008b, col 826-830 amendment 58-64, 72, 74, 80, 81, 86, 92, 93, 130 and 134 (addressing the appeal of such orders when made in the absence of the target).

[899] SPHSC, 2008b, col 830-833.

[900] *Id.* (addressing amendments 99, 102, 119 and 123; Amendments 104, 109, 116-118, 120-122, 124-129, 132, 133 and 135 regarding the extension of quarantine and hospital detention orders; and 152-156, 238, 243, 246, 158, and 159 Concern also accompanied obstruction offences. See Amendments).

[901] *Id.* at Part 4.

[902] *Id.* at Part 5.

[903] *Id.* at Parts 6-9.

[904] *See* CABINET OFFICE, CIVIL CONTINGENCIES ACT: A SHORT GUIDE (REVISED), *available at* http://www.ukresilience.gov.uk/media/ukresilience/assets/15mayshortguide.pdf.

[905] *See* http://www.ukresilience.gov.uk/response/emergencypowers.aspx (UK Resilience explains that use of the statute is "…a last resort in the most serious of emergencies where existing legislation is insufficient to respond in the most effective way. If the situation or event is so serious as to warrant consideration of use of the powers then the deciding factor will be

The first part of this statute addresses domestic preparedness concerns, creating a framework for local responders' roles and responsibilities. The second part establishes a framework for the use of special legislative measures. The trigger is what constitutes an "emergency", defined as:

> (a) An event or situation which threatens serious damage to human welfare *in the United Kingdom or in a Part or region*
> (b) An event or situation which threatens serious damage to the environment *of the United Kingdom or of a Part or region*, or
> (c) War, or terrorism, which threatens serious damage to the security of the United Kingdom[906]

The scope of the emergency contemplated by Parts 1 and 2 differs. For the former, the event must threaten "serious damage to human welfare or the environment in *a place* in the United Kingdom."[907] This provision is designed for first responders. For the latter, the language "of the United Kingdom or of a Part or region" refers to Scotland, Wales, or Northern Ireland. This is a higher threshold to meet, as it applies not just to any town or city, but to a larger geographic area.[908]

Both Parts 1 and 2 consider an event to threaten damage to human welfare where it involves, causes or may cause: loss of human life; human illness or injury; homelessness; damage to property; disruption in the supply money, food, water, energy or fuel; disruption of systems of communication; disruption of facilities for transport; or disruption of services related to health.[909]

For Part 2 powers, the Queen, or in extraordinary situations a Senior Minister,[910] has an almost unrestricted power to make emergency regulations

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whether existing powers, that could be used to deal with it, are insufficient or ineffective. If they are sufficient then emergency powers cannot be used, no matter how serious the emergency."); *See also* Update of Emergency Response and Recovery (consultation paper, closed in April 2009 (writing, "There must be no expectation that the Government will agree to use emergency powers and planning and response arrangements should assume that they will not be used.").

[906] Civil Contingencies Act of 2004 §19(1) (Emphasis in the original); *See also* Civil Contingencies Act Enhancement Program, Update of Emergency Response and Recovery Guidance, Paper E, Consultation Report, issued in June 2009*, available at* http://www.cabinetoffice.gov.uk/media/231587/err-consultation-report.pdf; Civil Contingencies Act Enhancement Programme (CCAEP), Program Initiation Document, Oct. 24, 2008, *available at* http://www.cabinetoffice.gov.uk/media/131900/ccaep_p*ld.*pdf.

[907] Civil Contingencies Act 2004, c. 36, § 1.

[908] *See* explanatory notes to the CCA.

[909] Civil Contingencies Act of 2004, c. 36.

[910] *See* Civil Contingencies Act of 2004, § 2 (a)(b) & § 4(a)(b). If it would not be possible to obtain an Order in Council from the Queen, without a delay that might (a) cause serious

provided that it would not be possible without serious delay to arrange for an Order in Council, and that s/he is satisfied that certain conditions are met: (a) an emergency has occurred or is about to occur, (b) the regulation is necessary to prevent, control or mitigate an aspect of the emergency, *and*(c) the provision be urgent.[911] A Senior Minister of the Crown includes the Prime Minister, any of her Majesty's Principal Secretaries of State, and the Commissioners of her Majesty's Treasury. In defining the scope that these emergency regulations can take, the Act provides as non-exclusive examples that regulations can restrict movement to or from specified places or restrict travel at specified times.[912]

Current government policy is to rely in the first instance upon voluntary compliance with governmental advice, with recourse to emergency powers only if necessary. It is unlikely that the act would be used to impose quarantine. Not only would it be a stretch of the current legal authorities, but, as discussed in the introduction of this paper, government policy documents repeatedly make it clear that quarantine itself is not a viable option.

IV. Constitutional Framing

The United States and United Kingdom frame the threat posed by pandemic disease and biological weapons within a national security rubric. For both countries, the threats are linked in terms of institutions and response. But the United States and the United Kingdom have very different approaches, as a matter of law and policy, when it comes to the central government's imposition of quarantine and isolation in response to the twin threats.

This article has suggested one explanation for this divergence is deeply historical. And it reflects important constitutional differences that continue to shape the two countries' approaches. American colonists routinely employed quarantine provisions to respond to epidemic and pandemic disease. Such measures tended to be temporary, reactive, and local in nature. At times they ran afoul of England's commercial interests, in which case the Privy Council simply disallowed them. The colonies nevertheless persisted. Following the

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damage or (b) seriously obstruct the prevention, control or mitigation of serious damage, then a Senior Minister of the Crown can declare an emergency. Note that in practice, the decision to use emergency powers under Part 2 falls to the UK central government and the relevant Lead Government Department; under §1(4)(a) (Part 1), a Minister of the Crown or, in relation to Scotland, the Scottish Ministers, are to provide by Order that a particular event or situation comes within (or does not come within) the definition of emergency; *See also* Laurie,*supra* note 891, at 113.

[911] *See* Civil Contingencies Act of 2004, c. 36, § 21 (2)-(4).

[912] *See* Civil Contingencies Act of 2004, c. 36, §21(3)(d)-(g).

Revolutionary War, states integrated quarantine authorities into their statutes and (in some cases) constitutions. Some measures were so local that they authorized towns to exclude individuals and goods from anywhere in the United States. Those who fell ill could be forcibly kept in their homes (or removed) by local authorities. Congress and the Supreme Court, in turn, considered quarantine well within the police powers of the state. Inter-state and U.S. foreign relations commerce might be implicated, but more important were the states' ability to defend its citizens from disease. The failure of some states to ensure the health of vessels leaving U.S. ports, however, earned America the enmity of key European trading partners. Congress began to pay more attention to what states were doing—or failing to do—and the consequent economic effect on the country as a whole.

Smallpox proved devastating during the Civil War, in the course of which Confederate soldiers and sympathizers used the disease as a weapon. But in the aftermath of the war, authority did not immediately shift to the federal government. Instead, Congressional initiatives expanded federal power within narrow limits—namely, the Marine Hospital Service, and consular reporting overseas. In a critical innovation, the legislature empowered the federal government to assume control of ports, where states were willing to sell. Quarantine facilities were expensive. Thus began the quiet transfer of state ports and, with them, state authorities, to the federal domain. Immersed in their new role, the federal government appeared to do a better job of stemming disease than the states. Regional initiatives, seeking uniform standards between states and along the U.S. border, broadened the call for a national approach to quarantine. In concert with the regional meetings, the medical and industrial fields began to call for federal regulation.

Into this mix stepped the courts: while quarantine fell firmly within state police powers, Congress might have room to preempt state law where commerce bore the cost. Encouraged by *Morgan's Steamship*, the legislature gave the Secretary of the Treasury the authority to develop rules and regulations to prevent the interstate spread of disease. An important Solicitor General determination spurred Congress to act not just inter-state, but, where state or local measures were deemed ineffective or non-existent, at a state or local level. New measures required bills of health to be obtained by all vessels sailing for the United States from abroad, and a stronger epidemiological surveillance program required U.S. consuls abroad to make weekly reports. By the early 20th century, while the federal government had made advances in the realm of quarantine, it had yet to preempt the states. Indeed, states still regularly exercised their quarantine authorities. Direct confrontation, however, proved unnecessary. The Spending Clause paved the way for federal control of local ports. In 1944, Congress empowered the Secretary of Health and Human

Services to make and enforce any regulations to prevent the introduction of disease into the United States, or the transfer of disease between the states. Broadly conceived, these provisions have yet to fall subject to Constitutional challenge. The Stafford Act, in turn, empowers the federal government to act subject to a Governor's request. Efforts to continue to expand federal authority continue, with the discussion now contemplating the precise manner in which the military could be used to impose quarantine in the event of either pandemic disease or terrorist attack.

The United Kingdom has followed almost the opposite trajectory—one deeply influenced by the constitutional structure of the state and the realities of responding to plague. The Tudors issued orders through the Privy Council, using the military to enforce them. Under the Stuarts, conventions changed, with quarantine provisions becoming both more coercive and increasingly political. The abolition of the conciliar courts restricted the broader contours of Privy Council proclamations, tilting English common law towards greater protection of individual rights and increased skepticism towards the exercise of Royal Prerogative—a context within which the Privy Council's exercise of quarantine became more constrained. It had to first obtain Parliamentary imprimateur, via statute, before being considered a valid exercise of the Crown's authority. Parliamentary authorization, however, brought with it a greater impact—which, ironically, helped to bring about the demise of the Privy Council's involvement. Commercial interests, increasingly organized and displeased with the Privy Council's orders, began making their case to Parliament. They were considerably helped in their efforts by medical treatises that began questioning the contagion theory of disease—specifically in relation to plague. The broader context also played a role: the increasing professionalization of the British civil service and the deference granted to science proved critical. Simultaneously, the greater attention played to sanitation offered a viable alternative to quarantine. By the late 19th century, the country had eschewed the use of the same. Current British emergency measures might be extended to quarantine, but they do not overtly recognize such powers and the use of quarantine is rejected in the country's policy documents.

The current state of play in both countries, and the potential historical explanation raise myriad questions: Should pandemic disease and biological weapons be treated in like manner? Ought both types of threats fall within a national security rubric? To what extent are the legal changes merely cosmetic? What constitutional concerns are raised by the most recent measures? These and further questions remain rich for further discussion.

STUDENT NOTE

Circumventing the Constitution for National Security: An Analysis of the Evolution of the Foreign Intelligence Exception to the Fourth Amendment's Warrant Requirement

Sarah Fowler *

Abstract

Though few are even aware of its existence, the foreign intelligence exception to the Fourth Amendment's warrant requirement affects the lives of nearly every American. Recent leaks of top-secret National Security Administration documents depict how the government has morphed the exception into a massive catch all that allows intelligence agencies to perform invasive searches without a warrant and in complete disregard of the Constitution. The foreign intelligence exception began as a narrow tool to shield sensitive national security investigations, but its application has reached an alarming breadth.

This note explores the creation and expansion of the foreign intelligence exception, tracing its history from George Washington's secret surveillance efforts during the Revolutionary War to the modern framework for warrantless intelligence surveillance created by the Patriot Act. The Supreme Court has long recognized the necessity of exceptions to the Fourth Amendment's ordinarily strict warrant and probable cause requirements. However, this history illustrates the foreign intelligence exception's glaring disregard for the protections afforded to all Americans by the Fourth Amendment.

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Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware 'the abridgement of freedom of the people by gradual and silent encroachments by those in power,' would be aghast.[1]
- The Honorable Richard J. Leon, on the constitutionality of the NSA's bulk data collection

I. INTRODUCTION

On June 6, 2013, *The Guardian* newspaper published a series of documents leaked by Edward Snowden, a contractor previously employed by the National Security Agency (hereinafter "the NSA").[2] The documents detailed the NSA's top-secret massive data collection program known as PRISM, which collected and stored the Internet communications of millions of people worldwide.[3] In a response to the uproar over the leaks, a senior government official cited the Foreign Intelligence Surveillance Act (hereinafter "FISA") as a solid foundation for the NSA's actions, and justified the programs by referring to the repeated congressional and judicial approval of FISA's procedures for collecting and disseminating foreign intelligence information.[4] As evidenced by the widespread acceptance of heightened security and intelligence gathering after the terrorist attacks of September 11, 2001, Americans have long been willing to accept a tradeoff of increased security for diminished liberties in times of crisis.[5] However, Snowden's leaks lead to many concerns regarding the constitutionality of the application of FISA and the government's now-sweeping foreign intelligence collection programs, which only continued to expand as the War on Terror deescalated in recent years.

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[1] Klayman v. Obama, 957 F. Supp. 2d 1, 42 (2013) (quoting James Madison, Speech in the Virginia Ratifying Convention on Control of the Military (June 16, 1788), *in* THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, WITH SOME ACCOUNT OF EMINENT VIRGINIANS OF THAT ERA WHO WERE MEMBERS OF THE BODY (Vol. 1) 130).

[2] Glenn Greenwald & Ewen MacAskill, *NSA PRISM Program Taps in to User Data of Apple, Google and Others,* THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

[3] *See Id.*

[4] *See Id.*

[5] *See generally* Justin F. Kollar, *USA PATRIOT Act, the Fourth Amendment, and Paranoia: Can They Read This While I'm Typing?*, 3 J. HIGH TECH. L. 67, 67 at note 3 (2004) (discussing the historical tradeoff between security and liberty in times of "perceived peril").

Snowden's leaks shed new light on the extent of the NSA's surveillance both at home and abroad and ignited a fiery debate on the limitations of the government's national security powers. This debate essentially centers around what has become known as the "foreign intelligence exception," which allows the government to circumvent ordinary Fourth Amendment warrant and probable cause requirements in certain situations involving concerns of national security. Most Americans are blissfully unaware of the magnitude of the foreign intelligence exception and pondered how the government had the authority for the expansive surveillance revealed by Snowden's leaks. While many reeled from the perceived affront on their constitutional rights and lauded Snowden as a hero, many others decried Snowden as a traitor and danger to the security of the United States (hereinafter "the US").[6] This wide range of reactions is illustrative of the difficulty the US government has faced since its inception, of properly balancing national security interests with the privacy and liberty rights afforded by the Constitution.

This note will explore how the creation and expansion of the foreign intelligence exception have significantly eroded the traditional constitutional protections of the Fourth Amendment and do little to realistically further the goal of fairly and justly balancing citizens' civil liberties with the duties of law enforcement and interests of national security in the spirit of the Fourth Amendment. Part II sketches the legal framework for the foreign intelligence exception. A history of Fourth Amendment search jurisprudence and the varied exceptions it inspired serves to illustrate the foreign intelligence exception's glaring departure from the customarily narrow exceptions and the Supreme Court's (hereinafter "the Court") prior definitions of which actions fell outside the scope of the Fourth Amendment's warrant and probable cause requirements. Part III details the development and application of the exception up to the enactment of FISA. Parts IV and V, respectively, analyze FISA and the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (hereinafter "the Patriot Act") to determine the significance of their impact on the foreign intelligence exception. Part VI explores the

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[6] *See, e.g., Post-ABC Poll: NSA Surveillance and Edward Snowden*, WASH. POST, July 24, 2013, *available at* http://www.washingtonpost.com/politics/polling/postabc-poll-nsa-surveillance-edward-snowden/2013/06/19/699571a8-d8cf-11e2-b418-9dfa095e125d_page.html.

potential for abuses of the foreign intelligence exception and suggests possible limitations that may help prevent such misuses.

II. Legal Framework for the Exception

Though many were shocked by Snowden's revelations of the NSA's secret actions, there is in place a legal framework within which the NSA's programs have developed. This note argues that the NSA and applications of the foreign intelligence exception exceeded the boundaries of that framework, and this section discusses the structure of the laws and precedents on which the NSA alleges PRISM and other such programs are based.

The collection of intelligence information, generally through electronic surveillance and wiretapping, has long been considered a search within the meaning of the Fourth Amendment, and is therefore, in theory, governed by the requirements of the Fourth Amendment.[7] Fourth Amendment protections are nebulous and adaptive. As technology, conflict, and security have evolved, so too have interpretations of the Fourth Amendment. The foreign intelligence exception, certainly not contemplated by the Founding Fathers, has developed within this framework of fluid and shifting Fourth Amendment analysis.

A. Development of Exceptions to the Fourth Amendment

i. Fourth Amendment Protections in General

In light of the tyrannies experienced at the hands of the oft-abused general warrants exercised by their British colonial overlords, the Founding Fathers viewed unwarranted intrusions into private lives and homes to be a chief evil against which the Constitution should offer citizens protections.[8] The drafters of the Constitution crafted the

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[7] In Katz, the Court conceded that "the Fourth Amendment protects people and not simply 'areas'." Therefore a search analysis turns on a defendant's reasonable expectation of privacy rather than his location. This assertion also means that the Fourth Amendment extends to the recording of oral and written statements, the action most often involved in intelligence collecting. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

[8] *See, e.g.,* Boyd v. United States, 116 U.S. 616, 625-628 (1886) (discussing the

Fourth Amendment to ensure that Americans could not be subjected to such tyranny.[9] Since its inception, two distinct clauses of the Fourth Amendment have shaped the interpretation of the protection it affords.

a. The Search and Seizure[10] Clause and the Requirement of Reasonableness

The text of the Fourth Amendment provides little guidance for defining what is meant by "searches," and the Court has gone through several distinct phases of interpretation of the term. In the embryonic years of the US, "the need for protections against search and seizure was articulated in the context of physical entry into the home."[11] The Court gradually moved from this property rights analysis to a test focusing on the defendant's expectation of privacy. This test was solidified by the 1967 *Katz* decision, in which Justice Harlan's concurrence laid out the rule used for the next several decades: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."[12] From *Katz* onward, reasonableness formed the basis of Fourth Amendment search analyses.

In light of the infinite number of situations from which a Fourth Amendment case may arise, the Court recognized the need for a flexible standard of reasonableness. Accordingly, the Court in *Harris* explained, "[t]he test of reasonableness cannot be stated in rigid and

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history of the Fourth Amendment).

[9] The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

[10] Though the Fourth Amendment protects against both searches and seizures, this note will focus only on searches, as foreign intelligence collection is rarely considered a seizure.

[11] Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, SUP. CT. REV., 2012 (forthcoming Sept. 2012) (manuscript at 7), *available at* http://ssrn.com/abstract=2154611 (explaining that the Court's early Fourth Amendment analysis often centered around physical trespass).

[12] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

absolute terms. 'Each case is to be decided on its own facts and circumstances.'"[13] This fact-intensive approach ensures a fair analysis of the specific facts of each case rather than application of a general rule more easily subject to abuses because of its generality. While the determination of reasonableness encompasses numerous factors, the Court has emphasized the context, which includes the defendant's expectation of privacy, and the intrusiveness of the search as the lynchpins of the analysis.[14]

b. The Warrant Clause and the Requirement of Probable Cause

Intrinsically tied to the requirement of reasonableness is the necessity of a warrant. A search conducted without prior judicial approval (via a warrant) is considered presumptively unreasonable.[15] This insertion of a neutral and detached magistrate between the suspect and law enforcement is a safeguard mandated by both the language and purpose of the Fourth Amendment and ensures that constitutional protections are not tainted by overzealous police investigation.[16]

The unbiased magistrate is tasked with determining whether

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[13] Harris v. United States, 331 U.S. 145, 150 (1947) (citing Go-Bart Importing Company v. United States, 282 U.S. 344, 357 (1931)).

[14] For example, the Court's decisions examining whether a dog sniff constituted a Fourth Amendment search highlight the focus on intrusiveness. *See, e.g.,* United States v. Place, 462 U.S. 696, 706-707 (1983) (emphasizing the fact that luggage sniffed by the dog remains closed, which "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (highlighting the facts that a dog sniff "does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics.").

[15] *See* Katz, 389 U.S. at 357 (citing Jones v. United States, 357 U.S. 493, 497-499 (1958); Rios v. United States, 364 U.S. 253, 261 (1960); Chapman v. United States, 365 U.S. 610, 613-615 (1961); Stoner v. California, 376 U.S. 483, 486-487(1964)).

[16] *See* McDonald v. United States, 335 U.S. 451, 455 (1948). *See also* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

sufficient probable cause exists to issue a warrant. Like reasonableness, probable cause is a fluid concept that takes into account the totality of the circumstances in each individual case so as to allow law enforcement sufficient room to conduct an investigation.[17] In general, "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that belief of guilt must be particularized with respect to the person to be searched or seized."[18] However, the requirements of probable cause and a warrant are occasionally relaxed and are not the sole means of legitimizing a search as reasonable.[19]

ii. The Court Recognizes Exceptions

Nearly as old as the Fourth Amendment itself are the exceptions to its warrant requirement. Because the Fourth Amendment denounces only "unreasonable" searches, a search that meets the reasonableness requirement even though it may lack a warrant is constitutionally permissible as an exception to the general requirement of a warrant. As Justice Stewart announced in *Katz*, the warrant requirement is "subject only to a few specifically established and well-delineated exceptions."[20] However, as Fourth Amendment jurisprudence has developed, it is not entirely clear that these exceptions truly are as "well-delineated" as Justice Stewart proclaimed.[21]

Though their boundaries may be ambiguous, the exceptions to the warrant requirement can be classified into four distinct types.[22]

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[17] *See* Maryland v. Pringle, 540 U.S. 366, 370 (2003).

[18] *Id.* at 371 (citing Brinegar v. United States, 338 U.S. 160, 175 (1949); Ybarra v. Illinois, 444 U.S. 85, 91, (1979)).

[19] *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[20] Katz v. United States, 389 U.S. 347, 357 (1967).

[21] *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 (1985) ("In fact, these exceptions are neither few nor well-delineated. There are over twenty exceptions to the probable cause or the warrant requirement or both.").

[22] "(1) exceptions based on a perception that exigent circumstances make obtaining a warrant impossible or impractical; (2) exceptions resting on a finding that the police action does not impinge upon a substantial privacy interest; (3) "special needs" situations where warrants might frustrate legitimate purposes of the government other than crime control; and (4) situations where magistrates are

The category of exceptions most analogous to the foreign intelligence exception is likely the "special needs" exception, which allows law enforcement to relax both the probable cause and warrant requirements in situations where such strictures would frustrate important goals not related to law enforcement (i.e. national security goals in the context of the foreign intelligence exception).[23] First enunciated in the 1985 decision *N.J. v. T.L.O.,* [24] which upheld the warrantless search of a student's purse in a public school, the special needs exception has since been applied to a number of varying circumstances. For example, the Court used the special needs exception to justify the warrantless drug testing of customs officials,[25] railway workers,[26] and student athletes.[27] Though it does not seem a far stretch from special needs cases to foreign intelligence cases, in which national security is arguably an incredibly compelling non-law enforcement goal, the Court has emphasized that the special needs decisions rested on the administrative nature of the searches in question, which lessens the intrusion involved.[28] Accordingly, the

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considered unnecessary because other devices already curb police discretion." Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18-19 (1991).

[23] *See generally* United States v. Kincade, 379 F.3d 813, 821 (2004) (describing cases in which the Supreme Court has applied the special needs exception).

[24] N.J. v. T.L.O., 469 U.S. 325, 333 (1985). Though the majority did not expressly create a special needs exception in its opinion, Justice Blackmun clarified the majority's balancing test analysis in his concurrence by saying that "[o]nly in those exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).

[25] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).

[26] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).

[27] Vernonia Sch. Dist 47J v. Acton, 515 U.S. 646, 653 (1995) ("[S]uch "special needs"… exist in the public school context. There, the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures….'" (citing *T.L.O.*, 469 U.S. at 340)).

[28] *See* Slobogin, *supra* note 22, at 26 ("The fact that the government investigators in these special needs situations typically are looking for proof of something other than crime, or at least evidence of something other than serious crime, is used by

Court declined to extend the exception to uphold random police checkpoints aimed generally at interdicting illegal drugs because such checkpoints' "primary purpose was to detect evidence of ordinary criminal wrongdoing," a law enforcement goal ill-suited for protection under the special needs exception.[29]

Special needs and other such exceptions help the Court balance the privacy interest of individuals against the concern that beefing up the warrant requirement may unduly hamper the job of law enforcement. This reasoning, on which most exceptions (including the foreign intelligence exception) rest, has led the Court to develop a balancing test to be used to determine whether an exception applies. This balancing requires the Court the weigh the government's interest (generally expressed as the need for effective and efficient law enforcement [30]) against the individual's constitutional rights.[31] When crafting an exception, the Court continually emphasizes that each exception is meant to be construed as narrowly as possible.[32] However, the proliferation of exceptions to the warrant requirement begs for an answer to the question: Is the requirement for a warrant truly implicit in the Fourth Amendment, or is there simply a general requirement for reasonableness?

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the Court to minimize the individual interests involved and, at the same time, bolster the government interest in dispensing with a warrant.").

[29] City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000).

[30] In arguing for exceptions to the warrant requirement, the government often contends that in certain situations the strictures of the Fourth Amendment impede effective law enforcement. *See, e.g.,* Johnson v. United States, 333 U.S. 10, 15 (1948). In a dissent, Justice Frankfurter argued that these claims were grossly exaggerated by the government and only in rare cases merited an exception. *See* Harris v. United States, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting).

[31] *See, e.g.,* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983).

[32] *See, e.g.* Thompson v. Louisiana, 469 U.S. 17, 21 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (explaining that exceptions to the warrant requirement are 'jealously and carefully drawn'… (quoting Jones v. United States, 357 U.S. 493, 499 (1958))); McDonald v. United States, 335 U.S. 451, 454 (1948) ("A search without a warrant demands *exceptional* circumstances…") (emphasis added).

B. The Executive's National Security Powers

The foreign intelligence exception cannot be looked at in the isolated context of Fourth Amendment exceptions. When dissecting the development of the foreign intelligence exception, an analysis of the evolution of the Executive's national security powers is equally important. Together, these two foundations have created the legal framework within which the foreign intelligence exception has flourished.

i. Constitutional National Security Powers

Article II, section 2 of the Constitution grants the Executive the well-known Commander-in-Chief power over the country's armed forces. This, combined with the President's authority to appoint and receive foreign officials, has long been understood as making the Executive the gatekeeper of national security and foreign relations.[33] The Court has recognized that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[34] Traditionally, the Executive has been afforded wide latitude to conduct the nation's foreign affairs. This has often come into conflict with other constitutional provisions and has led to the question of whether the Executive can effectively perform its national security duties within the confines of the Fourth Amendment. The foreign intelligence exception endeavors to address this problem by granting the Executive sufficient flexibility to deal with foreign intelligence without the ordinary barriers of the Fourth Amendment.

ii. Judicial Interpretations

The murkiness of the boundaries of the Executive's national security power is due in large part to the customary deference of the judiciary in all matters of national security.[35] Courts have widely

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[33] *See, e.g.,* United States v. Curtiss-Wright Export Corp., 209 U.S. 304, 319 (1936).
[34] *Id.*
[35] In describing this traditional deference of the judiciary, the United States Court of Appeals for the Second Circuit said, "the Supreme Court has stated in no uncertain terms that '[i]t is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation.'" United States v. Ghailani, 2013 U.S.

embraced the notion that the Executive is the preeminent authority in the area of foreign affairs and has much greater expertise in such matters, so his decisions should not be questioned or even scrutinized.[36] Even the Supreme Court is hesitant to define or even address the Executive's national security powers, often declaring the issue to be a non-justiciable political question that cannot be resolved by the Court.

In a rare case in which the Court even mentioned national security, it hinted that national security would be a sufficient justification that could shield executive actions from oversight by the courts.[37] During the Watergate scandal, President Nixon was served a subpoena requesting that he divulge tape recordings made in the White House.[38] Citing executive privilege, a rare defense used to guard the secrecy of presidential communications, and the traditional deference of the judiciary to the executive, Nixon refused to comply with the subpoena.[39] In their rejection of Nixon's claim of privilege, the Court declared that, "[a]bsent a claim of need to protect military, diplomatic, or *sensitive national security secrets*, we find it difficult to accept [Nixon's] argument…."[40] Later lower court decisions attempted to qualify this suggestion that national security concerns were an absolute shield for executive action by announcing some minimal restrictions, such as the United States Court of Appeals D.C. Circuit's assertion that "courts may not simply accept bland assurances by the Executive that a situation did, in fact, represent a national security problem requiring electronic surveillance."[41] However, no court has created any bright-line rule regarding the Executive's authority to act within the realm of national security.

App. LEXIS 21597 at 37 (2103) (citing Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

[36] *See Ghailani*, 2013 U.S. App. LEXIS 21597 at 37.

[37] *See* United States v. Nixon, 418 U.S. 683, 686 (1974).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 706

[41] Smith v. Nixon, 606 F.2d 1183, 1188 (D.C. Cir. 1979). However, the D.C. Circuit did not provide any suggestion as to how or to what degree the Executive's assertions should be corroborated.

iii. The Fourth Amendment in Matters of National Security

In light of this judicial deference, it is unsurprising that the scope of Fourth Amendment protections in the context of national security is equally unclear. The executive branch has continually engaged in activities such as surveillance and wiretapping, which implicate Fourth Amendment protections, in the name of national security with impunity.

a. History of Executive Wiretapping

In a 2006 memorandum describing the legal foundations for the NSA's extensive intelligence collection programs, the Department of Justice (hereinafter "the DOJ") traced the history of Executive secret intelligence gathering all the way back to George Washington, explaining that nearly every president since the very first has engaged in such activity.[42] Falling naturally in line with this storied history, "[e]lectronic surveillance – the interception of communications as they travel on a wire – began shortly after the development of electronic communications."[43] Electronic surveillance by the government has grown, largely unimpeded, since the genesis of the technology that allows it.

b. Executive Authority for Wiretapping & Judicial Regulation

The power to conduct secret surveillance and intelligence collection has long thought to be implicit in the Executive's constitutional duty to defend and protect the nation. The Court endorsed this notion on several occasions.[44] Even though *Katz*

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[42] *See* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, at 15 (January 19, 2006) (hereinafter "DOJ memo"), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv39.pdf.

[43] Matthew A. Anzaldi & Jonathan W. Gannon, In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act: *Judicial Recognition of Certain Warrantless Foreign Intelligence Surveillance*, 88 TEX. L. REV. 1599, 1602 (2010).

[44] *See* DOJ memo, *supra*, note 42 ("In accordance with these well-established principles, the Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g.,* Totten v. United States*,* 92 U.S. 105, 106

reversed the holding from *Olmstead* that electronic surveillance did not raise Fourth Amendment concerns,[45] the government continued to operate under the idea that the Executive had implied authority for such actions and was therefore not subject to the ordinary strictures of the Fourth Amendment's warrant and probable cause requirements in matters implicating national security. This position was not completely without support, though.

The majority in *Katz* made clear that it did not intend for its holding to resolve the question of the scope of Fourth Amendment protections in cases of national security,[46] and Justice White's concurring opinion urged the Court to exempt wiretapping for national security purposes from the warrant requirement.[47] The Court left considerable room for the Executive to flex its intelligence collecting muscle, and it did so with great veracity and little oversight or regulation.[48] Because of the wide holes left open by the few and limited Supreme Court cases on the issue, no court before FISA held that wiretapping ordered by the Executive and justified on the basis of national security violated the Fourth Amendment.[49]

(1876) (recognizing President's authority to hire spies); Tenet v. Doe, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *See also* Chicago & S. Air Lines v. Waterman S.S. Corp*.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); United States v. Curtiss-Wright Export Corp*.,* 299 U.S. 304, 320 (1936))").

[45] *See* Katz v. United States, 389 U.S. 347, 353 (1967); Olmstead v. United States, 277 U.S. 438, 466 (1928).

[46] *Katz*, 389 U.S. at 358 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security is a question not presented by this case.").

[47] *Id.* at 363 (White, J., concurring).

[48] Section IV. A., *infra*, will discuss the government's taking advantage of the lax regulations and the abuses that became the impetus for the creation of FISA.

[49] *See, e.g.,* United States v. Ehrlichman, 546 F2d 910, 924 (D.C. Cir. 1976), *cert den*., 429 U.S. 1120 ("Since 1940 the "foreign affairs" exception to the prohibition against wiretapping has been espoused by the Executive Branch as a necessary concomitant to the President's constitutional power over the exercise of this country's foreign affairs, and warrantless electronic surveillance has been upheld by lower federal courts on a number of occasions."); *But see* Halperin v. Kissinger, 606, F.2d 1192, 1201 (D.C. Cir. 1979) (restricting the national security powers of the Executive by declaring that situations in which they may be exercised "must be limited to instances of immediate and grave peril to the nation").

c. A National Security Exception?

Despite the seeming total deference to the Executive in matters labeled as national security, before FISA, there was no consensus on the issue of whether a general and absolute national security exception to the Fourth Amendment existed. However, most courts agreed that national security is a sufficient justification for abandoning the Fourth Amendment's warrant requirement when a *foreign* agent or power is involved.[50] The Court solidified the distinction between foreign and domestic targets in the case that has become known as "*Keith.*"[51] In *Keith*, the Court once again failed to reign in the Executive's expansive and ever-growing foreign intelligence powers by reserving the question of whether the warrant requirement applied to foreign intelligence surveillance for a later decision.[52] Though the holding made clear that the warrant requirement could not be circumvented in investigations of *domestic* security threats[53], the *Keith* decision also implied that not adhering to the warrant requirement "may be constitutional where foreign powers are involved."[54] The Court's balancing test to determine the

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[50] *See, e.g.* United States v. Smith, 321 F. Supp. 424, 425-26 (D.D. Cal. 1971) (emphasis added).

[51] United States v. United States District Court (Keith), 407 U.S. 297 (1972). The defendants in *Keith* were charged with the bombing of a Central Intelligence Agency building in Ann Arbor, Michigan, and information garnered through warrantless wiretaps formed the foundation of the indictment against them.

[52] *Id.* at 321-22 ("[T]his case involves only the *domestic* aspect of national security. We have not addressed…the issues which may be involved with respect to activities of foreign powers or their agents.") (emphasis added).

[53] *Id.* at 320. *See also* Amicus Curiae Brief of Former Members of the Church Committee and Law Professors in Support of Petitioners at 26, In re Electronic Privacy Information Ctr., No. 13-58 (2013) ("The 'inherent vagueness of the domestic security concept,' and the significant possibility that it be abused to quash political dissent, underscored the importance of the Fourth Amendment—particularly when the government was engaged in spying on its own citizens. (citing *Keith*, 407 U.S. at 323)").

[54] *Keith*, 407 U.S. at 322, note 20. Though the Court claimed that it "expressed no opinion" as to national security and foreign powers, note 20 of the opinion endorses the idea that "warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved" by listing a number of cases in support of that assertion. On the other hand, the Court provided no authority for the position that the warrant requirement also applied to cases involving foreign powers.

reasonableness of the search weighed the privacy of citizens against the concern that a warrant requirement would "unduly frustrate" the efforts of the government to protect itself from national security threats. The balance underscored the considerable weight given to the government's need to guard against potential national security threats.

III. THE STATE OF THE EXCEPTION BEFORE FISA

A. *The "Birth" of the Exception*

Because Executives since the dawn of the US proceeded under the assumption that they could act with almost unilateral authority, not bound by any Fourth Amendment requirements, in the area of intelligence collecting, it is challenging to pinpoint the "birth" of the foreign intelligence exception. One could say that the exception was born the instant George Washington put his intelligence-gathering network into action with no regard for the Fourth Amendment and no objection from Congress or the judiciary. Judicial deference in the area bolstered the appeal and applicability of the exception, and early cases such as *Olmstead* and *Katz* failed to take any stance on the role of the Fourth Amendment in national security investigations, implicitly underwriting the Executive's perceived preeminence and authority in the area. Though few ordinary citizens were aware of its existence, nearly every president relied on the foreign intelligence exception in undertaking some form of surveillance without first obtaining a warrant.[55] Prior to *Katz*, the Court made it clear that the Fourth Amendment was not even a consideration when dealing with electronic surveillance.[56] However, even after *Katz* described the reasonableness test and mandated that it be applied in cases involving electronic surveillance, the Executive continued to undertake massive warrantless surveillance of both foreign and domestic targets on the

[55] *See, e.g.,* the assertion by the D.C. Circuit in *Ehrlichman*, discussed *supra* note 49, that Executives since 1940 have espoused, with the support of the courts, a "foreign affairs" exception. *See also Keith*, 407 U.S. at 311, note 10 (describing the pervasive use of electronic surveillance by Executives since President Truman authorized his Attorney General to wiretap phones without a warrant in the name of domestic security in a 1946 memo).

[56] *See* Olmstead v. United States, 277 U.S. 438, 466 (1928).

basis of national security.

B. *Title III of the Omnibus Crime Control and Safe Streets Act*

The reluctance to limit the Executive in the area of foreign intelligence gathering did not rest with the judiciary alone. Congress similarly squandered opportunities to regulate the Executive's expansive intelligence collection. When Congress responded to *Katz* by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "Title III"), which laid out the procedures for obtaining a wiretap, it expressly avoided the regulation of foreign intelligence surveillance.[57] The new rules for law enforcement were aimed at ensuring citizens' reasonable expectations of privacy were respected as the holding of *Katz* required, but their application to only domestic law enforcement implied that different, though not at all elucidated, standards governed intelligence surveillance when a foreign agent was somehow involved. The foreign intelligence exception continued to evolve into a powerful investigatory tool with no oversight from Congress.

C. *Judicial Interpretations of the Exception after Katz*

The ambiguous boundary between foreign and domestic intelligence surveillance was only exacerbated by further judicial interpretations of the application of the Fourth Amendment to the Executive's national security powers after the passage of Title III. One of the first cases after *Katz* and Title III involving warrantless surveillance justified on the grounds of national security never even mentioned the Fourth Amendment.[58] There seemed to be a pervasive acceptance of the inability of the Court to challenge the Executive's assertion of a need, which would be significantly frustrated by a warrant requirement, for certain surveillance justified on the grounds of national security.[59]

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[57] *See Keith*, 407 U.S. at 306. *See also* The Omnibus Crime Control and Safe Streets Act, codified at 50 U.S.C. § 2511(3) (1968); explanation *infra* note 84 (discussing Title III's non-application for foreign intelligence and national security).

[58] *See* United States v. Clay, 430 F.2d 165 (5th Cir. 1970).

[59] *See, e.g.,* United States v. Enten, 388 F. Supp. 97 (D.D.C. 1971) (The court did "not believe the judiciary should question the decision of the executive department that

Keith seemed to be a step in the right direction toward curbing this unfettered executive power, with the Court requiring the government to comply with the warrant requirement and receive prior judicial approval for domestic security claims. It appeared as if privacy rights had won the balancing test battle, trumping the Executive's concerns of domestic security. However, *Keith's* limited holding and potentially ambiguous application left open a void the government was ready to fill.[60] By declining to detail the procedures necessary to obtain a domestic surveillance warrant that the Court now required and failing to thoroughly define "foreign" power and the relationship the foreign power must have to the surveillance, *Keith* simply invited the Executive to continue as it had been, so long as it could claim some vague relationship to a foreign agent in each case.

Keith and Title III did little to alter the legal landscape in which the foreign intelligence exception had developed and thrived. In applying *Keith*, District Courts of Appeal almost unanimously recognized the existence of the foreign intelligence exception in upholding warrantless government wiretaps.[61] In 1973, the Fifth Circuit Court of Appeals declared that the President's authorization of warrantless wiretaps for the purpose of gathering foreign intelligence did not violate the Fourth Amendment.[62] Reaffirming the dichotomy

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such surveillances are reasonable and necessary to the protection of the national interest.").

[60] "In the end, [*Keith*] left open the vacuum created by prior reluctance to regulate foreign intelligence surveillances, continued uncertainty as to the proper application of the Fourth Amendment, and the unabated exploitation of warrantless foreign intelligence surveillances on the basis of the President's inherent national security powers." David Hardin, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 301 (2003).

[61] *See, e.g.,* Stephanie Kornblum, *Winning the Battle While Losing the War: Ramifications of the Foreign Intelligence Surveillance Court of Review's First Decision*, 27 SEATTLE UNIV. L. R. 623, 634 (2003) ("Virtually *every* court that addressed the issue prior to the enactment of FISA concluded that the President had the inherent power to conduct warrantless electronic surveillance for the purpose of collecting foreign intelligence information, and any such surveillance constituted an exception to the warrant requirement of the Fourth Amendment." (citing United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426-27 (5th Cir. 1973); United States v. Clay, 430 F.2d 165 (5th Cir. 1970)) (emphasis added).

[62] *See Brown*, 414 F.2d at 426.

between domestic and foreign intelligence, the Fifth Circuit reasoned that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."[63] Importantly, the Fifth Circuit also required nothing more than the Attorney General's bare assertion that the surveillance was conducted for the purpose of gathering foreign intelligence.[64] This ensured that the government could continue electronic surveillance so long as they could somehow creatively attach the label of "foreign," which, like *Keith,* only encouraged further abuses of the constitutional requirements of probable cause and a warrant.

Though few courts expressly declared the existence of a foreign intelligence exception, and the "Supreme Court generally remained silent on the question of Fourth Amendment protections and foreign intelligence gathering,"[65] it was clear that such an exception was alive and well.[66]

D. *The "Primary Purpose" Test*

Despite its widespread acceptance and application, the foreign intelligence exception did not develop entirely without regulation and restraint. The most significant legal guideline created alongside the foreign intelligence exception came to be known as the "primary purpose test." Designed as a response to *Keith* and solidified by the Fourth Circuit in *Truong Dinh,*[67] the primary purpose test declared any warrantless search to be constitutionally reasonable and permissible so long as the primary purpose of the surveillance was the collection

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[63] *Id.; See also* Elizabeth Gillingham Daily, *Beyond "Persons, Houses, Papers, and Effects": Re-Writing the Fourth Amendment for National Security Surveillance*, 10 LEWIS & CLARK L. REV. 641, 653 (2006) ("[A] warrant requirement [for foreign surveillance] would unduly frustrate the President in protecting national security from foreign threats. First, foreign intelligence surveillance requires 'the utmost stealth, speed, and secrecy.' Second, the judiciary is largely inexperienced in analyzing foreign intelligence information. And third, the Executive Branch is constitutionally imbued with preeminent authority to conduct foreign affairs." (citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)).

[64] *Brown*, 414 F.2d at 426.

[65] Anzaldi & Gannon, *supra*, note 43, at 1603.

[66] *See supra* note 61 (listing courts upholding a foreign intelligence exceptions).

[67] United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

of foreign intelligence information.[68]

At the foundation of the primary purpose test is the notion that while a search aimed at finding evidence to be used in a criminal prosecution can run afoul of the Fourth Amendment if conducted without a warrant, a search whose primary goal is intelligence collection does not violate the Fourth Amendment. The origins of this belief are difficult to trace. Though the primary purpose test is most often associated with the foreign intelligence exception, the Court applied a similar analysis in previous Fourth Amendment warrant exception jurisprudence.[69] It is important to note that the Court used primary purpose language when examining the intrusiveness of administrative searches that spawned the special needs exception.[70] However, the language of the Fourth Amendment makes no distinction between criminal and any other type of investigation, so this assumption is troubling and rests on a constitutional foundation that is shaky at best.[71]

The minimal prerequisite required by the primary purpose test cemented the second dichotomy that shaped the foreign intelligence exception before the enactment of the Patriot Act – the separation between intelligence collection and criminal investigation. As warrantless investigative techniques became an indispensible tool in the government's security operations, executive branch officials self-imposed what one author calls "the pure intelligence rule" as an acknowledgement of the protections of the Fourth Amendment.[72] This pure intelligence rule permitted warrantless investigation but barred the evidence gathered through such techniques from being used in criminal prosecutions to ensure that warrantless intelligence searches remained within the bounds of reasonableness prescribed by

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[68] *See Id.* at 915. *See also* United States v. Butenko*,* 494 F.2d 593, 606 (3d Cir. 1974).

[69] *See, e.g.,* City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000) (declining to apply the special needs exception where the primary purpose of the investigation was general law enforcement, rather than a compelling non-law enforcement administrative goal, such as public health or safety).

[70] *Id.*

[71] *See supra* note 9 (text of the Fourth Amendment).

[72] *See* L. Rush Atkinson, *The Fourth Amendment's National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1362 (2013) (describing the "pure intelligence rule" as a prophylactic self-imposed by the FBI and other intelligence agencies to protect criminal prosecutions from being tainted by warrantless intelligence surveillance).

the Fourth Amendment.[73]

By separating national security investigations from criminal investigations by deeming them minimally intrusive intelligence searches rather than traditional evidentiary searches, the executive branch attempted to place national security investigations outside the realm of the Fourth Amendment and its warrant and probable cause requirements.[74] The judiciary's tacit approval of a national security exception to the Fourth Amendment only promulgated the use of warrantless surveillance and perpetuated the application of the pure intelligence rule as a justification for circumventing the warrant requirement. Like the national security exception, the primary purpose test did little to set clear boundaries for the government or curtail the use of warrantless surveillance.

IV. FISA

The enactment of FISA is arguably the most significant event in the storied history of the evolution of the foreign intelligence exception. Until FISA, Congress had remained relatively mute as to the executive branch's powers in the realm of national security.[75] However, the increasing sense in the early 1970's that the government was spinning out of control forced Congress's hand. FISA moved Congress out of the shadows and into the forefront of the debate concerning limitations to be placed on the government, namely its surveillance programs, in order to protect citizens and ensure compliance with the Constitution. For the first time, Congress was poised to exercise its power to check and balance the executive branch and demand accountability.

A. *The Church Committee & the Creation of FISA*

In response to the overwhelming unpopularity of the Vietnam War and public outrage over the Watergate scandal and numerous media

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[73] See *Id.*

[74] See *Id.*

[75] *See, e.g.,* Kollar, *supra* note 5, at 76 ("[F]or decades prior to the passage of FISA, Congress imposed no constraints on the executive with regards to gathering any information that fell under the aegis of national security." (citing United States v. United States District Court (Keith), 407 U.S. 297, 310-11 (1972)).

reports detailing the rampant abuses of law and power by the Executive and intelligence agencies,[76] Congress assembled the predecessor of the Senate Select Committee on Intelligence and charged it with investigating the illegality of actions by the FBI and other intelligence agencies. Headed by Senator Frank Church, a sixteen-year veteran of the Committee of Foreign Relations, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (hereinafter "the Church Committee") published fourteen reports between 1975 and 1976 that analyzed the scope and history of US intelligence operations.

The Church Committee's investigation involved one hundred twenty-six full committee meetings, forty subcommittee hearings, more than eight hundred witness interviews, and extensive review of more than one hundred ten thousand documents.[77] Their final report, published on April 29, 1976, included a litany of abuses and concluded that "[i]ntelligence agencies have undermined the constitutional rights of citizens primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."[78] The scathing report beseeched all branches of the government to take action to "ensure that the pattern of abuse of domestic intelligence activity does not recur." [79]

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[76] Congress was spurred into action largely by a *New York Times* article published in 1974 that exposed a domestic spying operation the CIA had undertaken for nearly ten years in direct violation of the agency's charter. *See* Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, December 22, 1974, *available at* http://www.documentcloud.org/documents/238963-huge-c-i-a-operation-reported-in-u-s-against.html.

[77] Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Book III, S. REP. NO. 94-755, at III (1976), *available at* http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf.

[78] *Id.* at 302.

[79] *Id.* at 21.

B. *Legislative Intent*

The reports of the Church Committee highlighted the failures of the judiciary to curtail intelligence abuses and emphasized the dire need "for *statutory restraints* coupled with much more effective oversight from all branches of the Government." [80] Rather than continue to rely on the courts, which were hesitant to even address national security issues, let alone create workable rules for intelligence investigations, Congress designed FISA to act as clear guidelines that would safeguard Americans from intelligence agencies that had long exploited conflicting interpretations of ambiguous limits.[81] FISA represented Congress's attempt to strike the appropriate balance between the nation's obligation to protect the security of its citizens and borders and the constitutional rights and civil liberties guaranteed to all Americans through the Constitution.[82]

C. *Relevant Changes to Existing Framework*

Congress's attempt to strike this balance was arguably a massive failure that did little to curb the excess and abuses that inspired FISA's creation. Instead of eliminating or reigning in the foreign intelligence exception, Congress essentially codified the exception. FISA gave law enforcement a roadmap detailing just how to use the foreign intelligence exception to thwart the civil liberties that the Fourth Amendment was expressly designed to protect. Federal agents now knew just how to tweak warrant applications to get whatever they wanted with no regard for the Constitution. By creatively attaching the label of "foreign" to a surveillance target, the government was now exempt from establishing probable cause, obtaining a warrant, or limiting its investigations in any significant way.[83]

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[80] *Id.* at 289 (emphasis added).

[81] *See* S. REP. NO. 95-604, pt. 1, at 3 (1977), *available at* http://www.cnss.org/data/files/Surveillance/FISA/Cmte_Reports_on_Original_Act/SJC_FISA_Report_95-604.pdf ("[FISA is] designed to clarify and make more explicit the statutory intent, as well as to provide further safeguards for individuals subjected to electronic surveillance….").

[82] *See Id.* at 4.

[83] For an example of how the government was able to craftily use the label of "foreign" to circumvent the constitutional rights of Americans, *see* Amicus Curiae Brief of Former Members of the Church Committee and Law Professors in Support

i. The Fate of the Primary Purpose Test

While the more stringent requirements of Title III continued to govern warrant procedures for surveillance of domestic security targets,[84] FISA filled the void courts had left by failing to prescribe any restrictions for foreign intelligence gathering. Acknowledging the legal framework pre-FISA courts attempted to forge by establishing the primary purpose test, FISA made the primary purpose test an integral part of the foreign intelligence exception.

In order for a federal officer (usually an NSA or FBI agent) to obtain a warrant for foreign intelligence surveillance under FISA, he or she needs to first obtain approval from the Attorney General, who must certify that "the target of the electronic surveillance is a foreign power or an agent of a foreign power."[85] After obtaining this approval, the officer submits the application to the Foreign Intelligence Surveillance Court (hereinafter "FISC"). The proceedings of FISC are conducted entirely in secret, with only a representative of the government present, and are subject only to minimal review. For review by FISC, a FISA application must also include a certification from "an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense" that "*the* purpose of the surveillance is to obtain foreign intelligence information."[86] FISA therefore

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of the Petitioners, In re Electronic Privacy Information Ctr at 8, 2013 U.S. C. Ct. Briefs LEXIS 3326 (No. 13-58) (Aug. 12, 2013) ("The government now argues that *all* telephone calls in the United States, including those of a wholly local nature, are 'relevant' to foreign intelligence investigations.").

[84] Though Title III was clearly aimed at domestic surveillance, its application to surveillance in the name of national security was quite ambiguous. As originally drafted, Title II stated that, "Nothing contained in this chapter…shall limit the constitutional power of the President to take such measures he deems necessary to protect the Nation against actual or potential attack…." 18 U.S.C. § 2511(3) (1968). This provision was deleted when FISA was enacted and was replaced with a reference to FISA's foreign intelligence gathering procedures. 18 U.S.C. § 2511(2)(f) (2000). *See also* Jessica M. Bungard, *The Fine Line Between Security and Liberty: The "Secret" Court Struggle to Determine the Path of Foreign Intelligence Surveillance in the Wake of September 11th*, 4 PGH J. TECH. L. & POL'Y 6, 7 (2004).

[85] 50 U.S.C. § 1804(a)(3)(A) (2014).

[86] 50 U.S.C. § 1804(a)(6)(B) (1978) (emphasis added); "'Foreign intelligence information' means-- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against-

completely embraces the primary purpose test as the appropriate determination of the reasonableness of the application of the foreign intelligence exception.

Though the primary purpose test seems to be a demanding requirement, the application approval rates of FISC certainly suggest otherwise. In the period between FISC's creation and September 11th (1978-2001), FISC granted more than thirteen thousand FISA warrant applications but denied not one single application.[87] Though Congress denied that FISA was used to subvert constitutional rights,[88] in reality, FISA and FISC morphed the primary purpose test from a strict protection into a rubber stamp condoning any and all government surveillance. The weakening of the primary purpose test is due in large part to the widespread acceptance of the idea that the executive branch is the preeminent national security authority and its bare assertion of a foreign intelligence objective is sufficient to invoke the foreign intelligence exception and do away with the imperatives of probable cause and a warrant.[89] FISA welcomed this notion by providing that the certification that the purpose of the surveillance is foreign intelligence collection may not be reviewed by FISC unless the surveillance targets a US citizen.[90]

US Circuit Courts of Appeals also widely endorsed the primary purpose test as implicit in FISA and the appropriate standard of

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(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to-- (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e) (2014).

[87] Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Court Orders 1979-2012*, *available at* http://epic.org/privacy/wiretap/stats/fisa_stats.html.

[88] S. COMM. ON INTELLIGENCE, S. REP. NO. 98-665, at 36 (1984) *available at* http://www.intelligence.senate.gov/pdfs98th/98665.pdf (stating that the sharp increase in the approval of FISA warrant applications 'does not reflect any relaxation in strict protections for the privacy of US persons.').

[89] *See supra* note 59.

[90] 50 U.S.C. § 1805(a)(4) (2014). Even if the target of the surveillance is a US citizen, the certification is reviewable only under the minimal standard of clear error. *Id.*

constitutional reasonableness in FISA cases. "[T]he circuit courts have ruled that FISA provides for a justifiable imposition on private rights where the 'primary purpose' of the warrants has been to gather foreign intelligence information in the interest of national security, and not to further a criminal prosecution."[91] In upholding the primary purpose test, the circuit courts also affirmed the importance of the dichotomy between foreign intelligence gathering and criminal investigation and prosecution.

ii. The FISA "Wall"

The government's efforts to comply with the primary purpose test led to the formation of the "FISA wall." Though the legislative history of FISA indicates Congress's recognition that foreign intelligence collection and criminal law investigation and enforcement will inevitably and necessarily overlap,[92] the consistent interpretation of FISA by federal courts reading the primary purpose test as implicit in FISA forced the government to maintain a clear divide between the two in order to comply with the Fourth Amendment's mandate of reasonableness. This quickly led to a concern that consultations and interactions between intelligence agents and prosecutors would severely diminish the assertion that intelligence collection was truly

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[91] Kornblum, *supra* note 61, at 627 (citing United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991)). *See also* United States v. Megahey, 553 F. Supp. 1180, 1188 (E.D.N.Y. 1982) (affirming that surveillance conducted pursuant to a FISA warrant fits within the recognized foreign intelligence exception to the Fourth Amendment's warrant requirement and that application of this exception is reasonable when the primary purpose of the surveillance is foreign intelligence, which is a requirement "clearly implicit in the FISA standards"); United States v. Falvey, 540 F. Supp. 1306, 1314 (E.D.N.Y 1982) (holding a search conducted pursuant to a FISA warrant to be reasonable because its primary purpose was foreign intelligence information).

[92] *See* S. REP. NO. 95-604, at 6 (1978), *available at* http://www.cnss.org/data/files/Surveillance/FISA/Cmte_Reports_on_Original_Act/SJC_FISA_Report_95-604.pdf. *But see*, 50 U.S.C. § 1801(h)(1)(2014) (Congress did attempt to put in place limitations on information sharing when crafting FISA. Each application for a FISA warrant is required to contain a description of "minimization procedures" designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information" garnered through foreign intelligence surveillance.).

for the purpose of obtaining foreign intelligence and not evidence of criminal wrongdoing.[93]

In response to this apprehension and in order to limit any appearance of coordination between intelligence agents and prosecutors, the DOJ designed formal procedures to restrict the flow of information from intelligence surveillance to law enforcement. Laid out in a 1995 memorandum authored by Attorney General Janet Reno, these procedures forbid "either the fact or the appearance of the Criminal Division's directing or controlling the [foreign intelligence] investigation toward law enforcement objectives".[94] The DOJ explicitly accepted and implemented the dichotomy between foreign intelligence objectives and criminal prosecution as required by the circuit courts' interpretations of FISA. However, the effect of this division was an entirely ineffective measure that had devastating results. "The [1995] procedures essentially cleaved the FBI into two different bodies- intelligence and law enforcement- and restricted the flow of information between the two."[95] The FISA wall further perverted the standard of reasonableness mandated by the Fourth Amendment by enforcing a useless and illusory dichotomy that led to intelligence failures that could arguably have prevented the terrorist attacks of September 11, 2001.[96]

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[93] *See* David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 498 (2006) (explaining that although it was decided under pre-FISA standards, *Truong Dinh* was extremely influential on later judicial interpretations of FISA; in determining that foreign intelligence was in fact the primary purpose of the investigation in *Truong Dinh*, the court examined the number and length of consultations between the intelligence agents that conducted the surveillance and the prosecutor that eventually charged Truong (citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)). *See also* Daily, *supra* note 63, at 658 ("If courts thought that agents were using FISA surveillance primarily for criminal prosecution, it would jeopardize the DOJ's ability to use evidence obtained in FISA surveillance in a later prosecution.").

[94] Memorandum from Janet Reno, Attorney Gen., to the Assistant Attorney Gen. of the Criminal Div., Procedures for Contacts Between the FBI Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations, part A, subsection 6 (July 19, 1995), *available at* http://www.fas.org/irp/agency/doj/fisa/1995procs.html.

[95] Atkinson, *supra* note 72, at 1390, note 240.

[96] *See generally* THE 9/11 COMMISSION REPORT (2004), *available at* http://www.911commission.gov/report/911Report.pdf.

V. THE USA PATRIOT ACT

In the wake of September 11th and the numerous allegations that the DOJ's FISA walls prevented information sharing that could have thwarted the deadly attacks, Congress was in an uproar over the disastrous failures of the once-lauded FISA. However, rather than take the opportunity to reexamine the now overwhelming breadth of the foreign intelligence exception and reevaluate the protections of the Fourth Amendment in light of modern technology and threats, Congress acted hastily to tear down the wall and expand the Executive's power. Enacted just forty-five days after September 11th, the Patriot Act greatly broadened the latitude of the foreign intelligence exception, which further eroded the constitutional protections the government vows to uphold and defend.

A. *The Wall Comes Down*

Before September 11th, FISA survived numerous constitutional challenges because courts consistently reiterated that the separation FISA maintained between law enforcement and intelligence investigation ensured that searches conducted pursuant to FISA were sufficiently reasonable so as to satisfy the requirements of the Fourth Amendment.[97] After the Patriot Act, the sound constitutional foundation on which FISA and the foreign intelligence exception seemed to rest was called into question. The increased information sharing allowed by the Patriot Act destroyed the FISA walls that the executive branch had so carefully erected to comply with judicial restrictions on the government's national security powers.[98] These shattered walls demanded a new interpretation of what made a search sufficiently reasonable so as to pass constitutional muster.

B. Significant Purpose v. The Purpose

By the time Congress passed the Patriot Act, the Fourth Amendment prerequisites of probable cause and a warrant had long been abandoned in favor of a loose, fluid standard of reasonableness

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[97] *See supra* note 91.
[98] *See, e.g.,* USA PATRIOT Act, codified at 50 U.S.C. §§ 1804-1806.

in cases in which national security was involved. Decades of judicial recognition of the paramount obligation of the government to protect the nation's security effectively shut out any arguments against the recognition of the national security and foreign intelligence exceptions.[99] Combined with the increasing willingness of the judiciary to accept without question government insistences that national security was being threatened, the Patriot Act's diminishing of the primary purpose test was all but inevitable. As unreasonable as the total forsaking of the primary purpose standard of reasonableness was, it should not have come as a surprise to anyone.

Two weeks after September 11th, a DOJ memorandum responded to the question of whether diminishing the primary purpose test would violate the Fourth Amendment with a resounding no.[100] One month later, the Patriot Act was signed into law, and, with the addition of two short words, completely changed the landscape of foreign intelligence investigation, shattering what minimal Fourth Amendment protections still remained in the area. The most momentous consequence of the Patriot Act's amendments to FISA is likely the dilution of the foreign intelligence purpose requirement from "the purpose" to a merely "a significant purpose."[101] With no guidance regarding how significant this purpose needed to be,[102] the DOJ quickly seized the opportunity to formulate an interpretation that would allow it to conduct foreign intelligence surveillance even where criminal prosecution was a primary aim of the investigation.[103]

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[99] *See supra* notes 61 and 91.

[100] *See* Memorandum for David S. Kris, Associate Deputy Attorney Gen., from John C. Yoo, Deputy Assistant Attorney Gen., Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches (September 25, 2001), *available at* http://www.justice.gov/opa/documents/memoforeignsurveillanceact09252001.pdf.

[101] 50 U.S.C. § 1804(a)(6)(B) (2001).

[102] For a discussion of the ambiguity of the new purpose standard, s*ee, e.g.,* Hardin, *supra* note 60, at 323 ("In contrast to 'primary,'…the term 'significant' is void of any preferential connotation that would accord a greater value to one purpose over another…The difficulty in quantifying the term is apparent.").

[103] *See* Brief for the United States at 30-56, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001) (describing the DOJ's interpretation of the Patriot Act's purpose requirement). *See also* Memorandum from John Ashcroft, Attorney Gen., Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI (Mar. 6, 2002) *available at* https://www.fas.org/irp/agency/doj/fisa/ag030602.html (reworking the DOJ's

C. *FISA Court of Review Convenes for the First Time*

Despite the fact that FISA established an appellate court to review orders of FISC, the Foreign Intelligence Surveillance Court of Review (hereinafter "FISCR") did not convene a single time in the twenty-three years of its existence prior to the Patriot Act.[104] After FISC hesitated to fully embrace the DOJ's utter abandonment of the primary purpose test and FISA walls and instead limited the coordination sought by the FBI in a FISA warrant application by requiring heightened minimization procedures, the government filed the first ever appeal with FISCR.[105] Although no court or legislator by 2002 could question the existence of the foreign intelligence exception, the preconditions that a FISA warrant application must meet in order to conform to Fourth Amendment requirements were far from certain.[106] Just shy of the one-year anniversary of the September 11th attacks, the DOJ gave FISCR the opportunity to clearly prescribe these limitations. Nonetheless, FISCR frittered away yet another occasion to define the boundaries of the excessive powers of the executive branch to intrude into the private lives and homes of people around the globe.

In re Sealed Case[107] was the last nail in the coffin of the primary purpose test. FISCR's holding that the Patriot Act eliminated the primary purpose test chastised the circuit courts for their consistent reliance upon it for the previous three decades.[108] In abruptly reversing the course of nearly twenty-five years of well-established

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minimization procedures to permit exchange of a "full range of information and advice" between intelligence and law enforcement agents).

[104] *See* 50 U.S.C. § 1803(b)(1978) (establishing a three-judge court to review denials of FISA warrant applications). *See also* Kornblum, *supra* note 61, at 643 (discussing FISCR's failure to convene a single time before 2002).

[105] *See generally* William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1170 (2003) (detailing the events that led up to the first FISCR opinion in November 2002).

[106] *See, e.g.,* the strikingly different arguments regarding the constitutionality of the Patriot Act offered by the DOJ in its brief and the ACLU in its amici brief. *See* Brief for the United States at 30-56, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001); Brief for the American Civil Liberties Union as Amicus Curiae at 14-23, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

[107] In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

[108] *See Id.* at 726-28.

precedent, FISCR reasoned that the primary purpose test was not mandated by either the language of FISA, especially as amended by the Patriot Act, or the Constitution.[109] In light of the axe the Patriot Act took to the primary purpose test by diminishing the purpose requirement from "the" to "a significant," this statutory interpretation is not at all surprising. The contention that the Patriot Act's new purpose standard was, in fact, constitutionally sufficient is much more shocking. To support this tenuous assertion, FISCR concluded that the boundaries the courts sought to institute by creating the primary purpose test were "inherently unstable, unrealistic, and confusing" and "unstable because [they] generat[e] dangerous confusion and creat[e] perverse organizational incentives."[110]

While FISCR may have been correct in saying that the line between a criminal and intelligence investigation is often murky and impossible to clearly delineate, completely obliterating the only barrier between limitless executive authority and the private liberty of citizens was hardly the way to go about fixing this problem. FISCR's holding that the Patriot Act fit within the Court's special needs exception because "FISA's general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from 'ordinary crime control'"[111] essentially removed the Constitution from consideration in cases where foreign intelligence plays any role. In the post-*In re Sealed Case* world, there remains no guarantee at all that FISA and other intelligence searches meet even the most minimal requirement of reasonableness.

D. *The Foreign Intelligence Exception Since the Patriot Act*

The utter disregard for the Fourth Amendment by the Patriot Act and FISCR does not rest entirely with FISCR and the legislature. The Court must also shoulder the blame for its failure to ensure that the Fourth Amendment maintained an important place in intelligence investigations. FISCR admitted that its decision treaded into unknown waters, and that the foreign intelligence exception was seemingly

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[109] *Id.*
[110] *Id.* at 743.
[111] *Id.* at 746.

incapable of strict regulation after so many years of unimpeded growth.[112] All three branches of government have fallen short of their constitutional obligations and have let national security completely consume the rest of the Constitution.

Since 2002, forty-seven cases have cited *In re Sealed Case* to support the conclusion that warrantless foreign intelligence surveillance does not offend the Constitution.[113] Only one case criticized the conclusion that the President has the inherent authority to conduct warrantless intelligence surveillance entirely outside the bounds of the Fourth Amendment.[114] Combined with numerous revelations that the Executive has consistently abused this "inherent authority" and circumvented the constitutional rights of millions,[115] *In re Sealed Case* serves to underscore the dire need to restore the validity and power of the Fourth Amendment in matters of national security.

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[112] *See Id.* (admitting that "the constitutional question presented by this case- whether Congress's disapproval of the primary purpose test is consistent with the Fourth Amendment- has no definitive jurisprudential answer.").

[113] *See* Shepard's Report, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

[114] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1040-1043 (D. Or. 2007), *vacated*, 599 F.3d 964 (2010).

[115] *See, e.g.,* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts,* N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0. *See also supra* note 2 (detailing Snowden's leaks that describe the NSA's massive data collection program that clearly violated to prohibition of warrantless and limitless domestic surveillance); *supra* note 83(describing how the NSA's data collection programs violate the constitutional rights of Americans).

VI. CONCLUSION

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[116]

- Justice Brandeis, on the scope of the Fourth Amendment

In a world where threats are evolving at a pace faster than the Executive could ever keep up with, the justification of national security protection is even more salient. It would be entirely unreasonable to subject the government to the ordinary warrant and probable cause requirements that govern more traditional criminal investigation and crime prevention in cases implicating national security concerns. However, the Fourth Amendment cannot be entirely forgotten. In fighting for what they seek to protect, the government should not at the same time destroy the values and liberties on which the nation was built. As FISCR stated in a later decision reviewing the now-repealed Protect America Act, "in carrying out its national security mission, the government must simultaneously fulfill its constitutional responsibility to provide reasonable protections for the privacy of United States persons."[117]

Because the security of the nation is such a compelling interest, the foreign intelligence exception appears to be here to stay. Forcing the government to pause a sensitive intelligence investigation to attain judicial approval would certainly frustrate national security aims in many instances. It does not seem feasible to reverse the course of history and stymie the evolution of the foreign intelligence exception. However compelling the justification of security may be, limitations must be placed on the foreign intelligence exception if the Fourth Amendment is to continue to have any meaning.

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[116] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[117] In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1016 (Foreign Int. Surv. Ct. Rev. 2008).

Like FISCR in *In re Directives*, significantly more focus should be placed on oversight and minimization procedures. The executive branch cannot be permitted to completely control foreign intelligence surveillance. Just as the Fourth Amendment inserted a detached and neutral magistrate to guard against overzealous law enforcement, some protections must be put in place to ensure that the overzealous executive is not able to subjugate constitutional rights under the guise of national security.

Eventually, the Supreme Court will be forced to step in. There must be a coordinated effort amongst all three branches of the government to zealously defend the Constitution by placing workable restrictions on the foreign intelligence exception and demanding accountability from those who seek to invoke it.

STUDENT NOTE

The National Security Implications and Potential Solutions for the Unintended Consequences of the 1980 Bayh-Dole Act on Brain-Injured Veterans from the Wars in Iraq and Afghanistan

COL Noel Christian Pace, MS, USAR[·]

ABSTRACT

Traumatic brain injury (TBI) is the "signature wound" seen in veterans from the wars in Iraq and Afghanistan, from which the U.S. now has over 20,000 young veterans living with TBI. However, some unintended consequences of the Bayh-Dole Act of 1980, a law designed to tap the "secret weapon" of federally funded research & development (R&D) to help the U.S. return to competitiveness after the recession of the late 1970's, are now preventing these heroes from getting the treatment and cures they need. This article reviews the history of American academia's close cooperation with the U.S. government in solving military medical problems from WWI through the Vietnam War, where those cures have now benefited millions worldwide. It then shows how this relationship has changed since the enactment of Bayh-Dole Act, and then examines the Act's current and future impact on U.S. national security and the all-volunteer force. The article concludes that the Bayh-Dole Act should not be completely

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repealed, but recommends some amendments be enacted in order to take better care of the 1% of the U.S. population that fights and sacrifices to protect the other 99%.

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I. SAVED, NOT CURED[1]

On January 28th, 2014, President Obama made his fifth State of the Union address to a staunchly divided Congress and a politically divided nation.[2] According to media experts, about 90% of the speech was not particularly memorable.[3] But, of the 6,778 words that the President spoke for over an hour, everyone in the attendance—and almost everyone watching across the nation—found common ground in only 10% of the content.[4] Americans discovered this commonality in their unqualified support for brain-injured veterans from the wars in Iraq and Afghanistan such as Army Ranger Sergeant First Class Cory Remsburg.[5] This support was evidenced by an almost two minute standing ovation for this hero's sacrifice- a hero who "never gives up, and does not quit!" on behalf of this country and its citizens.[6]

When Cory Remsburg's parents brought him home from the hospital as a newborn in Phoenix, Arizona, they were filled with the expectant joy of most young parents. As Cory matured, he later moved to St. Louis, Missouri, where he lived with his father and stepmother, Craig and Annie Remsburg.[7] Like many typical American kids, Cory played varsity volleyball, performed in the marching band, orchestra, and jazz band, and participated in the German Club.[8] "He just loved life, he was always swimming and running and doing all the

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[1] Michael M. Phillips, *Saved Not Cured: Brain-Injured Vets Search for Solace,* WALL ST. J., Feb. 20, 2014, *available at* http://search.proquest.com/newsstand/docview/1500218206/B84C9DFAE324546PQ/4?accountid=14585.

[2] Steve Holland, *Obama Warns Divided Congress That He Will Act Alone*, YAHOO (Jan. 29, 2014), http://news.yahoo.com/obama-lay-alone-approach-state-union-speech-003623143--business.html.

[3] John Cassidy, *The Meaning of Cory Remsburg*, THE NEW YORKER, Jan. 29, 2014, *available at* http://www.newyorker.com/online/blogs/johncassidy/2014/01/the-meaning-of-cory-remsburg-state-of-the-union.html.

[4] Dan Merica*, A Bipartisan Outpouring for Wounded War Hero at State of the Unio*n, CNN, *available at* http://politicalticker.blogs.cnn.com/2014/01/29/a-bipartisan-outpouring-for-wounded-war-hero-at-state-of-the-union/.

[5] *Id.*

[6] *Id.*

[7] 9Line, LLC, *Committed to the Wounded Warrior*, 9LINELLC.COM, http://www.9linellc.com/wits/WITS_2012_Feb_CoryRemsburg.htm (last visited Feb. 24, 2014).

[8] *Id.*

things that made his life very full," explained Cory's stepmother.[9] "We always called him our wild-child because if you told Cory he couldn't do something—that is what he was going to do," which is where his impetus to join the Army probably came from.[10] "'At 17, Cory went to his dad and said I want to go into the military–would you sign for me?'" said his father Craig.[11] But Craig wanted his son to give college a try first, which he did, until the morning of his eighteenth birthday.[12] According to Cory's stepmother Annie, on that day, the "doorbell rang at about 5:30 a.m., and Cory went bounding down the stairs as my husband and I were waking up. The Army recruiter came through the door."[13] Cory entered the Army in July 2001 and shipped off to boot camp at Ft. Benning, Georgia, which is where he learned about the U.S. Army Rangers, the Army's elite special operations infantry unit.[14]

Cory attended One Station Unit Training, the Basic Airborne Course and the Ranger Assessment and Selection Program and was then assigned to 1st Battalion, 75th Ranger Regiment, Hunter Army Airfield, Savannah, Georgia where he had served since 2002.[15] But, on October 1, 2009, on his tenth deployment to war (Rangers deploy more often, but for shorter durations than conventional units), and while returning from leading a Ranger squad into combat on the outskirts of Kandahar, where they killed nine insurgents,[16] Cory was "thrown like a rag doll into an Afghanistan canal by the blast from a 500-pound roadside bomb, also known as an improvised explosive device (IED), with the right side of his head caved in by shrapnel."[17]

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[9] Alice Massimi, *Road Back: A Wounded Savannah Soldier's Journey*, WSAV, (Oct. 28, 2010, 7:29 PM), *available at* http://www.wsav.com/story/20677231/the-road-back-a-wounded-savannah-soldiers-journey.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Gregg Zoroya, *For Troops With Brain Trauma, a Long Journey Back*, USA TODAY, (July 29, 2010), *available at* http://usatoday30.usatoday.com/printedition/news/20100729/1aawakening29_cv.art.htm. (last visited Feb. 24, 2014); *Rangers: A Day in the Life*, SOFREP.COM, http://sofrep.com/army-rangers/a-day-in-the-life (last visited Feb. 24, 2014).

[17] Alice Massimi, Road Back: A Wounded Savannah Soldier's Journey, WSAV, (Oct. 28, 2010 7:29 PM), *available at* http://www.wsav.com/story/20677231/the-road-back-a-wounded-savannah-soldiers-journey; Zoroya, *supra* note 16.

According to Cory's former battalion commander, Colonel Brian Mennes, the blast wounded eight members of Cory's unit, killing Sergeant Roberto Sanchez, severing a second Ranger's leg below the knee, and leaving Cory's "leg badly mangled and part of his face and head torn off."[18] One of Cory's best friends from the Rangers told his parents "when we cut Cory out of his uniform during medical treatment, we thought we were saying goodbye to him."[19] After a medical evacuation and six operations at military hospitals across the world from Afghanistan to Germany and then to Bethesda, Maryland, including two that removed skull sections allowing his brain to swell, Cory arrived at the James A. Haley Veterans Hospital in Tampa, Florida, in November 2009 in a vegetative state.[20] It took more than three months after Cory was pulled from the canal, with his parents constantly by his side, for him to emerge from his coma.[21] On January 13, 2010, Veterans Affairs (VA) doctors finally announced that Cory was "officially" awake.[22]

However, if this was another time or another war, such as the last major war the U.S. fought in- the Vietnam War, which ended in 1975, Cory probably would have just died on the battlefield.[23] Or, if Cory had been the Ranger that had lost his leg below the knee from the same IED instead, the solution for doctors today would be relatively easy: just give him a custom-fit, high-tech prosthetic leg, and get him back out the battlefield to fight after a few months of rehabilitation.[24]

But, this type of treatment is not possible for victims of TBI,

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[18]; Zoroya, *supra* note 16; *Editorial: Cory Remsburg: Not Just Another Number,* PRESS REPUBLICAN, *available at* http://www.pressrepublican.com/0201_editorials/x91133077/EDITORIAL-Cory-Remsburg-Not-just-another-number, (last visited Feb. 24, 2014).

[19] Massimi, *supra* note 9.

[20] Zoroya, *supra* note 16.

[21] *Id.*

[22] *Id.*

[23] Ronald H. Spector, *Vietnam War,* ENCYCLOPAEDIA BRITANNICA, (Dec. 23, 2013), *available at* HTTP://www.britannica.com/EBchecked/topic/628478/Vietnam-War; Steve Almasy, *The Toll of War Now Includes More Amputees*, CNN, (Oct. 29, 2012), *available at* http://www.cnn.com/2012/05/27/us/amputee-veterans-come-home/.

[24] *Ranger Writes Memoir About Losing His Leg,* COLUMBUS LEDGER-ENQUIRER (Georgia), (June 8, 2013), http://www.military.com/daily-news/2013/06/08/ranger-writes-memoir-about-losing-his-leg.html.

like Cory's, which is seen in veterans from the wars in Iraq and Afghanistan.[25] Hundreds of "Cory Remsburgs" return from the war zone with TBI each year.[26] This means that as a result of almost thirteen years of war, we now have over 20,000 young U.S. veterans living with TBI.[27] According to Retired General Peter W. Chiarelli, former Vice Chief of Staff of the Army, and now Chief Executive Officer for One Mind for Research, TBI and other mental health injuries to include Post Traumatic Stress (PTS), are the "signature wounds" of these wars.[28] In fact, the Institute of Medicine (IOM) Report Gulf War and Health, "Long Term Effects of Blast Exposures," stated that since 2001, more than 1,000 U.S. soldiers in the Afghanistan war have been killed in action and nearly 10,000 Wounded in Action (WIA) because of IED's. And, from March 2003 to November 2011, more than 2,000 U.S. soldiers in the Iraq war were killed in action and close to 22,000 wounded in action due to IED's.[29] Further, according to the Defense and Veterans Brain Injury Center, between January 1, 2001, and September 30, 2013, more than 265,000 U.S. troops suffered traumatic brain injuries.[30] Most were mild concussions, but 26,250 troops suffered penetrating head wounds or brain injuries classified as moderate or severe, which caused unconsciousness from 30 minutes to more than a day.[31] Even the long-term effects of concussions are significant, as evidenced by the recent rejection of the National Football League's $760 million proposed settlement with 4,000 former players by Federal District Judge Anita Brody on January 14, 2014, where she stated "on the basis of the present record, I am not yet satisfied that the Settlement has no obvious deficiencies, grants no preferential treatment to

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[25] *Department of Defense Numbers for Traumatic Brain Injury,* DEFENSE.GOV, (Feb. 10, 2012), http://www.defense.gov/home/features/2012/0312_tbi/chartaf_hires.jpg.
[26] *Id.*
[27] *Id.*
[28] Peter W. Chiarelli, *The Invisible Wounds of War,* USO ON PATROL, BRAIN LINE MILITARY, *available at* http://www.brainlinemilitary.org/content/2011/08/the-invisible-wounds-of-war_pageall.html (last visited Feb. 24, 2014).
[29] *Gulf War and Health, Volume 9: Long-Term Effects of Blast Exposures,* INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, (Feb. 13, 2014), *available at* http://www.iom.edu/Reports/2014/Gulf-War-and-Health-Volume-9-Long-Term-Effects-of-Blast-Exposures.aspx.
[30] Phillips, *supra* note 1.
[31] *Id.*

segments of the class, and falls within the range of possible approval."[32]

The Bayh-Dole Act of 1980, also known as the University and Small Business Patent Procedures Act of 1980, was designed to tap the "secret weapon" of federally funded R&D, and helped the U.S. return to competitiveness—boosting the economy after the recession of the late 1970's.[33] However, one of the most devastating unintended consequence of the Bayh-Dole Act is that thousands of brain-injured soldiers, who were represented by Cory Remsburg at the State of the Union address, may have to continue to learn to live with TBI, PTS, and other mental health injuries for many years to come, despite the fact that some treatment methods could already exist. In other words, because of the Bayh-Dole Act, potential treatments and cures, with the majority of the research being paid for by the U.S. taxpayers (who are also bearing the actual cost of the wars and the treatment of the injured soldiers as well) may not reach our brain-injured soldiers, or benefit the general public--until they become "profitable" to certain entities.

II. INTRODUCTION

The premise behind the Bayh-Dole Act of 1980 and its effort to stimulate competitiveness in R&D for the benefit of the taxpayers and the U.S. economy will be outlined in Section III of this article. Section IV will then trace the history of the medical technological advances from WWI through the Vietnam War and how they have benefitted the U.S. military, U.S. society, and millions of people world-wide. Section V will examine the passage of laws like Bayh-Dole after the Vietnam War, as well as some other policies our government has pursued, which may unintentionally have left our nation's war-footing somewhat off balance, and have national security implications for the next war. Section VI will analyze the "signature wound" of the wars in Iraq and Afghanistan, brain injury, and explain how some of the

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[32] Doug Farrar, *Judge Anita Brody Denies Preliminary Approval for NFL Concussion Settlement,* SPORTS ILLUSTRATED, (Jan. 14, 2014), *available at* http://nfl.si.com/2014/01/14/nfl-concussion-lawsuit-settlement-2/.

[33] Bayh-Dole Act Pub.L. No. 96–517, § 6(a), 94 Stat. 3018, (Dec 12, 1980); Sen. Birch Bayh, Joseph P. Allen, Howard W. Bremer, *Universities, Inventors, and the Bayh-Dole Act,* LIFE SCIENCES LAW & INDUSTRY REPORT, 3, 1266 (BNA, INC., 2009).

unintended consequences of the Bayh-Dole Act are negatively impacting brain-injured veterans. Next, the author will advocate for the position that Congress should create some exceptions to the Bayh-Dole Act, or enact some reforms for the benefit of brain-injured veterans.

III. WHAT IS THE BAYH-DOLE ACT?

The Bayh-Dole Act: A Guide to Implementing the Law and Regulations states, "technology transfer--the transfer of research results from universities to the commercial marketplace for the public benefit--is closely linked to fundamental research activities in universities."[34] In 1945, the success of the Manhattan Project[35] showed the importance of university research to national defense, and the report entitled "Science - The Endless Frontier," which Vannevar Bush wrote for President Roosevelt, recognized the value of university research in improving the economy by increasing the flow of science knowledge to industry.[36] As a result, Bush's report was key in the formation of the National Institutes of Health (NIH) and the National Science Foundation (NSF), where today 60% of R&D funding that goes to universities is provided by the federal government (the U.S. taxpayers contributed $40.1 billion in fiscal year 2012), as this research is considered vital to the national interest.[37]

But, during the Korean and Vietnam War eras, there was no government-wide policy regarding ownership/patent of inventions created by government contractors and grantees using federal

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[34] *The Bayh-Dole Act: A Guide to the Law and Implementing Regulations*, COUNCIL ON GOVERNMENT RELATIONS, (Sept. 1999), *available at* http://www.ucop.edu/ott/faculty/bayh.html, (last visited Feb. 24, 2014) (hereinafter "Council on Government Relations").

[35] Research funded by the U.S. government conducted at Columbia University, the University of Chicago, and the University of California at Berkley led to the development of the atomic bomb, and its application led to the end of the war through Japan's unconditional surrender just five days later. U.S. GOVERNMENT HISTORY: PRE-COLUMBIAN TO THE NEW MILLENNIUM, 51F. MANHATTAN PROJECT, *available at* http://www.ushistory.org/us/51f.asp, (last visited June 2, 2014).

[36] *Id.*

[37] Ronda Britt, *Higher Education R&D Expenditures Remain Flat in FY12,* NATIONAL SCIENCE FOUNDATION (Nov. 2013), *available at* http://www.nsf.gov/statistics/infbrief/nsf14303/.

funding.[38] The government retained title of the inventions and issued non-exclusive licenses to entities that wanted to use them.[39] For example, in early 1980 the federal government held title to approximately 28,000 patents, but fewer than 5% of these were licensed to industry for development of commercial products.[40] As a result, private companies did not have exclusive rights under government patents to manufacture and sell resulting products, and were worried that the competition could duplicate their efforts.[41] Although taxpayers were paying for the research, because the government was not effective in attracting private industry to manufacture and sell the inventions, the public was not benefiting from their investment.[42] In business terms, the incentives were not properly aligned with the desired outcomes.[43]

However, later in 1980, congressional lawmakers concluded that the taxpayers would benefit from a policy that permitted universities and small businesses to keep ownership of inventions made with federal funding, such as NIH grants, and should become directly involved in the commercializing ("exploiting for profit") of the product.[44] The goal was to stimulate the U.S. economy by licensing new inventions from universities to businesses for the public good, which would manufacture them in the U.S. (creating jobs, generating new tax revenues, etc.).[45] As a result, the Bayh-Dole Act "has been largely credited with the creation of the modern biotechnology

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[38] *Id.*
[39] *Id.*
[40] U.S. GOVERNMENT ACCOUNTING OFFICE (GAO) REPORT TO CONGRESSIONAL COMMITTEES ENTITLED "TECHNOLOGY TRANSFER, ADMINISTRATION OF THE BAYH-DOLE ACT BY RESEARCH UNIVERSITIES" (MAY 7, 1998), *available at* http://www.gao.gov/archive/1998/rc98126.pdf.
[41] Council on Governmental Relations, *supra* note 34.
[42] *Id.*
[43] Bill Crounse, MD, *Aligning Properly Placed Incentives to Improve Health and Healthcare Services.* MICROSOFT DEVELOPER NETWORK, (Mar. 7, 2011), *available at* http://blogs.msdn.com/b/healthblog/archive/2011/03/07/aligning-properly-placed-incentives-to-improve-health-and-healthcare-services.aspx, (last visited Feb. 24, 2014).
[44] Council on Governmental Relations, *supra* note 34; *Commercializing Definition,* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/commercialize (last visited Feb. 24, 2014).
[45] Council on Governmental Relations, *supra* note 34.

industry."[46]

Prior to 1980, medical technological advances had been force multipliers for the U.S. in WWI through the Vietnam War and had provided U.S. forces a decisive advantage over their adversaries.[47] In addition, these advances would then be used to save the lives and improve the quality of life and productivity of civilians in the U.S. and in some cases, all around the world. In short, millions and millions of people have "profited" from these medical advances devised to mitigate or cure some of the horrors of war. In many cases, these medical advances were funded with U.S. taxpayer money and resulted in the direct benefit to American forces and a good return on investment for the American people.[48] Until the Global War on Terrorism (GWOT), the U.S. had not fought a major war since the enactment of the 1980 Bayh-Dole Act. The Vietnam War (the U.S.' last major war) ended in 1975. Subsequently, there were conflicts of short duration with very minimal casualties compared to the size of the forces involved: Grenada in 1983, Panama in 1989, Desert Storm in 1991, and Somalia in 1993.[49] It was not until the commencement of the GWOT in 2001 and the advent of the enemy's signature weapon (the IED) that the unintended consequences of 1980's Bayh-Dole Act truly came to light.[50] If the Bayh-Dole Act had been in place before

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[46]Jeffery A. Baumel, *The Bayh-Dole Act: The Technology Revolution Shows its Age,* VENTURE CAPITAL REVIEW, (Winter 2009), *available at* http://nysstlc.syr.edu/media/documents/2009/6/The_BayhDole_Act_The_Technology_Revolution_Shows_its_Age.pdf.

[47] Air University, *Military Medicine During the Twentieth Century* at 3-15, *available at* http://www.au.af.mil/au/awc/awcgate/milmedhist/chapter3.htm (last visited April 13, 2014).

[48] Sean Pool & Jennifer Erickson, *The High Return on Investment for Publically Funded Research,* 2-4, (Dec 12, 2012), *available at* http://www.americanprogress.org/wp-content/uploads/2012/12/InnovationResearchInvestments-1.pdf.

[49] Hanna Fischer, *American War and Military Operations Casualties: Lists and Statistics,* NAVY DEPARTMENT LIBRARY, (July 13, 2005), http://www.history.navy.mil/library/online/american%20war%20casualty.htm, (last visited Feb. 24, 2014).

[50] Jeffrey A. Drezner, Raj Raman, Irv Blickstein, John Ablard, Melissa A. Bradley, Brent Eastwood, Maria Falvo, Dikla Gavrieli, Monica Hertzman, Darryl Lenhardt, & Megan McKernan, *Measuring the Statutory and Regulatory Constraints on DoD Acquisition*, RAND NATIONAL DEFENSE RESEARCH INSTITUTE, (2006), *available at*

WWI, or enacted at any time through the Vietnam War, many of the medical technological advances outlined *infra* may have never come to fruition, or they would certainly have taken significantly longer to go from idea to operation, which, as history shows us, would have been detrimental to improving the quality of life for people throughout the world.[51]

IV. MILITARY MEDICAL TECHNOLOGICAL ADVANCES: WWI THROUGH THE VIETNAM WAR

"The War to End All Wars," WWI, "produced casualties on a previously unknown scale among armies of an unprecedented size."[52] During an average day on the western front, there were over 9,000 casualties, with the number escalating dramatically during offenses.[53] WIA outnumbered killed in action (KIA) three-to-one, and there were as many disease non-battle injuries (DNBI) casualties as there were casualties from enemy action due to soldiers being highly susceptible to diseases in the close-quarters of damp trenches.[54] For example, in the Battle of Verdun, Germany had 434,000 men KIA, and the French suffered 542,000 KIA, a number not comprehendible in today's military operations.[55] It is easy to see that medical innovations were greatly needed to sustain the Allied effort. It is possible that some of the seeds of medical innovation for WWI were planted a few years prior when General Leonard Wood, a Harvard Medical School graduate and former Army physician, became U.S. Army Chief of Staff in 1910.[56] The appointment of a physician as the Army Chief of Staff was extremely unlikely and almost impossible in today's environment,

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http://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR347.pdf.

[51] *A Ballad to Balad: A Look into Medical Marvels in the Military.* YALE JOURNAL OF MEDICINE & LAW, (Nov. 3, 2006), http://www.yalemedlaw.com/2006/11/a-ballad-to-balad-a-look-into-medical-marvels-in-the-military/ (last visited Feb. 24, 2014).

[52] S. FORTY, WORLD WAR I: A VISUAL ENCYCLOPEDIA 301 (PRC PUBLISHING LTD., 2002).

[53] *Id.*

[54] *Id.*

[55] M. CAVENDISH, HISTORY OF WORLD WAR I: VOLUME 3, HOME FRONTS TECHNOLOGIES OF WAR 876 (2002).

[56] *Major General Leonard Wood,* LEONARD WOOD INSTITUTE, *available at* http://www.leonardwoodinstitute.org/documents/MajorGeneralLeonardWoodbiography.pdf.

but General Wood's stature as a Harvard-trained physician had a positive impact on the American Army's ability to greatly expand its medical forces during WWI.[57]

"The key to the issue of medical care in WWI was prevention of illnesses and diseases in a general sense and the need to offer effective and prioritized medical aid to a casualty as quickly as possible after a wound had been sustained."[58] Technological advances addressed a myriad of medical problems. The persistent nature of mustard gas used in chemical warfare was countered with the creation of mobile degassing units.[59] The typhoid vaccine, developed by Army physicians in 1911 in coordination with British and U.S. Navy researchers, drastically reduced the combatant death rate from typhoid in 1917-18 versus Army operations conducted in the late 1800's.[60] Powerful magnets were used to extract shell fragments from the eyeball.[61] The use of X-ray machines and laboratories attached to hospitals contributed to rapid diagnosis close to the fight, and "shell shock" was first recognized as a true medical problem, not just a case of cowardice.[62] But the most important and greatest medical technological advance in WWI was the adoption of blood transfusions to reduce the deadly effects of shock among wounded soldiers.[63]

Americans built on the medical advances of WWI during WWII by focusing physicians on specialty training, such as neurology, in part to combat "shell shock" and to provide specific care for the treatment of abdominal and chest trauma.[64] In addition, the military adopted a superior prophylaxis against malaria, originally produced by the Germans, and instituted mass production of penicillin, which greatly improved the chances that a wound victim would overcome

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[57] *Id.*
[58] CAVENDISH, *supra* note 55.
[59] SHIRLEY D. TUORINSKY, MEDICAL ASPECTS OF CHEMICAL WARFARE 79 (2008).
[60] COMMUNICABLE AND OTHER DISEASES, VOLUME 9, THE MEDICAL DEPARTMENT OF THE UNITED STATES ARMY IN THE WORLD WAR (THE OFFICIAL HISTORY SERIES) 16 *available at* , http://history.amedd.army.mil/booksdocs/wwi/communicablediseases/chapter1.html#table3.
[61] MILITARY MEDICINE DURING THE TWENTIETH CENTURY http://www.au.af.mil/au/awc/awcgate/milmedhist/chapter3.htm.
[62] J.W. CHAMBERS, THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 428, (1999).
[63] *Id.*
[64] *Id.*; I.C. B. DEAR, THE OXFORD COMPANION TO WORLD WAR II 727 (1995).

infection.[65] The wide-scale use of dichlorodiphenyltrichloroethane (DDT) also controlled a serious outbreak of typhus in Italy.[66] According to history professor J.W. Chambers, defeating typhus was *critical* to the Allied cause.[67] The disease was only quelled by a massive overall "dusting" with DDT, which saved thousands of lives. Nevertheless, we now know DDT causes birth defects in many species and is internationally banned.[68]

The sheer size of American military medicine expansion and its innovations throughout WWII explained much of its success. For instance, in 1942-45, 40% of the country's physicians and healthcare providers were serving in the military versus only 8% still in purely civilian practice.[69] However, it is just the opposite today. With the majority taxpayer's dollars provided through NIH grants going to university laboratories, where the universities can now transfer technology to the private sector for a "profit," enabled by the Bayh-Dole Act, the physicians can share in; physicians are now underrepresented in the military (there is a shortage, as now more lucrative opportunities are available).[70] For example, is it really reasonable to believe today, with the advent of the Affordable Care Act (ACA) providing funding for more patients, and healthcare costs making up almost one-fifth of the gross domestic product (GDP), that Harvard University would directly send ninety doctors and nurses to man the Fifth General Hospital and deploy overseas as they did in World War II?[71]

Leveraging medical technological advances provided strategic, operational, and tactical advantages for the Allies over the Axis

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[65] DEAR, *supra* note 64, at 723-727.
[66] *Id.*
[67] *Id.* (emphasis added).
[68] *Eagle Virtual Field Trip,* BRIDGEWATER STATE UNIVERSITY, *available at* h*ttp://www.bridgew.edu/*http://webhost.bridgew.edu/jhayesboh/trips/eagles/facts_about_ddt.htm (last visited Feb. 24, 2014).
[69] CHAMBERS, *supra* note 51.
[70] Baumel, *supra* note 45.
[71] Linda J. Blimes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets*, HARVARD KENNEDY SCHOOL FACULTY WORKING RESEARCH PAPERS, (March 2013), RWP13-006 *available at* https://research.hks.harvard.edu/publications/; *5th General Hospital Unit History,* WWII MEDICAL RESEARCH CENTRE, *available at* http://www.med-dept.com/unit_histories/5_gen_hosp.php (last visited Feb. 24, 2014).

powers and contributed to their victory.[72] And, it is clear the Axis powers' ability to leverage medical technology was not as great as the Allies' and contributed to their defeats in both WWI and WWII.[73] However, tough DNBI lessons that were learned in the past were not always heeded by major combatants for both the Axis and the Allies, as the incidence of disease varied greatly in different armies from one theater to another.[74] For instance, infection from diphtheria amongst Allied troops increased greatly in 1944-45 as they came into contact with heavily infested areas in the formerly German-occupied territories, and heavy losses were suffered by the Allies due to malaria in Asia until newly developed anti-malaria drugs were used.[75] Hygiene and preventive medicine usually were high priorities for both side's commanders, but there are some important exceptions that contributed to the demise of the German effort. [76] Worth noting is the absence of any field sanitation precautions in the German lines of the Western Desert Campaign.[77] British observers state that during the second battle of El Alamein, they could easily identify German defensive positions as indicated by the amount of human feces lying on the ground.[78] The lack of the ability to leverage medical technology for better field hygiene cost the German Afrika Corps dearly in terms of DNBI and severely hindered its ability to combat the Allied offensive.[79] German soldiers were 2.6 times more likely to be incapacitated from dysentery, malaria, hepatitis, and skin diseases than their British opponents.[80] In the two months before the second battle of El Alamein, more than one-in-five Germans had been sick from disease causing even the elite 15th Panzer Division to be well below strength.[81] Again, this is further evidence that it was the U.S. government's dedication to medical technological advances that directly benefited the troops and helped enable the Allies to victory over the Axis.

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[72] DEAR, *supra* note 64.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

In addition, during the Korean War, due to technological advances, new laws were enacted by Congress to ensure the soldiers in harm's way "profited" from and got the benefit of the U.S. taxpayer's dollars that were being spent to train physicians.[82] Case in point in terms of legislation, there was such a critical shortage of physicians that Congress passed Public Law 779, known as the Doctor Draft Law, in September 1950.[83] This legislation provided for the drafting of physicians who had gone to medical school at government expense during World War II, but who graduated after the war was over and whose services were no longer needed.[84] Now they were required to take care of soldiers, and many physicians were recalled to active duty in support of the Korean War effort.[85] This law was renewed in 1955, but has since fallen by the wayside.[86] In terms of medical technology in the Korean War, medical advances such as the Mobile Army Surgical Hospital (MASH) and helicopter ambulances were first used.[87] In addition, the national blood banking program was rapidly geared up with new techniques such as plastic bags used for collection and delivery.[88] Lastly, body armor that allowed for more mobility, while offering protection, was also developed and put into common use.[89]

The Vietnam War gave us the technological advance of Huey helicopters, where medical treatment was provided on-board, being used for evacuation of wounded soldiers. Now, many civilian trauma centers in the U.S. have similar life-flight helicopters and heliports.[90]

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[82] *Pentagon Panel Project: Navy Medicine in the Korean War,* KOREAN WAR 60TH ANNIVERSARY, *available at* http://www.koreanwar60.com/medical-advances (last visited Feb. 24, 2014).

[83] *Doctor Draft Law Extended Through Parliamentary Maneuver,* JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (JAMA), (July 30, 1955), *available at* http://jama.jamanetwork.com/article.aspx?articleid=301622 (last visited Feb. 24, 2014).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] M.S. Baker, *Military Medical Advances Resulting From the Conflict in Korea, Part I: Systems Advances That Enhanced Patient Survival,* MILITARY MEDICINE, *available at* (Apr. 2012), http://www.ncbi.nlm.nih.gov/pubmed/22594133.

[88] *Id.*

[89] *Id.*

[90] The role of the helicopter in support activities in the Vietnam War must not be overlooked, as thousands of missions were flown to resupply and reinforce troops

Vietnam also spurred major advances in vascular surgery, which were recorded for surgical posterity in the "Vietnam Vascular Registry," a database with records of over 8,000 vascular wound cases contributed to by over 600 battlefield surgeons.[91] This is one of the first examples of the use of "big data" to search for cures or better treatment modalities for soldiers and civilians alike.[92] Each of these technological advances was used by the military to save lives on the battlefield and then was leveraged by civilians to save lives in the U.S. and later, worldwide.[93]

V. NATIONAL SECURITY IMPLICATIONS

In addition to impacting veterans like Cory Remsburg who suffer from PTS and TBI, the Bayh-Dole Act may also have an unintended consequence leading to a lack of balance in the U.S.'s national security posture in the future. A "military revolution" characterizes profound changes in how war is waged at the strategic level—there are systemic changes in politics, society, and how forces and resources are mobilized to achieve national objectives through military means.[94] "Military revolutions recast society and the state as well as military organizations. They alter the capacity of states to create and project military power."[95] The French Revolution changed how the entire French country waged war—"it widened and deepened the state's grip upon the wealth and manpower of its citizens. The leaders of France declared a *levée en masse* that placed

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on the ground, to evacuate American and South Vietnamese wounded, and to offer countless other services in pursuance of the war effort. Indeed, the Vietnam War was the Helicopter War. *Vietnam, the Helicopter War,* TEXAS TECH UNIVERSITY: THE VIETNAM CENTER & ARCHIVE, *available at* http://www.vietnam.ttu.edu/exhibits/helicopter/; Paul E. Stepansky, PhD, *Medicine, Health, and History: Medicine in Vietnam: An Irony of War,* A DOSE OF HISTORY, (Feb. 11, 2012), *available at* http://adoseofhistory.com/category/military-psychiatry/medicine-in-vietnam/.

[91] N. M. Rich, A. Leppäniemi, *Vascular Trauma: A 40-Year Experience with Extremity Vascular Emphasis.* SCANDINAVIAN JOURNAL OF SURGERY, (2002), *available at* http://www.fimnet.fi/sjs/articles/SJS12002-109.pdf.

[92] *Id.*

[93] *Id.*

[94] M. KNOX, & W. MURRAY (EDS.). THE DYNAMICS OF MILITARY REVOLUTION 1300-2050. (2001).

[95] *Id.*

the French people and their possessions at the state's disposal for the duration of the war."[96] This major change at the strategic level centralized resources and injected a "level of ferocity" in war that had not been previously seen.[97] Similarly, it can be inferred that a "military revolution" in the U.S. has been taking place since the end of the Vietnam War. The U.S. no longer relies upon drafting forces to fill its ranks.[98] This is a major departure for U.S. policy, at the strategic level, from how forces and resources were mobilized during most of the twentieth century in order to achieve national objectives through military means. For example, following the Japanese attack on Pearl Harbor, war was declared and America mobilized.[99] In effect, all elements of famed military theorist Clausewitz's "paradoxical trinity"--violence and passion; uncertainty, chance and probability; and political purpose and effect, and reason—were in balance. "War," according to Clausewitz is "an act of force to compel our enemy to do our will."[100] All three elements of the "paradoxical trinity" are required in order to be ultimately successful, and they must be kept in balance in order to influence success in the conduct of war.[101] During WWII these elements were kept in balance by the U.S.--leading to victory.[102] Once again, war was declared by Congress, the draft was enacted, "Rosie the Riveter" started building aircraft and tanks, food was rationed, and war bonds were sold to raise needed financial resources.[103] Similar actions followed in the Korean Conflict and the Vietnam War. However, the U.S. ran into trouble later in the Vietnam

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[96] *Id.*

[97] Steve T. Ross, *"Napoleon and Maneuver Warfare." The Harmon Memorial Lectures in*
Military History, 1959–1987, OFFICE OF AIR FORCE HISTORY.

[98] R. Norman Moody, *After 40 Years, Return of Military Draft Not in Sight,* (July 23, 2013) FLORIDA TODAY, *available at* http://www.usatoday.com/story/news/nation/2013/07/23/return-of-military-draft-not-in-sight/2578847/ (last visited Feb. 24, 2014).

[99] *The Japanese Attacked Pearl Harbor December 7, 1941*, AMERICA'S LIBRARY, *available at* http://www.americaslibrary.gov/jb/wwii/jb_wwii_pearlhar_1.html (last visited on Feb. 24, 2014).

[100] M. HOWARD, & P. PARET, CARL VON CLAUSEWITZ: ON WAR 75, (EDS. AND TRANS.) (1976).

[101] *Id.*

[102] *Rosie the Riveter-Changing American History*, FEDERAL HIGHWAY ADMINISTRATION, (March 8, 2012), *available at* http://www.fhwa.dot.gov/wit/rosie.htm (last visited Feb. 24, 2014).

[103] *Id.*

era as policies were changed that took the "paradoxical trinity" out of balance (educational/political deferrals from the draft, no bombing of the North Vietnamese center of gravity, etc.).[104] Today, the unintended consequences of laws such as the Bayh-Dole Act of 1980, which in effect puts potential "profits" ahead of the health of our brain-injured soldiers, are extending this lack of balance into the twenty-first century. Reforming the Bayh-Dole Act of 1980, or creating some exceptions to it on behalf of our brain-injured veterans, will help our wounded soldiers regain their balance, as well as help our country regain its balance.

Since the end of the Vietnam War, the U.S. has relied on an all-volunteer force, much like the Prussians did in their conflict with the French. For most Prussian soldiers, fighting in a war was a job, and for the French, it was a "call to the colors."[105] France's ability to mobilize resources and its willingness to fight was the strategic difference that led it to resolute victory over the Prussians.[106] Even so, since the September 11, 2001 attacks on the World Trade Center and Pentagon, and despite President Bush statement on the rubble of the entombed terrorism victims declaring that "the people who knocked down these building will hear all of us soon," implying that everyone in the country is now involved, the U.S. has chosen to continue its "military revolution" of the all-volunteer force and has not called the U.S. people or its resources to the colors.[107] In fact, in a move that would seem opposite a "call to colors," the U.S. even lowered taxes in May 2003.[108] In addition, in another move that would seem contrary to a

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[104] *How the Draft Has Changed Since Vietnam,* SELECTIVE SERVICE SYSTEM, (Apr. 30, 2002) *available at* http://www.sss.gov/viet.htm; HARRY G. SUMMERS, ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 154 (2009).

[105] Ross, *supra* note 97.

[106] *Id.*

[107] G. W. Bush, *Standing upon the ashes on the worst terrorist attack on American soil President Bush pledges,* GEORGEWBUSH-WHITEHOUSEARCHIVES.GOV, (Sept. 14, 2001), http://georgewbush-whitehouse.archives.gov/president/response/05.html (last visited Feb. 24, 2014).; R. Norman Moody, *After 40 years, return of military draft not in sight,* (July 23, 2013 3:44 PM) FLORIDATODAY.COM, http://www.usatoday.com/story/news/nation/2013/07/23/return-of-military-draft-not-in-sight/2578847/ (last visited Feb. 24, 2014).

[108] Richard Cheney, *U.S.: Best pro-growth, pro-jobs environment in industrialized world,* AMERICAN PRESIDENCY PROJECT, *available at* (March 29, 2004 10:20 AM), http://www.presidency.ucsb.edu/ws/?pid=80848 (last visited Feb. 24, 2014).

"call to colors," the U.S. allowed the Taliban a safe-haven, for political reasons, in the mountains of Waziristan, an under-governed region of Pakistan.[109] This seems oddly similar to the safe-haven that the U.S. provided the North Vietnamese Army in North Vietnam and Cambodia during the Vietnam War.[110] Services that were provided to the flag in WWII by draftees, including the sale of war bonds and the "eminent domain-ing" of hotels by the U.S. Army in Miami Beach to serve as military training barracks, have been replaced by, according to Representative Charles Rangel on Good Morning America, an "economic draft"- enlistment bonuses, conversion of the Reserves from a strategic reserve to an operational force, and the use of contractors (i.e. KBR, Blackwater, privatized housing, etc.) working for a profit.[111] Again, in the case of our brain-injured warriors, the unintended consequences of the Bayh-Dole Act of 1980 exacerbate this focus on "profits" over the health of our people and may have a negative impact on raising an all-volunteer force for the next war. And, as history shows us, it is not a question of whether there will be a next war, but instead, *when* that next war will be.[112]

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[109] Seth G. Jones, *What Went Wrong in Afghanistan? Allowing a Sanctuary in Pakistan*, RAND CORPORATION, (Mar. 5, 2013), *available at* http://www.rand.org/blog/2013/03/what-went-wrong-in-afghanistan-allowing-a-sanctuary.html (last visited Feb. 24, 2014).

[110] Edwin E. Moise, *Limited War: Vietnam: Privileged Sanctuaries?* (Nov. 24, 1998), *available at* http://www.clemson.edu/caah/history/FacultyPages/EdMoise/limit3.html (last visited June 4, 2014).

[111] D. Markus. *Miami 1941-1945 From VIP Suites to GI Barracks*, MIAMI BEACH VETS, *available at* http://www.miamibeachvets.com/; *Congressman Fired Up by Prospect of Draft. As War Trudges on, Bush Advisor Suggests Military Draft Might be Worth Considering,* ABC NEWS, (Aug. 12, 2007), *available at* http://abcnews.go.com/print?id=3471496; *Army Force Generation,* APD.ARMY.MIL, (Mar. 14, 2011), *available at* http://www.apd.army.mil/jw2/xmldemo/r525_29/main.asp; Jeremy Scahill, *Flush with Profits from the Iraq War, Military Contractors See a World of Business Opportunities,* ALTERNET, (Aug. 13, 2007), *available at* http://www.alternet.org/story/59571/flush_with_profits_from_the_iraq_war,_military_contractors_see_a_world_of_business_opportunities; Captain Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass,* 53 A. F. L. REV. 1, 2 (2002), *available at* http://www.afjag.af.mil/shared/media/document/AFD-081204-025.pdf.

[112] David Piper, *North Korea's New Threat: War Not a Question of If, but When*, FOX NEWS, (Apr. 5, 2013), *available at*

Now that the war in Iraq has ended and the war in Afghanistan is winding down, economic pressures resulting from the recession, the ACA, and "sequestration" are putting pressure on the military to reduce personnel and readiness costs.[113] In fact, on February 23, 2014, the Defense Secretary released a plan to cut U.S. military costs by reducing personnel and benefits.[114] These cutbacks could potentially force the U.S. into a draft in the future. In 2007, U.S. Army Lieutenant General Douglas Lute, the newly-appointed White House war czar, urged the consideration of implementing a draft and stated, "I think it makes sense to certainly consider the draft and I can tell you, this has always been an option on the table. But ultimately, this is a policy matter between meeting the demands for the nation's security by one means or another."[115] His comments were quickly clarified by National Security Council spokesman Gordon Johndroe, who stated, "The President's position is that the all-volunteer military meets the needs of the country and there is no discussion of a draft."[116] However, in July 2007, Admiral Mike Mullen, the nominee to serve as the next chairman of the Joint Chiefs of Staff, candidly said, "the U.S. did not fully integrate all elements of national power in Iraq."[117] It can be speculated that one of those powers Admiral

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http://video.foxnews.com/v/2280404232001/north-koreas-new-threat-war-not-a-question-of-if-but-when/#sp=show-clips (last visited Feb 24, 2014).

[113] Katie Pavlich, *Obama Pushing ObamaCare on Troops, Forcing Them to Pay at Least Triple for Care*, TOWNHALL.COM, (Feb. 28, 2012), *available at* http://townhall.com/tipsheet/katiepavlich/2012/02/28/obama_cutting_medical_care_for_troops_to_push_obamacare; Dylan Mathews, *The Sequester: Absolutely Everything You Could Possibly Need to Know, in One FAQ*, WASH. POST, (Mar. 1, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know-in-one-faq/ (last visited Feb. 24, 2014).

[114] Dion Nissenbaum & Julian E. Barnes*, U.S. Military to Unveil Plan to Cut Personnel Costs,* WALL ST. J., (Feb. 21, 2014), online.wsj.com/news/articles/SB10001424052702303636404579397333410583004?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303636404579397333410583004.html (last visited Feb 24, 2014).

[115] R. Lardner, *War Czar Says Draft is Worth Considering*, ARMY TIMES, (Aug. 13, 2007), *available at* http://www.armytimes.com/news/2007/08/ap_draft_lute_070810/ (last visited Feb. 24, 2014).

[116] *Id.*

[117] W.H. McMichael, *Senate Approves Mullen to Lead Joint Chiefs*, AIR FORCE TIMES,

Mullen was referring to, and on the "back shelf" of everyone's mind in Congress, is the Selective Service System.[118] If we are in fact a nation totally committed to an all-volunteer force, why do U.S. taxpayers bear the expense of having every eighteen to twenty-five year old male still register?[119]

VI. ANALYSIS OF THE MEDICAL-LEGAL PROBLEM

There is no doubt that the U.S.'s ability to leverage medical technological advances provided strategic, operational, and tactical advantages over our enemies and contributed to our success from WWI through the Vietnam War. In addition, so far no country in the history of the world has dedicated more resources to its military or to the advancement of medical technology and medical support on the battlefield on behalf of its soldiers than the U.S. has.[120] Despite these advancements, the medical-legal problem caused by the unintended consequences of the Bayh-Dole Act of 1980 is now negatively impacting our country's ability to care for its brain-injured veterans returning home from Iraq and Afghanistan. On one hand, much of the problem can be attributed to the choice of weaponry used by Islamic terrorists, IED's, and the "signature wound" which they cause, brain injury. On the other hand, the problem is being contributed to by the "sentinel effect" in trauma treatment, which is what is seen by physicians with their own eyes and usually gets treated first.[121]

(Aug. 7, 2007), *available at* http://www.airforcetimes.com/news/2007/08/army_mullen_070803w/ (last visited Feb. 24, 2014).

[118] SELECTIVE SERVICE SYSTEM, *supra* note 104.

[119] *Id.*; R. Norman Moody, *After 40 Years, Return of Military Draft Not in Sight,* FLORIDA TODAY, (July 23, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/07/23/return-of-military-draft-not-in-sight/2578847/ (last visited Feb. 24, 2014).

[120] Brad Plumer, *America's Staggering Defense Budget, in Charts*, WASH. POST, (Jan. 7, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/07/everything-chuck-hagel-needs-to-know-about-the-defense-budget-in-charts/ (last visited Feb. 24, 2014).

[121] David H. Wisner, M.D., Noel S. Victor, M.D, & James W. Holcroft, M.D., *Priorities in the Management of Multiple Trauma: Intra-Cranial Versus Intra-Abdominal Injury.* 35 (2) J. TRAUMA 274-275 (1993); Shirzad Houshian, M.D., Morten S. Larsen, M.D., & Carsten Holm, M.D., *Missed Injuries in a Level I Trauma Center.* 52 (4) J. TRAUMA,

According to General Chiarelli, who, as the U.S. Army's number two general in charge, oversaw the operation of the Army Medical Department, "this is why we treat amputated legs with advanced prosthetics--where people are walking in a few months, but we are still very limited in treatments to help people think properly again."[122] General Chiarelli continued, "if the force of the blast is enough to severe a soldier's legs, it has probably affected their brain as well."[123]

In his keynote address to the American Health Lawyers Association (AHLA) national meeting in July 2013, General Chiarelli stated, "of the injuries that have a single disability diagnosis of greater than 30% (which is a significant number, providing enhanced disability benefits) by the VA from the GWOT; 67% of these cases were soldiers with either BI or PTS (over eleven-thousand soldiers)."[124] He emphasized, "TBI has tremendous costs in terms of long-term care for both soldiers and civilians," with the NFL concussion lawsuit again as just one example.[125] In addition, scientific evidence suggests that TBI can lead to the early onset of Alzheimer Disease and Parkinson's Disease, which going forward "will need to be considered by the courts," and the VA, in determining disability compensation settlements.[126] Furthermore, as the world's population ages, Alzheimer Disease International projects that over 115 million people will suffer from Alzheimer Disease by 2050.[127] Even our potential

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INJURY, INFECTION, & CRITICAL CARE 715-719 (2002).

[122] Feng Yi, Shi Zhonghua, Wang Yuhai, Dong Jirong, & Cai Xuejian, *Missed Injury in Patients With Severe Traumatic Brain Injury Complicated by Multiple Trauma*, TURKISH NEUROSURGERY (2013), *available at* https://www.readbyqxmd.com/read/23546905/missed-injury-in-patients-with-severe-traumatic-brain-injury-complicated-by-multiple-trauma; Peter W. Chiarelli, *Annual Meeting Keynote Address,* HEALTH LAWYERS, (July 2013), *available at* http://www.healthlawyers.org/Events/AnnualMeeting/2013/Pages/AM2013.aspx (last visited Feb. 24, 2014).

[123] Chiarelli, *supra* note 122.

[124] *Id.*

[125] *Id.*

[126] Tanya C. Lye & E. Arthur Shores, *Traumatic Brain Injury as a Risk Factor for Alzheimer's Disease: A Review,* NEUROPSYCHOLOGY REV., (June 2000); C.H. Tsai, et. al., *Environmental Risk Factors of Young Onset Parkinson's Disease: A Case-Control Study*, CLINICAL NEUROLOGY & NEUROSURGERY, (Sept. 2002); *A "Tsunami" Headed at Veterans,* 60 MINUTES, (May 5, 2013), *available at* http://www.cbsnews.com/video/watch/?id=50146243n (last visited Feb. 24, 2014).

[127] *Policy Brief for Heads of Government: The Global Impact of Dementia 2013–2050,*

military adversaries, such as China, are now facing an Alzheimer Disease crisis in their population, and it is only projected to get much worse.[128]

According to General Chiarelli, this is a $78 billion problem, as scientific studies show that 8% of total population will experience some form of PTS or other brain injury in their lifetime. Nonetheless, the NIH spent only less than 1% ($84 million) of their $40.1 billion annual grants on this problem, and there are really no drugs in the R&D pipeline for TBI or PTS (that the public knows of).[129] Meanwhile, the taxpayers expect the U.S. military, while trying to fight and win wars using their money, to share data in order to save soldier's lives and save taxpayer resources. In spite of this, because of the Bayh-Dole Act, research institutions using taxpayer dollars for R&D that might have shared information in prior wars for the benefit of the soldiers, do not normally share data now because it might eat into their potential profits. Simultaneously, the plight for brain-injured veterans is not getting much better. *The Wall Street Journal's* article "Saved but Not Cured: A Brain-Injured Vet's Search for Solace," lends further support to the hypothesis that recent advances in battlefield medicine keep alive troops with head wounds that might have killed them in World War II, Korea, or Vietnam but that science has not kept pace in its ability to cure.[130]

So, what can be done about the unintended consequences of the Bayh-Dole Act on behalf of our brain-injured heroes of Iraq and Afghanistan?

ALZHEIMER'S DISEASE INTERNATIONAL, *available at* http://www.alz.co.uk/research/GlobalImpactDementia2013.pdf.

[128] Rosalind Mathieson, *China Adopts Board-Game Strategy to Blunt U.S. Pivot to Asia*, BLOOMBERG NEWS, (Dec. 10, 2013), http://www.bloomberg.com/news/2013-12-09/china-adopts-board-game-strategy-to-blunt-u-s-rebalance-in-asia.html (last visited Feb. 24, 2014); Anjali Cordeiro, *At 71 Farmer Dresses Wife as China Faces Alzheimer's Crisis*, BLOOMBERG NEWS, (Jan. 27, 2014), http://www.bloomberg.com/news/2014-01-27/at-71-farmer-dresses-wife-amid-china-alzheimer-s-crisis.html (last visited Feb. 24, 2014).

[129] *Dispelling the Myths About Post-Traumatic Stress Disorder (PTSD) & Other Psychological Health Issues,* AMERICA'S HEROS AT WORK, *available at* http://www.americasheroesatwork.gov/forEmployers/factsheets/dispellMyth/ (last visited Feb. 24, 2014); Chiarelli, *supra* note 122.

[130] Phillips, *supra* note 1.

VII. POTENTIAL SOLUTIONS

First, this author echoes former President Bush's new initiative announced on February 20, 2014, to provide better funding and support to the 1% of the U.S. population that has kept the other 99% safe over the past decade of war.[131] According to a Harvard University report released in 2013, the cost of the wars, including health care for veterans, could be up to $6 trillion, with many of the healthcare costs yet to be realized.[132] With the scientific link between brain injury and debilitating diseases like Alzheimer's and Parkinson's, which are projected to affect hundreds of millions of people world-wide in the next thirty-five years, we need a new Manhattan-type project for the twenty-first century to cure brain injury and disease.[133] This project should be headed by the federal government, which needs to start better helping our brain-injured veterans returning home from Iraq and Afghanistan. The passing of the ACA into law, and the enrollment of over 7.5 million people in government regulated health plans, which surpassed expectations, strongly suggests that American citizens want their federal government to become more involved with the provision of healthcare.[134] The potential reduction in healthcare costs that would result from cures to brain injury and diseases presents an opportunity for our federal government to save money.[135]

This author does not argue for a complete repeal of the Bayh-Dole Act, recognizing that parts of the Act were hailed "as possibly the most inspired piece of legislation to be enacted in America over the

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[131] Lee Ann Caldwell, *Bush Calls Out the 99%*, CNN, (Feb. 20, 2014), *available at* http://www.cnn.com/2014/02/19/politics/bush-veterans/.

[132] Blimes, *supra* note 70.

[133] Michael Copeland, *The Government's New BRAIN Initiative: The Next Manhattan Project?*, SPARK.QUALCOMM.COM,(Apr. 22, 2013), *available at* http://spark.qualcomm.com/blog/government-s-new-brain-initiative-next-manhattan-project (last visited Feb 24, 2014).

[134] David Morgan, *Obamacare Enrollment to Surpass 7.5 Million: U.S. Official,* REUTERS U.S. (April 10, 2014, 3:01 PM), *available at* http://www.reuters.com/article/2014/04/10/us-usa-healthcare-obama-idUSBREA3918920140410.

[135] Galantly Miller*, 49 Percent of Americans Support the Majority Opinion: The Sociology of Obamacare Poll Numbers*, HUFFINGTON POST, *available at* http://www.huffingtonpost.com/galanty-miller/obamacare-poll-numbers_b_4008923.html.

past half-century" because they "helped to reverse America's precipitous slide into industrial irrelevance."[136] Despite its accolades, this author agrees with Dr. Joseph Fins, of New York Presbyterian-Weill Cornell Medical Center, that the Bayh-Dole Act should be revised "by suspending transfer rights of intellectual property until Phase II studies are ready to commence."[137] In Phase I studies, "researchers test a new drug or treatment in a small group of people for the first time to evaluate its safety, determine a safe dosage range, and identify side effects, but in Phase II studies, "the drug or treatment is given to a larger group of people to see if it is effective and to further evaluate its safety."[138] As a result, this author advocates that during this crisis in brain injury research, the U.S. government should retain all rights to Phase I studies, so that potential Phase II studies and treatments can be fast-tracked directly to brain-injured veterans of the wars in Iraq and Afghanistan.

Second, the Bayh-Dole Act should be reformed to force any research entity that is receiving NIH (taxpayer) funding to publish the results of, or enter into a national database, all of their Phase I, and potentially Phase II, studies that did *not* work. This will help mitigate the costs by minimizing the duplications of effort taking place in different entities on things that do not work.[139] As a result of Bayh-Dole, many organizations now hoard their data in an effort to protect their potential profitability from competitors.[140] A new policy of forcing entities to share their failures in a timely manner should lead to the quicker and less expensive development of cures for the benefit of the soldiers, the taxpayers, and society, while still being profitable for the actual discoverer. The sharing of data is not unheard of and is taking place in the field of Genomics, where in June

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[136] Howard Markel, M.D., Ph.D., *Patents, Profits, and the American People — The Bayh–Dole Act of 1980*, NEW ENG. J. MED., (Aug. 29, 2013), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1306553#t=article.

[137] Joseph J. Fins, M.D., *Deep Brain Stimulation, Free Markets and the Scientific Commons: Is It time to Revisit the Bayh-Dole Act of 1980?*, NEUROMODULATION 10; 13: 156, *available at* http://www.ncbi.nlm.nih.gov/pubmed/21992826.

[138] U.S. NATIONAL LIBRARY OF MEDICINE, FAQ CLINICALTRIALS.GOV-CLINICAL TRIAL PHASES, *available at* http://www.nlm.nih.gov/services/ctphases.html.

[139] *Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs*, NATIONAL INSTITUTES OF HEALTH, (Jan. 3, 2014), *available at* http://grants.nih.gov/grants/funding/sbirsttr_programs.htm

[140] Peter W. Chiarelli, *supra* at note 122.

2013 the U.S. Supreme Court issued a unanimous opinion in *Association for Molecular Pathology v. Myriad Genetics* that invalidated the claim of ownership of the breast cancer 1, early onset (BRCA1) and breast cancer 2, early onset (BRCA2) genes from research that was funded by NIH grants under the Bayh-Dole Act.[141]

VIII. CONCLUSION

While Congress intended to stimulate the economy and help bring the country out of the recession of the late 1970's by passing the Bayh-Dole Act, Congress unfortunately failed to anticipate the unintended consequences that the Act would have on War Veterans, such as Sergeant Cory Remsburg, who are now suffering from TBI/MTBI and/or PTS. Who knew it would take a twenty-first century war, against terrorists (not a state), with a new weapon system, the IED, and a new "signature injury," the brain injury, to realize the problem? It also appears that Congress did not foresee the potential impact the Act may have on the balance of U.S. national security posture in the future, as we continue to rely on an all-volunteer force.

While the U.S. has historically had a clear advantage over its opponents, due in large part due to technological advances, the current structure of Bayh-Dole Act weakens that advantage by providing an undeniable incentive for private organizations to keep the results of their research experiments to themselves, even though early intervention in brain-related injuries could potentially be life-changing for wounded veterans and their families. There is some evidence that Congress' views may be changing. H.R. 3547 became law on January 17, 2014 and includes language that requires Health and Human Services and other government departments with research budgets of $100 million or more to provide the public with online access to articles resulting from federally funded research within twelve months of publication in a peer-reviewed journal.[142] However, as General Chiarelli states, "publication in peer reviewed

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[141] Markel, *supra* note 135; http://www.genenames.org/cgi-bin/gene_symbol_report?hgnc_id=1100; http://www.genenames.org/cgi-bin/gene_symbol_report?hgnc_id=1101.

[142] Consolidated Appropriations Act, 2014, Pub. L. No. 87-195, 75 Stat. 424, http://beta.congress.gov/bill/113th-congress/house-bill/3547.

journals is far too long for our wounded warriors to wait."[143]

While the Bayh-Dole Act has been largely successful in achieving its original goals, the Act should be modified to require recipients of NIH grants to share their early research findings specifically with the federal government, considering that only 1% of the U.S. population, the military, selflessly fought to protect the other 99% of us in the wars over the past decade.

Or lastly, in light of the recent issues with the VA, maybe the benefits of ACA law can be better leveraged by the federal government for the benefit of our brain-injured veterans.[144] Instead of an estimated 20,000-plus brain-injured veterans from the wars in Iraq and Afghanistan going to the VA for their care, perhaps the funds allocated to the VA for brain injury treatment could be used by the federal government to create tax-subsidies for brain-injured veterans to buy private health insurance through the ACA healthcare exchanges instead.[145] It is a fact that by the end of 2014 there can no longer be a prohibition on pre-existing conditions in any U.S. health insurance plan.[146] Therefore, maybe these brain-injured veterans could use ACA health insurance to seek their care directly from the academic institutions that are already receiving NIH funding to conduct traumatic brain injury research, such as the University of Miami Miller School of Medicine, or other prominent institutions.[147]

Exploring these solutions to the unintended consequences of the Bayh-Dole Act is the least we can do for these heroes, but in the end, these solutions also have the potential to benefit millions more world-wide that suffer from brain injury and disease.

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[143] Chiarelli, *supra* note 122.

[144] Bill Chappell, *VA Chief Eric Shinseki Resigns Post, Obama Announces,* NPR (May 30, 2014, 10:15 AM), *available at* http://www.npr.org/blogs/thetwo-way/2014/05/30/317350806/calling-va-problems-indefensible-shinseki-will-fire-phoenix-leaders.

[145] Department of Defense Numbers for Traumatic Brain Injury, *supra* note 25.

[146] Julie Rovner, *Are Pre-Existing Condition Bans For Health Insurance Still With Us?* (June 2, 2014), *available at* http://www.wbur.org/npr/318210356/are-pre-existing-condition-bans-for-health-insurance-still-with-us.

[147] *NIH Grant Funds Traumatic Brain Injury Research* (April 1, 2014), *available at* http://med.miami.edu/news/nih-grant-funds-traumatic-brain-injury-research.

STUDENT NOTE

Don't Let Slip the Dogs of War: An Argument for Reclassifying Military Working Dogs as "Canine Members of the Armed Forces"

Michael J. Kranzler [*]

Abstract

Dogs have been an integral part of military activities around the world dating back more than two thousand years. They have fended off invasions and helped bring down one of the world's most notorious terrorist leaders. Yet under current law, they are afforded nearly the same protections as a torn uniform or a jammed rifle, classified in the United States Code as "excess equipment." Historically, this led to hundreds of dogs being euthanized each year because the United States had no legal obligation to bring this excess equipment home at the end of their deployments. While recent legislation has commenced a shift toward equal treatment of Military Working Dogs and their human counterparts, that process has slowed. New legislation will be necessary in order to give these soldiers the treatment in the eyes of the law that they have earned.

This Note will delve into recent scientific studies exploring canine cognition, the burgeoning discussion on animals, specifically dogs, gaining "quasi-personhood," general laws pertaining to dogs, and the history of Military Working Dogs in both ancient and modern settings, before moving on to how Military Working Dogs have been classified under modern American law. Finally, it will discuss the pending

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[*] University of Miami School of Law, Class of 2015. The author would like to thank his faculty advisor Professor George Mundstock for advice in developing this topic. This article was inspired by Dr. Gregory Berns' *How Dogs Love Us: A Neuroscientist and His Adopted Dog Decode the Canine Brain*. Additionally, the author would like to thank Locky Stewart, the Director of Research at Dognition and the author's best friend all the way back in middle school, who provided insight, advice, and stacks of scientific articles and studies for use in researching and writing about this topic. Finally, he would like to thank his own "Canine Member of the Author's Family," Rudy.

legislation that would change the law's basic approach to Military Working Dogs so as to reflect, as argued in this article, that, based on their contributions, accomplishments, and cognitive capabilities, Military Working Dogs are far more than mere equipment, and it would be in the best interests of the military for them to be considered on par with their human soldier counterparts. The author will ultimately suggest that Military Working Dogs (hereinafter "MWDs") should be reclassified under the United States Code as "Canine Members of the Armed Forces."

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I. INTRODUCTION

The capability they (Military Working Dogs) bring to the fight cannot be replicated by man or machine. By all measures of performance their yield outperforms any asset we have in our inventory. Our Army (and military) would be remiss if we failed to invest more in this incredibly valuable resource.
-General David H. Petraeus[1]

The dog may be man's best friend, and over the millennia they have evolved to be the perfect companion to humans; yet military dogs can be much more than that. From saving lives in the field of battle to providing emotional support to retired veterans suffering from Post Traumatic Stress Disorder, military dogs have enjoyed a long, happy career fighting alongside military veterans in the United States. Further, after retirement, many military dogs suffer from the same physical and psychological conditions as their human soldier counterparts. However, they are still not considered to be on par with this country's human soldiers, instead being classified for legal purposes as mere equipment. Therefore, these military dogs have for years been considered little more than excess equipment upon retirement, often being euthanized in order to save money rather than the government providing for their continued welfare upon the conclusion of their military careers.

An assault rifle cannot make the decision to put itself in harm's way in order to rescue a soldier or apprehend an insurgent, and a historical artifact, such as a letter or work of art, cannot identify improvised explosive devices, drugs, or other unseen dangers before it is too late to notify a platoon of soldiers on patrol in the area. Yet these inanimate objects are afforded the very same protections under the law as the canine soldiers who have been a constant presence on the battlefield for thousands of years for nearly every ancient culture, and for the United States military since the early 1940s.

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[1] *Quotes by Legendary Battlefield Commanders*, MILITARY WORKING DOG TEAMS NATIONAL MONUMENT (last visited Jan. 29, 2014), http://www.jbmf.us/quotes.aspx.

II. SCIENTIFIC RESEARCH

The ability to experience positive emotions, like love and attachment, would mean that dogs have a level of sentience comparable to that of a human child. And this ability suggests a rethinking of how we treat dogs.
-Gregory Berns, M.D., Ph.D., Canine Cognition Researcher and Author[2]

A. A New Approach to Canine Cognition

Recent studies in the scientific community have begun to support the proposition that dogs' brains are far more developed than previously thought and often mimic those of humans in ways unmatched by any other species in the animal kingdom. For example, researchers at Emory University sought to determine just how much dogs have learned to understand and communicate with humans. By training two dogs to participate in functional MRI trials while awake and unrestrained, these researchers demonstrated the first documented proof that dogs are able to associate abstract human hand signals with future rewards, something not known to be possible in any other animal species.[3]

B. What Makes Dogs Different?

In 2003, a Hungarian research team found "evidence that dogs have been selected for adaptations to human social life, and that these adaptations have led to marked changes in their communicative, social, cooperative, and attachment behaviors towards humans."[4] This study provided some of the first modern research to suggest that dogs may now deserve classification along with humans for the purpose of further research:

> We propose that through an evolutionary process, the dog as a species has moved from the niche of its ancestor (which is shared

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[2] Gregory Berns, *Dogs Are People, Too*, N.Y. TIMES, Oct. 5, 2013, http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?pagewanted=all&_r=0.
[3] G.S. Berns, A.M. Brooks & M. Spivak, *Functional MRI in Awake Unrestrained Dogs*, 7 PLOS ONE 5 (2012).
[4] Á. Miklósi, J. Topál & V. Csányi, *Comparative Social Cognition: What Can Dogs Teach Us?*, 67 ANIMAL BEHAVIOUR 6, 995 (2004).

> by wolves) to the human niche, which represents the dog's present natural environment. In this new niche, being a social species, dogs have formed a close contact with humans (at both species and individual levels), which has led to the emergence of heterospecific social groups. It follows that dogs can and should be studied in their natural group, that is, where and when they are living with humans.[5]

Ultimately, this study suggests that dogs have evolved in ways that distinguish them significantly enough from their lupine ancestors that scientists may be better served instead researching them in conjunction with human subjects.

Research conducted at the Max Planck Institute for Evolutionary Anthropology in Germany has also found dogs to be unique compared to the rest of the animal kingdom in the "human-like social skills" that they have developed through millennia of evolution, potentially similar to that which currently distinguishes humans from its nearest primate relatives.[6] This research suggested that "dogs have evolved special skills for reading human social and communicative behavior," and that these skills are "possibly more human-like . . . than those of other animals more closely related to humans phylogenetically, such as chimpanzees, bonobos, and other great apes."[7]

War is a social construct of mankind, and thus, it may be inferred that dogs have evolved the ability to participate in wars from millennia of close contact and interaction with humans. This research suggests the potential that humans and dogs may have experienced convergent evolution, which is "the process whereby organisms not closely related (not monophyletic), independently evolve similar traits as a result of having to adapt to similar environments or ecological niches."[8]

Ultimately, the general sentiment among researchers of canine cognition is that dogs have evolved over the millennia to be the

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[5] *Id.* at 997-998.

[6] Brian Hare and Michael Tomasello, *Human-Like Social Skills in Dogs?*, 9 TRENDS IN COGNITIVE SCIENCES 9, 439 (2005).

[7] *Id.*

[8] *Reference Article: Convergent Evolution*, SCIENCE DAILY, http://www.sciencedaily.com/articles/c/convergent_evolution.htm (last visited Jan. 30, 2014).

perfect companion to humans. They can understand and communicate with humans better than any other species, even those from which the domesticated dog and human beings each evolved, respectively. This relationship should not be understated, as it provides support for the argument that MWDs are more than excess equipment, and even more than mere animals. They are a unique species, one perfectly suited to the rigors and demands of modern military service. This sort of research is still only in its infancy, but there is growing support among the scientific community as well for the reclassification of MWDs as "Canine Members of the Armed Forces."

III. THE EVOLUTION OF ANIMAL PROTECTION LAWS

The relationship between a military working dog and a military dog handler is about as close as a man and a dog can become. You see this loyalty, the devotion, unlike any other . . .
-Robert Crais[9]

A. *Animals as Property*[10]

Dating back to prehistoric times, when man first began hunting other animals for food, the concept of property, an attitude of "this is mine," has been a common thread throughout human history. Prehistoric times were also the first instance of man reducing wild animals to possession, domesticating them into property. In fact, ownership of animals as property was an early measure of wealth in many cultures. Cattle in particular quickly became a valuable commodity, one that functioned just as money would.[11] Even in the United States, cattle were an original source of wealth and status prior to the discovery of oil.

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[9] Andy Lewis, *THR's Book of the Week: 'Suspect' by Robert Crais*, THE HOLLYWOOD REPORTER (Feb. 14, 2013, 11:49 AM), http://www.hollywoodreporter.com/heat-vision/robert-crais-suspect-thrs-book-421362.

[10] The author strongly recommends Harold W. Hannah's *Animals as Property Changing Concepts*, 25 S. ILL. U. L. J. 571 (2001), as a general primer on the topic of the evolution of animals in property law.

[11] Nerissa Russell, *Cattle as Wealth in Neolithic Europe: Where's the Beef?*, THE ARCHAEOLOGY OF VALUE: ESSAYS ON PRESTIGE AND THE PROCESSES OF VALUATION, 42, 44 (1998).

Over the years, however, a distinction has been made as it pertains to property law for companion animals. In *La Porte v. Associated Independents, Inc.,*[12] a 1964 decision in the Florida Supreme Court, the plaintiff received damages for emotional distress after a garbage collector struck the plaintiff's Dachshund with a garbage can in the plaintiff's yard, and the Dachshund passed away in her arms. In rendering its decision, the court compared the case specifically to that of *Kirksey v. Jernigan*,[13] in which an undertaker refused to release the body of a five-year-old child, who was accidentally shot and killed, to her mother.[14]

This was one of the first instances of an American court giving deference to the emotional connection that a person can have with a pet that previously constituted little more, from a strictly legal perspective, than property. Just a decade later, the Supreme Court of Oregon followed suit by allowing more than mere compensatory damages for mental anguish where the property subject to conversion was the family dog.[15]

B. The Growing Legal Protection of Animals

Early common law largely considered animals such as dogs and cats to be non-useful (because they served no purpose beyond companionship[16]). Abusers of these animals pointed to this as a defense to their actions because there could be no liability where the owner suffered no pecuniary loss. At the end of the nineteenth century, dogs were considered "of an imperfect or qualified nature,"[17]

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[12] La Porte v. Associated Independents, Inc., 163 So. 2d 267 (Fla. 1964).

[13] Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950).

[14] *La Porte* 163 So. 2d at 269 ("[W]e hasten to say that the anguish resulting from the mishandling of the body of a child cannot be equated to the grief from the loss of a dog but that does not imply that mental suffering from the loss of a pet dog, even one less an aristocrat than Heidi, is nothing at all. As for the matter of contact between the miscreant and the injured person, the attempted distinction is just too fine for us to accept.").

[15] Fredeen v. Stride, 525 P.2d 166 (1974); *See also* Knowles Animal Hosp. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978) (recognizing the special relationship that exists between a dog and its owner by awarding both compensatory and punitive damages for negligent burning of plaintiff's dog).

[16] Ward v. State, 48 Ala. 161 (Ala. 1872).

[17] Sentell v. New Orleans & C. R. Co., 166 U.S. 698, 701 (1897).

and in terms of classification, were stuck "between animals feroe naturoe in which until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete."[18]

Today, there is plenty of enacted legislation protecting the rights of animals,[19] yet those laws all place the burden on humans to treat animals humanely, rather than giving animals rights analogous to those of humans in order to protect their interests.[20] Additionally, there is still the issue of legal standing, as the plaintiff must have "a personal stake in the outcome of the controversy"[21] in order to bring forth a case. Unfortunately for animals, such a standing requirement precludes them from receiving equal treatment in court.

To that end, animal rights activists have found some success in bringing claims on behalf of animals who lack standing by way of the National Environmental Policy Act (the "NEPA"), which is "concerned with the impact of major federal actions on the human environment"[22] but has been invoked "for the sole purpose of protecting the quality of life of animals.[23] By doing so, activists have on occasion been able to use the NEPA in order to protect animal interests within the sphere of the human environment. This was most notably brought to the public consciousness in *Progressive Animal Welfare Society v. Department of the Navy,*[24] in which activists challenged the Navy's planned use of Atlantic bottlenose dolphins where the water temperature and holding pens would negatively affect the species, which would subsequently affect the surrounding human environment. The Navy moved to dismiss Progressive's

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[18] *Id.*

[19] *See generally* Henry Cohen, Cong. Research Serv., 94-731, Brief Summaries of Federal Animal Protection Statutes (2009).

[20] David R. Schmahmann & Lori J. Polacheck, *Article: The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 761 ("Such legislation does not address animals as beings with rights, but rather as beings toward which humans have responsibilities. These responsibilities are derived, not from some conception that animals possess claims against humans, but rather from a recognition that human interests and aesthetic sensibilities are impacted by our treatment of animals.").

[21] Baker v. Carr, 369 U.S. 186 (1962).

[22] Schmahmann & Polacheck, *supra* note 20, at 772.

[23] *Id.*

[24] Progressive Animal Welfare Soc. v. Dep't of Navy, 725 F. Supp. 475 (W.D. Wash. 1989).

preliminary injunction, but the court denied the motion because the Navy's decision to use dolphins was a major federal action that "requires an analysis of the effect of such use on the dolphins themselves."[25]

C. What About Military Working Dogs?

As general animal rights laws and perceptions continue to evolve, it is crucial to be mindful of the concerns regarding MWDs raised above. The military has spent the last fourteen years marching into a new era in the treatment of MWDs, but there is still much more that can be accomplished in order to give MWDs the treatment and recognition they have more than earned for their service.

At the heart of the American military is the concept of "family." For a military unit to succeed, "[s]oldiers of all ranks must feel they belong to the 'family' . . . Building the 'family' requires treating one another with dignity and respect."[26] Over nearly two centuries of military service in the United States, MWDs have become more than just fellow soldiers; they have become family.

Embedded in the *Soldier's Creed*, the heart of the values of the United States Army, is the following promise: "I will never leave a fallen comrade."[27] This promise is extended to MWDs as well. When soldiers train for potential situations that could happen in the field, one of the drills includes how to react when an MWD is injured. From realistic combat injury scenarios to performing medical drills on a "Jerry leg," ("a realistic, large, furry, fake dog leg that handlers can use for practicing placing IV's, bandaging, splinting, and giving

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[25] *Id.* at 479

[26] Personnel-General, Dept. of the Army Pamphlet 600-35, *Preface* to Relationships Between Soldiers of Different Rank, at i (2000).

[27] *Soldier's Creed*, Army Values (Mar. 30, 2014, 5:18 PM), http://www.army.mil/values/soldiers.html ("I am an American Soldier. I am a warrior and a member of a team. I serve the people of the United States, and live the Army Values. I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade. I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills. I always maintain my arms, my equipment and myself. I am an expert and I am a professional. I stand ready to deploy, engage, and destroy, the enemies of the United States of America in close combat. I am a guardian of freedom and the American way of life. I am an American Soldier.")

injections")[28], this country's military does everything in its power to prepare its soldiers to ensure the safety of every soldier, be it human or dog.

This bond between MWDs and their fellow soldiers goes beyond even that of normal human-dog relationships, and it is demonstrated in the constant advocacy of those soldiers who had the privilege of fighting along MWDs, such as former Marine Captain William Putney, who commanded an MWD platoon during World War II:

> Our service dogs must be honored and treated as heroes because that is what they are. And they must be allowed to retire to loving homes, as any soldier is. They have served us with honor and distinction, and have saved countless American sons and daughters from injury and death. They have risked their own death and injury for no more than the love and affection of their handlers. They would never, ever have left us behind, and they would never give up on us because we were too old or infirm to do our jobs anymore. If they can offer us this sort of service and devotion, how can we do less for them? We owe them.[29]

As strong as the bond is between man and dog, that between soldier and MWD is even deeper. And as history has shown, MWDs have proven themselves time and again in the field and are treated with the same respect and trust as is afforded to any of their human counterparts.

IV. DOGS AND "PERSONHOOD"

'These dogs are our partners. I remember trying to get into the K-9 program, and I had a human partner working in law enforcement at the time who commented to me that he couldn't believe I would choose to work with a dog over a human partner, a big strong guy as a partner.'

- Sgt. 1st Class Regina Johnson, Operations Superintendent at the Military Working Dog School[30]

Why should dogs have the same legal protections as humans?

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[28] MARIA GOODAVAGE, SOLDIER DOGS: THE UNTOLD STORY OF AMERICA'S CANINE HEROES 163 (2012).

[29] *Id.* at 263

[30] Linda Crippen, *Military Working Dogs: Guardians of the Night* (May 23, 2011), http://www.army.mil/article/56965/Military_Working_Dogs__Guardians_of_the_Night.

And why has it taken society so long to reach this point? These potential changes in the law, while considered by many to be long overdue, demonstrate a growing groundswell of support not just from animal rights activists, but also from scientists, families, and legislators around the country. However, some of dogs' strongest advocates, the traditional dog care-givers who would benefit the most from this enhanced focus on treating pets as family, are fighting such a shift in the legal treatment of dogs in fear of the legal and financial ramifications such changes could have for their own careers.

A. Concerns from the Opposition

As legislation creeps toward the potential personhood of dogs and other pets, a surprising class of outspoken opponents to such legal protections has emerged; veterinarians, pet groomers, dog walkers, and other individuals who make a living catering to the care of beloved family pets are staunchly against animals such as dogs gaining "quasi-personhood."

If dogs are afforded quasi-personhood, representatives from these industries argue, the increased risks of liability could put them out of business. Yet this was at least partially their own doing.[31] Veterinarians and other animal service providers took advantage of an emotional shift in treating animals like family, catering their practices to reinforce such feelings for the benefit of their respective businesses. Unfortunately for them, they are now seeing the

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[31] David Grimm, *Should Pets Have the Same Legal Rights as People?*, WALL ST. J., April 10, 2014, http://online.wsj.com/news/articles/SB10001424052702304058204579491630809550504?mod=WSJ_hp_EditorsPicks&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304058204579491630809550504.html%3Fmod%3DWSJ_hp_EditorsPicks. ("Ironically, veterinarians themselves helped to create this bind. In the 19th century, they would have shared the law's view that pets were worthless animals. Their work focused almost exclusively on economically valuable creatures such as horses and cows. But as these animals began to disappear from U.S. cities in the early 20th century, veterinarians often found themselves out of work. They turned to cats and dogs for the survival of their profession. Veterinary medicine began to resemble human medicine. Dank stables gave way to comfy waiting rooms, white coats replaced grungy aprons, and vets began performing blood transfusions, ultrasounds and even open-heart surgery. Owners became more like parents, and vets became the pediatricians of 'fur babies.'")

downside of those efforts, as treating pets with a higher standard of care has brought the risk of they themselves being held to a higher standard of care in the services they provide.

B. An Argument for Animal "Personhood"

Dogs, cats, and other animals have long been seen as unofficial members of their owners' families, even when the law has not recognized them as such. From the enaction of felony anticruelty laws in all fifty states to legislation such as the Pets Evacuation and Transportation Standards Act,[32] many smaller laws have been passed as stepping-stones toward the ultimate goal of quasi-personhood for dogs. In fact, "[j]udges have been increasingly willing to treat cats and dogs like people in the courtroom, allowing custody disputes over pets and granting large awards . . . including so-called noneconomic damages typically reserved for the death of a spouse or a child."[33] In fact, a 2012 decision saw a Colorado district court award one woman $65,000, one of the country's largest emotional distress judgments ever for the loss of a pet.[34]

While animals are not yet afforded "personhood" because they are not humans, the winds are beginning to shift in terms of providing constitutional protections to non-humans. For example, a corporation can now receive First Amendment protections as if it

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[32] H.R. 3858, 109th Cong. (2006) (amending the Robert T. Stafford Disaster Relief and Emergency Assistance Act in the aftermath of Hurricane Katrina to require rescue agencies to save pets in addition to people during natural disasters).

[33] *See* Grimm, *supra* note 31; *See also* Campbell v. Animal Quarantine Station, Div. of Animal Indus., Dep't of Agric., State of Hawaii, Bd. of Agric., 632 P.2d 1066 (1981) (holding that awarding damages for mental distress suffered through the loss of a family dog, which was personal property, was proper).

[34] Lance Hernandez, *Robin Lohre Sues Posh Maids, Awarded $65,000 After Dog Dies*, KSDK (April 19, 2012, 9:30 PM), http://archive.ksdk.com/news/world/article/316862/28/Owner-sues-maid-service-awarded-65K-after-dog-dies. (Robin Lohre left her dog, Ruthie, home with a maid service that insisted Ruthie could stay while they worked in the house. Despite Lohre's directions on how to enter and exit the house to avoid letting Ruthie out, the maid opened the front door, resulting in Ruthie getting hit by a car. Rather than contacting Lohre or bringing Ruthie to a veterinarian for treatment, the maid carried Ruthie inside and placed her under the dining room table, where she died before Lohre and her daughter came home).

were an individual human making the political speech rather than a larger corporate entity.[35] Dogs are slowly gaining more support in their quest for quasi-personhood, yet some of their toughest opposition may also be their strongest advocates. It will be up to the courts to reconcile the interests of these two opposing sides who are otherwise each other's strongest allies.

V. MILITARY DOGS: A HISTORICAL BACKGROUND

I often used war dogs in Vietnam in perilous areas where they quite literally saved many lives. There is no doubt that war dogs deserve to be recognized and honored for their service to our country. . .
- General H. Norman Schwarzkopf[36]

A. History of Dogs in Warfare

The use of military dogs in the field of battle dates back thousands of years, as they previously fought alongside the Egyptians, Persians, Greeks, Romans, and many other ancient cultures.[37] From Attila the Hun and Frederick the Great to Napoleon and Theodore Roosevelt's "Roughriders," the use of "war dogs" was a common trait among many of history's greatest military minds. The earliest recorded use of war dogs actually dates back to Alyattes, king of Lydia, in the year 600 B.C.[38] In fact, the Greek military author and historian Polyaenus once described how the use of dogs to guard a military camp was effective in preventing potential traitors from aiding the enemy forces.[39]

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[35] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[36] *Quotes by Legendary Battlefield Commanders, supra* note 1.
[37] 156 Cong Rec E 319 (2010).
[38] E.S. Forster, *Dogs in Ancient Warfare*, 10 GREECE & ROME 30, 114 (May 1941) (citing Polyaenus, *Strategems*, 7.2), *available at* http://www.jstor.org/stable/641375.
[39] John Ensminger, *War Dogs in Ancient Military* Strategy, DOG LAW REPORTER: REFLECTIONS ON THE SOCIETY OF DOGS AND MEN (June 9, 2011, 6:11 AM) (quoting Polyaenus, *Stratagems*, 2.25) ("While Agesipolis was besieging Mantineia, the Lacedaemonians were joined by their allies, who were sympathetic towards the Mantineians, but were obliged to help the Lacedaemonians because they were at that time the leading power in Greece. Agesipolis was informed that the allies were secretly supplying the defenders with whatever they might need. To prevent this happening in future, he let loose a number of dogs around the camp, and particularly around the part which faced towards the city. This stopped the

Even when the dogs were not actively participating in warfare, the mere threat of their presence proved effective in discouraging such traitorous conduct. Additionally, in the early nineteenth century, Napoleon used dogs as sentries stationed at the gates of Alexandria in order to serve as an early warning of an impending attack.[40]

B. Dogs in Modern American Military History

In the United States, the first recorded use of dogs in the military was during the Seminole War of 1835, in which the military used bloodhounds to track Indians and runaways through the swamps.[41] However, the United States did not have an official military dog program during World War I (in fact, up until 1942, Germany was the most dominant user of military dogs, using them mainly as messengers and scouts[42]), but one pit bull named Stubby started as the mascot of the 102nd Infantry after being picked up as a stray, and quickly distinguished himself in several battles. He was ultimately promoted to Sergeant, the only dog to receive such an honor through combat, due to his contributions in warning a sleeping sergeant about an impending gas attack in time to save the lives of his soldiers, as well as catching a German infiltrator long enough for him to be captured.[43]

By World War II, an official Army K-9 Corps established its first Reception and Training Facility in order to prepare more military dogs for combat, and these dogs were part of teams with specialized handlers. While the first use of dogs on D-Day was unsuccessful (the dogs cowered in fear from the sounds of explosions all around them), they quickly proved themselves very capable at sentry duty, often proving to be more alert than their handlers.[44] By 1943, MWDs had

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communications with the defenders; because no one ventured to cross between the camp and the city, for fear of being discovered by the barking of the dogs.").

[40] SANDRA CHORON & HARRY CHORON, *PLANET DOG: A DOGOPEDIA*, 22 (2005).

[41] *Id.*

[42] Staff Sergeant Tracy L. English, *The Quiet Americans: A History of Military Working Dogs*, (Dec. 15, 2000), http://www.37trw.af.mil/shared/media/document/AFD-061212-027.pdf at 3-4; *See also* Choron & Choron, *supra* note 40, at 22 ("Who first thought of using dogs to guide blind people? At the end of World War I, the German government trained the first guide dogs to assist blind war veterans.").

[43] MICHAEL G. LEMISH, WAR DOGS: CANINES IN COMBAT 25 (1996).

[44] English, *supra* note 42, at 5.

been trained for a number of various roles, including attack dogs, tactical dogs, silent scout dogs, messenger dogs, casualty dogs, sledge dogs, and pack dogs.[45]

In the Korean War, war dog programs were minimized, although the 26th Scout Dog Platoon remained on active duty. Within this unit, canine members of the Platoon earned three Silver Stars, six Bronze Stars for Valor, and thirty-five Bronze Stars for meritorious service.[46]

Military dogs saw a resurgence during the Vietnam War, as the Air Force realized their own need for sentry dogs and established its own training facility at Lackland Air Force Base in 1958. However, many of these dogs were still trained and deployed by the Army in Okinawa. Overall, military dogs were credited with saving an estimated 10,000 human lives over the course of the Vietnam War.[47] In fact, one dog, named Nemo, was shot in the face, losing an eye, but still managed to crawl across his handler's body to protect him during a major Viet Cong attack of the Tan Son Nhut Air Base.[48] By 1965, the Marines also recognized the advantages of military dog units and entered into an agreement with the Army to train scout dogs. Ultimately, MWDs in the Vietnam War "were directly responsible for more than 4,000 enemy killed and over 1,000 captured. By locating caches of supplies, the teams recovered more than 1,000,000 pounds of rice and corn, located over 3,000 mortars, and exposed at least 2,000 tunnels"[49] However, by the end of the Vietnam War, these military dogs had fulfilled their purpose, leading to many of them being discarded or euthanized, as it was the most cost-effective method of disposing of equipment that was no longer needed.[50]

Today, military dogs continue to play a valuable role within our armed services, from drug and bomb detection to even being a part of

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[45] *Id.* at 8.

[46] Bert Hubble, *The K-9 Corps: A Brief History Of War Dogs In The U. S. Military (A Historical Perspective)*, 47TH SCOUT DOG PLATOON, http://www.47ipsd.us/47k9hist.htm (last visited Jan. 29, 2014).

[47] Jessica Ravitz, *War Dogs Remembered, Decades Later*, CNN, Feb. 12, 2010, http://www.cnn.com/2010/LIVING/02/12/war.dogs/index.html?hpt=C1.

[48] *AF Sentry Dog To Become Symbol of Professionalism* (Aug. 9, 1967), Air Force News, *available at* http://www.tsna.org/7thafnews/aug091967.html.

[49] Lemish, *supra* note 43, at 240.

[50] *Id.* at 232 ("Most American dogs were condemned to permanent exile and eventual death in a foreign land").

Seal Team 6, the team that tracked down and killed Osama Bin Laden.[51] Dogs are also often used as a therapy device for retired veterans suffering from Post Traumatic Stress Disorder (PTSD).[52] Notably, all MWDs are noncommissioned officers, a rank one level higher than their handlers, in order to prevent handlers from mistreating their canine partners, as well as to instill respect in the newer trainees who may not fully appreciate their MWDs' capabilities and accomplishments.[53] As explained by Sergeant First Class Regina Johnson, who is the Operations Superintendent at the Military Working Dog School at Lackland Air Force Base, "[t]he more we're out there with the combat commanders, they see. They see that the dog just saved their Soldiers' lives. That dog just saved that entire platoon."[54]

VI. CURRENT LEGISLATION

Sometimes, a man and his dog truly do become one being. Kory and Cooper served together. They risked life and limb together. And because they did this, they saved many lives together. Many other soldiers have made it home because of them.
- Governor of Oregon Ted Kulongoski, at the funeral of Corporal Kory Wiens and his Military Working Dog Cooper[55]

The use of MWDs is codified in Title 10 of the United States Code within Chapter 153, which covers the "Exchange of Material and Disposal of Obsolete, Surplus, or Unclaimed Property.[56] Under this larger heading, MWDs are considered legally on par with historical artifacts, surplus military equipment, recyclable materials, and war

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[51] Julie Watson & Sue Manning, *War Dog Adoption Requests Rise Following Bin Laden Mission,* May 24, 2011, HUFFINGTON POST, http://www.huffingtonpost.com/2011/05/24/war-dog-adoption-navy-seal-cairo_n_866392.html.
[52] *Dogs and PTSD*, U.S. DEPARTMENT OF VETERANS AFFAIRS, http://www.ptsd.va.gov/public/treatment/cope/dogs_and_ptsd.asp (last visited Jan. 29, 2014).
[53] Crippen, *supra* note 30.
[54] *Id.*
[55] Kevin Hanrahan, *Kory & Military Working Dog Cooper*, SOLDIER WRITER: BALANCING THE SWORD AND THE PEN, http://khanrahan.com/2012/03/05/kory-cooper/ (last visited Jan. 29, 2014).
[56] 10 U.S.C. § 2583 (2014).

booty.[57] Under 10 U.S.C. § 372, Congress authorizes the Secretary of Defense to "make available any equipment . . . for law enforcement purposes."[58] This sweeping use of "surplus military equipment" also includes Military Working Dogs.[59]

A. Robby's Law

In 2000, Congress passed "Robby's Law," requiring the Secretary of Defense to submit an annual report to Congress on the disposition of MWDs, including "the number of military working dogs adopted under this section during the preceding year, the number of these dogs currently awaiting adoption, and the number of these dogs euthanized during the preceding year."[60] This bill also made retiring military animals, a designation that applies to both MWDs and Department of Defense-owned horses, available for adoption, provided that they have been determined to be suitable for adoption and are not otherwise necessary anymore to their respective military departments.[61]

Previously, when a dog was retired, the military would often decide that transporting it home was not worth the costs (since it is considered excess equipment), and would instead have it euthanized. In fact, prior to the year 2000, it was an alarmingly common practice for the military to euthanize MWDs once they were retired from active duty, regardless of a dog's health.[62] "Robby's Law" signaled the end of this practice and limited MWD euthanization "to those

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[57] 10 U.S.C. § 2572 (2014) (Documents, historical artifacts, and condemned or obsolete combat material: loan, gift or exchange); 10 U.S.C. § 2576 (2014) (Surplus military equipment, sale to State and local law enforcement, firefighting, homeland security, and emergency management agencies); 10 U.S.C. § 2577 (2014) (Disposal of recyclable materials); 10 U.S.C. § 2579 (2014) (War booty: procedures for handling and retaining battlefield objects).

[58] 10 U.S.C. § 372 (2014).

[59] Catherine A. Theohary, Lawrence Kapp, David F. Burrelli & Don J. Jansen, Cong. Research Serv., R42651, FY2013 National Defense Authorization Act: Selected Military Personnel Policy Issues (2013).

[60] H.R. 5314(1)(a), 106th Cong., 2d Sess. (2000) (amending 10 U.S.C. 2582(f) to require annual reporting by the Secretary of Defense).

[61] 10 U.S.C. § 2583 (2014).

[62] Brief Summaries of Federal Animal Protection Statutes, *supra* note 19 ("[U]nder Department of Defense policy, such dogs were caged, sometimes for as long as a year, and then euthanized.").

situations in which euthanization is medically necessary or necessary for public safety."[63] Specifically, it required the Secretary of Defense to submit an annual report to Congress accounting for all MWDs adopted due to Robby's Law, as well as a specific explanation for every individual dog that was euthanized rather than made available for adoption.[64] Thanks to this legislation, between the years 2001 and 2011, the number of MWDs euthanized dropped from 107 to 60, while the number of MWDs instead transferred or adopted leapt from 53 to 328.[65] In the aftermath of the Bin Laden raid, one in which a MWD named Cairo was an integral part of the team, war dog organizations claim that the number of people inquiring into adopting retired MWDs has risen dramatically.[66] Today, there is an average estimated waiting list of 300 to 400 potential adoptive families.[67]

Unfortunately, one of the biggest barriers to adoption of MWDs remains; under their current legal designation as "excess equipment," Major General Mary Kay Hertog argues that "once that dog is adopted, it becomes a pet, and therefore loses its MWD status, so it would be fraud, waste and abuse for the DOD to transport that pet."[68] Under this suggested approach, anyone looking to adopt a

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[63] H.R. 5314(1)(a)(2).

[64] 10 U.S.C. § 2583(f) (2000) ("The Secretary of Defense shall submit to Congress an annual report specifying the number of military animals adopted under this section during the preceding year, the number of these animals currently awaiting adoption, and the number of these animals euthanized during the preceding year. With respect to each euthanized military animal, the report shall contain an explanation of the reasons why the animal was euthanized rather than retained for adoption under this section.").

[65] *We Have All 11 "Robby's Law" Reports!*, THE OTHER FORGOTTEN SOLDIER: MILITARY & LAW ENFORCEMENT WORKING DOG RESCUE & SUPPORT, http://www.save-a-vet.org/d7/robbyreportall (citing available Military Working Dog disposition reports) (last visited January 29, 2014) (hereinafter "'Robby's Law' Reports").

[66] *War Dog Adoption Requests Rise Following Bin Laden Mission*, *supra* note 51. ("While about 300 retired U.S. military dogs are put up for adoption each year, military officials say they've received more than 400 adoption applications in the three weeks since the May 2 ra*id.*").

[67] Laura Sesana, *Military Working Dogs Today Have Long History of Heroism*, WASH. TIMES COMMUNITIES: SOCIAL JOURNALISM FROM INDEPENDENT VOICES, http://communities.washingtontimes.com/neighborhood/world-our-backyard/2013/jan/11/military-working-dogs-today/ (last visited Jan. 29, 2014).

[68] Technical Sergeant Amaani Lyle, *Officials Outline Adoption Process for Military Working Dogs*, U.S. AIR FORCE, http://www.af.mil/News/ArticleDisplay/tabid/223/Article/119321/officials-outline-

retired MWD must not only complete a rigorous application process but must often pay expenses in excess of $2,000 to bring just one such dog home.[69] However, Major General Hertog, as the Department of Defense's MWD Executive Agent, agreed herself in that same statement that MWDs are "not just a piece of equipment."[70]

This internal logical struggle continues to be at the forefront, as MWDs are afforded more and more treatment equal to that of their human counterparts while continuing to skirt the issue of an equal legal designation. This approach, essentially taking a "separate but equal" tack to MWD rights, demonstrates the United States' wishes to appease the masses by meeting most demands while still minimizing costs that would otherwise be incurred as part of the adoption process.

Under current legislation, adoption priority goes to the MWD's former handler, or to the family of such a handler if he is deceased or injured to the point that he would not be able to provide adequate care for the dog. In fact, this provision was inserted as part of the Corporal Dustin Lee Memorial Act, in honor of a Marine K9 handler who was killed in Fallujah in 2007 during an attack that his MWD, Lex, survived.[71] If the dog does not go to its handler or handler's family, law enforcement agencies are also given the opportunity to adopt it for their own uses.[72] At that point, should a retiring MWD still be available for adoption, a prospective family must follow a series of prescribed procedures, from an initial application to a follow up interview, in order to determine the best fit between a retiring MWD and an adoptive family.

Another concern for retiring MWDs, as well as for human military veterans, is the availability of health care once they retire from active duty. In fact, recent data as of 2011 suggests that as many of five percent of military dogs on active duty demonstrated

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adoption-process-for-military-working-dogs.aspx (last visited Jan. 29, 2014).

[69] *Department of Defense Military Working Dog Adoption Program: Frequently Asked Questions*, http://www.37trw.af.mil/shared/media/document/AFD-120611-035.pdf (last visited Jan. 29, 2014).

[70] "Robby's Law" Reports, *supra* note 47.

[71] *Corporal Dustin Lee Memorial Act*, H.R. 4639, 111th Cong, 2d. Sess. (2010).

[72] 10 U.S.C. § 2583(f) (2014) ("Military animals may be adopted under this section by law enforcement agencies, former handlers of these animals, and other persons capable of humanely caring for these animals.").

symptoms of developing canine post-traumatic stress disorder (hereinafter "PTSD").[73] Just as with humans, dogs who suffer from PTSD can struggle with day-to-day activities once they are retired, often suffering from hypervigilance (the condition of maintaining an abnormal awareness of environmental stimuli[74]), avoidance of buildings or work environments in which they had previously been comfortable, or sharp changes in temperament. For MWDs who have not yet retired and are therefore expected to continue with patrols or other day-to-day military activities, PTSD can lead to them being unable to continue to perform their jobs, putting them at a greater risk of euthanization as an efficient, inexpensive method of discarding excess equipment that is no longer of use to the military. While a human soldier runs the risk of a court martial for dereliction of duty, the repercussions for such behavior in an MWD are obviously much more dire.[75]

B. The Canine Members of the Armed Forces Act

The Canine Members of the Armed Forces Act,[76] (hereinafter "The Act") led to the enaction of a new statute "to establish and maintain a system to provide for the veterinary care of retired military working dogs."[77] This placed MWDs on similar ground, in many ways, as retired military veterans, who are "entitled to medical and dental care in any facility of any uniformed service."[78] Congress passed the majority of the act under H.R. 4310, yet the final bill omitted one of the most critical components of The Act. The language that would have reclassified MWDs as "Canine Members of the Armed Forces"

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[73] James Dao, *After Duty, Dogs Suffer Like Soldiers*, N.Y TIMES, Dec. 1, 2011, http://www.nytimes.com/2011/12/02/us/more-military-dogs-show-signs-of-combat-stress.html.

[74] "hypervigilance." Merriam-Webster Online Dictionary. 2014. http://www.merriam-webster.com/medical/hypervigilance (last visited Jan. 29, 2014).

[75] 10 U.S.C. § 892(3) (2014) ("Any person subject to this chapter who . . . is derelict in the performance of his duties . . . shall be punished as a court-martial may direct.

[76] *Canine Members of the Armed Forces Act*, H.R. 4103, 112th Cong. (2012).

[77] *Canine Members of the Armed Forces Act*, Sec. 4(a)(1)(a) (amending 10 U.S.C. § 994).

[78] 10 U.S.C. § 1074 (2014).

rather than "excess equipment" was nowhere to be found in the text of the final bill, having been excised during deliberations.

Yet the United States is not the only country seeking to provide for the best interests of their canine partners upon retirement. In November 2013, a United Kingdom police force became the first in its country to create a pension plan for its retired police dogs, paying £1,500 for three years of service to each dog for the purpose of paying for medical bills after they retire. When asked for his reaction to complaints that such spending was not fair to his constituent taxpayers, Paddy Tipping, the Police and Crime Commissioner for the Nottinghamshire Police, argued that, while some people may believe in different priorities, these dogs deserve nothing less.[79]

This appears to be a more and more prevalent attitude among law enforcement officials in the United States as well. Currently, at least eight different states have statutes providing for severe penalties at the felony level for harming a police dog.[80] Just as assaulting a police officer is a more serious offense than assaulting a civilian, so

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[79] Chris Pleasance, *Police Dogs to Get a Pension Plan: Animals to be Given £1,500 Each to Help Pay Medical Bills After They Retire From Service*, DAILY MAIL, Nov. 5, 2013,,http://www.dailymail.co.uk/news/article-2487540/Police-dogs-pension-plan-Animals-given-1-500-help-pay-medical-bills-retire-service.html. ("We look after the people who work for us who have been police officers and staff – they get a decent retirement and I think it's important the same is done for the dogs. These animals work hard for the police and they are officers in their own right. Many of the force's dogs are fit and healthy when they retire but some need medical treatment for injury or illness resulting from being worked hard while tackling crime. These dogs give willing and sterling service over the years in protecting the public so I am delighted to approve a scheme that will ensure continuing medical help once their work is done.").

[80] Cal. Pen. Code § 600 (2014); Ind. Code § 35-43-1-2(B)(vi) (2014) (Criminal mischief under this code is a Class D felony if "the damage is to a law enforcement animal," defined in Ind. Code § 35-46-3-4.5 as "an animal that is owned or used by a law enforcement agency for the principal purposes of aiding in the detection of criminal activity, the enforcement of laws, and the apprehension of offenders," as well as "ensuring the public welfare"); M.G.L.A. 272 § 77A (2014) ("Willfully injuring police dogs and horses"); Ohio Rev. Code § 2921.32.1 (2006) ("Assaulting or harassing police dog or horse or assistance dog"); N.J.S.A. 2C:29-3.1 ("Interference/harm to a law enforcement animal"); O.R.S. § 167.337 (2009) ("Interfering with law enforcement animal"); Utah Code Ann. § 76-9-306. Police service animals -- Causing injury or interfering with handler -- Penalties").

too is the punishment for assaulting a police canine harsher than the punishments prescribed for other instances of animal cruelty.

Ultimately, Robby's Law, The Canine Members of the Armed Forces Act, and other associated pieces of legislation enacted over the last fifteen years, while incremental, have materially improved the lives and rights of MWDs once their service careers have come to an end. They are now afforded veterinary care in line with the medical care provided for human military veterans, and are often recognized for their accomplishments in the line of duty just as would their human counterparts. Unfortunately, this approach could best be described as asymptotic; legislation continues to inch closer and closer to the original purpose of these proposals, that is, to put MWDs on the same level as human military members, but never succeeds in reaching the ultimate goal. At this point, the largest remaining hurdle is for the United States to decide that MWDs truly are a part of this country's military and that to treat them as such would be in the best interests of the military moving forward.

In determining how best to handle the debate on MWDs, could the United States look to a key turning point in its own shameful past? Comparing slavery with the slow march toward quasi-personhood by animals is a veritable minefield of potential controversy stemming from one of the darkest, most embarrassing periods in American history. Dogs may not biologically be humans, but many early twentieth century Americans viewed black people as little more than savage beasts themselves.[81] Animal rights activists would be wise to look to leaders of the Civil Rights Movement for a road map as they continue their efforts toward equal treatment for dogs under the law. Since 1883, the Supreme Court has interpreted the Thirteenth Amendment to afford Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[82] Ultimately, an important question is raised:

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[81] *See, e.g.* George T. Winston, *The Relation of the Whites to the Negroes*, ANNALS AM. ACAD. POL. & SOC. SCI. 18, 108-09 (July 1901) ("When a knock is heard at the door [a White woman] shudders with nameless horror. The black brute is lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal. A mad bull or tiger could scarcely be more brutal. A whole community is frenzied with horror, with the blind and furious rage for vengeance.").

[82] "The Civil Rights Cases,"109 U.S. 3, 20 (1883).

> What, however, qualifies as a badge or incident of slavery? Does this concept refer only to a public law that discriminates against African Americans or, more generally, on the basis of race? Alternatively, does it encompass any public or private practice that "perpetuates [racial] inferiority?" Or is its scope even broader, extending to "any act motivated by arbitrary class prejudice?" Surprisingly, there is no generally accepted understanding as to the meaning of this often-invoked but under-theorized concept.[83]

Additionally, the Supreme Court held in 1968 that the Civil Rights Act of 1866 was intended "to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein."[84]

Under a broad reading of the Supreme Court's interpretation of the Thirteenth Amendment, it can be argued that the misclassification of MWDs is itself in line with the badges and incidents of slavery, as current legislation appears to label MWDs as "separate but equal" in what seems to be little more than a cost-cutting measure. MWDs are afforded nearly every other benefit given to human soldiers upon retirement, far in excess of any consideration given to excess equipment at the end of its useful life. But the reclassification of MWDs continues to be a line that Congress refuses to cross toward true equality between MWDs and human soldiers. Further lobbying and legislation will be necessary in order to rid this country's MWDs of this gross misclassification and afford them the same rights bestowed upon their fellow soldiers.

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[83] Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 564 (2012) (citing Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 116 (1990) and G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, *in* THE QUEST FOR FREEDOM, A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 175, 177 (1976).

[84] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

VII. PROPOSED LEGISLATION

War dogs have, indeed, served the nation well and saved many lives. Dogs continue to serve to protect Americans both in combat zones and in homeland security roles.
- General Colin L. Powell[85]

A. *One Step Forward, Two Steps Back*

The United States' progress toward appropriate treatment of MWDs continues to be a long, slow process, with legislators making a number of smaller concessions while avoiding the biggest issue of them all, that of reclassifying MWDs. As one of the most important aspects of The Act, dogs would be reclassified under 10 U.S.C. 2583 as "Canine Members of the Armed Forces," rather than merely being considered "excess equipment."[86] However, this language was removed from the version of H.R. 4310 that was ultimately passed by Congress; anonymous sources claim that it was removed at the insistence of Senator John McCain, a veteran himself.[87]

Additionally, the Act also unsuccessfully sought to create a program for the recognition of military dogs "that are killed in action or perform an exceptionally meritorious or courageous act in service to the United States."[88] This would treat MWDs' actions in combat similarly to those of their human counterparts in the line of duty. Considering the growing support for using MWDs in direct combat

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[85] *Quotes by Legendary Battlefield Commanders, supra* note 1.

[86] *Canine Members of the Armed Forces Act*, Sec. 3(a)(2)(f) ("Classification of Military Working Dogs.-- The Secretary of Defense shall classify military working dogs as canine members of the armed forces. Such dogs shall not be classified as equipment.").

[87] Kevin Hanrahan, *Did Senator John McCain Cut the Military Working Dog Legislation?*, SOLDIER WRITER: BALANCING THE SWORD AND THE PEN, http://khanrahan.com/2013/01/14/did-senator-john-mccain-cut-the-military-working-dog-legislation/ ("According to Lisa Phillips, CEO of the Retired Military Working Dog Assistance Organization, 'Senator McCain, ranking member of the Senate Armed Services Committee, did not want *any* part of the bill/amendment to go forward at all.'") (last visited Jan. 29, 2014).

[88] *Canine Members of the Armed Forces Act*, Sec. 5(2)(b) ("Recognition of Service of Military Working Dogs.-- The Secretary of Defense shall create a decoration or other appropriate recognition to recognize military working dogs under the jurisdiction of the Secretary that are killed in action or perform an exceptionally meritorious or courageous act in service to the United States.").

action situations, rather than just in support roles, it seems appropriate that MWDs be further recognized for their heroic work on the battlefield.[89]

Even more unfortunately, a provision inserted into the 2012 National Defense Authorization Act repealed the reporting requirement brought forth under Robby's Law, and will require further lobbying in hopes of once again compelling transparency in the disposition of retiring MWDs on an annual basis.[90] The current pattern of "one step forward, two steps back" does not bode well for the ultimate reclassification of MWDs as "Canine Members of the Armed Forces."

B. The True Costs of MWD Adoption

For families who want to adopt retired MWDs, the costs of transportation are passed on to them, and it can cost thousands of dollars to bring one dog home. There is pending legislation to allow for the use of frequent flier miles to bring MWDs home just as is currently permitted for human members of the military, but it is unknown if or when it will be enacted.[91] This appears to be the main sticking point preventing the reclassification of MWDs as "Canine Members of the Armed Forces," as Congress does not seem to be willing to foot the bill in order to bring retiring MWDs home.

According to the 2011 Military Working Dog Adoption Report, which is the final report available under Robby's Law prior to the

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[89] 40 Army Law 1, *citing* R. Norman Moody, *Florida-Based Military Dogs Do Heroic Work In War Zone,* FLA. TODAY, May 9, 2005, *available at* http://www.floridatoday.com/apps/pbcs.dll/article?AID=/20050426/NEWS01/504260331/1006
(last visited Jan. 30, 2014) (describing how a MWD apprehended two men in southern Iraq who were attempting to avoid capture) and *Unit Oket'z Attack Palga*, THE ISRAELI SPECIAL FORCES DATABASE, *at* http://www.isayeret.com/units/land/special/7142/attack.htm (last visited Jan. 30, 2014) (explaining how the Israeli Defense Force has employed MWDs against enemy combatants during counter-terrorism missions in the Occupied Territories and Lebanon).

[90] 112 P.L. 81 (2011).

[91] *Canine Members of the Armed Forces Act*, Sec. 3(b) (*amending* 10 U.S.C. 2613 -- Acceptance of frequent traveler miles, credits, points, and tickets: use to facilitate rest and recuperation travel of deployed members and their families -- to apply to MWDs as well).

reporting requirement being repealed, 276 MWDs were adopted by private families in 2011, with another 52 MWDs being "transferred from the Department of Defense to other government or law enforcement agencies for continued public service."[92] While there is no cost to adopt the dog itself, "any Law Enforcement Agency or person approved to adopt [a MWD] is completely responsible for all costs associated with transportation of the MWD from the military installation to any final destination."[93] Factoring in the costs of international travel, especially for those MWDs retiring from military installations in relatively inaccessible locations such as Afghanistan, a prospective adoptive family may have to pay as much as $2,000 in transportation costs alone to bring the MWD home.

Multiplying roughly $2,000 per MWD times the 328 MWDs adopted in 2011 brings an estimated total cost of adoptions in 2011 to $656,000. That is less than five-millionths of one percent of the estimated annual cost to the United States government of the wars in Iraq and Afghanistan.[94] Considering the enormous budget of the United States military (for 2014 alone, the DoD has requested $79.4 billion in funding for overseas contingency operations, mainly for Operation Enduring Freedom in Afghanistan[95]) and the myriad lives that are saved every year by MWDs (it is estimated that the average war dog saves 150 soldier lives during its service[96]), it does not seem unreasonable for the government to commit the relatively miniscule amount of additional resources toward ensuring equal treatment and

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[92] U.S. Air Force Report to Cong. Comm., 2011 Military Working Dog Adoption Report 1, 3 (December 2011), *available at* http://www.save-a-vet.org/d7/sites/default/files/docs/MWD%20Disposition%20Report%202011.pdf.

[93] Watson & Manning, *supra* note 51.

[94] Roger C. Altman and Richard N. Haass, *American Profligacy and American Power: The Consequences of Fiscal Irresponsibility*, EUROCAPITAL, http://www.eurocapital.gr/permalink/21515.txt ("Together, the wars in Iraq and Afghanistan cost more than $150 billion a year.") (last visited Jan. 30, 2014).

[95] Office of the Under Secretary of Defense (Comptroller) / Chief Financial Officer, *Overview: United States Department of Defense Fiscal Year 2014 Budget Request, Addendum A: Overseas Contingency Operations* 1,5 (May 2013), *available at* http://comptroller.defense.gov/defbudget/fy2014/FY2014_Budget_Request_Overview_Book_Amended.pdf.

[96] Jennifer Rizzo, *When a Dog Isn't a Dog*, CNN, Jan. 6, 2012, http://security.blogs.cnn.com/2012/01/06/when-a-dog-isnt-a-dog/.

a happy retirement for this valuable and heroic, yet vastly underappreciated by those not in uniform, part of the armed forces.

VIII. Conclusions and Recommendations

'That dog is not just a piece of equipment -- it's what enables us to save lives so we exhaust all avenues to ensure the dogs remain as healthy as possible.'
-Major General Mary Kay Hertog[97]

MWDs have played a crucial role in the long history of warfare, dating back to ancient times. They have been bred, trained, and carefully selected over millennia of martial contributions to be the perfect partner in this nation's military efforts around the world. Yet political handwringing and budgetary concerns have ultimately forced an asymptotic "separate but equal" approach to legislation regarding the treatment of MWDs. They have earned nearly all of the rights afforded to their human soldier counterparts, yet are legally classified on the same level as uniforms, guns, and the various spoils of war. Over the decades, this has led to retired MWDs being cast aside just as would a defective assault rifle or a torn uniform.

Scientific research into canine cognition, along with myriad anecdotal evidence regarding the battlefield exploits of MWDs, suggests that MWDs are much more than military equipment, and should be recognized as such. By reclassifying MWDs as "Canine Members of the Armed Forces," the United States government would be taking an important step in finally recognizing the tens of thousands of lives saved and the untold thousands more that will be saved in future military efforts by an underappreciated segment of its military that only aims to serve its country and protect its fellow soldiers.

[97] Lyle, *supra* note 68.

STUDENT NOTE

Where is the Justice? The Sexual Assault Crisis Plaguing the Military and a Lack of Meaningful Justice

Marc Edward Rosenthal[*]

Abstract

Sexual assault is a major problem in every branch of the American Armed Forces. The current military justice system is flawed in such a way as to deny victims of sexual assault in the military meaningful and competent justice. Victims of sexual assault in the military do not receive the same due process that their civilian counterparts receive. The bottom line is that our service-members deserve more than the current military justice system provides because service-members leave their loved ones and homes to fight-- sometimes never to return-- in order to protect our homeland and promote American justice and democracy abroad.

One of the military justice system's many failures is the lack of procedural protections in pretrial probable cause determination (Article 32) hearings. Unlike the closed-door civilian grand jury proceedings, which do not allow defense counsel to attend, Article 32 hearings are public, and defendants are legally entitled to thoroughly cross-examine government witnesses. While rape shield protections are supposed to prevent many of the abuses that have occurred, the protections have not been competently enforced. Two laws applicable in Article 32 hearings completely contradict each other, resulting in an impediment of important procedural protections. However, if the military justice system is amended and the rape shield laws are properly followed, many injustices, i.e., the fall 2014 Maryland Naval Academy pretrial hearing, will be averted. In addition to the rape shield problem, the National Defense Authorization Act ("NDAA") of 2014 did not create laws prohibiting the use of non-legally trained investigating officers in all situations. Additionally, even

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though NDAA 2014 amended the "availability" options for Article 32 witnesses by giving witnesses the legal right to not attend the hearing in certain circumstances, there is still a loophole that allows defense counsel to depose and thoroughly cross-examine key government witnesses. Most importantly, the deposition officer charged with overseeing the deposition is not required to rule on objections or to possess any legal training.

Some victims fed up with the failure of the military justice system are turning to federal district courts—desperate for relief and crying for help. While district courts are sympathetic to the allegations, the courts do not have the legal ability to provide redress for the victims. Finally, although NDAA 2014 was not as revolutionary as Senator Gillibrand's proposed Military Justice Improvement Act, it still passed several key improvements. It is a positive half-step forward.

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I. INTRODUCTION

No one will believe you, and even if someone did believe you, you have a long road ahead. You came overseas to fight for your country, for something you believe in, and for something bigger than yourself. You spend your nights away from your loved ones, while they live out their lives at home without you. One night something tragic happens. Something you never thought would happen to you. You become one of the many service members who are sexually assaulted every single day in the military.[1] You, someone minding your own business on your walk back to the barracks, got knocked over the head from behind with a metal pipe and subsequently blacked out. You wake up, not realizing you are bound at your hands and feet. Then the beating starts. You are raped and told you will be killed if you open your mouth.[2]

The next day it hits you. You were raped last night. You feel disassociated from yourself, a sort of numb depression you have never felt before. You are too embarrassed to talk to anyone about it. You feel resentment toward the military establishment, and resentment toward yourself for having such naïve preconceptions of people and justice. What happened to you *personally* goes against everything you thought you knew about the glory and the fraternal nature of military service. Feeling violated and angry, you talk to one of your peers, who encourages you to file a report with military law enforcement.

You don't want to make it a big deal. Why would you want everyone talking about you? Your anger grows. Finally, you file a report with law enforcement. At your Article 32 hearing[3], where your superiors determine if there is enough evidence to court-martial the accused, you are vigorously, in an almost hazing like fashion, asked disgusting and

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[1] Jackie Speier, *Why Rapists in Military Get Away With It*, CNN OPINION (June 21, 2012, 8:19 AM EDT), http://www.cnn.com/2012/06/21/opinion/speier-military-rape/. The statistics cited in this article were compiled by the Department of Defense and presented to Congress and can be found in the Sexual Assault Prevention & Response Office ("SAPRO"), *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012,* (2013) (hereinafter "*2012 SAPRO Report* ")). *See http://www.sapr.mil/index.php/annual-reports*.

[2] Michael F. Matthews, Op-Ed., *The Untold Story of Military Sexual Assault*, N.Y. TIMES (November 25, 2013), *available at* http://www.nytimes.com/2013/11/25/opinion/the-untold-story-of-military-sexual-assault.html#.

[3] *See* 10 U.S.C. § 832 (2014).

embarrassing questions about your sexual habits, including whether you invited the alleged sexual assault because you did not wear underwear, and how wide you opened your mouth while performing oral sex.[4] All the while, your peer, the one who you trusted and confided with, is testifying on the stand saying none of what you said actually happened. Now it is your chance to testify and you cringe into a tight little ball, as you start to relive what happened as you testify. You feel a horrific wave of anxiety overcome you as you make eye contact with your peers and realize that once you testify, you are an outsider. Your mind begins to race. You think about how you rely on your military employment for important government benefits, that you would feel dishonored if you were discharged from the armed services, and how much you value your job security. Are you going to inculpate one of your brothers or sisters, in front of anyone? Is anyone going to believe you? Will you be ostracized and retaliated against?[5] Can't the commander disregard any verdict against the accused?[6]

The aforementioned hypothetical[7] illustrates something wrong with our military justice system. Consider the following facts and statistics. If you serve in the U.S. Military and you rape or sexually assault a fellow service member, chances are you won't be punished.[8] In fact, you have an estimated 86.5% chance of keeping your crime a secret and

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[4] *See* Jennifer Steinhauer, *2 Face Court-Martial in Naval Academy Assault Case*, N.Y. TIMES (October 10, 2013), http://www.nytimes.com/2013/10/11/us/2-ex-navy-football-players-face-court-martial-in-rape-case.html?_r=0 (hereinafter "Steinhauer 1"); Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES (September 20, 2013), http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?ref=us (hereinafter "Steinhauer 2").

[5] Common reasons for victim's not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident. *See* AZ v. Shinseki, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing Gov't Accountability Office, GAO–08–1013T, *Military Personnel: Preliminary Observations on DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs* 14 (2008)).

[6] R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW at 8 (Aug. 12, 2013) (citing Art. 60, UCMJ; 10 U.S.C. § 860; RCM 1107).

[7] This hypothetical was created based on facts taken from the sources cited in footnotes 1, 2, 4, 5, and from Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK, (Apr. 3, 2011), http://www.newsweek.com/militarys-secret-shame-66459.

[8] *See* Speier, *supra* note 1.

a 92% chance of avoiding a court-martial.[9] Service members who report being sexually assaulted by a commanding officer or military colleague do so at their own peril.[10] They face ridicule, demotion, investigation that includes a review of their sexual history and even involuntary discharge.[11] A Department of Defense report released in May 2013 estimated that there were 26,000 instances of unwanted sexual contact in the military in 2012, an increase of 35% compared with 2010.[12] The Department of Defense estimates that between 2006 and 2012, fewer than 15% of military sexual assault victims reported the assault to a military authority.[13] There were 3,553 sexual assault complaints reported in the first three quarters of this fiscal year (2013), a nearly 50% increase over the same period a year earlier.[14] Of the 3,553 sexual assault complaints, fewer than 500 were brought to trial and 200 resulted in a conviction.[15] Additionally, according to *The Invisible War*, a 2012 documentary detailing the gravitas of the sexual assault crisis in the military[16], a Navy study conducted anonymously reported that 15% of incoming recruits had attempted or committed rape before entering the military, twice the percentage of an equivalent civilian population.[17] Women who have been raped in the military have a higher Post-Traumatic Stress Disorder

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[9] *See Id.*
[10] *Id.*
[11] *Id.*
[12] Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, USA TODAY (Dec. 10, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/12/10/military-sexual-assault-congress/3953705/.
[13] AZ v. Shinseki, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing *2012 SAPRO Report, supra* note 1*,* at 53).
[14] Jonathon Weisman & Jennifer Steinhauer, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES (December 9, 2013), *available at* http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?_r=0.
[15] Lauren Fox, *Gillibrand Versus McCaskill and Levin*: *The War to Solve Military Sexual Assaults Heats Up*. *Lawmakers Feud Publicly on How to Stop Rape in the Military*. U.S.NEWS & WORLD REPORT (July 29, 2013), *available at* http://www.usnews.com/news/articles/2013/07/29/gillibrand-versus-mccaskill-and-levin-the-war-to-solve-military-sexual-assaults-heats-up.
[16] THE INVISIBLE WAR (Amy Ziering & Tanner King Barklow 2012).
[17] Nancy Ramsey, *'Invisible War': New Documentary Exposes Rape in the* Military, ABC NEWS (June 27, 2012), *available at* http://abcnews.go.com/Politics/rape-military-invisible-war-documentary-exposes-assaults/story?id=16632490&page=1.

("PTSD") rate than men in combat.[18] In 2010, there were 2, 617 military sexual assault victims (women and men), but that represented only about 14% of the estimated number of victims; 86% did not report they had been sexually assaulted.[19] 40% of homeless female veterans have been raped.[20] In 2012, the Department of Defense ("DoD") estimated that only about 11% of the sexual assaults involving service members that occurred each year are reported to authority[21], and that between 2006 and 2012, fewer than 15% of military sexual assault victims reported the assault to a military authority[22]. Common reasons victims cite for not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident.[23] These statistics[24] make clear that the current situation is unacceptable and must change.

With these facts in mind, my article will argue that the military justice system is in need of reform that will actually make a difference. My article will argue that the National Authorization Act of 2014 ("NDAA 2014")[25] does not go far enough to ensure that victims of sexual assault in the military are afforded justice during a critical point in the criminal adjudicative process. My article will argue that there is a large lack of accountability because victims do not receive fair and meaningful justice.

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See* AZ v. Shinseki, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing 1 DoD Sexual Assault Prevention & Response Office ("SAPRO"), *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012,* at 18 (2013) ("*2012 SAPRO Report* ")).
[22] *Id.* (citing *2012 SAPRO Report, supra* note 1*,* at 53).
[23] *Id.* (citing Gov't Accountability Office, GAO–08–1013T, *Military Personnel: Preliminary Observations on DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs* 14 (2008))
[24] How are these statistics gathered? Data about Unrestricted Reports of sexual assault reports is drawn from official investigations conducted by the Military Criminal Investigation Organizations. Sexual Response Coordinators collect data about Restricted Reports of sexual assault and forward it to the Military Service Sexual Assault Prevention and Response program offices. Each Fiscal Year, the Under Secretary of Defense for Personnel and Readiness submits a data call to the Military Departments to collect the required statistical and case synopsis data. DoD SAPRO aggregates and analyzes this data. *See 2012 SAPRO Report*, *supra* note 1, at 56.
[25] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.

Specifically, my article will argue that the mandated procedural requirements of Military Rule of Evidence ("MRE") 412[26] have not been enforced thus leading to the harassment of victims during pretrial proceeding, a prevalent occurrence. I argue that these injustices could be cured if officials simply abide by MRE 412's explicit procedural requirements. Additionally, I will argue that a legally trained judicial officer must oversee pretrial proceedings in *every* situation involving cross-examination.

My article will illustrate the defectiveness of the current military justice system, as evidenced by the military justice system's inability to provide victims with relief, which is causing victims to bring their cases to civilian courts. Specifically, I will discuss *Cioca v. Rumsfeld*, a U.S. Fourth Circuit Court of Appeals decision that twenty-eight victims, discussed in the documentary *The Invisible War*, brought in federal district court. My article will address Senator Gillibrand's Military Justice Improvement Act ("MJIA")[27]. Finally, my article will analyze the benefits and shortcomings of other sexual assault related reforms in NDAA 2014[28].

II. MILITARY PROCEDURE PRIOR TO 2014, THE SEVERITY OF THE SEXUAL ASSAULT CRISIS, AND THE NEED FOR ARTICLE 32 HEARING REFORM

A. *The Military Justice System Prior to the Passage of the National Defense Authorization Act of 2014*[29]

To understand why reform is so important, one must understand the fundamental differences between the military and civilian legal systems. While my article does go on at some length to lie out the relevant military legal procedures, I believe such an overview is necessary to fully grasp why it has the potential for implementing subpar justice. "The Constitution, in order to provide for the common defense[30], gives Congress the power to raise, support, and regulate the Armed Forces[31], but makes the President

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[26] Mil. R. Ev*Id.* 412.
[27] Military Justice Improvement Act, S. 967, 113TH Cong. (2013).
[28] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.
[29] *Id.*
[30] *See* Mason, *supra* note 6, at 1 (citing U.S. CONST. Preamble).
[31] *See Id.* at 1 (citing U.S. CONST. art. I §8, cls. 11-14 (War Power)).

Commander-in-Chief of the Armed Forces.[32]" "Article III, which governs the federal judiciary, does not give that judiciary any explicit role in the military, and the Supreme Court has taken the view that Congress's power '[t]o make Rules for the Government and Regulation of the land and naval Forces'[33] is entirely separate from Article III."[34] Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.[35]

"Discipline is as important as liberty interests in the military justice system."[36] "The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment, from which the Supreme Court has inferred there is no right to a civil jury in courts-martial."[37] Article 32 of the Uniform Code of Military Justice ("UCMJ") mandates a pre-trial hearing that performs the same function as a grand jury, finding probable cause to move forward with prosecution.[38] Court-martial panels consist of a military judge and several panel members, who function similarly to a jury.[39]

Under Article I, Section 8 of the U.S. Constitution, Congress retains the powers to raise and support armies, provide and maintain a navy, and provide for organizing and disciplining them.[40] Pursuant to this power, Congress enacted the UCMJ,[41] which is the code of military criminal laws applicable to all U.S. military members around the globe.[42] The President implemented the UCMJ through the Manual for Courts-Martial ("MCM"), which was initially promulgated by Executive Order 12473 (April 13, 1984).[43] Military courts are considered Article I courts, and as a result are of limited jurisdiction.[44]

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[32] *See Id.* at 1 (citing U.S. CONST. art. II §2, cl. 1).
[33] *See Id.* at 1 (citing U.S. CONST. art. I §8, cl. 14).
[34] *See Id.* at 2 (citing Dynes v. Hoover, 61 U.S. (How.) 65 (1857)).
[35] *See Id.* at 2 (internal citations omitted).
[36] *See Id.* at 2.
[37] *See Id.* at 2.
[38] *Id.* at 2 , note 9 (citing *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).
[39] *See Id.*
[40] *See Id.* at 2.
[41] *See Id.* at 2 (citing 10 U.S.C. §§801-941).
[42] *See Id.* at 2.
[43] *See Id.*
[44] *See Id.* at 2, n. 15 (citing United States v. Wuterich, 67 M.J. 32 (2007)).

Article I of the U.S. Constitution, addressing legislative powers of Congress, includes the power to regulate the Armed Forces, and by implication, the power to create legislative courts to enforce those regulations.[45] In creating legislative courts, Congress is not limited by the restrictions imposed in Article III.[46]

The UCMJ gives court-martial jurisdiction over service members[47] and other categories of individuals, including retired members of a regular component of the Armed Service entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during 'times of war,' limited to declared wars.[48] The MCM contains the Rules for Courts-Martial ("RCM"), the MRE,[49] and the UCMJ.[50] The MCM covers nearly all aspects of military law.[51] Jurisdiction of a court-martial does not depend on where the offense happened; it depends exclusively on the status of the accused.[52]Courts-martial try "military offenses," which are listed in the punitive articles of the UCMJ and are also codified in 10 U.S.C. 877 et seq.[53] The Supreme Court does not promulgate procedural rules for courts-martial.[54] Congress regulates the Armed Forces primarily through Title 10 of the United States Code.[55] Congress established three types of courts-martial: (1) summary court-martial, (2) specific court-martial, and (3) general

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[45] *See Id.*
[46] *See Id.* at 3, n. 16 ("The term service members, as used in this report, includes uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.")
[47] *See Id.* at 3.
[48] *See Id.* at 3 (citing Art. 2, UCMJ; 10 U.S.C. § 802).
[49] *See Id.* at 3, n. 13 ("Rules of procedure and rules of evidence for courts-martial are established by the President and authorized by Art. 36, UCMJ (10 U.S.C. § 836)").
[50] *See Id.* at 3.
[51] *See Id.*
[52] *See Id.* at 3 (citing Solorio v. United States, 483 U.S. 435, 447 (1987)).
[53] *See Id.* at 3, n. 19.
[54] *See Id.* at 5.
[55] *See Id.* at 5.

court-martial.[56]

When a service member has allegedly committed an offense, the accused's immediate commander will conduct an inquiry.[57] Such inquiry may range from an examination of the charges and an investigative report or summary of expected evidence to a more thorough investigation, depending on the offense(s) alleged and the complexity of the case.[58] The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials.[59] Once evidence has been collected and a complete inquiry has been made, the commander can chose to dispose of the charges by either (1) taking no action, (2) initiating administrative action, which can include separation from the military,[60] (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.[61]

The first formal step in a court-martial, preferral of charges, is comprised of the drafting of a charge sheet containing the charges and specifications, which is a plain and concise statement of the essential facts constituting the offense charged against the accused.[62] The charging document must be signed by the accuser under oath before a commissioned officer authorized to administer oaths.[63] A charge amounts to a statement of the Article of the Code or other law allegedly violated.[64] A specification is a concise statement of the essential facts constituting the offense charged.[65] Once the charges have been preferred, they may be referred to one of the three types of courts-martial.[66]

Before convening a general court-martial, a pretrial Article 32 investigation hearing must be conducted; this is meant to ensure that

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[56] *See Id.* at 4 (citing Art. 16 UCMJ; 10 U.S.C. § 816).
[57] *See Id.* at 3 (citing R.C.M. 303).
[58] *See Id.* at 3.
[59] *See Id.*
[60] *See Id.* at 4, n. 24 (citing 10 U.S.C. §§ 1161 *et seq*).
[61] *See Id.* at 4 (citing R.C.M. 306(c)).
[62] *See Id.* at 4 (citing R.C.M. 307(c)(3)).
[63] *See Id.* at 4 (citing R.C.M. 307(b)).
[64] United States v. Franklin, 68 M.J. 603, 604 (A. Ct. Crim. App. 2010) (citing R.C.M. 307(c)(2)).
[65] *Id.* (citing R.C.M. 307(c)(3)).
[66] *See* Mason, *supra* note 6, at 4 (citing R.C.M. 401(c)).

there is a basis for prosecution.[67] An investigating officer ("IO"), who must be a commissioned officer, presides and *should be an officer in the grade of major or lieutenant commander or higher or one with legal training*.[68] Unlike a civilian grand jury proceeding, at an Article 32 hearing the accused has the opportunity to examine the evidence presented against him or her, cross-examine witnesses, and present his or her own arguments.[69] In the event that the investigation uncovers evidence that the accused has committed an offense not charged, the investigating officer can recommend that new charges be added.[70] Additionally, if the investigating officer believes that evidence is insufficient to support a charge, the investigating officer can recommend dismissal of the charge.[71] When the Article 32 investigation is complete, the investigation officer makes recommendations to the convening authority ("CA") through the CA's legal advisor.[72] The legal advisor then provides the CA with a formal written recommendation, called the Article 34 UCMJ advice, as to the disposition of the charges, and then the CA determines whether to convene a court-martial or to dismiss the charge(s).[73]

Before any charge may be referred for trial by a general court-martial, it shall be referred to the Staff Judge Advocate ("SJA") of the CA for consideration and advice.[74] The advice of the SJA shall include a written and signed statement which sets forth that person's: 1) conclusion with respect to whether each specification alleges an offense under the code; 2) conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the repot of investigation; 3) conclusions with respect to whether a court-martial would have jurisdiction over the accused and the offense; and 4) recommendation of the action to be taken by the CA.[75]

Referral is the order of a CA that charges against an accused

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[67] *See Id.* at 7 (citing Art. 32 UCMJ; 10 U.S.C § 832).
[68] *See Id.* at 7, n. 61 (citing R.C.M. 405(d)(1)) (emphasis added).
[69] *See Id.* at 7 (citing Art. 32(b)-(c), UCMJ; 10 U.S.C § 832(b)-(c); R.C.M. 405(f); United States v. Davis, 64 M.J. 445 (2007)).
[70] *See Id.* at 7 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).
[71] *See Id.* at 7 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).
[72] *See Id.* at 7.
[73] *See Id.* at 7 (citing Art. 33-35, UCMJ; 10 U.S.C. § 833-835; R.C.M. 407) (emphasis added).
[74] R.C.M. 406(a).
[75] R.C.M. 406(b).

will be tried by a specified court-martial.[76] The CA may not refer a specification under a charge to a general court martial unless: 1) there has been substantial compliance with the pretrial investigating requirements under RCM 405; and 2) The CA has received the advice of the staff advocate required under RCM 406.[77] However, both of these prerequisites may be waived by the accused.[78] The CA or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence that may arise at trial.[79]

A court-martial is created by a convening order of the CA.[80] The court-martial must be convened by an officer with sufficient legal authority, meaning the CA, who will most likely be the commander of the unit to which the accused is assigned.[81] A general court-martial is the highest trial level in military law and is usually used for the most serious offenses.[82] A general court-martial panel is composed of a military judge sitting alone, or in the alternative, not less than five members and a military judge.[83] The accused has the right to choose the composition of the court-martial except in capital cases, where jury members are required. [84]

Convictions at a general court-martial that include a punitive discharge are subject to an automatic post-trial review by the CA.[85] This process begins with a review of the trial record by the SJA, who makes a recommendation to the CA as to what course to pursue.[86] "The review is 'probably the accused's best chance for relief, as the CA has broad powers to act on the case.'"[87] After the CA has reviewed the trial record and the SJA's recommendation(s), the CA may, among

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[76] R.C.M. 601(a).
[77] R.C.M. 601(d).
[78] *Id.*
[79] *Id.*
[80] R.C.M. 504(a); *See also* R.C.M. 103 ("'Convening authority' includes a commissioned officer in command for the time being and successors in command.").
[81] *See Id.*, at 4 (citing R.C.M. 103(6)).
[82] *See Id.* at 7.
[83] *See Id.* at 7 (citing Art. 16, UCMJ; R.C.M. 201(f)(1)(C)); Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused's command. *See Id.* at 6 n. 53.
[84] *See Id.* at 7 (citing Art. 16, UCMJ; R.C.M. 903).
[85] *See Id.* at 8.
[86] *See Id.* at 8 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).
[87] *See Id.* at 8 (citing United States v Davis, 58 M.J. 100, 102 (2003)).

other remedies, suspend all or part of the sentence, disapprove a finding or a conviction, or commute the sentence, but cannot increase the sentence.[88] Once the CA takes action on the case, the conviction is ripe for an appeal.[89]

B. The Story That Sparked Public Outrage: Maryland Naval Academy, Fall 2013.

Reforms to Article 32 hearings were included in the NDAA 2014, at least in part, because of the public outrage that followed from the Article 32 hearing that took place in August and September of 2013 at the United States Naval Academy.[90] For roughly thirty hours over several days, defense lawyers for three former Naval Academy football players grilled a female midshipman about her sexual habits.[91] In a public hearing, they asked the woman, who accused the three athletes of raping her, whether she wore a bra, how wide she opened her mouth during oral sex, and whether she had apologized to another midshipman with whom she had intercourse "for being a ho."[92]

This Naval Academy case stems from a 2012 "yoga and toga" off-campus party near the academy in Annapolis, Maryland, where, according to the alleged victim's testimony, she arrived intoxicated and continued to drink.[93] In testimony at the hearing, she said she had no memory of parts of the evening and may have passed out.[94] The next day, the woman testified that she heard from a friend of one of the three football players via social media that she had sex with them at an Annapolis home known as "the football house."[95] The three football players were charged with sexually assaulting and making false statements.[96]

Commander Robert J. Monahan Jr., a Navy Judge Advocate

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[88] *See Id.* at 8 (citing Art. 60, UCMJ; 10 U.S.C. § 860; R.C.M. 1107).
[89] *See Id.* at 8.
[90] Steinhauer 1, *supra* note 4.
[91] *Id.*
[92] *Id.*
[93] Steinhauer 2, *supra* note 4.
[94] *Id.*
[95] *Id.*
[96] *Id.*

General ("JAG"), served as the Article 32 IO at the pretrial hearing.[97] After four days and more than twenty hours of relentless questions about the alleged victim's medical history, motivations, dance moves, and underwear, the twenty-one-year-old midshipman pleaded for a day off from testimony.[98] The investigating officer granted the victim's request, but not before the request triggered more skepticism from defense attorneys, who said the young woman was faking her exhaustion.[99] The IO made his decision after a pointed request by Susan Burke, the woman's attorney, who said her client was being worn down by limitless and repetitive questioning by three separate legal teams representing the defendants.[100] By the time the alleged victim concluded, she had been on the stand for more than twenty-four hours over five days.[101] When asked why she did not come forward sooner, the alleged victim said that she "didn't want to make it a big deal" and began tearing up as she said she "didn't want to disappoint her mother."[102] She added, "I guess I just didn't have the courage."[103]

During cross-examination, defense lawyers repeatedly asked the victim about a consensual sexual encounter she said she had the

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[97] Annys Shin, *Three Former Naval Academy Football Players Face Accuser at Hearing on Rape Charges*, WASH. POST, (Aug. 27, 2013), *available at* http://www.washingtonpost.com/local/three-former-naval-academy-football-players-face-accuser-at-hearing-on-rape-charges/2013/08/27/ffb6607c-0f23-11e3-85b6-d27422650fd5_story.html.

[98] Melinda Henneberger & Annys Shin, *Military's Handling of Sex Assault Cases on Trial at Naval Academy Rape Hearing*, WASH. POST, (Aug. 31, 2013), *available at* http://www.washingtonpost.com/local/militarys-handling-of-sex-assault-cases-is-on-trial-at-naval-academy-rape-hearing/2013/08/31/5700c9de-10d3-11e3-b4cb-fd7ce041d814_story.html.

[99] *Id.*

[100] Lyndsey Layton, *Accuser in Naval Academy Rape Case Concludes Testimony After Five Days on Stand*, WASH. POST, (Sep. 1, 2013), *available at* http://www.washingtonpost.com/local/accuser-in-naval-academy-rape-case-resumes-testimony/2013/09/01/e39b1b96-1313-11e3-880b-7503237cc69d_story.html.

[101] *Id.*

[102] Ali Weinberg, *Woman at Center of Alleged Naval Academy Gang Rape Testifies For First Time*, NBC NEWS, (Aug. 28, 2013), *available at* http://www.nbcnews.com/news/other/naval-academy-sex-assault-accuser-grilled-memory-alleged-attack-f8C11042678.

[103] *Id.*

day after the alleged rape.[104] One of the defendants' attorneys, asked the victim whether she wore a bra or other underwear to the party and whether she "felt like a ho" afterward.[105] An attorney for one of the other defendants asked the victim repeatedly about her oral sex technique, arguing over objections from the prosecution that oral sex would indicate the "active participation" of the woman and therefore her consent.[106] Even when the IO did sustain the prosecutors' objections, barring, for example, a question about whether the alleged victim carried condoms in her purse, the tone of the cross-examination did not change.[107] "This was a case of defense lawyers gone wild, unhampered by strict rules of evidence and with clearly inadequate supervision by the officer who presided over the melee."[108]

In an interview, the victim's attorney told the New York Times, "I have been contacted by many, many victims told they had to go through this abusive process. One of the complexities is they are forced to go through this, but the decision maker is not in the room."[109] Article 32 proceedings permit "questions not allowed in civilian courts and can include cross-examination of witnesses *so intense that legal experts say they frighten many victims from coming forward*."[110] The New York Times reported in the same article that "[s]everal military justice experts said Article 32 proceedings should be eliminated."

Legal scholar, Victor M. Hansen, a former military lawyer, told the New York Times that military rape proceedings should be changed to look more like proceedings for civilian rape trials, where questions about a woman's sexual techniques would not be allowed and where rape shield laws would either prohibit or limit questions about a woman's sexual history.[111]

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[104] Steinhauer 2, *supra* note 4.
[105] *Id.*
[106] *Id.*
[107] Henneberger & Shin, *supra* note 98.
[108] Ruth Marcus, Op-Ed., *In Navy Rape Case, Defense Lawyers Go Wild*, WASH. POST, (Sep. 5, 2013), http://www.washingtonpost.com/opinions/ruth-marcus-in-navy-rape-case-defense-lawyers-go-wild/2013/09/05/2c729520-1647-11e3-a2ec-b47e45e6f8ef_story.html.
[109] Steinhauer 2, *supra* note 4.
[110] *Id.* (emphasis added).
[111] *Id.*

C. NDAA 2014 Reforms

Title XVII of The NDAA 2014, includes a series of "Sexual Assault Prevention and Response Related Reforms."[112] I will discuss only those relevant to my argument. Section 1701 provides specific rights for victims of offenses under the UCMJ including the rights to: (1) be protected from the accused; (2) reasonable, accurate, and timely notice of any public proceeding involving the offense; (3) not be excluded from such proceeding[113]; (4) confer with trial counsel in the case; (5) full and timely restitution; (6) proceedings free from unreasonable delay; and (7) be treated with fairness and respect for the victim's dignity and privacy.[114] Section 1701 also provides for the assumption of such rights by a legal guardian in the case of a victim who is under eighteen years of age, incompetent, incapacitated, or deceased.[115] Section 1701 is required to be implemented "[n]ot later than one year after the date of the enactment of [the] Act."[116]

Section 1702 amends Article 32 proceedings, and is codified in 10 U.S.C. § 832.[117] The amendment changes the name of the hearing from an "investigation under section 832" to "a preliminary hearing under section 832."[118] No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.[119] The purpose of the hearing is limited to a determination of probable cause, appropriate jurisdiction, the form of charges, and a recommendation of case disposition.[120]

Additionally, section 1702 amends the IO qualification

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[112] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.

[113] Unless the military judge or IO, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard testimony at that hearing or proceeding. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1701, 127 Stat 672 (codified as amended at 10 U.S.C. § 806b (2014)).

[114] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1701, 127 Stat 672 (codified as amended at 10 U.S.C. § 806b (2014)).

[115] *Id.*

[116] *Id.*

[117] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672 (codified as amended at 10 U.S.C. § 832 (2014)).

[118] *Id.*

[119] *Id.*

[120] *Id.*

requirements.[121] Under the amendment, a preliminary hearing shall be conducted by an impartial JAG *whenever practicable* or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a JAG.[122] If the hearing officer is not a JAG, a JAG shall be available to provide legal advice to the hearing officer.[123] After conducting a preliminary hearing, the JAG or IO conducting the preliminary hearing shall prepare a report.[124] Section 1702 amends §832 by stating: "A victim may not be required to testify at the preliminary hearing.[125] A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing."[126] The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing.[127] Failure to follow the requirements of this section does not constitute jurisdictional error.[128]

Section 1704 requires defense counsel to make any request to interview the alleged victim of a sex-related offense, who the trial counsel of the alleged victim intends to call to testify at a preliminary hearing, through the trial counsel.[129] Any interview under Section 1704 must be conducted in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate ("SAVA").[130]

Section 1716 also directs the Secretary concerned to designate legal counsel, known as Special Victims' Counsel ("SVC") for the purpose of providing legal assistance to a member or dependent

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[121] *Id.*
[122] *Id.*
[123] *Id*
[124] *Id*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] United States v. Burton, ACM 36296, 2007 WL 2300788, at *3 (A.F. Ct. Crim. App. July 16, 2007) *aff'd*, 67 M.J. 150 (C.A.A.F. 2009) ("The requirements for pretrial investigations are binding but failure to follow them does not constitute jurisdictional error. An error in the Article 32, UCMJ, investigation process is not a structural error subject to reversal without testing for prejudice."(internal citations omitted)).
[129] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1704, 127 Stat 672 (codified as amended at 10 U.S.C. § 846 (2014)).
[130] *Id.*

who is the victim of a sex-related offense.[131] Section 1716 authorizes several forms of legal assistance, which include in part: 1) legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense; 2) legal consultation regarding the military justice system, including the victim's responsibility to testify, and other duties to the court; 3) to accompany the victim at any proceeding in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense[132]; 4) legal consultation regarding eligibility and requirements for services available from appropriate agencies or officers for emotional and mental health counseling and other medical services; and 5) legal consultation and assistance in any proceedings of the military justice process in which a victim can participate as a witness or other party.[133] Section 1716 makes the relationship between an SVC and victim one protected by attorney-client privilege.[134] Victims of an alleged sex-related offense shall be offered the option of receiving assistance from a SVC upon report of an alleged sex-related offense or at the time the victim seeks assistance from a SAVA, a military criminal investigator, a victim/witness liaison, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary.[135] Section 1716 will be implemented 180 days from the

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[131] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

[132] Although a non-party to the Courts-Martial, an alleged victim of sexual assault has standing. *See* LRM v. Kastenberg, 72 M.J. 364, 368, 370, 372 (C.A.A.F. 2013) ("[The] [victim's] position as a nonparty to the courts-martial does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. . . . Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. . . . M.R.E. 412. . .create[s] certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801. . . .")

[133] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

[134] *Id.*

[135] *Id.*

passage of NDAA 2014.[136]

D. The Procedural Paradox

i. How M.R.E. 412 *Should Be* Applied Versus How M.R.E. 412 *Has Been* applied.

MRE 412[137] is inapplicable at Article 32 hearings despite

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[136] *Id.*

[137] Mil. R. Ev*Id.* 412. "Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition:

(a) Evidence generally inadmissible

The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) Procedure to determine admissibility

(1) A party intending to offer evidence under subsection (b) must--

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the

statutory language requiring MRE 412 to apply at Article 32 hearings.[138] MRE 412 requires a party intending to offer evidence to file a written motion at least five days prior to entry of a plea that specifically describes the evidence and states the purpose for which it is offered. "[139] The party intending to offer evidence under this rule must also "serve the motion on the opposing party and the military judge and notify the alleged victim…."[140] Before admitting evidence under this rule, the military judge must conduct a hearing, *which shall be closed*."[141] "The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise."[142]

Prior to 1993, MRE 303[143], the rule regarding degrading

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presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Ev*id.* 403.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." Mil. R. Ev*id.* 412.

[138] *See* Mil. R. Ev*id.* 1101(d) ("("[The] [MRE], other than with respect to privileges and Mil. R. Ev*id.* 412, do not apply in investigative hearings pursuant to Article 32. . .")

[139] Mil. R. Ev*id.* 412(c)(1)(A).

[140] Mil. R. Ev*id.* 412(c)(1)(B).

[141] Mil. R. Ev*id.* 412 (c)(2) (emphasis added).

[142] Mil. R. Ev*id.* 412 (c)(2).

[143] Mil. R. Ev*id.* 303. "Degrading questions: No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or

questions, was the "means by which the substance of MRE 412 applie[d] to Article 32 proceedings, and no person [would] be compelled to answer a question that would be prohibited by Rule 412."[144] In MRE 303's comments discussing MRE 412's application before the 1993 amendment, the analysis states:

> It should also be noted that it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination formerly typical of sexual cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual.[145]

In 1993, RCM 405(i) and MRE 1101(d) were amended to make the provisions of MRE 412 applicable at pretrial investigations.[146] The MRE 303 analysis states: "[The 1993 Amendment] ensure[s] that the same protections afforded victims of nonconsensual sex offenses at trial are available at pretrial hearings."[147]
The analysis for MRE 412 states in part:

> Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.[148]

Like MRE 303's analysis, MRE 412's analysis section states:

> *1993 Amendment.* R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412.[149]

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evidence is not material to the issue and may tend to degrade that person."
[144] *Manual for Courts–Martial, United States,* Analysis of the Military Rules of Evidence app. 22 at A22–9 (2012 ed.) (hereinafter "*Manual for Courts-Martial*").
[145] *Id.*
[146] *Id.* (discussing the 1993 Amendment).
[147] *Id.*
[148] *Id.* at A22–36.
[149] *Id.*

In 1998, MRE 412 was amended again to more closely resemble its civilian counterpart. In discussing MRE 412's replacement of an in camera procedure with a closed hearing, the analysis states:

> [A] closed hearing was substituted for the in camera hearing required by the Federal Rule. Given the nature of the in camera procedure used in Military Rule of Evidence 505(i)(4), and that an *in camera* hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the latter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new requirement to seal the motion, related papers, and the record of the hearing, fully protects an alleged victim against invasion of privacy and potential embarrassment.[150]

Despite the above language, MRE 412 has never been amended to make the procedural requirements applicable in an Article 32 hearing. MRE 412's procedural requirements as currently written state in relevant part:

> (c) Procedure to determine admissibility
>
> (1) A party intending to offer evidence under subsection (b) must--
>
> (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
>
> (2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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[150] *Id.* at A22–37.

> (3) If the military judge determines on the basis of the hearing . . . [151]

As mentioned *supra*, MRE 412(c)'s procedural requirements mandate at least five day's notice prior to the entry of a plea by the party intending to offer MRE 412 evidence.[152] However, fulfilling this requirement before the end of an Article 32 hearing is impossible because the accused cannot enter a plea until the CA refers the case to a court-martial.[153] The CA cannot refer the case to a court-martial without probable cause, which is determined, at least in part, by an Article 32 hearing.[154] The entry of pleas is done at the beginning of trial, ordinarily at arraignment, unless deferred by defense counsel to a later time.[155] Thus, because the event referenced in MRE 412(c)'s notice requirement cannot take place until after the Article 32 hearing concludes, MRE 412(c) procedural gatekeeping cannot be implemented. Despite the 1993 amendment's optimistic language, "the same protections afforded victims of nonconsensual sex offenses

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[151] Mil. R. Ev*Id.* 412(c).
[152] Mil. R. Ev*Id.* 412(c)(1)(A).
[153] R.C.M. 601(d)(2).
[154] R.C.M. 405(a) ("[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.")
[155] *See* R.C.M. 910; R.C.M. 904; *See also* R.C.M. 910(e) (Discussion). ("Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused."); *See also* Lieutenant Colonel Le T. Zimmerman, USAF, *The Trial Script Everything You Didn't Even Know You Didn't Know*, 36 NO. 2 The Reporter 18, 22 (2009) (citing R.C.M. 904, Arraignment) ("Arraignment is the reading of the charges and specifications to the accused and calling on the accused to plead. The entry of the pleas is not part of the arraignment and the accused can ask to defer entry of pleas; therefore, arraignment is complete when the military judge utters the words "Accused, how do you plead?" The arraignment triggers certain legally significant events; therefore, as counsel, you should listen for the judge to ask the accused to plead and should be aware of the consequences when requesting an arraignment, especially if you don't plan to immediately proceed to trial. Once an accused is arraigned, no additional charges may be referred against the accused to that court-martial.")

at trial are [not] available at pretrial hearings.[156]

In addition to MRE 412's explicit language, recent case law has attempted to explain the rule's application. The highest military court tried to clarify the application of the rule in 2011.[157] The following excerpt from a 2013 Air Force Court of Criminal Appeals case illustrates the application of MRE 412:

> [E]vidence of a victim's past sexual behavior is inadmissible in a case involving an alleged sex offense. Evidence offered to prove that any alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense except as provided in [Mil. R. Evid. 412] subdivisions (b) and (c). Subdivision (b) provides three exceptions to this general rule of exclusion. The third of these exceptions, the constitutionally required exception, permits the admission of evidence the exclusion of which would violate the constitutional rights of the accused. Mil. R. Evid. 412(c) provides the procedure to determine the admissibility of evidence offered under the three exceptions. This procedure includes the Mil. R. Evid. 412 balancing test, . . . [The] [balancing] [test] [provides] [that] [i]f the military judge determines ... that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403. Evidence may be admitted under Mil. R. Evid. 412(b)(1)(C) when the evidence is relevant, material, and its probative value outweighs the dangers of unfair prejudice. Relevant evidence is any evidence that has any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence. The evidence must also be material, which requires looking at the importance of the issue for which the evidence was offered in relation to the other issues in th[e] case; the extent to which th[e] issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue. If evidence is material and relevant, then it must be admitted under subsection (b)(1)(c) when the accused, under the Mil. R. Evid. 412 balancing test, can show that the probative value of the evidence outweighs

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[156] *Manual for Courts-Martial, supra* note 144, at A22–9 (discussing the 1993 Amendment).

[157] United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

> the dangers of unfair prejudice to the victim's privacy. If the military judge, after then applying the Mil. R. Evid. 403 balancing test, finds that the probative value of the evidence outweighs the danger of unfair prejudice, it is admissible no matter how embarrassing it might be to the alleged victim. Unfair dangers include concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Likewise, if a military judge determines that the evidence is not constitutionally required, the military judge must exclude the evidence under Mil. R. Evid. 412 because the evidence does not fall under an exception to the rule of exclusion. [158]

MRE 412 as currently written requires that a closed hearing by a military judge occur before admitting MRE 412 evidence and for the record of the closed hearing to remain sealed.[159] No MRE 412(c) closed hearings were conducted in the 2013 Naval Academy case discussed *supra*. If MRE 412(c) was amended to make closed hearings possible for MRE 412 Article 32 purposes, maybe the abuses that occurred in Maryland would have been avoided. The MCM should be amended to add specific procedural requirements to accommodate pretrial proceedings.

The MRE 412's mandated applicability at pretrial hearings mixed with its apparent lack of procedural requirements specific to a pre-trial setting create a paradox. To further add to the confusion, under RCM 405, the investigating officer is not required to rule on the admissibility of evidence.[160] An investigating officer may consider any evidence, even if that evidence would not be admissible at trial."[161]

An Article 32 IO "is not required to rule on objections, [but] may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the [IO] believes such action is appropriate."[162] Additionally, the IO "is not required to rule on the admissibility of evidence and need not consider such matters except as the [IO] deems necessary to an informed

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[158] United States v. Evans, ACM 38218, 2013 WL 6913159, at *3 (A.F. Ct. Crim. App. Dec. 3, 2013) *review denied*, 14-0381/AF, 2014 WL 1760008 (C.A.A.F. Apr. 3, 2014) (internal citations and quotations omitted).
[159] Mil. R. Ev*id.* 412 (c).
[160] R.C.M. 405(h)(2); R.C.M. 405(h)(2) (Discussion).
[161] R.C.M. 405(i) (Discussion).
[162] R.C.M. 405(h)(2) (Discussion).

recommendation."[163] Case law has extrapolated on the types of corrective action an IO may take. For instance: 1) An IO conducting a pretrial investigation can restrict defense cross-examination of government witnesses at investigation, to prevent defense counsel from merely rephrasing questions five, six or seven times[164]; 2) An Article 32 pretrial investigation is judicial in nature, and the IO presiding over investigation has an obligation to regulate matters before him to ensure that the hearing is fair and impartial; and 3) An IO presiding over Article 32 pretrial investigation has the authority to limit redundant, repetitive or irrelevant questions.[165]

The RCM provide no practical guidance beyond the ability of "the [IO] may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the IO believes such action is appropriate."[166] Furthermore, "[i]f an objection raises a substantial question about a matter within the authority of the commander who directed the investigation . . . the IO should promptly inform the commander who directed the investigation.[167] However, what happens after the IO informs his commander and returns to finish the hearing? How does the MRE 412 issue go away? How does the IO informing his commander fix the evidentiary concerns? If MRE 412 is intended to act as a rape shield and protect victims from improper questioning but the only powers the IO has is to note an objection in a report, and the IO is not bound by the rules of evidence, how are victims protected?

Because both the MRE and RCM apply with equal authority, when applied in conjunction with one another they lead to a dead end. As a result of MRE 412's procedural inapplicability in Article 32 hearings, the IO uses his ability to control the conduct of the hearing as a way to prevent the victim from abuse. This standard is based on the IO's subjective "my gut says this does not feel right" standard. An IO's conduct determinations have the potential to limit relief on appeal due to its non-legally based subjective standard. The law is unclear on how an IO's conduct determinations will be reviewed on

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[163] R.C.M. 405(e) (Discussion).
[164] United States v. Lewis, 33 M.J. 758, 762 (A.C.M.R. 1991) *aff'd*, 36 M.J. 299 (C.M.A. 1993) (internal citations omitted).
[165] *Id.* at 763 (internal citations omitted).
[166] R.C.M. 405 (h)(2) (Discussion).
[167] *Id.*

appeal.

What happens if the IO does not want to rule on evidentiary objections?[168] For instance, if an IO does not allow the defendant the right to thoroughly cross-examine a key witness against him or her, over the accused's objections, and the accused moves the trial court to cure Article 32 defects before trial on the merits, the accused will be entitled to relief without needing to show prejudice.[169] Thus, the defendant at least has an explicit procedural mechanism to cure legitimate Article 32 defects. However, what happens if the IO does not want to rule on evidentiary objections posed by the government in the event defense counsel is abusively cross-examining an alleged victim? I searched military case law and the MCM to find what remedy the government has to cure Article 32 defects. I spoke to three high-ranking JAGs from different branches of the Armed Forces, and they all said the same thing: There is no explicit procedural remedy for the government to cure Article 32 defects.[170]

Several JAGs confirmed the procedural defectiveness of the current military justice system, noting the lack of explicit statutory avenues for government relief to cure alleged defects in Article 32 hearings. For instance, in the event an IO attempted to let in the type of evidence that would normally be prohibited under MRE 412 (c)'s closed hearing and advance written notice requirements, the

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[168] *See* R.C.M. 405(h)(2).

[169] United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007) ("The UCMJ and the *Manual for Courts–Martial* provide an accused with a substantial set of rights at an Article 32 proceeding. . . . As a general matter, an accused is required to identify and object to any errors in the Article 32 proceeding at the outset of the court-martial, prior to trial on the merits. . . . When an accused makes an objection at that stage, the impact of an Article 32 violation on the trial is likely to be speculative at best. The time for correction of such an error is when the military judge can fashion an appropriate remedy under R.C.M. 906(b)(3) before it infects the trial, not after the members, witnesses, and parties have borne the burden of trial proceedings. . . . In the event that an accused disagrees with the military judge's ruling, the accused may file a petition for extraordinary relief to address immediately the Article 32 error. . . ."(internal citations and quotations omitted)); *see* United States v. Davis, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) *aff'd*, 64 M.J. 445 (C.A.A.F. 2007) (holding if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial).

[170] Telephone & E-mail Interviews with JAGs, who requested to remain anonymous (Thursday, May 22, 2014).

government would stop the Article 32 hearing and demand that the IO speak with his independent legal advisor. If, after speaking to the independent legal advisor, the IO continued to allow prohibited cross-examination, the government would speak to CA to potentially seek a new IO. However, the RCM 905(b)(1) pretrial motion option available for the accused is not available for the government.[171] The government should be able to petition to the trial court judge to review Article 32 abuses. Other JAGs, who wish to remain anonymous, share similar concerns about the clear lack of guidance regarding how the Article 32 IO is supposed to make preliminary MRE 412 admissibility determinations during the pretrial hearing, especially when one of the procedural requirements, five day's-notice of intent to offer MRE 412 evidence, is required to be filed prior to the entry of pleas.

Currently, the system is rigged for abuse because of a major problem with the military justice system's procedures. However, there is a simple solution. Both MRE 412 and RCM 405 should be amended to make MRE 412 practically applicable in Article 32 hearings. If a defendant wants to offer in evidence that falls within the ambit of 412, then they must follow the procedures laid out in MRE 412(c). This is not a revolutionary idea. The rule requires procedures that are intended to benefit the victim from embarrassing and degrading testimony and ensures that the accused is entitled to evidence, the exclusion of which would violate his or her constitutional rights.[172] My remedy calls for enforcing procedures already required to be enforced by both the MRE and the RCM. If the rule is properly enforced, many of the problems sexual assault victims face in initially coming forward and in pretrial hearings will be alleviated.

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[171] R.C.M. 905(b)(1) ("Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered: Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation or referral of charges; . . ."); R.C.M. 905 (Discussion) ("Such non-jurisdictional defects include unsworn charges, inadequate Article 32 investigation, . . .")

[172] *See* United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

ii. A Legally Trained Hearing Officer "Whenever Practicable"[173]

In addition to legally trained IOs either attempting to or not employing MRE 412 at all in pretrial hearings, the fact that there is a loophole in NDAA 2014's language to continue to allow for non-legally trained IOs is equally, if not more, problematic. The 2014 amendment dealing with the legal qualifications of investigating officers is not an absolute ban on non-legally IOs at Article 32 hearings. The problem with the 2014 amendment to § 832(b) is the statute's "whenever practicable" language[174]. "Practicable" is not statutorily defined in the UCMJ; however, military courts have interpreted "practicable" in non-Article 32 contexts. Regarding an Article 62 government appeal, the highest military court stated: "[P]racticable [is] not statutorily defined, but surely [its] plain English meaning is clear—the case is supposed to move to the front of the line if *feasible*."[175]

Other military courts have similarly concluded that "practicable" is generally synonymous with "if feasible". Therefore, the "whenever practicable" language provides for an opportunity where, if the use of a JAG to serve as an IO is not feasible, then the IO does not have to be legally trained, so long as a JAG is available to serve as a legal advisor to the non-legally trained IO.[176] Presumably, there will be situations[177] where the use of a JAG will not be feasible,[178] resulting in a deprivation of both party's rights due to a non-legally trained IO's incompetency on legal matters. In addition to the "whenever practicable" language in §832(b), none of the Article 32 amendments go into effect until December 26, 2014.[179]

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[173] *See* 10 U.S.C. § 832 (2014).
[174] *See* 10 U.S.C.A. § 832(b) (2014).
[175] United States v. Danylo, 73 M.J. 183, 190 (C.A.A.F. 2014) (interpreting "practicable" in an Article 62 appeal context, where, like in the Article 32 context, it is similarly not defined) (emphasis added).
[176] 10 U.S.C. § 832(b) (2014).
[177] David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, ARMY NEWS SERVICE (Jan. 8, 2014), *available at* http://www.defense.gov/news/newsarticle.aspx?id=121444.
[178] *See Id.* (describing a situation where a shortage of JAGs resulted in the inability to provide legally trained IOs in the Army, prior to the passage of NDAA 2014).
[179] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672 (codified as amended at 10 U.S.C. § 832(b) (2014)).

Regarding the NDAA 2014 Article 32 amendment's "whenever practicable" language, in a situation where there is a shortage of JAGs, litigants will pay the price. A shortage of JAGs is cited by the policy branch chief of the Army's Criminal Law Division as the reason for not using legally trained IOs in all instances prior to the 2014 amendment.[180] The branch chief stated that JAGs did not always serve as Article 32 IOs "largely because we try four times the number of cases of any of the other services" and that legally trained IOs were not used exclusively because of a shortage JAGs and the Army's high volume of cases.[181] Obviously a shortage of lawyers would make the use of legally trained IOs not "practicable." If JAGs were not being used at Article 32 hearings because of a legal personnel shortage and the 2014 amendments do not address the legal personnel shortage discussed *supra*, it stands to reason that there will be instances where non-legally trained IOs preside over Article 32 hearings, at least in the Army.

Assuming the military starts to enforce MRE 412 procedural requirements at pretrial proceedings, how can someone with no legal training enforce the rules of evidence in any meaningful way that would not prejudice either the victims or the accused? How can someone with no legal training enforce the rule's protections in the event a deposition is required? Especially when the highest military court in the United States stated "[t]he M.R.E. 412(c)(3) 'balancing test'. . .is anything but simple to understand or apply, but it is not facially unconstitutional. . . .[182] To a certainty, though, it has done nothing but add additional layers of confusion and uncertainty to the application of M.R.E. 412."[183]

Confusion for a judge trying to apply an evidentiary balancing test and confusion for an IO, a legal layman, trying to apply the same evidentiary balancing test are of a different magnitude. A trained judicial officer has endured the rigors of law school, and has been trained to think in a specific way. This legal training and experience makes a judge more qualified to make these rulings than a person with no legal training. An investigating officer should be required to possess formal legal training because they make evidentiary rulings with the potential for grave constitutional harms to both parties. It is not an unreasonable requirement, considering the potential for great harm. IOs are

[180] Vergun, *supra* note 177.
[181] *Id.*
[182] United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011).
[183] *Id.*

significantly restricted in their ability to seek legal advice. An Article 32 investigating officer violates his role as judicial officer when he receives advice from an individual who serves in a prosecutorial function or when he obtains advice from a non-prosecutor advisor on a substantive question without prior notice to all other parties.[184] Errors relating to Article 32 investigations, when preserved by timely motion, will only constitute grounds for reversal when the accused has been prejudiced; however, prejudice is presumed when investigating officer receives advice from an individual who serves in prosecutorial function or receives advice from non-prosecutor on substantive question without prior notice to all other parties.[185] The highest military court included "*evidentiary standards*" as an example of a substantive, rather than a procedural matter.[186]

The Investigative Officer is charged with determining whether probable cause exists, a prosecutorial task. However, the highest military court has repeatedly held that "Article 32 investigation[s] [are] judicial in nature. "[187] Noting the potential for unconstitutional bias in civilian administrative adjudication, the Supreme Court correctly stated, "under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[188] The Army's highest court shared similar concerns when "it found that it was error for the investigation officer to prevent the defense counsel from fully cross-examining one of the Government's

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[184] *See* United States v. Grimm, 6 M.J. 890, 893 (A.C.M.R. 1979).
[185] *See Id.*
[186] *See* United States v. Payne, 3 M.J. 354, 355 n. 4 (C.M.A. 1977).
[187] United States v. Davis, 20 M.J. 61, 65 (C.M.A. 1985) ("Furthermore, we do not wish to establish a rule which will lead to the appointment of line officers, rather than military lawyers, as investigating officers. An Article 32 investigation is judicial in nature. . .and use of legally trained persons to perform the judicial duties involved avoids some of the complaints lodged against lay judges." (citing United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977); United States v. Samuels, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); *Payne*, 3 M.J. at 355 note 6) (internal quotations omitted)).
[188] Withrow v. Larkin, 421 U.S. 35, 47 (1975) (discussing the potential for unconstitutional bias in civilian administrative adjudication) (internal citations and quotations omitted).

principal witnesses on a matter that affects the witness' credibility."[189] In arriving at their conclusion, the Court noted that it did "*not expect a layman in the law to know the niceties of the rules of evidence*."[190]As mentioned *supra*, the MCM states that "it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination . . . typical of sexual assault cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual."[191] RCM 405 and MRE have a paradoxical relationship.

iii. The "Availability" Issue

The Article 32 amendments fall short in another important area. The amendments added the right of military witnesses to lawfully refuse to appear at a pretrial hearing, thus giving military witnesses the same right civilian witnesses had prior to the NDAA 2014.[192] Civilians have never been legally obligated to appear or testify at Article 32 hearings.[193] The Rules for Courts-Martial state in relevant part: "If a witness is not reasonably available the investigating officer may consider alternatives to that witness's testimony.[194] A civilian witness who refuses to testify is not reasonably available, because civilian witnesses may not be compelled to attend a pretrial investigation."[195] Therefore, even before NDAA 2014, if a key government civilian victim-witnesses did not want to appear or testify at an Article 32 hearing, they would be declared unavailable and could not be compelled to appear.[196] However, just because a key government witness is unavailable, this does not mean that the accused cannot request the military judge to subpoena the witness for a

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[189] U. S. v. Harris, 2 M.J. 1089, 1090 (A.C.M.R. 1977) *aff'd*, 5 M.J. 266 (C.M.A. 1978) (emphasis added) (internal citations omitted).
[190] *Id.*
[191] *Manual for Courts-Marital*, *supra* note 144, Analysis of Mil. R. Ev*id.* 303, App. 22, at A2-29.
[192] The amendment provides in relevant part:
"(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing." 10 U.S.C.A. § 832(d)(3) (2014)
[193] *See* R.C.M. 405(g)(2)(B) (Discussion).
[194] *See Id.*
[195] *See Id.*
[196] *See* R.C.M. 405(g)(2)(B) (Discussion).

deposition.[197] The presence of a civilian witness may be obtained by subpoena.[198] NDAA 2014 does nothing to cure the deposition loophole regarding victim availability.[199]

A March 2014 Air Force Court of Criminal Appeals decision illustrates this issue. In *McDowell*, the Government preferred a charge and specification on August 14, 2013 alleging rape against the accused.[200] An Article 32 hearing was scheduled for September 4, 2013.[201] On August 27, 2013, trial defense counsel contacted the mother of BB, the alleged civilian victim, to arrange an interview with BB.[202] The interview took place on September 3, 2013, the first mutually available day and one day before the pretrial hearing.[203] After three hours of answering questions from trial defense counsel, BB and her mother ended the interview, noting that it was late and that BB had to meet with trial counsel to prepare for the Article 32 hearing the next day.[204] At the pretrial hearing, defense counsel noted they had not completed their interview of BB.[205] The IO allowed defense counsel additional latitude on cross-examination because of the limited pre-trial interview of BB.[206] BB completed her testimony on direct, and cross-examination began before the lunch break.[207] During the lunch break, the IO observed that BB appeared upset by the questions asked on cross-examination.[208] The IO was unsure if BB knew that she was not legally obligated to appear at the hearing.[209] The IO informed counsel for both parties that he intended to inform BB that she was not required to appear, in order to preclude any possible claim

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[197] *See* R.C.M. 702(a).
[198] *See* R.C.M. 703(g)(2).
[199] The amended version of 10 U.S.C. § 832(d)(3), which will go into effect at the end of 2014 says: "A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing."
[200] United States v. McDowell, MC 2013-28, 2014 WL 1323102, at *1 (A.F. Ct. Crim. App. Mar. 13, 2014).
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*

that BB was forced to testify against her will.[210] Both sides agreed with the IOs decision, and after the break, the IO informed BB, and cross-examination resumed.[211]

Defense counsel asked BB a number of probing questions on issues not immediately related to the offense charged.[212] During interrogatories posed by the military judge during pre-trial motions practice, the IO responded that many of the questions defense counsel asked at first glance seemed irrelevant and intended to harass, but justified the questions based on the defense's lack of a complete pretrial interview.[213] The IO raised relevancy objections, but defense counsel insisted the questions were necessary and refused to move on to questions relevant to the offense charged.[214]

Cross-examination took place for more than two hours.[215] BB was asked a number of questions about the type of shoes the accused wore.[216] The IO did not know why defense counsel was not satisfied with BB's first response indicating she did not remember the accused's shoe type.[217] The IO believed defense counsel was "needling her for a reaction."[218] BB asked whether the type of shoes the accused wore was relevant and asked permission to leave.[219] The IO informed BB she was free to leave.[220] BB left before defense counsel questioned her about the offense charged.[221] Defense counsel objected to the IO's Article 32 report.[222] The IO considered the objections and prepared a recommendation that included BB's testimony.[223]

During pre-trial motions practice, defense counsel moved the military judge to order a deposition of the victim, arguing that the investigation was not sufficiently thorough and denied the accused a

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[210] *Id.* at *2.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.* at *3.

substantial pretrial right by not being afforded a full opportunity to cross-examine the key witness-victim, who was central to the government's case.[224] Defense counsel previously requested that the convening authority order a deposition, but their request was denied.[225] Additionally, defense counsel moved the military judge to dismiss the charge and specification, or to direct a new Article 32 hearing.[226] The government opposed both motions.[227] The military judge granted both motions, ordering the reopening of the Article 32 hearing so the IO could consider the victim's testimony.[228] In granting the motion, the judge concluded that although the victim would be available for trial, a deposition was proper because the victim provided incomplete testimony at the Article 32 hearing, which denied the accused a substantial pretrial right to cross-examine an available witness.[229] Sixteen days after the motions were granted, the United States filed a Petition for Extraordinary Relief[230], seeking a writ of mandamus ordering the military judge to reverse the order.[231]

On review, the Air Force Court of Criminal Appeals concluded it was proper to consider the petition under the All Writs Act[232] but

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[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.* ("The All Writs Act, 28 U.S.C. § 1651(a), authorizes all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. This Court is among the courts authorized under the All Writs Act to issue all writs necessary or appropriate in aid of their respective jurisdictions. The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have no other adequate means to attain the relief; (2) the party seeking the relief must show that the right to issuance of the relief is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." (internal citations and quotations omitted)).
[231] *Id.*
[232] *Id.* at *4 ("To justify reversal of a discretionary decision by mandamus, we must be satisfied that the decision amounted 'to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur. A decision by a trial judge may be erroneous but not rise to the level of a usurpation of judicial power, so long as the trial judge's ruling is "made in the course of the exercise of the court's

nevertheless denied the government's petition.[233] The appellate court discussed Article 32 proceedings, stating:

> A formal pretrial investigation is a predicate to the referral of charges to a general court-martial unless the accused waives the pretrial proceeding. The procedures for an Article 32 hearing include representation of the accused by counsel, the right to present evidence, and the right to call and cross-examine witnesses. The Article 32 investigation operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges. However, the accused has no absolute right to examine or cross-examine all relevant witnesses at this proceeding. If a witness is not reasonably available the investigating officer may consider alternatives to that witness's testimony. A civilian witness who refuses to testify is not reasonably available, because civilian witnesses may not be compelled to attend a pretrial investigation.[234]

Regarding depositions, the appellate court stated:

> A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial. A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the Article 32 investigation or at trial. After referral, either the convening authority or the military judge may order that a deposition be taken on request of a party. A request for a deposition may be denied only for good cause. Good cause for denial includes failure to state a proper ground for taking a deposition, failure to show the probable relevance of the witness's testimony, or that the witness's testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a

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jurisdiction to decide issues properly brought before it. Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous, and therefore limited application of the All Writs Act for writs of mandamus to the exceptional case where there is clear abuse of discretion or usurpation of judicial power." (internal citations and quotations omitted)).

[233] *Id.*

[234] *Id.* (internal citations and quotations omitted).

witness.[235]

Consequentially, the appellate court held that the military judge decided an issue the parties properly placed before him, and he elected a lawful option in response to the motions.[236] Therefore, there was no judicial usurpation of power in either of the trial court's rulings.[237] Based on the Discussion to RCM 702(c)(2)(A), which indicates that ordering a deposition may be proper if an essential witness is unavailable at an Article 32 hearing, the appellate court agreed that a "reasonable argument could be made that an essential witness—BB—was made unavailable at the Article 32 hearing when she excused herself before cross-examination concluded."[238] While "BB was not required to appear at the Article 32 hearing at all, the highest military court has held that the absence of a key civilian witness can 'deprive the accused of a substantial pretrial right,' and that the mere refusal of a civilian to testify do at an Article 32 hearing 'does not *eo ipso* nullify the defense right to cross-examine.'"[239] The highest military court held that where the defense did not file a timely motion to depose the absent civilian witness, and the absence of the civilian witness at the pretrial hearing did not adversely affect the trial, there was no reason to set aside the conviction.[240] However, in the instant case, defense counsel timely filed a motion to depose a key civilian witness.[241]

"Assuming without deciding that [BB's] departure after more than two hours of cross-examination constituted her 'unavailability' that 'deprived the accused of a substantial pretrial right,' [binding precedent] indicates that ordering [BB's] deposition was an authorized course of action."[242] Despite affirming the trial court's course of action, the appellate court viewed the trial court's ruling with caution.[243] Here, defense counsel "had the benefit of more than five hours with BB: three hours during the defense interview and more than two hours of cross-

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[235] *Id.* (internal citations and quotations omitted).
[236] *Id.* at *5.
[237] *Id.*
[238] *Id.*
[239] *Id.* (quoting United States v. Chuculate, 5 M.J. 143, 144–46 (C.M.A. 1978)).
[240] *Id.* (citing *Chuculate*, 5 M.J. at 144-46).
[241] *Id.*
[242] *Id.* (quoting *Chuculate*, 5 M.J. at 144-46).
[243] *Id.*

examination during the Article 32 hearing."[244] If defense counsel "could not cover this relatively straight-forward accusation during that time, then perhaps defense counsel should not be entitled to another unlimited block of time in which to question BB during a deposition."[245] The court cautioned trial judges and IOs to ensure that their rulings do not generate an incentive for defense counsel to create a situation that renders a witness unavailable at an Article 32 hearing.[246] BB was available to testify at trial.[247]

In conclusion, the appellate court stated: "We know of no other instance in which a military judge has ordered a deposition under similar facts such as the instant case, and the parties and amicus briefs have pointed us to none."[248] Furthermore, because the Article 32 process will soon be more limited in scope, with "explicit statutory language" requiring that "[a] victim may not be required to testify at the preliminary hearing . . . . [d]efense counsel may or may not have greater occasion to request depositions of alleged victims after this legislation[249] takes effect…."[250]

The *McDowell* court's decision was based on earlier binding precedent. For instance, in *Jackson*[251], the highest military court found that the accused was denied a substantial pretrial right, requiring reversal, where the accused was denied the right to cross-examine a key government witness prior to trial and the trial court denied defendant's motion for further proceedings under Article 32.[252] Thus, whether a deposition will be granted or not will be determined by the importance of the initially unavailable witness's testimony. Submitting to a deposition would not be that big of an issue if the person overseeing the deposition was required to possess legal training. However, the RCM does not require a deposition officer to be legally trained. Additionally, unlike in an Article 32 hearing, where the IO may rule on objections, the deposition

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[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.* at *6.
[249] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672.
[250] *Id.*
[251] United States v. Jackson, 3 M.J. 597 (N.C.M.R. 1977) *aff'd*, 3 M.J. 206 (C.M.A. 1977).
[252] *See Id.* at 599.

officer shall "record, *but not rule upon*, objections or motions and the testimony to which they relate. . . ." [253]

"When any unusual problems, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the [CA]."[254] Regarding deposition testimony: "Part or all of a deposition, so far as otherwise admissible under the [MRE], may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable. . . ."[255] Additionally, the deposition officer is charged with "maintain[ing] order during the deposition and protect[ing] the parties and witnesses from annoyance, embarrassment, or oppression."[256] The deposition officer decides whether to adjourn the proceedings and inform the convening authority.[257]

MRE 1101 applies MRE 412 to Article 32 hearings.[258] However, MRE 1101 does not apply MRE 412 to depositions, but RCM 702 says deposition testimony can be used on the merits and as substantive evidence if the witness is unavailable.[259] In the civilian legal system, "[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." [260] However, in the military, a party cannot move to terminate the deposition. Only the deposition officer can terminate the deposition. Considering deposition officer's responsibilities are "primarily ministerial in nature"[261], the RCM gives a deposition officer a significant

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[253] R.C.M. 702(f)(7).
[254] R.C.M. 702(f) (Discussion).
[255] R.C.M. 702(a) (Discussion).
[256] R.C.M. 702(f)(3).
[257] *See* R.C.M. 702(f) (Discussion) ("When any unusual problem, such as improper conduct by counsel or witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.")
[258] Mil. R. Ev*Id.* 1101(d).
[259] R.C.M. 702(a) (Discussion).
[260] Fed. R. Civ. P. 30; *See also* Fed. R. Civ. P. 30(d) (B) ("The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.")
[261] United States v. Hughes, ACM 37958 (F REV), 2013 WL 4734857, at *5 (A.F. Ct. Crim. App. Aug. 28, 2013) *review denied*, 14-0144/AF, 2014 WL 1345428 (C.A.A.F. Mar. 6, 2014) ("R.C.M. 702(f) outlines the duties of a deposition officer. Our superior

amount of discretion resulting in the potential for victim abuse. Both parties should be allowed to move the military judge to terminate the deposition. At least in the civilian system, the military judge is in a separate branch of the government, free from the appearance of and potential actual biases involved. In the military, the CA, IO, and deposition officer are all members of the same executive branch. Furthermore, in the military, the RCM do not explain what happens after the deposition officer decides to inform the CA because according to the deposition officer, the conduct of the deposition is out of control. Can the CA terminate the deposition? Does the CA just tell the deposition officer to take a break and continue?

A legally trained officer should be required for depositions because, in addition to the concerns of admissibility of evidence at trial, MRE 412 is also intended to protect the victim from degrading and embarrassing cross-examination. Even if a deposition officer were forbidden from ruling on objections, at least a legally trained officer would have a better idea of when the MRE 412 line is crossed. MRE 412's application is explained in the MRE and in case law. However, the RCM, do not provide guidance on how to handle a situation where cross-examination becomes so abusive as to warrant the deposition officer to use his powers to control conduct as a means to stop the cross-examination. The deposition officer's conduct determination is too subjective to afford any meaningful protections to an alleged victim. Questions that a legally trained officer would properly exclude under MRE 412 might be allowed under a deposition officer's conduct determination if that officer did not subjectively think that a specific line of questioning passed into his bad conduct threshold.

The benefit of allowing witnesses the option of appearing at Article 32 hearings is undermined in the event the accused timely objects to not having an opportunity to cross-examine a key witness before trial. If the accused object before trial starts, the victim will be required to appear at a deposition potentially overseen by a non-legally trained deposition officer. Thus, victims are subject to the same legal incompetence and unfairness that precipitated reforms in the first place;

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court has stated such responsibilities are primarily ministerial in nature…. As a deposition officer, [the] [deposition] [officer] would not have been called upon to ask her own questions or make conclusions of law or findings of fact."(internal citations and quotations omitted)).

only the venue has changed.

The victim-witness is left with a Hobson's choice. One option is for the victim to choose to testify at an Article 32 hearing, where hopefully the use of a JAG is "practicable" and MRE 412's procedural requirements are enforced completely. However, because the hearing is public, and MRE 412's procedures are not adequately enforced, ostracism and retaliation from peers who either attended the hearing or heard about the victim's testimony are likely.[262] The other choice is a deposition, where the accused will have the right to cross-examine the witness without the requirement of a legally trained judicial officer to rule on objections and with either all or part of the deposition testimony considered on the merits in pretrial proceedings by the IO.[263]

The addition of SVCs for sexual assault victims will benefit victims by providing victims with an attorney who will advocate for them exclusively[264]. However, because IOs are neither required, nor in the case of deposition officers, qualified, to rule on evidentiary objections at pretrial proceedings[265], in the event an SVC attempts to invoke MRE 412 protections, the remedy to the victim in a pretrial setting is unclear. Regardless, for victims, the benefit of SVCs will be seen at trial.

While there are definitely some legal procedures in the military that justify a deviation from civilian procedures, criminal justice proceedings should not be one of them. The need for reform has never been more important, especially because victims are taking their grievances to federal civilian courts, only to be denied justice.[266] Both

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[262] Common reasons for victim's not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident. *See* AZ v. Shinseki, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing Gov't Accountability Office, GAO–08–1013T, *Military Personnel: Preliminary Observations on DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs* 14 (2008)).

[263] R.C.M. 702(a) (Discussion).

[264] 10 U.S.C.A. § 1044e (2014)

[265] *See* R.C.M. 405(e) (Discussion); R.C.M. 405(h)(2) (Discussion); R.C.M. 702(f)(7); R.C.M. 702(h).

[266] *See* Cioca v. Rumsfeld, 720 F.3d 505, 513-515 (4th Cir. 2013) (holding that service members' allegations that former Secretaries of Defense, through their acts and omissions in their official capacities, contributed to a military culture of tolerance for sexual crimes were either incident to, or arose out of, their military service, and, thus, no federal *Bivens* remedy was available for their injuries; allegations, including that Secretaries failed to appoint any members to a commission to investigate policies and procedures with respect to reports of sexual misconduct and that they

legal systems encounter victims who are afraid to speak up because of fear of retaliation and embarrassment. The psychological trauma and social consequences that haunt a victim of sexual assault do not differ because they happened on a military base or at a college fraternity party.

The procedural requirements of MRE 412 must be completely enforced. The ability of defense counsel to cross-examine witnesses in any circumstance where a JAG is not present must be eliminated. Additionally, an independent legally trained officer should make evidentiary rulings in both depositions and Article 32 hearings to ensure that MRE 412 fulfills its intended purpose as a rape shield. As long as the defense is afforded a meaningful and thorough opportunity to cross-examine witnesses at trial, due process will not be offended. Grand juries do not permit the defendant to cross-examine witnesses, let alone be present at the grand jury proceeding, and I see no reason other than tradition to justify its continuance, at least in sexual assault cases.

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permitted command to use non-judicial punishment for sexual crimes, directly challenged wisdom of a wide range of military and disciplinary decisions made within ultimate chain of command.); *see* Klay v. Panetta, 924 F. Supp. 2d 8, 20 (D.D.C. 2013) ("[T]he Court finds that a *Bivens* remedy is unavailable to plaintiffs both because their injuries arose from, or were suffered in the course of activity incident to, their military service, and because their particular claims raise the very public policy considerations underlying the abstention doctrine. This decision is not meant to question in any way the seriousness of the alleged sexual assaults and retaliation, to minimize plaintiffs' suffering, or to express any doubts about the allegations that the culture and management of the military has allowed this kind of harassment and retaliation to persist. All parties agree that there is no question that allegations of rape and sexual assault by service-members should be investigated and, if appropriate, prosecuted, and that victims of any such assaults should be treated with care and compassion, and receive the full range of available support services and medical treatment to address their needs…. But the fact remains, as plaintiffs recognized in open court, that the constitution vests the ultimate power to decide how the military should run itself in Congress. Notwithstanding the deeply troubling nature of the allegations in plaintiffs' complaint, the Court is not free to infer a *Bivens* remedy under these circumstances. The special status of the military has required, the Constitution contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel…."(internal citations and quotations omitted)).

III. MJIA AND THE NDAA OF 2014

A. United States Senator Kirsten Gillibrand's (D-NY) Reform Proposal

In an article written by U.S. Senator Kirsten Gillibrand outlining her proposed reforms to the military justice system, she begins with, "[t]o find a common-sense solution, [one] just [has] to listen to the victim's stories."[267] Gillibrand then describes the story of Air Force First Lieutenant Adam Cohen, who after telling his superiors that he was sexually assaulted and threatened, became the target of a criminal investigation.[268] "In April of 2013, he was told by his commander, 'I don't believe you were raped."[269] After Cohen described the attack, he was then told, "[t]hat's good acting, but I still don't believe you."[270] Cohen was then denied an expedited transfer request.[271] Gillibrand included this victim's account as just one example of what commanders say directly to victims that are brave enough to come forward. [272]

In Gillibrand's proposed Military Justice Improvement Act ("MJIA")[273], decision-making regarding whether serious crimes go to trial moves "from the chain of command to professionally trained military prosecutors, where it belongs."[274] Gillibrand points out that critics of the MJIA say that moving decision making will diminish good order, discipline, and unit cohesion.[275] However, Gillibrand counters by arguing that "America's closest allies like the U.K., Canada, and Israel have already adopted this approach without reported negative consequences to the 'good order and discipline' our military leaders are trying, but failing, to uphold."[276]

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[267] Kirsten Gillibrand, *Justice Equal to Their Sacrifices*: *Military Leadership Can't Ensure Justice For Sexual Assault Victims*. U.S. NEWS & WORLD REPORT (July 5, 2013), *available at* http://www.usnews.com/opinion/articles/2013/07/05/military-leadership-cant-solve-the-problem-of-sexual-assault.
[268] *See Id.*
[269] *See Id.*
[270] *See Id.*
[271] *See Id.*
[272] *See Id.*
[273] Military Justice Improvement Act, S. 967, 113TH Cong. (2013).
[274] *See* Gillibrand, *supra* note 267.
[275] *See Id.*
[276] *See Id.*

The MJIA also leaves many crimes within the chain of command, including thirty-six crimes unique to the military, such as insubordination and other crimes punishable by less than one year of confinement.[277] Additionally, the Act provides the offices of the military chiefs of staff with the authority and discretion to establish courts, empanel juries, and choose judges to hear cases (i.e. convening authorities).[278] The MJIA would not amend Article 15,[279] which deals with a commanding officer's non-judicial punishment option.[280] Commanding officers would still be able to order non-judicial punishment for lesser offenses not directed to trial by the prosecutors.[281]

"Despite ongoing advances in the areas of military medicine, technology, weaponry, and tactics, U.S. military justice remains rooted in an obsolete, eighteenth century system.[282] Commanders, rather than highly trained military legal personnel, are vested with the authority to administer justice."[283] Prior to the enactment NDAA of 2014,[284] the convening authority had the ability to make charging decisions, select jury members, and modify or overturn court decisions.[285] Because the commander making these important decisions is in the accused's chain of command, military justice is unfairly biased, compromising both the accused's right to a fair and impartial trial as well as the alleged victim's access to meaningful justice.[286]

The MJIA still equips commanders with the tools to prevent and respond to sexual assault by empowering them to continue to create and maintain the climate within their respective units.[287] If a military prosecutor decided not to try a case, a commander could still impose

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[277] *See Id.*
[278] *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND U.S. SENATOR FOR N. Y., http://www.gillibrand.senate.gov/mjia.
[279] 10 U.S.C. § 815 (2014).
[280] *See* Gillibrand, *supra* note 371..
[281] *See Id.*
[282] THE MILITARY JUSTICE IMPROVEMENT ACT OF 2013 (S. 967) INFORMATIONAL FLYER (2013), *available at* http://www.vva.org/MJIA/Documents/MJIA-Informational-Flyer.pdf.
[283] *See Id.*
[284] National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (2013) (enacted).
[285] *See supra* note 376.
[286] *See Id.*
[287] *See Id.*

other forms of military discipline, including non-judicial punishment and administrative separation.[288] Contrary to the critics' contentions, good order and discipline do not depend on just one person.[289] The convening authority itself does not determine good order and discipline in a unit.[290] Most leaders responsible for maintaining good order and discipline (i.e., Non-Commissioned Officers, Staff Non-Commissioned Officers, and junior officers) do not even have convening authority.[291]

B. The National Defense Authorization Act of 2014[292]

The NDAA of 2014, signed into law by President Obama on December 26, 2013,[293] fell short of enacting Gillibrand's transformative "taking the decision out of the chain of command" proposal, but did enact some significant and progressive reforms.[294] The NDAA of 2014 will provide a victim advocate to every service member who reports an assault.[295] Additionally, it will also make it a crime to retaliate against service members who report assaults, and it will prevent commanding officers from overturning sexual assault verdicts.[296] The NDAA of 2014 gives the armed services one year to implement the use of judge advocates to conduct Article 32 investigations *where practicable*.[297] Any

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[288] THE MILITARY JUSTICE IMPROVEMENT ACT OF 2013 (S. 967) INFORMATIONAL FLYER (2013), *available at* http://www.vva.org/MJIA/Documents/MJIA-Informational-Flyer.pdf.
[289] *See Id.*
[290] *See Id.*
[291] *See Id.*
[292] National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (2013) (enacted).
[293] *Obama Signs Budget Bills, Addresses Sexual Assault*, USA TODAY (Dec. 26, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/12/26/obama-military-defense-bill-sex-assault-cases/4210213/.
[294] Ashley Parker, *Senate Passes Pentagon Bill After Compromise on Obama Nominees*, N.Y. TIMES (Dec. 19, 2013), *available at* http://www.nytimes.com/2013/12/20/us/politics/senate-pentagon-policy-bill.html?_r=1&.
[295] *See Id.*
[296] *See Id.*
[297] David Vergun, *New Law Brings Changes to Uniform Code of Military Justice,* LEMOORE NAVY NEWS, (Jan. 24, 2014), *available at* http://www.hanfordsentinel.com/lemoorenavynews/news/new-law-brings-changes-to-uniform-code-of-military-justice/article_9727c3e8-8516-11e3-8f57-0019bb2963f4.html (emphasis added).

victim of a crime who suffers pecuniary, emotional, or physical harm and is named in one the charges as a victim does not have to testify at the Article 32 hearing.[298] Finally, there is no longer a five-year statute of limitations on rape and sexual assault on adults and children under Article 120 cases.[299]

C. A Positive Half-Step Forward

The military justice system must adopt Senator Gillibrand's idea to take prosecution outside of the chain of command if service-members are to receive true and meaningful justice. The NDAA of 2014 is a massive improvement, but it does not go far enough. Making retaliation a crime is a step in the right direction, especially because the complaining party can bring the claim directly to the Inspector General ("IG") of their respective military branch for an independent investigation of alleged retaliation.[300] The IG of the specific branch will also be required to notify the IG of the Department of Defense of the inquiry.[301] Therefore, because the IG is several ranks above the immediate superior a victim would normally consult about alleged retaliation, there is a better chance of an impartial investigation and determination due to the IG's lack of personal relationships and therefore bias against or for the victim or accused. However, victims may still fear ostracism and retaliation because now instead of simply going to the teacher, they must go directly to the principal.

The auxiliary legal assistance to sexual assault victims will definitely benefit alleged victims by putting someone by their side throughout the proceedings for emotional support and by providing competent legal representation.[302] However, as mentioned *supra*, the benefits of SVCs will largely be felt at trial because a judge knowledgeable in the law can rule on objections. Certain victims named in charges but

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[298] *See Id.*
[299] *See Id.*
[300] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1714, 127 Stat 672 (codified as amended at 10 U.S.C. § 1034 (2014)).
[301] *Id.*
[302] NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1704, 127 Stat 672 (codified as amended at 10 U.S.C. § 846 (b)(2014)); NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

not having to testify at Article 32 hearings will also ensure more just outcomes and protect victim interests, assuming people "in the know" do not gossip. Regarding legally trained judicial officers at pretrial proceedings, hopefully, "whenever practicable" will turn out to mean every time there is a pretrial proceeding. Overall, the passage of the NDAA of 2014 was a substantial and very positive move in the right direction, but without a doubt, more must be done.

VII. CONCLUSION

A few weeks after the Naval Academy Article 32 hearing concluded, a reporter from the Washington Post went to the Naval Academy to interview the victim.[303] "As [the victim approached] the Naval Academy gate to meet [the] reporter, the guard who had just been so chatty and welcoming stop[ed] smiling."[304] "No one acts like they know her anymore; no one speaks or even looks her way as she crosses the campus."[305] During the interview, the victim said that the questions she was asked at a public preliminary hearing in the case—whether she wore underwear to the party, for instance—"were more humiliating than [she] could have imagined."[306] The victim told the reporter that regardless of the case's disposition, she intends to finish her remaining seven months at the academy and become a commissioned officer, despite what the victim calls her "complete and total isolation" on campus.[307] The victim believes that that "If someone committed a heinous crime, they should be held accountable."[308] Additionally, last fall, the young woman was required to attend football games with the rest of the cheerleading team, where some of the cheers were directed at her.[309] Since the case made the news, she no longer has to attend the games.[310] The victim believes that that "[i]f someone committed a

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[303] Melinda Henneberger, *Alleged Victim in Navy Rape Case: 'This is Still My School'*, WASH. POST, (Oct. 10, 2013), *available at* http://www.washingtonpost.com/politics/alleged-victim-in-navy-rape-case-this-is-still-my-school/2013/10/10/d4592c18-30ff-11e3-9c68-1cf643210300_story.html.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*

heinous crime, they should be held accountable."[311] Anytime someone walks in and sees the victim sitting in the café, they turn their head in avoidance.[312] Prior to this case, the victim was a popular cheerleader who "used to interact with lots of people" but after the pretrial hearing, she said she had to write off having a social life.[313] The victim's boyfriend told the reporter "[s]he still flashes back to a defense lawyer asking her how she 'performs certain activities' — oral sex, she means, and can't believe it."[314]

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[315] This Naval Academy victim was denied due process. The military needs reform that will ensure that both the accused and the accuser are afforded meaningful justice. Article 32 hearings are supposed to determine probable cause so that justice is served. Instead, they are used to scare victims into silence and isolation. Although Article 32 hearings are not trials, they are equally as important. If the IO does not believe there is probable cause, the accused will not be tried, and the victim will be denied justice. Without a victim's complete and accurate testimony of what occurred, probable cause will most likely be lacking, and the accused will not be adjudicated. If defense counsel can make the victim recant, not because the victim is lying, but because defense counsel is abusing the victim on the witness stand, the victim will never get his or her day in court.

Substantial progress will be made if MRE 412's procedural requirements are enforced. This does not require committee meetings, bill drafting, or any additional legislative energy. The rules are already written—they just need to be addressed and enforced. How can service-members be denied the same protections afforded to American civilians, when service-members are the one's sacrificing their time and their lives to ensure that our country's democratic and judicial values are protected? "Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice."[316] "If the

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[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] Kaley v. United States, 134 S. Ct. 1090, 1114, 188 L. Ed. 2d 46 (2014) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (internal quotations omitted)).
[316] Sacher v. United States, 343 U.S. 1, 23-24 (1952) (Frankfurter, J., dissenting).

conditions for a society of free men formulated in our Bill of Rights are not to be turned into mere rhetoric, independent and impartial courts must be available for their enforcement."[317]

[317] *Id.*