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A FACTOR BY ANY OTHER NAME: THE RELIGIOUS EMPLOYER'S DEFENSE TO CONTRACEPTIVE EQUITY CLAIMS UNDER THE EQUAL PAY ACT AND TITLE VII

Cheryl A. Beckett¹

*Since, therefore, openly departing from the uninterrupted Christian tradition some recently have judged it possible solemnly to declare another doctrine regarding this question, the Catholic Church, to whom God has entrusted the defense of the integrity and purity of morals, standing erect in the midst of the moral ruin which surrounds her, in order that she may preserve the chastity of the nuptial union from being defiled by this foul stain, raises her voice in token of her divine ambassadorship and through Our mouth proclaims anew: any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.*²

¹ Associate Professor and Director of LR&W, Gonzaga University School of Law. A.B., *cum laude*, Rutgers University; J.D., *magna cum laude*, Gonzaga University School of Law. In addition to LR&W, Professor Beckett has taught labor and employment law classes at Gonzaga since 1993 and in its summer program in Florence, Italy since 2003. I am grateful for the initial research provided by two former research assistants, Carly Nelson and Ryan Feeney, and the support of my current research assistant, Katie Deal. Special thanks to my son, Nowell Beckett Bamberger, an associate at Cleary Gottlieb Steen & Hamilton LLP in Washington D.C., for his candid comments, encouragement, and patient listening.

² Pope Pius XI, encyclical letter on Christian marriage, *Casti Connubii*, given at St. Peter's in Rome, Dec. 31, 1930, available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-

INTRODUCTION

Health care reform, including the role of employers in providing health insurance, is one of this country's most controversial and critical issues. The cost, coverage, administration, and provision of care are at the core of the public and political debates. Since this country does not offer universal health care through a single-payer or a socialized-medicine system, the heavy burden of providing such coverage falls almost exclusively on the shoulders of employers. They are caught in the middle of this national debate. By offering health insurance, an employer is better able to compete in the marketplace for the qualified workers who will remain loyal employees. It is therefore within the best interests of both the employer and its employees for an employer to offer the most comprehensive health care benefit package possible. However, offering comprehensive prescription coverage in employee benefit plans, without including contraceptives, necessarily results in a disparity of benefits because of sex. Employers who choose to exclude such coverage now face litigation under both discrimination laws³ and health care legislation mandating that such plans include FDA-approved contraceptives.⁴

xi_enc_31121930_casti-connubii_en.html; see also Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741,750-67 (2005) (an in-depth discussion of the Catholic Church's position on contraception in her evaluation of state contraceptive equity statutes).

³ The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(1) (2009); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2009) (amending Title VII to provide that pregnancy bias is covered as unlawful discrimination "because of sex").

⁴ The Federal Employees Health Benefits Plan (FEHBP), passed in 1998, mandates coverage of all five FDA-approved contraceptive drugs and devices for all federal employees. See [http://www.opm.gov/INSURE/HEALTH/CONTRACEPTIVE_COVERAGE_IN_THE_FEDERAL_EMPLOYEES_HEALTH_BENEFITS_PROGRAM,CENTER_FOR_REPRODUCTIVE_RIGHTS_\(2003\),http://reproductiverights.org/en/document/contraceptive-coverage-in-the-federal-employees-health-benefits-program](http://www.opm.gov/INSURE/HEALTH/CONTRACEPTIVE_COVERAGE_IN_THE_FEDERAL_EMPLOYEES_HEALTH_BENEFITS_PROGRAM,CENTER_FOR_REPRODUCTIVE_RIGHTS_(2003),http://reproductiverights.org/en/document/contraceptive-coverage-in-the-federal-employees-health-benefits-program). There is not yet a similar federal mandate for those in the private sector. However, there have been several bills introduced in both the House and Senate for the Equity in Prescription Insurance and Contraceptive Act (EPPIC) since 1997 to require all health benefits plans covering prescription drugs and devices to also include equivalent

In addition to the traditional Title VII and Pregnancy Discrimination Act (PDA)⁵ claims raised by the gender inequities in such benefit plan exclusions, employees may also challenge such exclusions under the Equal Pay Act (EPA)⁶ and

contraceptive drugs and devices. H.R. 2174, 105th Cong. (1997), S. 766, 105th Cong. (1997); H.R. 2120, 106th Cong. (1999), S. 1200, 106th Cong. (1999); H.R. 1111, 107th Cong. (2001), S. 104, 107th Cong. (2001); H.R. 2727, 108th Cong. (2003), S. 1396, 108th Cong. (2003); H.R. 4651, 109th Cong. (2005), S. 1214, 109th Cong. (2005); H.R. 2412, 110th Cong. (2007), S. 3068, 110th Cong. (2007). Now, in the 111th Congress, it has once again been reintroduced in the House as Title II, Equity in Prescription Insurance and Contraceptive Act of 2009, as part of the Prevention First Act of 2009. H.R. 463, 111th Cong. (2009). This proposed Act includes the following specific findings:

....

(20) Although employer-sponsored health plans have improved coverage of contraceptive services and supplies, largely in response to State contraceptive coverage laws, there is still significant room for improvement. The ongoing lack of coverage in health insurance plans, particularly in self-insured and individual plans, continues to place effective forms of contraception beyond the financial reach of many women.

(21) Including contraceptive coverage in private health care plans saves employers money. Not covering contraceptives in employee health plans costs employers 15 to 17 percent more than providing such coverage.

Id. § 2 (20), (21).

⁵ See *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 941 n.1 (8th Cir. 2007) (noting that the district courts are split on the question of whether or not “the PDA requires companies to provide coverage of contraception”). In *Standridge*, the Eighth Circuit found that the PDA is not triggered when an employer excludes coverage for all prescription contraception because such exclusion is gender neutral in that it does not favor one gender in favor of another. *Id.* at 944. The issue remains unsettled.

⁶ 29 U.S.C. § 206(d) (2009); see *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (suit brought under both Title VII and the EPA for discriminatory practice of providing health insurance benefits only to male “head of household”); see also Case No. 07-CV-2587, available at <http://www.eeoc.gov/press/5-21-08a.html> (a case filed by the Equal Employment Opportunity Commission and the U.S. Attorney for the Southern District of New York against the New York Department of Correctional Services in the United States District Court for the Southern District of New York, alleging violations of both Title VII and the EPA for providing inferior benefits

state contraceptive equity statutes. Currently, twenty-seven states have enacted such equity laws.⁷ For employers in those states, the obligation to ensure gender equality in the workplace, at least with regard to benefit plans, now extends beyond traditional discrimination law. Presently, under the contraceptive equity laws, there is an independent state obligation to offer FDA-approved contraceptives in any medical plan that includes comprehensive prescription coverage.⁸

What, however, of the religious employer?⁹ Some religious organizations have a core moral conviction opposing the use of

to female employees on maternity leave; settled by the parties for nearly \$1 million).

⁷ Guttman Institute, *State Policies in Brief: Insurance Coverage of Contraceptives*, Oct. 1, 2009, available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf. In addition, other states have partial mandates. *Id.* Still others have less formal mandates requiring such coverage, e.g., Montana (Attorney General Opinion); and Michigan and Wisconsin (administrative ruling). *Id.*

⁸ *Id.*

⁹ Religious employers include the obvious such as churches, temples, mosques, synagogues, and other places of worship. They also include religious-affiliated institutions such as universities and colleges, hospitals and nursing homes, and social and charitable organizations. Title VII provides a specific exemption for religious institutions. 42 U.S.C. § 2000e-1(a) (2009) (“shall not apply. . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”). Such an exemption, however, does not insulate employers from claims for sex discrimination. *E.g.*, *Fremont Christian Sch.*, 781 F.2d at 1366 (noting that in the legislative history it was clear that the original version of the “Act passed by the House in 1964 excluded religious employers from coverage altogether,” H.R. REP. NO. 914, 95th (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2391, 2402, while “[t]he final version excluded such employers only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer’s ‘religious activities.’”); see also *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (application of Title VII to nonprofit religious publishing house for alleged sex discrimination did not violate the First Amendment), *abrogated on other grounds recognized in* *Am. Friends Serv. Comm. v. Thornburgh*, 941 F.2d 808, 810 (9th Cir. 1991). In addition to the specific exemption from the prohibition against religious discrimination, Title VII also specifically permits religious discrimination by certain religious schools and universities. 42 U.S.C. § 2000e-2(e)(2) (2009).

contraceptives. The most visible and chief opponent among such organizations is the Catholic Church.¹⁰ Such religious employers face a classic Hobson's choice: follow the deeply rooted religious tenets and moral teachings against the use of contraceptives and violate state and federal laws against sex discrimination and state law mandating contraceptive equity or follow the state and federal law and violate the fundamental religious conviction. Such a dilemma poses an untenable tension between protective legislation and religious teachings. Recognizing the potential constitutional implications of mandating that religious employers provide such coverage,¹¹ eighteen states that have passed legislation mandating contraceptive coverage have included a "conscience clause" or "refusal provisions" allowing "employers or insurers to refuse to cover contraceptives on religious or moral grounds."¹² However, one recognized problem with such conscience clauses is that the definition of the "religious employer" is so narrow as to exclude

¹⁰ One of the Church's basic moral convictions is rooted in abstaining from artificial contraceptives. "[A]ny use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin." *Casti Connubii*, *supra* note 2. Because of the Catholic Church's strong stance against artificial contraception, it is the focal point for this analysis of the "religious employer."

¹¹ "There is not a uniform view on the constitutional source of the ministerial [religious] exception." *Coulee Catholic Sch. v. Labor and Indus. Review Comm'n*, Dept. of Workforce Dev., 752 N.W.2d 341, 344 n.9 (Wis. Ct. App. 2008) (citing, e.g., *Fremont Christian Sch.*, 781 F.2d at 1369 and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (a state discrimination claim case noting that some courts treat the exception as derived from the free exercise clause, while others treat it as derived from the establishment clause; while seven circuits have addressed the issue, the Supreme Court has not). In any case, for purposes of this Article, the constitutional implications are avoided since the question is not whether the EPA and Title VII apply or are shielded by the First Amendment. Instead, the question is simpler. It centers on whether deeply-rooted religious doctrine falls within the broad terms of the statutory affirmative defense, "any other factor other than sex." See discussion *infra* Parts I and II. There is no question that the EPA and Title VII apply to claims of gender bias in compensation packages. The only question is the availability of the broad statutory defense to employers with established religious objections.

¹² Guttman Institute, *supra* note 7.

all religious employers except those inextricably tied to “inculcating,” “employing,” or “serving” those of a particular religious faith.¹³ This narrow exclusion from the state mandates means that religious employers, such as hospitals, social service agencies, and post-secondary educational institutions, cannot stay true to the fundamental religious tenets of their Catholic roots and still provide comprehensive prescription coverage for all their employees. The very practical effect is that such employers will choose to avoid the controversy and simply not provide prescription coverage; or worse yet, refuse to offer health care coverage at all.

There are also implications under the Employee Retirement Income Security Act (“ERISA”)¹⁴ to consider in evaluating application of the state contraceptive equity laws. A self-insured employer, whether religious or secular, can operate outside the

¹³ *E.g.*, *Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento*, 85 P.3d 67 (Cal. 2004). In that case, California’s Women’s Contraceptive Act (WCEA) and its narrow religious employer exemption was at issue. The plaintiffs there, Catholic Charities of Sacramento (“Catholic Charities”), a social service provider, defined itself as “operated in connection with the Roman Catholic Bishop of Sacramento” and as an “organ of the Roman Catholic Church.” *Id.* at 75. It provided health insurance, including prescription coverage to its 183 full-time employees. *Id.* The coverage did not include contraceptives. When faced with that mandate, Catholic Charities conceded that it did not fall within the ambit of the state statute’s four-criterion definition of “religious employer” to allow it to take advantage of the statutory exemption. *Id.* at 80. It thus challenged the statute itself arguing that it impermissibly burdened its rights of free exercise under the First and Fourteenth Amendments and the free exercise clause of the California Constitution. *Id.* at 76. It argued that it could not comply with the mandatory contraceptive coverage without “improperly facilitating [the] sin” of using artificial means of contraception. *Id.* at 75. The California Supreme Court rejected Catholic Charities’ arguments and affirmed the lower court’s upholding of the WCEA. *Id.* at 76. The U.S. Supreme Court denied Catholic Charities’ petition for a writ of certiorari, 543 U.S. 816 (2004). See, e.g., *Stabile*, *supra* note 2, at 755-64; Melissa Seifer Briggs, Comment, *Exempt or Not Exempt: Mandated Prescription Contraception Coverage and the Religious Employer*, 84 OR. L. REV. 1227, 1247-61 (2005); Kate Spota, Comment, *In Good Conscience: The Legal Trend to Include Prescription Contraceptives in Employer Insurance Plans and Catholic Charities’ “Conscience Clause” Objections*, 52 CATH. U. L. REV. 1081 (2003); William W. Bassett, RELIGIOUS ORGANIZATIONS AND THE LAW § 6:63 (database updated on WL Nov. 2008).

¹⁴ 29 U.S.C. §§ 1001-1461 (2009).

state-mandated contraceptive equity law: ERISA preemption of “state regulation[s] . . . mandating benefits or defining discrimination in self-insured employee benefit plans” exempts many plans from state regulation entirely.¹⁵ This is not treated as a “defense,” but instead is an exemption from state law. Thus, under traditional ERISA preemption of state insurance laws, self-insured employers need not comply with the state-mandated contraceptive coverage.

However, the state contraceptive equity laws, complicated related constitutional issues, and ERISA preemption are not the particular focus here. Instead, this Article more narrowly addresses the circumstances that arise when there is either no state contraceptive equity statute in play (either through ERISA preemption or inaction by the state legislative body) or there is a *broad* religious conscience clause exception in extant state law. In those cases, a plaintiff employee seeking to force her religious employer to provide contraceptive coverage is simply left with relief under the traditional discrimination laws. This Article then looks to those traditional arguments under Title VII, the PDA, and the EPA for gender equality in benefit plans and focuses on the religious employer’s statutory defense.¹⁶

¹⁵ *Catholic Charities of Sacramento*, 85 P.3d at 106 (Brown, J., dissenting).

¹⁶ I originally researched this issue with an eye toward plaintiffs’ relief under the gender equity statutes. In short order, it became apparent that the more compelling point was the religious employer’s defense. The issue is once again at the fore. On July 30, 2009, the EEOC district office in Charlotte, North Carolina issued a written determination letter to Belmont Abbey College, a small Benedictine Roman Catholic college in Belmont, North Carolina, regarding charges filed by eight current and former faculty members alleging gender discrimination under the Pregnancy Discrimination Act for the college’s 2007 decision to not provide coverage in its employee health plan for abortion, elective sterilization (vasectomies and tubal ligation), and prescription contraceptives. See Patrick J. Reilly, *Look Who’s Discriminating Now*, WALL ST. J., Aug. 13, 2009, available at <http://online.wsj.com/article/SB10001424052970203863204574346833989489154.html>; Valerie Schmalz, *Ruling: College Wrong to Not Cover Birth Control*, OUR SUNDAY VISITOR, Aug. 19, 2009, available at <http://www.osv.com/tabid/7621/itemid/5264/Ruling-College-disctimated-against-women> (the actual determination letter is not available on the EEOC website or on request; a FOIA request was recently denied on the grounds that the determination letter relates to an open case). When faced with the initial EEOC charge, the school responded, “As a Roman Catholic institution, Belmont Abbey College is not able to and will not offer nor subsidize medical services

The EPA catch-all affirmative defense of “any other factor other than sex,” coupled with its closely related cousin in Title VII, the under-utilized Bennett Amendment,¹⁷ are available as a strong defense for any employer faced with an EPA, Title VII, or PDA claim for sex discrimination for failing to include contraceptives in a comprehensive employee benefit plan. Such a defense is particularly powerful for the religious employer. Part I provides the historical context. It first examines the EPA, and then moves to the Bennett Amendment to Title VII. It finally reviews the interaction with the PDA. Part II focuses on the statutory language of the EPA affirmative defense in 29 U.S.C. § 206 (d)(1)(iv) and the courts’ interpretation of the “any other factor other than sex” defense. Part III contends that this potent defense should be used in the first instance by the religious employer faced with a discrimination claim for providing inferior benefits when it refuses on moral grounds to provide contraceptive drugs and devices as part of an overall health plan. Part IV then concludes that this use of the catch-all EPA defense is sound policy.

I. THE STATUTORY UNDERPINNINGS

A. THE EQUAL PAY ACT

The Equal Pay Act¹⁸ predates the landmark Civil Rights Act of 1964 by one year. In its sweeping path, the 1964 Act prohibits workplace discrimination and retaliation in Title VII.¹⁹ The

that contradict the clear teaching of the Catholic Church.” Reilly, *supra* at 1. The college had initially received a Dismissal and Notice of Rights determination letter from the district office in March 2009, wherein the office noted its decision to close its file on the discrimination charge. *Id.* This latest determination by the EEOC office is thus a reversal of its previous finding in March. Within its own procedures, the EEOC has now moved forward with its own confidential conciliation efforts. This case is precisely the scenario contemplated by this Article. The North Carolina contraceptive equity law includes an exemption for religious employers, thus the employees chose to file with the EEOC under the PDA. *Id.*

¹⁷ 42 U.S.C. § 2000e-2(h) (2009).

¹⁸ 29 U.S.C. § 206(d) (2009).

¹⁹ 42 U.S.C. § 2000e-2 (2009).

EPA, however, is much narrower, prohibiting wage discrimination “on the basis of sex.”²⁰ Passed in 1963, it amends the Fair Labor Standards Act (FLSA),²¹ an Act originally enacted in 1938 as part of the New Deal legislation regulating the minimum wage and overtime compensation.²² “Congress’ purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry - the fact that the wage structure of ‘many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.’”²³ As part of the FLSA, the EPA is enforced within the procedures and limitations of that wage regulatory Act, not the Civil Rights Act.²⁴

While the necessary proof for the *prima facie* case under the EPA and Title VII is distinct,²⁵ there remains an unmistakable, and intentional, overlap in the defenses.²⁶ The EPA specifies

²⁰ 29 U.S.C. § 206(d)(1) (2009).

²¹ 29 U.S.C. §§ 201-219 (2009).

²² *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974).

²³ *Id.* at 195 (quoting S. REP. NO. 176, 88th Cong., 1st. Sess., 1 (1963)).

²⁴ 29 U.S.C. §§ 215-217, 255, 259, 260 (2009). The practical point is that the EPA claim is not bound by the same administrative exhaustion requirement and tight administrative statute of limitations as the Title VII claim. Although Congress recently passed the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e), superseding the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which turned the longstanding continuing violation application of the Title VII 180-day statute of limitations for compensation claims on its head, the EPA statute of limitations is still more generous. Likewise, the “double damages” remedy is available to the EPA plaintiff, § 216(b), but not the compensatory and punitive damages available under Title VII. 42 U.S.C. § 1981a (2009).

²⁵ For the EPA, the plaintiff must show sex-based wage disparity for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d)(1) (2009). The Title VII plaintiff is not so strictly bound and can make out a claim without the burden of “equal work.” 42 U.S.C.A. § 2000e-2 (2009).

²⁶ *County of Washington v. Gunther*, 452 U.S. 161, 171, 180 (1981).

these exceptions to the prohibitions against sex-based disparities between the sexes: “where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”²⁷ Title VII duplicates the seniority and merit system defenses of the EPA, as well as the “earnings by quantity or quality of production” defense.²⁸

Passing the EPA was no small task. “[A]fter 18 months of careful and exhaustive study, [Congress] specifically addressed the problem of sex-based wage discrimination.”²⁹ There was not much dispute that there *should* be pay equity between the sexes in the workplace. Instead, the lengthy debate centered on whether the measure for that standard should be based on “comparable” work or “equal” work.³⁰ Ultimately relying on an “economic realities” test, Congress “concluded that governmental intervention to equalize wage differentials was to be undertaken only within one circumstance: when men’s and women’s jobs were identical or nearly so.”³¹

Although the Equal Pay Act specifies “wages” in its language, the realities of actual compensation packages lead to the inclusion of benefits within that definition of “wages.”³² To

²⁷ 29 U.S.C. § 206(d)(1) (2009).

²⁸ 42 U.S.C. § 2000e-2(h) (2009).

²⁹ *Gunther*, 452 U.S. at 184 (Burger, CJ.; Rehnquist, Stewart, Powell, JJ., dissenting).

³⁰ *Id.* at 184-88.

³¹ *Id.* at 188.

³² See *Dep’t. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (noting the use of sex-based actuarial tables to determine pension contributions implicates the EPA since benefit plans such as pensions are a form of compensation); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 252 n.2 (6th Cir. 1988) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)) (where the court applied the Bennett Amendment to reconcile the EPA implications in a Title VII sex discrimination claim for a “head of household” provision of the employer’s medical and dental insurance plan, noting that the term “compensation” within Title VII includes health insurance and other fringe benefits). By analogy, it seems even more likely that courts applying the EPA, the “wage” Act, will extend the term “wages” to include all facets of a

illustrate, the EEOC, along with the U.S. Attorney for the Southern District of New York, recently filed suit under both Title VII and the EPA against the New York State Department of Correctional Services for providing inferior benefits to female employees on maternity leave.³³ The EEOC settled that suit on May 21, 2008 for nearly \$1 million dollars.³⁴ The EPA claim centered on the Department's practice of switching female employees from worker's compensation leave to maternity leave resulting in lesser benefits. Male corrections workers with work-related injuries received up to six months of paid workers' compensation leave. In contrast, female employees, who were pregnant and on such leave, were involuntarily switched to the inferior internal maternity leave around the time they gave birth. The U.S. Attorney's Office simultaneously pursued the Title VII claim on the same facts alleging that the Department was engaging in a pattern and practice of sex discrimination since it would categorically transfer female employees to the inferior benefits without making an individual determination as to whether that female employee continued to be eligible for the superior workers' compensation benefits.³⁵ Thus, it is not unusual or unexpected that plaintiffs in a wage claim based on sex would bring the claim under both the EPA and Title VII.

B. TITLE VII

In stark contrast to the lengthy debate in Congress on the EPA, the discussion in Congress on "sex" as a protected class within Title VII is scant at best.³⁶ Consequently, courts have had great latitude in attempting to decipher the parameters of this class. Late in the debate over Title VII, which is the employment

compensation package, including benefits. *E.g., Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (suit brought under both Title VII and the EPA for discriminatory practice of providing health insurance benefits only to male "head of household").

³³ Case No. 07-CV-2587, available at <http://www.eeoc.gov/press/5-21-08a.html> (in the U.S. District Court for the Southern District of New York).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *County of Washington v. Gunther*, 452 U.S. 161, 172 (1981).

title of the landmark 1964 Civil Rights Act, the House amended the bill “to proscribe sex discrimination.”³⁷ It was a hasty addition without careful consideration by either the Senate or the House.³⁸ When the Senate directly considered the “House version of the Civil Rights bill without reference to any committee[,]” “[s]everal Senators expressed concern that insufficient attention had been paid to possible inconsistencies between the statutes.”³⁹ Senator Bennett led the way to attempt to reconcile the overlapping protection of the narrow EPA prohibition against sex-based wage discrimination and the newly minted Title VII broader proscription against all discrimination in employment based on sex.⁴⁰ Thus, the Bennett Amendment was born.⁴¹ It is referred to as the “reconciling provision” of Title VII for claims of sex-based discrimination in compensation.⁴² Although such discrimination is primarily prohibited by the Equal Pay Act,⁴³ as noted, that Act predated Title VII by one year. When Congress enacted The Civil Rights Act of 1964 that next year, prohibiting discrimination in employment in Title VII, it necessarily had to address the overlap between the two Acts. As the United States Supreme Court noted in 1981 when finally deciding the practical effect of the Bennett Amendment in Title VII litigation,

Senator Bennett proposed the Amendment because of a general concern that insufficient attention had been paid to the relation between the Equal Pay Act and Title VII, rather than

³⁷ *Id.* (referring to 110 CONG. REC. 2577-2584 (1964)).

³⁸ *Id.*

³⁹ *Id.* at 172-73 (referring to 110 CONG. REC. 7217 (1964) (statement of Senator Clark)).

⁴⁰ *Id.* at 173 (referring to 110 CONG. REC. 13310 (1964) (statement of Senator Bennett)).

⁴¹ *See* 42 U.S.C. § 2000e-2(h) (2009).

⁴² *Gunther*, 452 U.S. at 174.

⁴³ 29 U.S.C. § 206(d)(1) (2009).

because of a *specific* potential conflict between the statutes. His explanation that the Amendment assured that the provisions of the Equal Pay Act “shall not be nullified” in the event of conflict with Title VII may be read as referring to the affirmative defenses of the Act.⁴⁴

That Amendment thus makes the defenses of the Equal Pay Act applicable to a Title VII claim for sex-based discrimination in compensation.⁴⁵ It specifies that “[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].”⁴⁶ This provision appears as the final clause in the subsection outlining the affirmative defenses to a Title VII claim.⁴⁷ In addition to the so-called Bennett Amendment, this subsection also sets forth, among others, the following specific affirmative defenses for claims for “different standards of compensation,”⁴⁸ and claims for “different terms, conditions, or privileges of employment”⁴⁹: “bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production.”⁵⁰

Thus, while Title VII sweeps broadly both in coverage and application, the Equal Pay Act narrowly requires employers to give equal pay to men and women “for equal work.” However, the affirmative defenses applicable to disparity in compensation

⁴⁴ *Gunther*, 452 U.S. at 174 (citation omitted) (emphasis in original).

⁴⁵ *Id.* at 175 (clarifying that the Bennett Amendment only incorporates the affirmative defenses of the Equal Pay Act into the analytical framework of a Title VII sex-based wage claim, not the *prima facie* case).

⁴⁶ 42 U.S.C. § 2000e-2(h)(2009).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

offered in both Acts are identical, if not redundant, except for the fourth defense offered in the EPA “a differential *based on any other factor other than sex*.”⁵¹ It is this fourth defense that gives muscle to the Bennett Amendment in Title VII claims for sex-based wage discrimination claims.

C. APPLICATION OF THE PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act (“PDA”) amends the definition of “sex” in Title VII to specify “because of sex” or “on the basis of sex” to include “pregnancy, childbirth, or related medical conditions.”⁵² Whether or not it applies to claims of contraceptive inequity based on sex remains unsettled.⁵³ Congress passed the Act to address the U.S. Supreme Court’s decision in *General Electric v. Gilbert*.⁵⁴ In *Gilbert*, the employer offered a disability benefits plan that covered all non-occupational sickness and accidents.⁵⁵ Disabilities arising from pregnancy were excluded.⁵⁶ The trial court found that the exclusion of such benefits violated Title VII and the court of appeals affirmed.⁵⁷ The Supreme Court reversed, holding that the policy did not constitute discrimination on the basis of sex.⁵⁸ The majority gave two reasons: (1) by providing equal benefits to men and women, a company was providing equal coverage to both sexes, and (2) because pregnancy does not affect all women, discrimination on the basis of pregnancy does not constitute discrimination.⁵⁹ The dissent, however, opined that a

⁵¹ 29 U.S.C. § 206(d)(1)(iv) (2009)(emphasis added).

⁵² 42 U.S.C. § 2000e(k) (2009).

⁵³ *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 941 n.1 (8th Cir. 2007).

⁵⁴ 429 U.S. 125 (1976).

⁵⁵ *Id.* at 127.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 138-39.

⁵⁹ *Id.* at 138.

policy treating both sexes equally should offer comprehensive coverage to both sexes, and since only women are capable of pregnancy, a benefit plan excluding pregnancy necessarily constituted discrimination “based on sex.”⁶⁰

The PDA breathed life into *Gilbert’s* dissent in 1978 and in 1983 the Supreme Court, in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, addressed discrimination in a benefit plan under the newly minted definition of sex in the PDA.⁶¹ The plaintiffs in *Newport News* were male employees who argued that their employer-provided benefit plan, which covered pregnancies and pregnancy-related medical costs for female employees but did not cover the same costs for the female spouses of the male employees, constituted sex-based discrimination under the PDA.⁶² The Court held that the PDA does include pregnancy benefits for the female spouses of male employees, as well as female employees.⁶³

In 2000, the EEOC decided that the PDA applies to contraception.⁶⁴ In deciding a claim brought by two women who filed charges alleging sex discrimination against their employers for failing to provide insurance coverage for contraceptive drugs and devices, the Commission reasoned, “[t]he PDA’s prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”⁶⁵ The Commission looked at explicit language in the PDA that states that coverage need not include “health insurance benefits for abortion,”⁶⁶ and concluded that if

⁶⁰ *Gilbert*, 429 U.S. at 146-62 (Brennan J., dissenting).

⁶¹ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁶² *Id.* at 674.

⁶³ *Id.* at 676.

⁶⁴ EEOC Enforcement Guidance, *Comm’n Decision on Coverage of Contraception*, 2000 WL 33407187, at *3 (Dec. 14, 2000).

⁶⁵ *Id.* at *2.

⁶⁶ 42 U.S.C. § 2000e(k) (2009).

Congress had meant for other pregnancy-related costs such as contraception to be excluded, it would have expressly stated so.⁶⁷ The Commission recognized “contraception” is one means used by women to control their ability to become pregnant.⁶⁸ The Commission also looked to the records of the congressional debates noting that members of Congress intended to prevent “discrimination against women based on the ‘whole range of matters concerning the childbearing process’ and gave women ‘the right . . . to be financially and legally protected before, during, and after ... pregnancies.’”⁶⁹

Then in 2001, in *Erickson v. Bartell Drug Co.*,⁷⁰ the Western District of Washington dealt with a case under Title VII as amended by the Pregnancy Discrimination Act.⁷¹ It was the first federal court to apply Title VII, and the PDA, to the issue of contraceptive coverage.⁷² It was the natural successor to

⁶⁷ EEOC Enforcement Guidance, 2000 WL 33407187, at *3.

⁶⁸ *Id.*

⁶⁹ *Id.* (referring to H.R. REP. NO. 948, 95th Cong., 2d Sess. 5(1978); 124 CONG. REC. H38, 574 (Oct. 14, 1978) (statement of Rep. Ronald Sarasin, manager of the House version of the PDA)) (footnotes omitted). The Supreme Court, in *United Automobile Workers v. Johnson Controls*, noted that discrimination against women on the basis of “potential pregnancy” is a violation of Title VII, as amended by the PDA. 499 U.S. 187, 199 (1991).

⁷⁰ *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). When this case first appeared on the landscape, it created a flurry of academic analysis and debate for a number of years. *E.g.*, Brietta R. Clark, *Erickson v. Bartell Drug Co.: A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?*, 23 LAW & INEQ. 299 (2005); Jennifer M. Saubermann, Current Event, *Erickson v. Bartell Drug Co.* 141 F. Supp. 2d 1266 (W.D. Wash. 2001), 10 AM. U.J. GENDER SOC. POL’Y & L. 233 (2001); Mari K. Cania, Policy Watch Article, *From Bartell to Erickson To Mauldin: Title VII’s Effect on Insurance Coverage of Contraceptives*, 11 BUFF. WOMEN’S L.J. 59 (2004); James A. Ryan, Case Note, *Contraceptives and Employer Health Prescription Plans: An Examination of Erickson v. Bartell Drug Co.*, 11 GEO. MASON L. REV. 215 (2002).

⁷¹ 42 U.S.C. § 2000e(k) (2009).

⁷² *Erickson*, 141 F. Supp. 2d at 1268, 1271-72.

*Newport News Shipbuilding*⁷³ and the 2000 EEOC decision.⁷⁴ In *Erickson*, the court held that an employer's prescription coverage plan, which excluded contraception from an otherwise comprehensive plan, constituted discrimination on the basis of sex under both Title VII and the Pregnancy Discrimination Act.⁷⁵ The defendant/employer, Bartell Drug Co., raised six defenses, all addressed and dismissed by the court.⁷⁶ It did not raise a Bennett Amendment defense. It should have.

The health benefit plan at issue in *Erickson* was analogous to the "head of household" provision of the employer's medical and dental insurance plan at issue in *EEOC v. J.C. Penney Co.*⁷⁷ Such benefits necessarily include the provision for, or exclusion of, contraceptives in comprehensive prescription coverage in a medical benefits plan, which was the very issue at the heart of *Erickson*. It is baffling why the defendant in *Erickson* did not even raise the defense. In raising the Bennett Amendment defense, Bartell Drug Co. would have been able to argue that there was another factor ("any other factor") other than sex that supported its decision to exclude prescription contraceptives from its otherwise comprehensive plan. Indeed, that employer raised six defenses, including cost.⁷⁸ Evaluating the cost defense in light of Title VII standards and sensibilities, the court correctly found that cost could not be a defense to discrimination under Title VII.⁷⁹ However, if the employer had

⁷³ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁷⁴ EEOC Enforcement Guidance, *Comm'n Decision on Coverage of Contraception*, 2000 WL 33407187 (Dec. 14, 2000).

⁷⁵ *Erickson*, 141 F. Supp. 2d at 1276-77.

⁷⁶ *Id.* at 1272-77.

⁷⁷ *EEOC v. J.C. Penny Co.*, 843 F.2d 249 (6th Cir. 1988) (the court applied the Bennett Amendment to a Title VII sex discrimination claim for a "head of household" provision of the employer's medical and dental insurance plan).

⁷⁸ *Erickson*, 141 Supp. 2d at 1274.

⁷⁹ *Id.*

argued the Bennett Amendment, cost could have been evaluated by applying the “any other factor other than sex” defense.⁸⁰

The issue of PDA coverage for employer health plans that exclude contraceptive drugs and devices is far from settled. In 2007, the Eighth Circuit challenged such coverage.⁸¹ The court reviewed a health plan offered by the employer, Union Pacific, that excluded from coverage “both male and female contraceptive methods, prescription and non-prescription, when used for the sole purpose of contraception.”⁸² The plaintiffs, a class of 1500 females, sued claiming that the exclusion violated the PDA. The lower court agreed, finding that Union Pacific’s failure to cover prescription contraception constitutes a violation of Title VII, as amended by the PDA⁸³ specifically because “it treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees’ health than is pregnancy.”⁸⁴ On appeal, the Eighth Circuit first noted that the district court “incorrectly characterized Union Pacific’s policy as the denial of prescription contraception coverage *for women*.”⁸⁵ It clarified that the employer’s policy “exclude[d] all types of contraception, whether prescription, non-prescription or surgical and whether for men or women, unless an employee ha[d] a non-contraception medical necessity for the contraception.”⁸⁶ Although that court recognized that “prescription contraception

⁸⁰ See, e.g., *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982) (where the employer’s use of prior salary as a factor in determining minimum salary guaranteed to new sales agents resulted in a gender-based wage differential).

⁸¹ *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 941 n.1 (8th Cir. 2007).

⁸² *Id.* at 938.

⁸³ *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1149 (D. Neb. 2005).

⁸⁴ *Id.*

⁸⁵ *Standridge*, 479 F.3d at 939 (emphasis added).

⁸⁶ *Id.*

is currently only available for women, non-prescription contraception is available for men and women,”⁸⁷ it concluded that the “issue is whether [the employer]’s policy of denying coverage for *all contraception* violates Title VII, as amended by the PDA.”⁸⁸ It went on to reverse the district court in a two to one decision, holding that “the PDA does not encompass contraception.”⁸⁹ It reasoned that “[c]ontraception, like infertility treatments, is a treatment that is only indicated prior to pregnancy because [it] actually prevents pregnancy from occurring. Furthermore, like infertility, contraception is a gender-neutral term.”⁹⁰

In rejecting the plaintiffs’ claim in *Standridge* that the PDA in fact covers contraceptives, the Eighth Circuit recognized that until it reviewed the lower court’s decision in the current case, “[n]either the circuit courts nor the Supreme Court has considered whether the PDA applies to contraception. The Supreme Court, though, has discussed the scope of the PDA in [*Newport News Shipbuilding* and *Johnson Controls*].”⁹¹ The Eighth Circuit specifically distinguished the Court’s holding in *Johnson Controls* when it decided that the PDA did not cover infertility treatments in *Krauel v. Iowa Methodist Med.Ctr.*,⁹²

⁸⁷ *Id.*

⁸⁸ *Id.* (emphasis added).

⁸⁹ *Id.* at 943.

⁹⁰ *Standridge*, 479 F.3d at 943.

⁹¹ *Id.* at 940 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) and *United Auto. Workers v. Johnson Controls*, 499 U.S. 187 (1991)). The court went on to recognize the split in the district courts on “whether the PDA requires companies to provide coverage of contraception.” *Id.* at 941 n.1 (discussing those finding coverage: *Stocking v. AT&T Corp.*, 436 F. Supp. 1014, 1016-17 (W.D. Mo. 2006), *vacated, on reconsideration*, 2007 WL 3071825 (W.D. Mo. Oct. 22, 2007); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984-85 (E.D. Mo. 2003); *Mauldin v. Wal-Mart Stores, Inc.*, No.01-CV-2755, 2002 WL 2022334 (N.D. Ga. Aug. 23, 2002); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1270-71 (W.D. Wash. 2001); and those finding no coverage: *Cummins v. Illinois*, No. 02-4201, slip op. at 16 (S.D. Ill. Aug. 30, 2005)).

⁹² *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996).

by noting that “[p]otential pregnancy [as protected in *Johnson Controls*], unlike infertility, is a medical condition that is sex-related because only women can become pregnant . . . [while] the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers.”⁹³

The dissent in *Standridge* clearly, and practically, approaches the simple issue of PDA coverage for contraceptives.⁹⁴ “While the plain language of the PDA does not specifically include prepregnancy conditions, there is some indication Congress intended the act to cover prepregnancy discrimination.”⁹⁵ Judge Bye, in his dissent, also reasoned that the Circuit’s decision in *Krauel* did not “draw such a bright line [at pregnancy] because of *Johnson Controls*.”⁹⁶ In discussing the reasoning of the court in *Krauel*, he acknowledged that after that case, the “denial of coverage for infertility treatments does not implicate the PDA because infertility affects both men and women.”⁹⁷ He then explained that the majority position in *Standridge*, that contraception, like infertility treatments is pre-pregnancy and not covered by the PDA, ignores the simple fact that “[a]lthough both are used prior to conception, when one looks at the medical effect of the denial of insurance coverage, prescription contraception is easily distinguishable from infertility treatments.”⁹⁸ To illustrate, he quoted the district court in explaining that “[h]ealth plans that deny coverage for *contraception*, by definition, affect only the health of women.”⁹⁹

⁹³ *Id.* at 680.

⁹⁴ *Standridge*, 479 F.3d at 946 (Bye, J., dissenting).

⁹⁵ *Id.* (stressing Congress’s use of the phrase “related medical condition” in the PDA as an indication of its intent to cover “more than mere pregnancy”).

⁹⁶ *Id.* at 947 (pointing out the Circuit’s implicit indication that it would expand the line in *Walsh v. Nat’l Computer Sys.*, 332 F.3d 1150, 1160 (8th Cir. 2003), a case where the discrimination claim revolved around allegations that a woman who had been pregnant in the past and taken a maternity leave, and “might become pregnant again”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1145 (D. Neb. 2005) in describing in detail that “prescription

Surely Congress could not have anticipated that, despite its best efforts to expand the definition of sex in Title VII by passing the PDA, it would have consequently allowed employers to treat women differently from men with regard to healthcare plan prescription coverage in the workplace. As Judge Bye pointed out in his dissent in *Standridge*, “to be equal, a plan would have to cover for the uniquely female risk of pregnancy. . . . [A]s prescription contraception is a treatment for (or a method to control the occurrence and timing of) the uniquely female condition of potential pregnancy, the exclusion of this coverage in a plan providing other preventative coverage is discriminatory.”¹⁰⁰

Even if the Supreme Court were to decide that prescription contraceptives are not within the ambit of the PDA, which is not likely given the legislative history of the Act and the Court’s previous decisions in *Newport News Shipbuilding* and *Johnson Controls*, there is still room for argument under a general Title VII analysis that the exclusion of prescription contraceptives discriminates against women since at this time there are only prescription contraceptives for women. In any case, a Title VII claim, whether brought under the general proscriptions or under the PDA amendment, implicates the Bennett Amendment defense.

II. “ANY OTHER FACTOR OTHER THAN SEX”

Although some may argue that the Bennett Amendment is not intended to broaden the defenses for the Title VII defendant, practically that is exactly what it does. In the rush to bypass conservative senators at the time of passage, the Bennett Amendment suffers the same lack of legislative history as the prohibition against sex discrimination. Thus, without any guidance from the drafters, the lower courts are left only with the Court’s decision in *Gunther* interpreting the Bennett Amendment to allow differentials in compensation that are

contraception and infertility treatments are like apples and oranges”) (emphasis in original).

¹⁰⁰ *Standridge*, 479 F.3d at 949.

based on “any other factor other than sex.”¹⁰¹ Consequently, the lower courts are split. They have generated a body of law that at times mimics the broad “legitimate, non-discriminatory reason”¹⁰² of *McDonnell Douglas Corp. v. Green*,¹⁰³ while at other times suggests a narrower “business” justification.¹⁰⁴ But “there is nothing in the text of the Equal Pay Act that suggests that the ‘factor other than sex’ must be proven to be business related.”¹⁰⁵ Moreover, as the Supreme Court pointed out in *Gunther*, “[u]nder the Equal Pay Act courts and administrative agencies are not permitted to ‘substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide’ . . . [reason] so long as it does not discriminate on the basis of sex.”¹⁰⁶ The Federal Circuit reasons that those courts rejecting the necessity for the factor to be related to business use the more reasonable approach.¹⁰⁷ Most recently, the Supreme Court appears to agree with this broader

¹⁰¹ *County of Washington v. Gunther*, 452 U.S. 161 (1981) (discussing the EPA affirmative defenses, most notably the “any other factor” defense spelled out in 29 U.S.C. § 206(d)(1)(iv) (2009)).

¹⁰² See *Taylor v. White*, 321 F.3d 710, 717-19 (8th Cir. 2003); *Fallon v. Illinois*, 882 F.2d 1206, 1216 (7th Cir. 1989).

¹⁰³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁰⁴ See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982); see also *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003) (citations omitted) (“Although an employer may not rely on a ‘general practice’ as a factor ‘other than sex,’ it may consider factors such as the ‘unique characteristics of the same job; . . . an individual’s *experience*, training[,] or ability; or . . . special exigent circumstances connected with the business.’”) (emphasis in original).

¹⁰⁵ *Behm v. United States*, 68 Fed. Cl. 395, 400 (2005) (where the court examined the Circuit split on tying the “factor” to a business reason).

¹⁰⁶ *Id.* at 400 (citing *Gunther*, 452 U.S. at 170-71).

¹⁰⁷ *Behm*, 68 Fed. Cl. at 400 (citing *Taylor v. White*, 321 F.3d 710, 717-19 (8th Cir. 2003); *Fallon v. Illinois*, 882 F.2d 1206, 1211(7th Cir. 1989)) (noting the Eighth and Seventh Circuits’ approach that “it is enough that the factor be gender-neutral on its face and bona fide—that is, used in good faith and not in a discriminatory manner—in its application”).

interpretation when in dictum in an Age Discrimination in Employment Act (ADEA) claim, it stated that “in the Equal Pay Act . . . , Congress barred recovery if a pay differential was based ‘on any other factor’ – reasonable or unreasonable - ‘other than sex.’”¹⁰⁸ With this statement, it seems likely that the Supreme Court would give the broader reading to the “any other factor” language of the Equal Pay Act defense. For as the Seventh Circuit has noted, “[s]ection 206(d) does not authorize federal courts to set their own standards of ‘acceptable’ business practices. The statute asks whether the employer has a reason other than sex — not whether it has a ‘good’ reason.”¹⁰⁹ “A district judge does not sit in a court of industrial relations. No matter how medieval a firm’s practices, no matter how high-handed its decisional process, no matter how mistaken the firm’s managers”¹¹⁰

Given this broad reading, the Title VII defendant should add the Bennett Amendment defense to its arsenal when faced with claims of gender inequity in benefit plans. If the secular employer can take advantage of such a broad reading, the religious employer¹¹¹ would have an even more powerful defense. What could be a more bona fide reason for a Catholic employer to exclude contraceptive coverage in an employee benefit plan than its deep-seated religious belief that to include such coverage would violate one of its most fundamental tenets? The policy behind carving out “conscience” clauses for religious employers in the recent contraceptive equity statutes only reinforces the argument.

¹⁰⁸ *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (where the Court was distinguishing the ADEA “reasonable factors other than age” defense from the Equal Pay Act defense of “any other factor other than sex”); *cf.* *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2403 (2008) (the Supreme Court’s latest pronouncement in an ADEA case on the affirmative defense of “reasonable factor other than age” endorsing its previous decision in *City of Jackson*, 544 U.S. 228).

¹⁰⁹ *Wernsing v. Dep’t. of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005).

¹¹⁰ *Id.* at 468 (quoting *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560-61 (7th Cir. 1987)).

¹¹¹ The problem is more likely to arise in situations involving the religious-affiliated employer, such as schools, hospitals, and social service agencies, rather than those religious employers directly involved in faith propagation.

At least two religious employers have raised the “any other factor other than sex” defense when faced with EPA claims contending that the provision of “head of household” benefits resulted in unequal compensation for men and women.¹¹² In both instances, the employers were religious-based schools. In *Fremont Christian*, the benefit was health insurance;¹¹³ in *Tree of Life*, it was a family allowance.¹¹⁴ In *Fremont Christian*, the school interpreted “head of household” to be “single persons and married men.”¹¹⁵ It explained its religious belief that “in any marriage, only the man can be the head of the household, regardless of what his salary is in relation to his wife.”¹¹⁶ Similarly, in *Tree of Life*, the school interpreted its “head of household” term to relate only to “those persons who are married and have dependent children,” and reasoned based on its beliefs, “a female [would] only qualify . . . if her husband is either absent or unable to work.”¹¹⁷ In both cases, the employers claimed that their religious beliefs were “any other factor other than sex” under the terms of the EPA affirmative defense, and therefore, their benefit programs did not violate the Equal Pay Act.¹¹⁸ Both courts rejected the defense. In *Tree of Life*, the court cited *Fremont Christian* and in quoting that Ninth Circuit case, noted that court’s agreement with a passage from 29 C.F.R. § 800.149:

Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and

¹¹² EEOC v. *Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); EEOC v. *Tree of Life Christian Sch.*, 751 F. Supp. 700 (S.D. Ohio 1990).

¹¹³ *Fremont Christian Sch.*, 781 F.2d at 1364.

¹¹⁴ *Tree of Life Christian Sch.*, 751 F. Supp. at 702.

¹¹⁵ *Fremont Christian Sch.*, 781 F.2d at 1364-65.

¹¹⁶ *Id.*

¹¹⁷ *Tree of Life Christian Sch.*, 751 F. Supp. at 702.

¹¹⁸ *Fremont Christian Sch.*, 781 F.2d at 1367; *Tree of Life Christian Sch.*, 751 F. Supp. at 707.

the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, . . . the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a “factor other than sex” within the intent of the statute.¹¹⁹

The court in *Fremont Christian* simply avoided any discussion of the religious connotation of the employer’s practice there. However, in *Tree of Life*, the court recognized the religious roots, but settled the point there relying on the Sixth Circuit requirement that the “other factor” have some business tie.¹²⁰ It reasoned that:

While the pay differential correlates with Tree of Life’s religious conviction, to say that giving witness to a religious belief is a “legitimate business reason” is to stretch the parameters of the Sixth Circuit’s test of “factor other than sex” well beyond the context of the cases in which the court has applied that test.¹²¹

Giving more than lip service to the employer’s religious belief, the court went on to specifically point out that:

Since Tree of Life’s head of household allowance policy is in fact based on sex, albeit as a means of

¹¹⁹ *Tree of Life Christian Sch.*, 751 F. Supp. at 708 (quoting *Fremont Christian Sch.*, 781 F.2d at 1367) (citation omitted).

¹²⁰ *Id.* at 709.

¹²¹ *Id.*

giving witness to a religious belief that men and women occupy different family roles, its argument that the policy is based on a “factor other than sex” within the meaning of 29 U.S.C. § 206(d)(1)(iv) must fail.¹²²

That court thus opened the door for a later argument that in *some* instances, in *some* circuits, religious conviction *could* serve as the statutory “factor other than sex.”

Nothing in *Fremont Christian* or *Tree of Life* suggests that reliance on a core religious belief can *never* serve as a “factor other than sex”¹²³ in defending an EPA or Title VII compensation differential sex claim. Rather, the courts in those cases rejected the defense because the religious belief was itself rooted in stereotypical ideas of sex roles.¹²⁴ Such is not the case with the Catholic Church’s continuing belief that the use of any and all artificial means of contraception, prescription or not, is contrary to Church teachings and closely held beliefs on the “‘sacredness’ and ‘inviolability’ of life”¹²⁵ that underscore the Church’s moral opposition to contraception. Thus, there is no legal impediment; the courts should recognize such a defense within the terms of 29 U.S.C. § 206(d)(1)(iv) (“factor other than sex”) for the religious employer facing a complaint that its health care package does not include coverage for prescription contraceptives.

The logical counterargument necessarily fails. A plaintiff may attempt a weak argument that at this time there are only prescription contraceptives for women and thus the defense must fall since it is not based on a “factor other than sex.” Such a circular argument defies reason. Unlike the plaintiffs in *Fremont Christian* and *Tree of Life*, such a plaintiff would be confronted with a bona fide gender-neutral factor, deeply rooted and well documented. The religious employer’s abhorrence of

¹²² *Id.*

¹²³ 29 U.S.C. § 206(d)(1)(iv) (2009).

¹²⁴ EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1363-67 (9th Cir. 1986); EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700, 709 (S.D. Ohio 1990).

¹²⁵ Stabile, *supra* note 2, at 751.

artificial contraception, whether it is by prescription or not, is in fact not based on sex, but is based on its genuine belief in the sacredness of human life.¹²⁶ As such, it stands as “any other factor other than sex” within the terms of the affirmative defense as drafted and intended in the EPA.¹²⁷ Likewise, it transports as a defense to a claim under Title VII for gender inequity in compensation under the Bennett Amendment.¹²⁸

III. THE RELIGIOUS EMPLOYER’S DILEMMA

The religious employer providing prescription drugs as part of an employee health care package is not unlike any other employer attempting to cover the needs of its employees in order to attract and retain a qualified workforce. In a country where the burden of health care coverage in great part falls squarely on the shoulders of employers, there are many difficult decisions for each individual employer to make. There are questions as to underwriting, extent of individual coverage, dependent coverage, retiree coverage, and costs associated with administration, to name a few. Deciding whether or not to include prescription drugs in a comprehensive health care package is critical to both the employer and the beneficiary employees. Whereas many employees will only on occasion need major medical treatment or intervention, most use some prescription medication over the course of any given year.

This ineluctable fact presents the most poignant problem for those religious employers that do not directly propagate faith-based doctrine, but follow doctrine in their missions. For example, employees of a house of worship, or a faith-based primary or secondary educational institution, more than likely expect their employer to follow Church doctrine. By logical

¹²⁶ As a practical matter, the religious employer that does include prescription drug coverage in its health care plan should simply state explicitly in its personnel manual or description of health care benefits that prescription contraceptives are excluded as a matter of Church doctrine against the use of all contraceptives, whether by prescription or not.

¹²⁷ 29 U.S.C. § 206(d)(1)(iv) (2009).

¹²⁸ 42 U.S.C. § 2000e-2(h) (2009).

inference, those employees are not likely to challenge that employer's decision to refuse to provide prescription contraceptives. This is not necessarily the case for the religious-affiliated employer that does not serve as the face of the Church. That employer, such as a social service agency or hospital that chooses to follow the Catholic Church's ban on artificial contraceptives, is faced with an overwhelming decision when it comes to including contraceptives in any prescription drug benefit plan it wants to offer its employees. To compel such an employer to finance, in whole or in part, conduct that it condemns is to force that employer to ignore, or worse, to violate a rudimentary tenet of its religious base.

Professor Susan J. Stabile considered this dilemma in 2005 when writing about state contraceptive equity statutes.¹²⁹ She noted that:

There is no ambiguity about the Catholic Church's position on contraception. The Catechism of the Catholic Church labels as "intrinsically evil" any "action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible."¹³⁰

This prohibition on artificial contraceptives is deeply rooted in the Church's moral convictions and its unequivocal opposition to abortion.

[S]tate statutes mandating coverage of prescription contraceptives typically require that a plan providing any prescription coverage must provide coverage of all FDA[-]approved methods of birth control. Among the FDA[-]approved prescription contraceptives are several that are abortifacients which operate post-conception to

¹²⁹ Stabile, *supra* note 2.

¹³⁰ *Id.* at 750 (quoting in part the CATECHISM OF THE CATHOLIC CHURCH § 2370) (citation omitted).

inhibit the implantation of an embryo. These include IUDs and the morning-after pill....

... [T]hese statutes effectively blur the line between birth control and abortion. The result is to force religious organizations to provide coverage for procedures that are abortive, thereby violating a deeply held moral principle against killing.¹³¹

The Catholic Church's position on this point has been consistent and intractable over time. It finds its early root in the "notion of an inextricable link between sex and procreation . . . solidified around the fourth and fifth centuries and Augustine of Hippo."¹³² From Pope Pius XI's encyclical on Christian marriage, *Casti Connubii* in 1930,¹³³ through Pope Paul VI's encyclical, *Humanae Vitae* in 1968,¹³⁴ to Pope John Paul II's apostolic exhortation, *Familiaris Consortio* in 1981,¹³⁵ the Catholic Church has spoken with one forceful voice.¹³⁶ Pope Paul VI reiterated:

Just as man does not have unlimited dominion over his body in general, so also, and with more particular reason, he has no such dominion over his specifically sexual faculties, for these are concerned by their very nature with the generation

¹³¹ *Id.* at 752-53 (footnotes omitted).

¹³² *Id.* at 749 n.37 (citation omitted).

¹³³ Encyclical letter *Casti Connubii*, *supra* note 2.

¹³⁴ Pope Paul VI, *Humanae Vitae*, given at St. Peter's in Rome, July 25, 1968, *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (last visited 9/20/09).

¹³⁵ Pope John Paul II, *Familiaris Consortio*, # 30, Nov. 22, 1981, *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (last visited 9/20/09).

¹³⁶ *Humanae Vitae*, *supra* note 134, at n.4.

of life, of which God is the source. “Human life is sacred—all men must recognize that fact,” Our predecessor Pope John XXIII recalled. “From its very inception it reveals the creating hand of God.”¹³⁷

Pope John Paul II reaffirmed, “[t]he Church is called upon to manifest anew to everyone, with clear and stronger conviction, her will to promote human life by every means and to defend it against all attacks in whatever condition or state of development it is found.”¹³⁸ Most recently, on March 18, 2009, Pope Benedict XVI repeated the Church’s condemnation of artificial contraceptives when speaking on the use of condoms to stall the spread of AIDS in Africa.¹³⁹

With such a formidable, unambiguous view as the touchstone on this issue, the religious employer is left with little choice. Consequently, the employer that follows the Church’s teaching on birth control by excluding contraceptives in its prescription plan does so not because it is somehow simple.¹⁴⁰

¹³⁷ *Id.* at § I, ¶ 13(citing encyclical letter *Mater et Magister*: AAS 53 (1961), 447 [TPS VII, 331]).

¹³⁸ *Familiaris Consortio*, *supra* note 135, at Part Three, § II, ¶ 30.

¹³⁹ Daniel Blake, *Pope Promotes Morality Not Contraception in Africa Aids Fight*, CHRISTIAN TODAY, Mar. 18, 2009, available at <http://www.christiantoday.com/article/pope.promotes.morality.not.contraception.in.africa.aids.fight/22808.html> (last visited 9/20/09).

¹⁴⁰ In fact, it is more difficult for the employer to stand its ground on its religious belief in the face of internal tumult, public criticism and ridicule, and possible litigation. As noted in *supra* note 126, the wise employer will explicitly state its reason for excluding contraceptive coverage. The prudent employer should go one step further and provide coverage for those women prescribed contraceptives only for therapeutic purposes. This would reinforce the employer’s acknowledged adherence to Church teaching since Pope Paul VI specifically carved out such use as “lawful” within Church doctrine: “the Church does not consider at all illicit the use of those therapeutic means necessary to cure bodily diseases, even if foreseeable impediment to procreation should result there from — provided such impediment is not directly intended for any motive whatsoever.” *Humanae Vitae*, *supra* note 134, at § II, ¶ 15 (footnote omitted). Such strict adherence would involve an even greater administrative burden on the employer and its chosen insurance underwriter if it is not self-

It does so because it holds a genuine belief that providing such coverage for contraceptive purposes would be funding a practice that is an offense “against the law of God.”¹⁴¹ That belief should insulate the employer from a lawsuit alleging that the refusal is “because of sex.”

IV. EMPLOYERS AND COURTS CAN RELY ON SOLID GUIDING PRINCIPLES

It is sound policy to recognize that following entrenched religious doctrine is “any other factor other than sex” for purposes of the affirmative defense under the EPA¹⁴² and Title VII’s Bennett Amendment¹⁴³. While some may disagree with Church doctrine that advocates a procreative motive for all instances of conjugal sex, and by theological extension equates artificial contraception with killing, none can doubt the bona fides of that orthodoxy as religious conviction. Thus, the decision to exclude contraceptives flows from a religious base, not a direct or indirect bias against women. Without the availability of the affirmative defense, the religious employer would best be advised to exclude all prescription drug coverage from any health care plan it chooses to offer to avoid any challenge. That surely is not in the best interests of either the employer or the employees.

Allowing the employer to stand on religious conviction as a “factor other than sex” defense in the context of the unique issue of contraceptives is the flip side of allowing employees protection of their religious beliefs in the workplace in Title VII.¹⁴⁴ In addition, it is the natural complement to Congress’s

insured. However, it would further support the strength of its defense as a matter of religious faith and not gender discrimination.

¹⁴¹ *Casti Connubii*, *supra* note 2.

¹⁴² 29 U.S.C. § 206(d)(1)(iv) (2009).

¹⁴³ 42 U.S.C. § 2000e-2(h) (2009).

¹⁴⁴ Not only does Title VII prohibit discrimination “because of . . . religion,” 42 U.S.C. § 2000e-2(a) (2009), but it also places an affirmative duty on an employer to “reasonably accommodate” the needs of its employees unless it can show an “undue hardship,” 42 U.S.C. § 2000e(j) (2009); *e.g.*, *TWA v. Hardison*, 432 U.S. 63 (1977).

intent to exempt the religious employer from discrimination claims based on religion.¹⁴⁵ By statute, the employer's right to adhere to its religious convictions in matters dealing with "religious activities" is sheltered.¹⁴⁶ To the secular mind, providing contraceptives in an overall health care package is perhaps a social, political, and economic matter. To the sectarian mind, especially the Catholic mind,¹⁴⁷ there could be nothing more at the heart of its religious convictions. Despite its seeming intransigence, the Catholic Church has shown flexibility on a number of issues since the Second Ecumenical Council of the Vatican (1962-1965).¹⁴⁸ Its stance on the use of contraceptives to prevent conception, however, is unyielding. It is not simply a matter of chosen perspective, it is as described *supra* in Part III, a deeply rooted orthodoxy.

There may be other similarly rooted orthodoxies in other religions that could also serve as the "factor other than sex" defense. Courts should scrutinize such a proffered defense narrowly since it is raised in the face of a gender inequity claim. Given the courts' record of careful examination of this affirmative defense,¹⁴⁹ and the employers' burden to prove the defense by a preponderance of the evidence,¹⁵⁰ it stands to reason that those employers that attempt to simply raise a

¹⁴⁵ 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2009); *see supra* text in note 9.

¹⁴⁶ *Id.* § 2000e-1(a).

¹⁴⁷ "Prior to the 1930 Lambeth Conference all Christian churches were opposed to artificial contraception, on the basis of two thousand years of teaching on sexuality, morals and the family, anchored firmly in Scripture. But once the Anglican Communion gave in to mounting secularist pressure—albeit in a fairly minimal way to begin with—most of the protestant world followed suit." Bishop David's Blog, *Furthermore . . . Look What T.S. Eliot Said*, <http://bishopdavidsblog.blogspot.com/2009/05/furthermore-look-what-ts-eliot-said.html> (Oct. 9, 2009, 14:21 EST) (commenting on T.S. Eliot's work, *Thoughts After Lambeth* (1931), which discussed Pope Pius XI's *Casti Connubii*).

¹⁴⁸ John W. O'Malley, S.J., *The Style of Vatican II*, AMERICA, THE NATIONAL CATHOLIC WEEKLY, Feb. 24, 2003.

¹⁴⁹ *See supra* notes 101-104.

¹⁵⁰ *See, e.g.,* Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982).

religious perspective or individually crafted principle will fail, as they should, much as the defendant did in *Tree of Life*.¹⁵¹

Some States have already matter-of-factly recognized that religious employers should be treated differently when contraception is the issue.¹⁵² The state contraceptive equity statutes very pointedly obligate private employers that offer prescription drug plans in their overall health benefits to include prescription coverage for female beneficiaries. An employer that fails to include such coverage faces litigation in state court. The religious employer, however, may enjoy an exemption in that very same state statute in recognition of its moral convictions.¹⁵³

This recognition of moral conviction should extend to the religious employer facing a Title VII or EPA claim for lack of contraceptive coverage in health care plans. Not only would it be sound policy, but the defense has been there untapped all along, just like the pentimento in an age-old painting hides beneath the surface for years.

CONCLUSION

In a time such as this, when the cost to employers to provide health benefits grows disproportionately to profit margins, more employers may seek ways to limit their costs. Slashing coverage may be the answer. Indelicate slashing may result in increased litigation in this area. Employers should be aware of their full range of defenses. Although there is no question that most employers facing an EPA lawsuit are aware of the power of the “any other factor” defense in 29 U.S.C. § 206(d)(1)(iv), it is questionable whether the employer facing a Title VII benefit discrimination claim is aware of the use of that defense under the Bennett Amendment.¹⁵⁴ As reasoned herein, this defense is particularly potent for the religious employer.

¹⁵¹ EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700 (S.D. Ohio 1990).

¹⁵² See discussion *supra* pp. 3-5.

¹⁵³ See Guttman, *supra* note 7.

¹⁵⁴ 42 U.S.C. § 2000e-2(h) (2009).

Unless this country goes to a fully taxed- or government-subsidized health care system, which is not likely, employers will remain in the business of providing or underwriting health insurance to some extent. Although employers are not required to provide health care plans as part of their compensation packages, many do as a means to remain competitive and viable in the marketplace. Along with the financial burden for all those employers, goes the additional burden of conscience for the religious employer. As the health care debate rages on in Congress, boardrooms, and households, the employer remains saddled with this burden. For now, there may be no way out of the often-crippling financial burden. However, the religious employer can effectively use its moral conscience as the factor in deciding to exclude contraceptives and still provide a comprehensive health care benefit package to all employees. In this game of ideological chicken, with rights on a straight collision course, something must veer. It is undeniable that female employees receive different prescription coverage than their male counterparts when contraceptives are excluded. However, it is also undeniable that a religious employer would be subverting its own intrinsic faith and beliefs if forced to provide such coverage. An employee has a choice whether to work for a secular or religious employer. The religious employer does not necessarily have the same choice. The catch-all affirmative defense of the EPA, and likewise the Bennett Amendment, provides the answer.



A NEW HISTORICAL PERSPECTIVE ON NATIONAL SECURITY LAW POLICIES DURING THE BUSH ADMINISTRATION AND THEIR IMPLICATIONS FOR THE FUTURE; CONSTITUTIONAL IN CONCEPTION, PROBLEMATIC IN IMPLEMENTATION

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I. INTRODUCTION

It is a well-known fact that the Bush administration endured constant criticism while in office based on a widespread belief that it was abusing civil liberties.² This perception began fairly early with USA Today noting in 2002 that, “there is an emerging resistance to what a growing number of critics say is an extraordinary assault on civil liberties by the Bush administration”³ It evolved to the point that President Bush was personally accused by various commentators of perpetrating “mass violations of civil liberties,”⁴ possessing the worst civil rights record of any American President,⁵ and presiding over “eight years of shameful policies”⁶ that in effect amounted to a “war on civil liberties.”⁷ This criticism may be a lasting legacy.

² Tom Head, *George W. Bush's Record on Key Civil Liberties Issues*, <http://civilliberty.about.com/od/profiles/p/georgewbush.htm> (last visited Sept. 26, 2009). Gallup noted that the number of US citizens polled who expressed concern about civil liberties violations increased from 47 percent in 2002 to 65 percent in 2006. Gallup, *Civil Liberties*, <http://www.gallup.com/poll/5263/civil-liberties.aspx> (last visited November 18, 2009). See numerous sources cited throughout this article for various aspects of the repeated and pervasive criticism directed at the administration.

³ Joan Biskupic, *Attention Turns Back to Liberties*, USA Today, Nov. 1, 2002, at 17A, available at http://www.usatoday.com/news/politics/elections/2002-10-31-liberties-usat_x.htm.

⁴ Ronald Brownstein, *Gore Urges Repeal of Patriot Act*, L.A. Times, Nov. 10, 2003, at 12, available at <http://www.commondreams.org/headlines03/1110-01.htm>.

⁵ Samuel Walker, *The Worst President Ever on Civil Liberties?*, History News Network, Dec. 12, 2005, <http://hnn.us/articles/19113.html> (last visited Sept. 26, 2009).

⁶ Press Release, Anthony D. Romero, *ACLU Announces Agenda for 111th Congress*, <http://www.aclu.org/safefree/general/38307prs20090113.html> (last visited Sept. 26, 2009).

⁷ See ELAINE CASSEL, *THE WAR ON CIVIL LIBERTIES: HOW BUSH AND ASHCROFT HAVE DISMANTLED THE BILL OF RIGHTS* (Lawrence Hill Books) (2004).

A detached post administration legal review of the government's most controversial policies, however, leads one to a dramatically different conclusion. Specifically, from a legal standpoint, the vast majority of programs appear to have been fully supported by precedent and well within the law as the law was understood when the programs were conceived and implemented. This conclusion is strongly supported by the legal analysis that follows. It can only be reinforced, to a degree, by President Obama's recent announcements that he has decided to continue in slightly modified form some of the same policies.⁸

This does not mean that the actions and proposals of Bush officials were beyond reproach. As will be explained in this article, in addition to making a major strategic and equitable error regarding the status of the Guantanamo detainees, many of the government's procedures contained gaps and provisions that, upon application, could theoretically lead to unfair results. Defense attorneys, human rights groups, and academics, as will be discussed later, discovered and publicly highlighted several of these isolated faults. The courts, showing a highly unusual predisposition to abandon decisions sanctioned by both the Executive and Legislative branches in a time of congressionally authorized war,⁹ sustained their objections, based on politics,

⁸ See Alex Kingsbury, *Moving Beyond Bush's War on Terrorism*, US NEWS & WORLD REPORT, June 1, 2009, at 56. As of September 2009, the Obama Administration had made no proposals to change the Patriot Act and has specifically requested that Congress reauthorize some of the controversial sections passed under President Bush. See Joe Palazzolo, *Justice Department Supports Renewal of Patriot Act Provisions*, Sept. 15, 2009, <http://www.mainjustice.com/2009/09/15/justice-department-supports-renewal-of-patriot-act-provisions/> (last visited Nov. 16, 2009); Larry Margasak, *Obama: Patriot Act Surveillance Law Should Stay*, Sept. 22, 2009, http://www.huffingtonpost.com/2009/09/22/obama-patriotactsurveil_n_295194.html (last visited Nov. 16, 2009). This Act will be discussed at length in the following section.

⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952); *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304, 319-20 (1936); *Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981); *Boumediene v. Bush*, 128 S. Ct. 2229, 2276, 2297 (2008); Steve R. Shapiro, *Defending Civil Liberty in the War on Terror*, 29 FLETCHER F. WORLD AFF. 103 (2005); Glenn Sulmasy, *Military Commissions Act of 2006*, 33 OKLA. CITY U. L. REV. 361, 363 (2008). Regarding existence of war, see *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. Paragraph 2(b) constitutes

ideology, law or other factors. The result was a series of well-reported reversals that substantially undermined the Bush administration's public image and significant aspects of its legislative program.¹⁰ The legal history of the last eight years thus stands as a fascinating lesson for future governments, which must quickly issue regulations and propose legislation to deal with a perceived national crisis.

The following article represents a new perspective on the national security law policies initiated during the Bush regime that hopefully, over time, will prove to be both more accurate and objective than what has often been expressed by contemporary observers.¹¹ It is of course impossible to review every government action of the last eight years, but I will examine the most controversial ones, such as Patriot¹² detention of enemy combatants, military commissions, denial of habeas, NSA surveillance, racial profiling and interrogation, as well as the refusal to acknowledge application of the Geneva Conventions.¹³ In the process, I will attempt to clearly set forth the actual law behind these policies as well as the potential flaws in their implementation.

Each of the programs listed above has individually contributed to the previously quoted complaints that the Bush administration record is one of repeated abuse of civil liberties. To measure these claims against legal reality, it is necessary at the outset to define what is meant by "civil liberties." This

authorization pursuant to section 5(b) of the War Powers Resolution. AUMF permits the President to utilize all "necessary and appropriate force" and "incident[s] of war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 2, 28 (1942)).

¹⁰ Note cases highlighted throughout this article.

¹¹ Much of the popular as well as legal literature has of course been highly critical. *See supra* notes 2-6, as well as the many writings cited throughout this article.

¹² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot].

¹³ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004).

phrase, as is the case with such words as “terrorism,” “torture,” “racial profiling,” and other terms used in the national security context, has multiple meanings in popular culture that are to some extent dependent on the mind of the listener. As lawyers and law students, however, we try to avoid emotional reaction to particular words and phrases by looking at the best legal definition available. Fortunately, a review of multiple sources¹⁴ indicates that legally the phrase “civil liberties” is well understood.¹⁵ Civil liberties refers to the fundamental rights against unwarranted government interference guaranteed by the Bill of Rights and the Thirteenth and Fourteenth Amendments to the Constitution including, but not limited to, freedom of speech, press, assembly, and religion; the right to be free from unreasonable search and seizure; due process of law; and equal treatment under the law. Exactly what those Constitutional rights mean in different situations, and who is eligible to be protected by their guarantees is a complex subject. But throughout this article, the first question the reader should ask is whether the major government actions described violated our fundamental Constitutional rights as the Courts throughout United States history have interpreted them. If they do not, then one must ask why has there been such extensive criticism and what, if anything, governments should do in the future.

II. PATRIOT ACT

One of the poster children for the attacks on the Bush administration’s national security law program was the Patriot Act. Human rights groups, scholars, and ordinary citizens vehemently attacked this legislation, which, in their opinion, pervasively undermined fundamental civil liberties.¹⁶ In the

¹⁴ BLACK’S LAW DICTIONARY 263 (8th ed. 2006); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Houghton Mifflin Co. 340 (4th ed. 2006); THE NEW DICTIONARY OF CULTURAL LITERACY 333 (E.D. Hirsch, Jr. et al. eds., 2002); US Legal.com: Civil Liberties Law & Legal Definition, <http://definitions.uslegal.com/c/civil-liberties/> (last visited Sept. 26, 2009).

¹⁵ Id.

¹⁶ See, e.g., *USA PATRIOT Act*, Nov. 14, 2003, <http://torturefoia.aclu.org/safefree/resources/17343res20031114.html> [hereinafter ACLU] (last visited

words of the ACLU, the Patriot Act: “. . . threaten[s] your fundamental freedoms by giving the government the power to access your medical records, tax records, information about the books you buy or borrow without probable cause, and the power to break into your home and conduct secret searches without telling you for weeks, months or indefinitely.”¹⁷

Yet, despite these claims, as of this writing, eight years after ratification, the appellate courts have yet to reverse any major provisions of the 342-page Patriot Act.¹⁸ There have been appellate decisions questioning wording directly related to and slightly extending the Clinton era material support provisions,¹⁹ and court actions challenging long standing disclosure law pertaining to National Security Letters and other matters that were modified to a degree by Patriot.²⁰ Many of these latter decisions were falsely bannered by the media as proclamations by the courts that substantial sections of Patriot had been found unconstitutional.²¹ To their credit the *N.Y. Times* and

Sept. 26, 2009); Human Rights First: *Privacy Policy*, <http://www.humanrightsfirst.org/hrf-privacy.htm> (last visited Sept. 26, 2009); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy under the USA Patriot Act*, 80 DENV. U. L. REV. 375 (2002); Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161 (2006); Heather Hillary & Nancy Kubasek, *The Remaining Perils of the Patriot Act: A Primer*, 8 J.L. SOC'Y 1 (2007).

¹⁷ ACLU, *supra* note 16.

¹⁸ Patriot, *supra* note 12. As to the claim of no major reversals, it is impossible to footnote a negative. The author can only state that he has kept up with this issue, regularly reviewed the appellate decisions and news articles dealing with the Patriot Act and, as of June 2, 2009, has not found an appellate opinion overturning any significant section of the Act.

¹⁹ See Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 386 (9th Cir. 2003); Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1138 (9th Cir. 2007); United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

²⁰ Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005); Doe v. Mukasey, 549 F.3d 861 (2d Cir. 2008).

²¹ The *Rahmani* decision on Clinton's Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and material support was headlined as “*Judge's Ruling Indicates Part of PATRIOT Act is Unconstitutional.*” BALTIMORE

Washington Post published retractions stating that their headlines were inaccurate as the cases essentially dealt with preexisting legislation.²² An Oregon District Court found that the changes to the Foreign Intelligence Surveillance Act that enabled the government to share the product of intelligence wiretaps with federal law enforcement were unconstitutional,²³ in direct conflict with a decision made years before by the Appellate Foreign Intelligence Surveillance Court of Review.²⁴ If the Ninth Circuit upholds the lower court, this could result in a very important Supreme Court opinion that goes to the heart of Patriot's effort to ensure that after 2001, government agencies could talk to each other and connect the dots.²⁵ But none of these cases constitutes a significant appellate reversal of legislation that was continuously portrayed from its inception as a serious affront to the Constitution. Furthermore, it is very interesting to note that six months into the Obama administration, the new President has not requested that Congress make major changes to the Act. The logical conclusion to be drawn from these facts is that many of the public proclamations about how Patriot violated fundamental civil liberties have been largely without legal merit.

CHRONICLE AND SENTINEL, July 3, 2002, http://www.baltimorechronicle.com/patriotact_julo2.shtml (last visited Sept. 26, 2009). The *Doe* cases were originally reported by the *N.Y. Times* as "*Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data*," Julia Preston, *N.Y. TIMES*, Sept. 30, 2004, at A26, and by *The Washington Post* as "*Key Part of Patriot Act Ruled Unconstitutional: Internet Providers' Data at Issue*," Dan Eggen, *WASH. POST*, Sept. 30, 2004, at A16.

²² Mr. Eggen's correction noted that the Judge's ruling "focused on earlier statutes" not created under Patriot. *WASH. POST*, Oct. 1, 2004, at A-16, available at <http://www.washingtonpost.com/wp-dyn/articles/A59626-2004Sep29.html>. Ms. Preston later acknowledged the questioned statute was not created under Patriot. *N.Y. TIMES*, Oct. 1, 2004, at A26, available at <http://query.nytimes.com/gst/fullpage.html?res=9D04E2DB1538F933A0575AC0A9629C8B63>.

²³ *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1042-43 (D. Or. 2007).

²⁴ *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

²⁵ Other district courts have declined to follow *Mayfield*. See *United States v. Mubayyid*, 521 F. Supp. 2d 125, 137 (D. Mass. 2007); *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299, 304 (D. Conn. 2008).

The obvious question is, if the Patriot Act is really not a great assault on civil liberties, why was there such a visceral reaction to the statute? It is not the purpose of this article to analyze in detail all of the questioned provisions of the Act. The author has done that elsewhere and the interested reader is encouraged to access this work.²⁶ This article has a much wider scope. But a brief review of some of the most controversial provisions discloses the nature of the problem. That is, Patriot critics often, singularly or in combination, 1) were unaware of long-established legal concepts, 2) misunderstood the legislation and/or 3) possessed an expectation of privacy beyond that which has been currently recognized by the law. At the same time, the government occasionally supported statutory wording that was indefensible.

A. "SNEAK AND PEAK" WARRANTS

The ACLU has challenged Section 213²⁷ of the Patriot Act, claiming that the government can now search your home without a warrant and never tell you.²⁸ The ACLU has stated that: "For centuries, common law has required that the government . . . give you notice before it executes a search. . . .The Patriot Act, however, unconstitutionally amends the Federal Rules of Criminal Procedure to allow the government to conduct searches without notifying the subjects"²⁹

These statements are inaccurate. Section 213 does not permit searches without a warrant, but only delays the traditional, after-the-fact notice given to those whose property has been searched.³⁰ It is obvious that providing immediate

²⁶ Ronald J. Sievert, *Truth, Controversy and Consequences*, 11 TEX. REV. L. & POL. 319 (2007).

²⁷ 18 U.S.C. § 3103(a) (2006).

²⁸ ACLU, *supra* note 16.

²⁹ ACLU.org, *Surveillance Under the "USA/PATRIOT" Act*, <http://www.aclu.org/privacy/spying/14889prs20020101.html> (last visited Sept. 26, 2009).

³⁰ 18 U.S.C. § 3103(a) (2006).

notice would not make any sense if it would endanger informants, lead to destruction of evidence, or seriously compromise an investigation.³¹ Imagine, as just one of many examples, a situation where the FBI, pursuant to a court authorized search warrant, discovered a document stating that the absent occupant intended to have a meeting with all of his co-conspirators to assemble a weapon at a specific future location and time. Any logical investigator would want to delay notice of the search so as to be able to identify and arrest the conspirators and seize the evidence. The Supreme Court has recognized this basic principle, stating contentions that searches are unconstitutional for lack of notice are frivolous.³² Individual appellate courts have recognized delayed notice in a variety of circumstances.³³ The Patriot Act simply provided a uniform statutory basis for this recognized principle of law, stating that a court may delay notice for a reasonable time where there was reason to believe that immediate notice would endanger the life or physical safety of an individual, lead to flight from prosecution, destruction of evidence, or seriously jeopardize the investigation.³⁴

B. LIBRARY RECORDS

The ACLU has stated that, under the Patriot Act, “without a warrant and without probable cause, the FBI now has the power to access many private medical records, library records, and student records”³⁵ The truth is that the government has always had the ability in ordinary criminal cases to obtain such records without probable cause simply by issuing a grand jury

³¹ 18 U.S.C. § 2705(a)(2) (2006).

³² *Dalia v. United States*, 441 U.S. 238, 247-48 (1979).

³³ *United States v. Villegas*, 899 F.2d 1324, 1338 (2d Cir. 1990); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986).

³⁴ 18 U.S.C. § 2705(a)(2)(A)-(E) (2006).

³⁵ ACLU.org, *ACLU of New Jersey Commends Princeton for Passage of Pro-Civil Liberties Resolution*, <http://www.aclu.org/safefree/general/17708prs20031008.html> (last visited Sept. 26, 2009).

subpoena.³⁶ The standard to issue a grand jury subpoena is “relevancy,” and courts will uphold any challenged subpoena unless “there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.”³⁷ Recognizing that some government investigations may be conducted for intelligence only, without any present intent of eventually obtaining a criminal grand jury indictment, the Patriot Act established a mechanism by which records could be obtained in intelligence cases. The standard applied was naturally the same that existed to obtain records in ordinary cases. Thus, the Patriot Act authorized a court to issue orders to obtain records after a Government certification that the records are relevant to a foreign intelligence investigation, or to protect against international terrorism and espionage.³⁸ As this provision actually requires a court order, and, pursuant to later legislation, a statement of facts supporting relevance,³⁹ it is in fact actually far more restrictive than the standards that have long been applied in ordinary criminal cases to obtain records.

C. INTERNET COMMUNICATIONS

The Patriot Act recognized that in today’s society people communicate constantly via the Internet whereas in the past they relied upon the telephone. The vast majority of these communications are innocent, but some advance the activities of criminals and terrorists. Accordingly, the Act contained provisions that authorized the government in limited instances to access the Internet.⁴⁰ This led to a storm of controversy. *The*

³⁶ FED. R. CRIM. P. 17(c).

³⁷ *United States v. R. Enter., Inc.*, 498 U.S. 292, 301 (1991).

³⁸ 50 U.S.C. § 1861(b)(2) (2006).

³⁹ USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, 196 (2006) [hereinafter PIRA]; § 1861(b)(2)(A).

⁴⁰ *See* 18 U.S.C. §§ 3123(a), (b)(1) (2006); 50 U.S.C. § 1842(d)(2)(A)(ii) (2006) (adding such phrases as “routing . . . information” and “or other facility” to accommodate the Internet).

New Republic suggested that Patriot gave the government “essentially unlimited authority to install recording devices to monitor” Internet use.⁴¹ The ACLU maintained that, “the FBI has broad new powers to secretly conduct a physical search or wiretap . . . without proving probable cause”⁴²

The Patriot Act basically applied long approved telephone monitoring concepts to the Internet. If, during the course of an investigation, the government desires to find out with whom a suspect is communicating by phone, it obtains a pen-register or tap-and-trace order (PR/TT) from a court based on a certification that the information is relevant.⁴³ The Patriot Act applied the same standards to identify who or what a suspect on the Internet is accessing.⁴⁴ These PR/TT orders do not, and have never, required probable cause because the government does not obtain the actual content of conversations in the sense of a telephone dialogue or words in e-mail.⁴⁵

If the government wishes to obtain the content of a telephone conversation, it must obtain Title III or Foreign Intelligence Surveillance Act (FISA) authorization based on a court finding that there is probable cause that the suspect is committing a crime or is an agent of a foreign power or terrorist organization.⁴⁶ These probable cause affidavits are extremely lengthy and require detailed information that probable cause exists. They must be reviewed and approved by the highest levels of the FBI and Justice Department and then by a U.S.

⁴¹ Jeffery Rosen, *Tapped Out: The Terrorism Bill Does Too Much and Not Enough*, THE NEW REPUBLIC, Oct. 15, 2001, at 12.

⁴² ACLU.org, *Surveillance Under the USA Patriot Act*, Apr. 3, 2003, <http://www.aclu.org/FilesPDFs/surveillance.pdf>.

⁴³ 18 U.S.C. §§ 3121-3127 (2006).

⁴⁴ See 18 U.S.C. §§ 3123(a), (b)(1) (2006); 50 U.S.C. § 1842(d)(2)(A)(ii) (2006).

⁴⁵ *In re Sealed Case*, 313 F.3d at 722-25, 738, 742.

⁴⁶ 18 U.S.C. § 2518(3)(a) (2006); 50 U.S.C. § 1805(a)(2)(A) (2006).

District Court. The Patriot Act basically applied the exact same standards to monitor conversations on the Internet.⁴⁷

The complaints about Patriot in this regard may have been motivated, in part, by the fact that critics did not understand what the legislation provided or its application of traditional legal concepts. There is also an argument that identifying the website that an internet user has accessed based on relevance alone is really obtaining content,⁴⁸ although to date the courts have not accepted this claim for the reason that no conversation is obtained and the access is not contemporaneous with the user.⁴⁹ The author suspects, however, that in today's society there may be a greater expectation of privacy in telephone and computer communications than there may have been in years past when everyone knew that a telephone operator, as opposed to a machine, had open access to every conversation on the telephone line. There may, in truth, be a greater expectation of privacy in almost all of our transactions than there was in previous decades.

The fact that government critics have an increased expectation of privacy, however, does not mean that this expectation is a constitutionally legitimate expectation that would preclude government access based on traditional standards. In *Smith v. Maryland*⁵⁰ and *United States v. Miller*⁵¹, the Supreme Court held that there is not a legitimate expectation of privacy in information that an individual has voluntarily turned over to a third party such as, respectively, a telephone company or financial institution. Recently, in *United States v. Forrester*, the Ninth Circuit agreed that this same

⁴⁷ See 18 U.S.C. §§ 2516-2519 (2006) (and specifically § 2518); 50 U.S.C. §§ 1821-1829 (2006) (and specifically §§ 1823-1824).

⁴⁸ Peter Madrinan, *Devil in the Details: Constitutional Problems Inherent in the Internet Surveillance Provisions of the USA Patriot Act of 2001*, 64 U. PITT. L. REV. 783, 806 (2003).

⁴⁹ See *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008) [hereinafter *Forrester*].

⁵⁰ 442 U.S. 735, 743-44 (1979).

⁵¹ 425 U.S. 435, 442 (1976).

principle applies to Internet service providers, stating that “e-mail and Internet users, like the telephone users in *Smith*, rely on third-party equipment in order to engage in communication. . . . [They] have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit”⁵² Furthermore, the internet users’ agreements signed by customers when they first access an ISP usually contain language similar to that expressed by Yahoo!, to the effect that information will be shared or disclosed when Yahoo! “. . . believe[s] it is necessary to share information in order to investigate, prevent, or take action regarding illegal activities, suspected fraud, situations involving potential threats to the physical safety of any person, violations of Yahoo!’s terms of use, or as otherwise required by law.”⁵³

The courts have placed great reliance on these agreements⁵⁴ with the Ninth Circuit stating in *United States v. Heckenkamp* that, “privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user.”⁵⁵

There were, nevertheless, isolated quirks and errors in the original Patriot legislation that, when exposed, fueled the Patriot Act paranoia, lent credibility to its critics, and undermined the image of what was apparently essentially sound legislation. For example, when the Act formalized the delayed notice concept, it permitted the Court to postpone notice for a reasonable time without stating any time limits for periodic review.⁵⁶ This

⁵² *Forrester*, 512 F.3d at 510.

⁵³ Yahoo! Privacy Policy, <http://info.yahoo.com/privacy/us/details.html> (last visited Sept. 26, 2009). AOL, Windows, Hotmail and Google contain similar agreements as detailed in a paper prepared by Katie Lyons, *ePrivacy: The Expectation of Privacy on the Internet*, May 7, 2009 (on file with the author). Ms. Lyons’ paper greatly contributed to this section on privacy.

⁵⁴ See *Warshak v. United States*, 490 F.3d 455, 482 (6th Cir. 2007) (*vacated on other grounds*) and *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007) [hereinafter *Heckenkamp*].

⁵⁵ *Heckenkamp*, 482 F.3d at 1147.

⁵⁶ Patriot, § 213; 18 U.S.C. § 3103(b) (2006).

opened up the Act to claims that under it, the government could search and “never tell you.” The original Act was worded in such a way that it implied that a court *must* issue an order to produce records any time the government filed a certificate of relevance, as opposed to giving the court discretion to inquire further and perhaps request facts that backed up the certification.⁵⁷ The access to records for intelligence purposes contained a non-disclosure provision similar to that which had been utilized for years in requests to banks and utilities for records,⁵⁸ but this led to libraries and others complaining that Patriot orders prevented them from consulting lawyers to contest the request.⁵⁹ The intent, of course, was to prevent notification of the targets, but the wording was probably excessively broad.

It is impossible to know whether these provisions in the legislation were purposely inserted with an understanding of their full implication or just drafting oversights. Their technical nature in the context of the overall legislation suggests the latter. They were nevertheless problematic and extremely embarrassing when highlighted and successfully exploited by the government’s opponents. Perfection in a 342-page statute is probably impossible, but when composing sensitive provisions of ground breaking national security legislation, attention to detail is vital. It would also have helped if the government had immediately suggested legislative changes as soon as these errors were noted. The Department of Justice (DOJ) could also have publicly declined to seek enforcement of these provisions in the courts until Congress addressed their deficiencies.

⁵⁷ Patriot, § 215; 50 U.S.C. § 1861(c)(1) (2006).

⁵⁸ 18 U.S.C. § 1510(b)(1) (2006) (prohibiting disclosure of subpoenas to a financial institution); 18 U.S.C. § 2511(2)(a)(ii) (2006) (prohibiting disclosure of electronic surveillance); 50 U.S.C. § 1861(d)(1) (2006) (prohibiting disclosure of records request). *See also* Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); Doe v. Gonzales, 386 F. Supp. 2d 66 (D.C. 2005); Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

⁵⁹ *See* Press Release, *ACLU of New Jersey Commends Princeton for Passage of Pro Civil Liberties Resolution*, <http://www.aclu.org/safefree/general/17708prs20031008.html> (Oct. 8, 2003).

All of the above problems were, in the end, easily corrected by amendments that the government readily agreed to include four years later in the Patriot Improvement and Renewal Act of 2005.⁶⁰ Time limits were applied to delayed notice,⁶¹ the courts were assured that they had discretion,⁶² and lawyers were excluded from the non-disclosure provisions.⁶³ Such mistakes or technical glitches had serious ramifications during the public discourse. But, it is doubtful that either they or the Patriot Act in general constituted a pervasive assault on fundamental, well-established civil liberties. The Act now stands as an important tool that all future administrations will use in their efforts to identify and deter a terrorist threat.

III.DETENTION, MILITARY COMMISSIONS AND DENIAL OF HABEAS CORPUS

The perception that the Bush administration was violating civil liberties was greatly enhanced by its efforts to detain suspected terrorists without trial, create military commissions for those who were tried, and deny all of these suspects' habeas corpus appeals in civilian court. An objective review of well-established law in effect when these decisions were made, however, provides extensive legal support for the administration's decisions to pursue this program.

In the months following September 11th, lawyers and scholars advocated two distinctly separate theories as to how we should handle al Qaeda terrorists. Some on the left, echoing the previous approach of the Clinton administration, felt that "terrorists are criminals, not warriors,"⁶⁴ that the thought of war against terrorists as opposed to nation states was

⁶⁰ 50 U.S.C. § 1861.

⁶¹ PIRA, § 114; 18 U.S.C. § 3103(a), (b)(3) and (c) (2006).

⁶² PIRA, § 106(c); 50 U.S.C. § 1861(c)(1) (2006).

⁶³ PIRA, § 106(c); 50 U.S.C. § 1861(d)(1)(b) (2006).

⁶⁴ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 2* (2006) (quoting Gary Hart & Joyce Appleby).

“preposterous,”⁶⁵ and that the government should capture al Qaeda operatives, “give them lawyers, and begin a jury trial, or . . . let them go.”⁶⁶ Others, noting that al Qaeda had declared war against the US in 1998, had attacked our financial and military centers, was a highly organized foreign enemy motivated more by ideology than criminal greed, and that the organization must be prevented from committing future attacks instead of simply punished by jail time after the fact, concluded that we were definitely at war with al Qaeda.⁶⁷ The Justice Department’s initial treatment of those who were first captured suggested some confusion between these approaches,⁶⁸ but there is no question that President Bush quickly decided we were at war.⁶⁹

President Bush was legally backed up in this decision by Congress on September 18, 2001 when it passed the Authorization for Use of Military Force, authorizing “the President in accordance with the War Powers Act and his Constitutional War Power under Article II, section 2 to use “all necessary and appropriate force” against “nations, organizations or persons” associated with the September 11, 2001 terrorist attacks.⁷⁰ As the Supreme Court had noted in *Ex Parte Quirin*,⁷¹ and reiterated with specific respect to the AUMF of 2001 in *Hamdi v. Rumsfeld*, “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful

⁶⁵ *Id.* (quoting Bruce Ackerman).

⁶⁶ *Id.* (summarizing the arguments of lawyers before the Supreme Court).

⁶⁷ *Id.* at 1-18.

⁶⁸ See Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 309 (2003) (detailing inconsistent statements of the President and actions of the DOJ with regard to individuals like Zacarias Moussaoui, John Walker Lindh and Jose Padilla in months following September 11th) [hereinafter *War on Terrorism*].

⁶⁹ *Id.*

⁷⁰ AUMF 115 Stat. 224, (2001); *Hamdi*, 542 U.S. at 518 (discussing AUMF at length).

⁷¹ 317 U.S. 1, 26 (1942).

combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”⁷² What logically followed from the choice of the military approach and the broad legal authorization of the AUMF were, therefore, the Executive branch’s decisions to detain enemy combatants for the duration, to try those who had violated the laws of war before military commissions, and to deny attempted access to lower level civilian courts through habeas corpus appeals.

A. DETENTION

It is quite natural that the civil liberties community and those who favored the civilian approach to al Qaeda objected from the start to the first step in this process which was the detention of suspected enemy combatants without all the rights inherent in a civilian trial. Legally, however, as Justice O’Connor stated in *Hamdi*, citing numerous authorities on military law, the purpose of detention is simply to prevent captured individuals from returning to the field of battle.⁷³ It is neither revenge nor criminal punishment, but protective custody designed to prevent further participation in the war.⁷⁴ It is a detention “which is devoid of all penal character.”⁷⁵ In this area there must be great “deference” to the “military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, [and] others charged with violating the laws of war” without lengthy trials.⁷⁶ As the Supreme Court had previously stated:

It would be difficult to devise more effective fettering of a field commander than to allow the

⁷² *Hamdi*, at 518 (quoting *Ex Parte Quirin*, 317 U.S. at 28, 30).

⁷³ *Id.* at 518-19.

⁷⁴ *Id.* (citing 84 Int’l Rev. Red Cross 571, 572 (2002)).

⁷⁵ *Id.* (quoting W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 778 (2d ed., Government Printing Office 1920) (1896)).

⁷⁶ *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946)).

very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.⁷⁷

The Bush administration, in acting to detain enemy combatants pursuant to the authority granted by the AUMF, was consistent with legal tradition and the U.S. Constitution.⁷⁸

The Supreme Court, later supported by Congress,⁷⁹ had essentially settled on a definition of enemy combatants as those who were “part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States.’”⁸⁰ They could be citizens or aliens.⁸¹ The difficult question raised by attorneys for the many young foreigners caught fleeing the battlefield in Afghanistan and Pakistan was this: how do you determine if a detainee is an enemy combatant if they maintain they were not in fact combatants? On this question, there was virtually no case law, statutory precedent or constitutional standard. The U.S. Army in World War II, pursuant to internal procedures, conducted quick tribunals composed of a few officers to sort out true farmers from soldiers in civilian clothes and Article 5 of the Geneva Convention did suggest such decisions should be made

⁷⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

⁷⁸ *Hamdi*, 542 U.S. at 518. The Court rejected the petitioners’ claim that the Non-Detention Act of 1970, 18 U.S.C § 4001, required a specific act of Congress to detain enemy combatants. *Id.* at 517.

⁷⁹ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2601. Once habeas corpus was granted, the lower courts would struggle with this definition and the meaning of the word “support.” *Hamli v. Obama*, 616 F. Supp. 2d 63, 76-78 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

⁸⁰ *Hamdi*, 542 U.S. at 526 (quoting Respondent’s Brief 3). The lower court noted that the term had generated controversy but it, in fact, had been used by the Supreme Court many times. See *Hamdi*, 316 F.3d at 463 n.3 (citing *Madsen v. Kinsella*, 343 U.S. 341, 355 (1952); *Ex parte Quirin*, 317 U.S. 1, 31 (1942)).

⁸¹ *Quirin*, 317 U.S. at 37; *Hamdi*, 542 U.S. at 519.

by a “competent tribunal.”⁸² But at this point in U.S. legal history it was well established that the Geneva Conventions were not self-executing, did not create a private right of action and did not apply to terrorists who were not signatories, did not wear uniforms and did not follow the laws of war.⁸³ Furthermore, there was not any clear guidance pertaining to what evidence should be presented and what procedures should be followed by such a “competent tribunal,” if one were to be held.

The Bush Administration acted well within the Constitution in its decision to detain enemy combatants, but in answering the above procedural question they made a critical mistake. The Administration did not act in violation of any known law, but did act in a way that set them up for charges of being basically unfair. Specifically, in the case of detainee Yasser Hamdi, a U.S. citizen captured in Afghanistan, the government advocated before the district court that even when detaining a citizen like Hamdi it should only have to meet a “some evidence” standard; this standard was met without any hearing by simply filing a brief two page affidavit from a Department of Defense (DOD) official stating that Hamdi was affiliated with the Taliban and captured in Afghanistan with an AK-47.⁸⁴ The district court reacted by ordering the government to produce a long list of details that would essentially turn Hamdi’s detention hearing into a drawn out civilian trial.⁸⁵ The appellate court struggled to determine exactly what the law required in this case of first impression. It concluded that, “Hamdi’s petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and

⁸² Geneva Convention Relative to the Treatment of Prisoners of War, Art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See also Hamdi*, 542 U.S. at 538.

⁸³ *See Hamdi*, 316 F.3d at 468. *See generally Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁸⁴ *Hamdi*, 316 F.3d at 472-73.

⁸⁵ *See id.* at 470-71.

Congressional authorization for use of military force”⁸⁶ The complaint and the Government’s affidavit were enough.

The Supreme Court then granted cert to resolve this unprecedented question. It recognized Hamdi’s liberty interest on one hand versus the “governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle”⁸⁷ Relying on the balancing principle of *Mathews v. Eldridge*, it established new standards for determining status as an enemy combatant; specifically the suspect would be entitled to notice of the factual basis of his classification and an opportunity to rebut the charge before a neutral decision maker.⁸⁸ Hearsay could be admitted as the most reliable available evidence from the government and there could be a presumption in favor of the government’s evidence so long as the presumption remained a rebuttable one.⁸⁹ These standards “could be met by an appropriately authorized and properly constituted military tribunal” as opposed to a civilian trial before a judge or jury.⁹⁰

Unlike the Court’s highly questionable opinions in *Hamdan v. Rumsfeld*⁹¹ and *Boumediene v. Bush*,⁹² which will be discussed shortly, it is hard to quarrel with Justice O’Connor’s opinion in *Hamdi*. The Court was confronted with a novel question and fairly struck a balance to create a new procedure. The government quickly compiled and submitted proposals to Congress, which soon passed the Detainee Treatment Act

⁸⁶ *Id.* at 474.

⁸⁷ *Hamdi*, 542 U.S. at 531.

⁸⁸ *See id.* at 533 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

⁸⁹ *Id.* at 533-34.

⁹⁰ *Id.* at 538.

⁹¹ 548 U.S. 557 (2006).

⁹² 128 S. Ct. 2229 (2008).

establishing procedures for Combat Status Review Tribunals in accordance with Justice O'Connor's directions.⁹³

This litigation provided an important lesson for future administrations. The challenges advanced by the attorneys for the detainees, all of whom did not wear uniforms and some of whom had been sold to the U.S. and its allies for bounties, raised legitimate questions. The government, however, responded with proposals and procedures that would appear blatantly insufficient and unfair to any objective observer and certainly to the courts. The *Hamdi* decision was touted by the media as a stinging rebuke to the Bush administration.⁹⁴ This was true to an extent, and it was brought about by the decision to attempt to detain Hamdi and other enemy combatants with the least possible evidence. As noted later, proposing a fair military hearing at the start would have been a common sense answer to the problem. The lower court's decision in *Hamdi* to demand endless details characteristic of discovery in a civil suit demonstrated a lack of familiarity or recognition of the realities of combat detention, but the government's argument that a two page affidavit from a bureaucratic official was sufficient appeared arrogant on its face.

At the same time, it is incorrect to state that the Bush administration's decision to detain enemy combatants without civilian trials violated established constitutional law. Until the Supreme Court's decision in *Hamdi*, there was not any specific Constitutional guidance on the issue.

B. MILITARY COMMISSIONS

Enemy combatants who comply with the laws of war are detained and removed from the battlefield, but enemy

⁹³ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-06, 119 Stat. 2680, 2739-44.

⁹⁴ See, e.g., Marjorie Cohn, *Supreme Court: War No Blank Check for Bush*, Truthout.org, June 30, 2004, <http://www.truthout.org/article/marjorie-cohn-war-no-blank-check-bush>; David Von Drehle, *Executive Branch Reined In*, WASH. POST, June 29, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A13226-2004Jun28.html>; Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES, June 29, 2004, at A26.

combatants who violate the laws of war may be punished.⁹⁵ The traditional method to determine guilt and impose punishment is to hold a trial before a military commission.⁹⁶ On November 13, 2001, after Congress had passed the AUMF, President Bush issued an order to the Department of Defense to establish commissions to decide the guilt of non citizens suspected of committing terrorist acts in violation of the laws of war.⁹⁷ Despite the patriotic furor aroused by the September 11th attacks, this order drew immediate and heavy criticism based in part on what appeared to be a belief that all individuals accused by the government should have Fifth and Sixth Amendment rights to a civilian jury trial.⁹⁸ By December 5, 2001, five-hundred lawyers and scholars had signed a letter to Senator Patrick Leahy challenging the constitutionality of military commissions.⁹⁹ Over time the common refrain was that “the Justice Department has a perfect record” of convicting terrorists in federal court and the President had not demonstrated why these cases could not continue to be handled in the civilian system.¹⁰⁰ The quick answer for the government would be that

⁹⁵ See *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

⁹⁶ *Id.*

⁹⁷ See President’s Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57833-36 (Nov. 13, 2001).

⁹⁸ See Memorandum from Kate Martin, Center for National Security Studies to Interested Persons (Nov. 19, 2001), www.cnss.org/military_commissions_km_memo.doc; Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice our Freedoms?*, 63 OHIO ST. L.J. 1225 (2002).

⁹⁹ AmericanProgress.org, Gonzales on Military Commissions, n.7, http://www.americanprogress.org/kf/ag_onmilitarycommissions.doc (last visited Sept. 26, 2009).

¹⁰⁰ Michael C. Dorf, *Why the Military Commission Act is No Moderate Compromise*, FindLaw.com, Oct. 11, 2006, <http://writ.news.findlaw.com/dorf/20061011.htm>. See also Bob Egelko, *Military Tribunals Not the Same as U.S. Courts*, S.F. CHRONICLE, May 23, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/23/MN9Q17OTTB.DTL>.

most, although not all, terrorist trials in civilian courts involved actions that took place in the U.S., making it far easier to comply with strict civilian evidentiary and other procedural rules than when evidence was seized by soldiers on an overseas battlefield.¹⁰¹ The latter, however, are policy arguments. The key question for this article is whether the President in any way was acting in an unconstitutional manner when he decided to try al Qaeda terrorists before military commissions instead of civilian juries.

In 1942, eight German soldiers landed on beaches in Long Island and Florida, removed their uniforms, and set out to sabotage American industrial and military installations.¹⁰² They were captured by the F.B.I., tried before a military commission established by the President, convicted of violating the laws of war, and sentenced to be executed.¹⁰³ The Supreme Court agreed to review the case in *Ex Parte Quirin* to ensure that the trial and sentence conformed with the laws and Constitution of the United States.¹⁰⁴ The Court noted that the Executive Branch had utilized military commissions to try offenders since “before the adoption of the Constitution and during the Mexican and Civil Wars.”¹⁰⁵ Congress had specifically sanctioned the President’s use of military commissions in 1916 by passing

¹⁰¹ See Sievert, War on Terrorism *supra* note 68, at 327-29. One excellent example not contained in the article would relate to a document seized in a destroyed terrorist safe house with the suspect’s name on it. This evidence would not generally be admissible under records provisions of the Federal Rules of Evidence as they are interpreted by civilian trial judges, but the document would certainly be reliable and probative enough to be considered by a jury. See also American Bar Association Standing Committee on Law and National Security Post-Workshop Report, *Trying Terrorists in Article III Courts: Challenges and Lessons Learned*, July 2009, http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf (discussing the recent hearsay and *Miranda* issues in civilian court) [hereinafter ABA Workshop Report].

¹⁰² *Ex parte Quirin*, 317 U.S. 1, 21-22 (1942).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 18-19.

¹⁰⁵ *Id.* at 31.

Article 15 of the Articles of War stating that the “jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such”¹⁰⁶ Accordingly, based upon the “authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm” as “important incident[s] to the conduct of war” the President could convene military commissions.¹⁰⁷ The court restated this conclusion four years later in *Yamashita v. Styer*.¹⁰⁸ In neither of these cases did the Court seriously question the rules or procedures of the commissions even though it was noted in *Yamashita* that they did not comport with the rules for civilian trials or courts martial.¹⁰⁹ This variance was legally authorized because courts martial were believed to apply to U.S. soldiers, whereas Article 15 “left the control over the procedure in such a case [for enemy belligerents] where it had previously been, with the military command.”¹¹⁰

As noted above, President Bush’s decision to employ military commissions created a furor, but even the American Bar Association acknowledged that his action had a strong historical and legal foundation and may have been necessary to protect the “physical security of the courthouse and the participants” and to “safeguard classified information, including intelligence sources and methods”¹¹¹ Subsequently, President Obama, despite

¹⁰⁶ *Id.* at 27 (quoting Articles of War, Art. 15, 10 U.S.C §§ 1471-1593). *See also Yamashita v. Styer*, 327 U.S. 1, 19-20 (1946) (describing the genesis of Article 15).

¹⁰⁷ *Quirin*, 317 U.S. at 28.

¹⁰⁸ *Yamashita*, 327 U.S. at 7.

¹⁰⁹ *Id.* at 19.

¹¹⁰ *Id.* at 20.

¹¹¹ American Bar Association Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, Jan. 4, 2002, <http://www.abanet.org/leadership/military.pdf>.

strong expectations to the contrary, acknowledged the logic of President Bush and the ABA by announcing that he would continue the use of modified military commissions, stating, “[m]ilitary commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war”¹¹² It is obvious from the foregoing that President Bush’s basic decision to try al Qaeda terrorists by military commissions instead of before civilian jury trials was not an overt denial of civil liberties.

Despite the authorities cited above, Salim Ahmed Hamdan filed a habeas corpus petition in civilian court challenging the authority of the government to try him before a military commission.¹¹³ The D.C. Circuit responded decisively and with clarity, stating that “on the merits there is little to Hamdan’s argument.”¹¹⁴ It noted that Congress had reenacted former Article 15 as Article 21 of the Uniform Code of Military Justice, 18 U.S.C § 821 and that “[g]iven these provisions and *Quirin* and *Yamashita*, it is impossible to see any basis for Hamdan’s claim . . . ” that the law did not authorize his trial before a military commission.¹¹⁵

The D.C. Circuit may have felt it was “impossible” to support Hamdan’s claim based on law and precedent, but it apparently did not take into account the ingenuity of a Supreme Court on a mission. The possible reasons for this mission will be explored

¹¹² See *Obama’s Statement on Military Commissions*, N.Y. TIMES, May 15, 2009, available at <http://www.npr.org/templates/story/story.php?>. The President’s Detainee Policy Task Force, in a report released on July 21, 2009, also concluded that the use of military commissions was legitimate. It proposed some evidentiary modifications for Congress to consider as amendments to the Military Commissions Act. These modifications, relating to hearsay and voluntariness of confessions, are logical but would not, from the author’s perspective as a trial attorney, result in a military commission trial that would be dramatically different from that which would have been conducted under the Bush rules, per the Military Commissions Act. See Press Release, Department of Justice, Detention Policy Task Force Issues Preliminary Report, July 21, 2009, <http://www.usdoj.gov/opa/pr/2009/July/09-ag-705.html>.

¹¹³ *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

¹¹⁴ *Id.* at 37.

¹¹⁵ *Id.* at 38.

later. Suffice it to say that in *Hamdan v. Rumsfeld*, Justice Kennedy joined the four consistently liberal justices to conclude that, despite the wording of *Quirin*, Article 21 (former Article 15) did not give the President general legislative authority to convene military commissions.¹¹⁶ The President also did not possess inherent Commander-in-Chief authority to order such trials regardless of the tradition and history cited by *Quirin* which strongly suggested that he had this authority.¹¹⁷ The Court found that a close reading of Article 21 revealed that Congress had sanctioned military commissions only for offenses in direct violation of the laws of war.¹¹⁸ In the Court's opinion, Hamdan's military charges of being a member of al Qaeda and conspiracy to commit offenses triable by military commission, to commit attacks on civilians and murder supported by overt acts of transporting bin Laden and transporting weapons for al Qaeda, did not really charge offenses in direct violation of the laws of war.¹¹⁹ The government's allegations were in essence only a charge of "conspiracy" that did not violate the laws of war.¹²⁰ This despite the fact that joining al Qaeda was a crime, that the *Quirin* defendants as well as the defendants tried by military commission for the attack on President Lincoln were charged with conspiracy,¹²¹ and that eight defendants had been convicted of conspiracy by the International Military Tribunal at Nuremberg.¹²²

¹¹⁶ 548 U.S. 557, 593-94 (2006).

¹¹⁷ *Id.* at 593. *But see Ex parte Quirin*, 317 U.S. 1, 31 (1942) (noting the presidential authority to establish military commissions).

¹¹⁸ *Hamdan*, 548 U.S. at 628.

¹¹⁹ *Id.* at 646.

¹²⁰ *Id.* at 602.

¹²¹ *Id.* 604-05; *see also id.* at 699-705 (Thomas, J., dissenting).

¹²² *Id.* at 610 (noting that the Nuremberg Court had problems with the concept of conspiracy). The majority glossed over the fact that although the International Military Tribunal did not convict on conspiracy to commit crimes against humanity, it did agree on the charge of conspiracy to commit aggressive

The Court further stated in *Hamdan* that any acts the defendant committed before Sept. 11th could not be considered because we were not at war before the AUMF (disregarding al Qaeda's 1996 declaration of war and the subsequent al Qaeda attacks on the U.S.S. Cole and U.S. Embassies, as well as the fact that military commissions were used in the Indian Wars and the Philippines without a declaration of war).¹²³ Additionally, Article 36 of the Uniform Code of Military Justice suggested that military commission rules should try to mirror court martial procedures and the government's rules did not do so (even though Article 36 stated the president could deviate if he felt it was not practical to follow the Uniform Code of Military Justice).¹²⁴ Finally, in the face of previous opinions uniformly holding that the Geneva Conventions were not self-executing and did not convey a private right of action,¹²⁵ the *Hamdan* Court relied upon Common Article 3 of the Geneva Conventions to require that commissions be "regularly constituted courts," which in the U.S. must be separately created by the legislature.¹²⁶

One wonders what would motivate the Court to embark on this entire series of somewhat novel and arguably strained findings, all siding with the petitioner, in an effort to find that the military commissions ordered by the President were not authorized. It is difficult to imagine from the tone, emphasis and scope of the opinion, that the Court would ever have been content to sanction these commissions even if the government had clearly complied with Article 21 by charging a substantive violation in direct violation of well-recognized laws of war instead of conspiracy. A few very strong philosophical forces that may have been at work will be discussed later after *Hamdi*,

war. See *Hamdan*, 548 U.S. at 610-11; see also ROBERT CONOT, JUSTICE AT NUREMBERG 482-83, (1 ed. Harper & Row 1983).

¹²³ *Hamdan*, 548 U.S. at 598-99; but see *id.* at 686-88 (Thomas, J., dissenting).

¹²⁴ See *id.* at 620-23.

¹²⁵ See *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003).

¹²⁶ *Hamdan*, 548 U.S. at 632.

Hamdan and *Boumediene* have been reviewed. In the author's opinion, however, there was also a very specific reason that may have driven the Court to strike down the President's military commissions. The Court was obviously very concerned about the fairness of the overall rules, and possibly one rule in particular. It briefly discussed admission of hearsay and relevance, but repeatedly came back to Section 6 "which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances . . . " whereas in courts martial, the defendant has a right to be present at all proceedings.¹²⁷ This rule sounded like the government was creating a secret court. One of the "judicial guarantees which [is] recognized as indispensable by civilized peoples," as set forth in Common Article 3 of the Geneva Convention,¹²⁸ and recognized by the Geneva Protocols, is the "right to be tried in [one's] presence."¹²⁹ Information utilized to convict persons of a crime must be disclosed to them.¹³⁰ The Court would under no circumstances tolerate a commission that theoretically could try a defendant in secret without his knowledge of the evidence utilized to convict him.

It is unknown whether such a trial was ever intended by those who drafted the rules of military commissions for the President or if, instead, this was just another theoretical possibility created by loose drafting that was very effectively employed by the defense to undermine the government. The rules issued by President Bush and the Department of Defense actually provided the accused with a right to counsel, right to confront witnesses, right to remain silent, presumption of innocence and stated that he must be convicted on proof beyond a reasonable doubt.¹³¹ These did not indicate a desire to create

¹²⁷ *Id.* at 621, 633-34.

¹²⁸ *Id.* at 642 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

¹²⁹ *Id.* at 633 (quoting Geneva Conventions Protocol I, Art. 75(4)(e)).

¹³⁰ *See id.* at 635.

¹³¹ *See Hamdan*, 548 U.S. at 721-22 (Thomas, J., dissenting); *see also* 32 C.F.R. §§ 9.4, 9.5.

kangaroo courts or reflect an assault on civil liberties. But Section 6 stated that the accused “may personally be present at every stage of the trial unless . . . the prosecution introduces classified or other protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial.”¹³² This may have been an attempt to ensure that the defendant was not present in chambers when the court was considering redaction of classified information before it was presented to the jury. Such rules have recently been upheld in civilian court under the Classified Information Procedures Act.¹³³ That is not, however, exactly what the language states. It does create the possibility that evidence could be presented to a military jury without the defendant present, the only saving grace being that an appellate court could reverse the conviction if it believed this did not create a full and fair trial.

The media reaction to *Hamdan* naturally portrayed the administration as once again being repudiated after attempting to act in a high handed manner in violation of fundamental rights.¹³⁴ Justice Stevens was quoted as stating that “[t]he executive is bound to comply with the rule of law that prevails in this jurisdiction.”¹³⁵ The case was a “sweeping and categorical defeat” for the President.¹³⁶ There was simply no way that a newscast or newspaper headline could reflect the subtlety of the decision. Congress, however, responded by passing the Military Commissions Act of 2006.¹³⁷ This specifically authorized the

¹³² *Hamdan*, 548 U.S. at 722 (quoting Resp’ts Br. p. 4).

¹³³ See, e.g., *United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008); *In re Terrorist Bombings of E. Afr. Embassies*, 552 F.3d 93, 122 (2d Cir. 2008).

¹³⁴ See, e.g., Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan To Try Detainees*, N.Y. TIMES, June 30, 2006, at A6; Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A01.

¹³⁵ Greenhouse, *supra* note 134.

¹³⁶ *Id.*

¹³⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

President to create military commissions to try alien unlawful enemy combatants,¹³⁸ thus eliminating the Supreme Court's main ostensible objection to the President's 2001 order. The rules for these trials, as outlined by Congress, were remarkably similar to the rules that had already been established by the President.¹³⁹ The Act did correct the problem that appeared to most trouble the Court by changing the language related to protection of classified information to essentially reflect what the Classified Information Procedures Act¹⁴⁰ had established in civilian court.¹⁴¹ There would not be any secret evidence presented to a military jury to convict the defendant. At the same time Congress clearly stated, in accordance with what appeared to be settled Supreme Court law¹⁴² and the Detainee Treatment Act,¹⁴³ that it did not expect any further habeas appeals to civilian U.S. district courts by including a provision explicitly denying habeas appeals to any alien determined to be an enemy combatant.¹⁴⁴ Appeals could be submitted to the D.C. Circuit when the Combatant Status Review Tribunal process was complete.¹⁴⁵ This set the stage for the next major Supreme Court decision.

¹³⁸ *Id.* at § 948(b).

¹³⁹ Compare 32 C.F.R. §§ 9.4, 9.5 (Presidential order providing those before a military commission with right to counsel, right to confront witnesses, right to remain silent, presumption of innocence and stated that he must be convicted on proof beyond a reasonable doubt), with Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Congressional act providing the above mentioned rules as well as admission of hearsay if reliable and conviction by a two thirds majority of a seven member military panel were all maintained).

¹⁴⁰ 18 U.S.C. app. § 3 (2006).

¹⁴¹ See Military Commissions Act of 2006, § 949(d)(f)(2)(B), (j)(c)(2).

¹⁴² See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁴³ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2680, 2739-44.

¹⁴⁴ Military Commissions Act, § 7.

¹⁴⁵ *Id.* § 3 (950g).

C. HABEAS CORPUS

When it became publicly known during the Bush administration that the government was seeking to “deny the right of habeas corpus,” many laypersons probably concluded that the President was again acting to suppress or deny fundamental civil liberties. As noted by the Alliance for Justice, “countless lawyers, law deans and professors, politicians, religious leaders and military officials have condemned the denial of habeas corpus rights to detainees and have called for a restoration of our constitutional values.”¹⁴⁶

The truth, of course, was that President Bush was not attempting to eliminate habeas as a general principle, but was acting to prevent habeas appeals to civilian courts by enemy combatants. This was in line with the President’s early policy decision that we were at war and should proceed accordingly. It is doubtful that the public would have expected alien POWs in World War II, Korea and Vietnam to have had a right to appeal their detention to U.S. civilian courts. In fact, the Supreme Court itself had clearly recognized this over 50 years ago when it held in *Johnson v. Eisentrager* that alien enemies held by U.S. authorities outside the sovereign U.S. at Landsberg prison in Germany did not have habeas rights.¹⁴⁷ The government in all likelihood relied upon this “settled precedent” when it decided to house those captured in the war against terrorism in Guantanamo Bay, Cuba.¹⁴⁸ So how did it come about that in the summer of 2008 the Supreme Court in *Boumediene v. Bush* held that alien enemy combatants detained at Guantanamo really did have a right to habeas?¹⁴⁹

The background of *Boumediene* traces to *Rasul v. Bush*, wherein the Supreme Court stated that it believed that Congress

¹⁴⁶ ALLIANCE FOR JUSTICE, HABEAS CORPUS, THE RESTORATION OF A FUNDAMENTAL RIGHT, <http://www.defendhabeas.org/habeasbackground.pdf> (last visited Sept. 26, 2009).

¹⁴⁷ *Eisentrager*, 339 U.S. at 785.

¹⁴⁸ *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008).

¹⁴⁹ *Id.* at 2262.

by previous statutes had intended to grant habeas to people similar to those situated at Guantanamo.¹⁵⁰ Congress responded quickly to disabuse the Court of this notion by including in the Detainee Treatment Act a provision stating that “no court, justice or judge shall have jurisdiction to . . . consider an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo”¹⁵¹ In *Hamdan*, the Court stated that Congress really meant to deny habeas in future, rather than pending, cases.¹⁵² Congress once again corrected them by stating in the Military Commissions Act that all enemy combatants wherever they were held did not have habeas rights and this “shall apply to all cases, without exception . . . which relate to any aspect of the detention of an alien [combatant] detained . . . since September 11th, 2001.”¹⁵³ Congress clearly wanted to continue to follow the law established by the Court in *Johnson v. Eisentrager*.¹⁵⁴

The lawyers for the detainees likely understood that the government would have a much harder time making any case against their clients, most of whom had been captured in foreign locations by U.S. or Pakistani military forces, under technical civilian rules interpreted by civilian judges. Boumediene and others thus challenged the government by maintaining that Congress had acted illegally in categorically denying them habeas.¹⁵⁵ When their case reached the Supreme Court, the Court disregarded *Eisentrager* and agreed with Boumediene.¹⁵⁶ The detainees could file habeas appeals to U.S. civilian district

¹⁵⁰ *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

¹⁵¹ Detainee Treatment Act, Pub. L. No. 109-48, 119 Stat. 2680, § 1005(e) (2005).

¹⁵² *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-84 (2006).

¹⁵³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 7(a), 7(b) (2006) (amending the habeas statute, 18 U.S.C. 2241).

¹⁵⁴ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁵⁵ *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

¹⁵⁶ *Id.* at 2257.

courts under rules to be determined by those courts.¹⁵⁷ Writing for the 5-4 majority, Justice Kennedy stated that *Eisentrager* really relied in large part on the “[p]ractical considerations” and difficulties involved in transporting aliens to U.S. courts as opposed to the fact that they were alien enemies held outside the sovereign territory of the U.S.¹⁵⁸ Any objective reading of *Eisentrager* so plainly demonstrates that this contention is not true that it is astounding that Justice Kennedy could have ever made such a claim or his associate justices could in good faith have signed on to it. Justice Jackson wrote in *Eisentrager* that:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time . . . has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.¹⁵⁹

[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary the power to act.¹⁶⁰ But the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even . . . qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.¹⁶¹

¹⁵⁷ *Id.* at 2262, 2275.

¹⁵⁸ *Id.* at 2257.

¹⁵⁹ *Eisentrager*, 339 U.S. at 768.

¹⁶⁰ *Id.* at 771.

¹⁶¹ *Id.* at 776.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. (citation omitted). None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.¹⁶²

The German defendants had already been transported from Nanking, China to Germany at a time when hundreds of thousands of soldiers were being moved by the military all around the world. There certainly existed no practical hindrance to transporting them to the US if the Court had felt it necessary.

Justice Kennedy's opinion that *Eisentrager* was based on practicality rather than the bright line of territorial sovereignty amounted to a "sheer rewriting" of the case.¹⁶³ It is likely that he realized this, because his next argument was that Guantanamo is not really outside the U.S. but, in essence, is sovereign territory. The "critical difference[]" between Guantanamo and Landsberg prison in Germany, he maintained, was that the U.S. did not have absolute and indefinite control of the prison whereas the U.S. has "complete and uninterrupted control of [Guantanamo] Bay" pursuant to an indefinite lease that conveyed such authority.¹⁶⁴ "In every practical sense, Guantanamo is not abroad."¹⁶⁵ He is right, of course, that we have control over Guantanamo, but we had total control over our prisoners in Landsberg, "an American military facility located in the American Zone of occupation in postwar

¹⁶² *Id.* at 784.

¹⁶³ *Boumediene*, 128 S. Ct. at 2257, 2299.

¹⁶⁴ *Id.* at 2258, 2260.

¹⁶⁵ *Id.* at 2261.

Germany.”¹⁶⁶ Furthermore, the 1903 lease with Cuba specifically stated “that Cuba retained ‘ultimate sovereignty’ over Guantanamo”¹⁶⁷ In the end, Justice Kennedy had to acknowledge that “[i]t is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.”¹⁶⁸

So once again, the Bush administration was overruled by the Supreme Court, and blasted by the press as having received a “harsh rebuke,”¹⁶⁹ after what must have appeared to the general public as another government effort to violate fundamental rights. In reality, it had been following what had always been a major principle of Constitutional law. Moreover, the Executive and Congress had been making every effort to comply with the whims of the Court for five years and had been rejected at every turn. That is, *Rasul* had required a statute suspending habeas¹⁷⁰ and Congress passed the statute in the DTA and the MCA;¹⁷¹ *Hamdi* required hearings for detainees¹⁷² and Congress followed Justice O’Connor’s guidelines with the DTA;¹⁷³

¹⁶⁶ *Id.* at 2298.

¹⁶⁷ *Id.* at 2258.

¹⁶⁸ *Id.* at 2262.

¹⁶⁹ See, e.g., David Stout, *Justices Rule Terrorist Suspects Can Appeal in Civilian Court*, N.Y. TIMES, June 13, 2008, at 1, http://www.nytimes.com/2008/06/13/washington/12cndgitmo.html?_r=1&scp=1&sq=Justices%20Rule%20Terrorist%20Suspects%20Can%20Appeal%20in%20Civilian%20Court&st=cse (“In a harsh rebuke to the Bush administration . . .”).

¹⁷⁰ *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

¹⁷¹ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680, § 1005(e) (2005); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 7(a), 7(b) (2006).

¹⁷² *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

¹⁷³ Detainee Treatment Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

*Hamdan*¹⁷⁴ required that Congress sanction the rules for military commissions and Congress responded by establishing clear rules and an appellate procedure in the MCA.¹⁷⁵ As Chief Justice Roberts stated in *Boumediene*, “The Court, however, will not take ‘yes’ for an answer.”¹⁷⁶ What the Court had now achieved was to strike down “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants” and replaced them “with a set of shapeless procedures to be designed by federal courts [in habeas hearings] at some future date.”¹⁷⁷ Indeed, as of this writing, the lower courts are still trying to determine the basic rules for Guantanamo habeas hearings.¹⁷⁸ However many years it may take for these cases to wind their way through habeas litigation, the rules will now be made by the judiciary instead of the Executive and Congress. Chief Justice Roberts concluded his dissent by stating:

So who has won. . . . Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.¹⁷⁹

¹⁷⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

¹⁷⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 948(a) (2006).

¹⁷⁶ *Boumediene v. Bush*, 128 S. Ct. 2229, 2285 (2008).

¹⁷⁷ *Id.* at 2279.

¹⁷⁸ See, e.g., *Al Halmandy v. Obama*, 612 F. Supp. 2d 45 (D.D.C. 2009); *Zuhair v. Bush*, 611 F. Supp. 2d 69 (D.D.C. 2009); *Ameziane v. Obama*, No.1158843, slip op. (D.D.C. Apr. 30, 2009).

¹⁷⁹ *Boumediene*, 128 S. Ct. at 2293.

Why, aside from the general considerations that may have affected all of the above major Supreme Court decisions, did the Court overrule such well established precedent in *Boumediene*? The Court can be taken at its word when it states that if Guantanamo is not part of the U.S., it is about as close as it can be without being sovereign territory. But it is still not sovereign territory and such clear lines have been routinely drawn and adhered to by the courts. If the test now becomes “practical” control, then every military prisoner held by the U.S. anywhere in the world will have a right to habeas.

The court also appeared to be genuinely concerned about the CSRT procedures established in the DTA to determine if a detainee was an enemy combatant. The DTA rules on their face followed the rules dictated by Justice O'Connor in *Hamdi* as to meaningful opportunity to be heard, hearsay and presumptions, but barely. Specifically, and most troubling, they did not provide that the suspect could have an attorney, but rather a “Personal Representative” who was not necessarily an advocate.¹⁸⁰ Moreover, these basic rules had never been approved by the majority of the Justices in *Hamdi*.¹⁸¹

In this respect, the Court was probably aware of the various widely publicized allegations that the CSRT process was inadequate as reflected by such documents as a Seton Hall study claiming that 92 percent of detainees had never carried a weapon for Al Qaeda.¹⁸² This was countered by a later evaluation seriously questioning the methodology of the first study and finding that 73percent of detainees were a “demonstrated threat” to the U.S. and 92 percent a “potential threat.”¹⁸³ It is clear, however, whether for these or other

¹⁸⁰ *Id.* at 2260.

¹⁸¹ *Id.*

¹⁸² See Mark Denbeaux *et al*, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data, http://law.shu.edu/publications/guantanamoReports/guantanamo_report_fin_al_2_08_06.pdf (last visited Nov. 18, 2009).

¹⁸³ Michael, *Paper Chase: CSRT Summaries Show Most Guantanamo Detainees Pose Terror Threat: West Point Report*, JURIST, July 26, 2007,

reasons, that the CSRT tribunals were suspect in the eyes of the Court.

The Court's concerns extended to the appeals process provided by the DTA. The D.C. Circuit was instructed to review the findings of the CSRTs and military appeals courts only to determine if they were "consistent with the standards and procedures specified by the Secretary of Defense" and the "Constitution and laws of the United States" to the extent that they were applicable.¹⁸⁴ In the opinion of the *Boumediene* majority, this meant that new facts and exculpatory evidence could not be presented to the civilian court.¹⁸⁵ Chief Justice Robert's argument that in reality an appellate court could send the case back to the CSRT for further factual hearings was ignored by the majority.¹⁸⁶ They concluded that the appellate process was flawed and not an adequate substitute for robust civilian habeas corpus hearings.

Yet there was a more fundamental, theoretical basis for the majority's decision in *Boumediene*. It is clear from reading the opinion that the Court saw the case as an opportunity to break new ground in what has been a sixty year battle among the justices as to whether the Constitution follows the flag.¹⁸⁷ The liberals believe it does, and perhaps their high point was *Reid v. Covert* in 1957, applying the Fifth and Sixth Amendments to trials of U.S. citizens by the military overseas.¹⁸⁸ The countervailing high point for the conservatives was Chief Justice Rehnquist's opinion in *U.S. v. Verdugo-Urquidez* in 1990,

<http://jurist.law.pitt.edu/paperchase/2007/07/csrt-summaries-show-most-guantanamo.php>.

¹⁸⁴ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680, § 1005(e)(2)(c) (2005).

¹⁸⁵ *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).

¹⁸⁶ *Id.* at 2284.

¹⁸⁷ This arose with post-World War II trials of war criminals and was discussed in law review articles as early as 1948. See, e.g., Application of Yamashita, 337 U.S. 1, 7 (1946); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

¹⁸⁸ *Reid v. Covert*, 354 U.S. 1, 8 (1957).

holding that the Fourth Amendment does not apply to aliens outside the U.S. and limiting *Reid* to U.S. citizens in certain circumstances.¹⁸⁹ This latter case was completely consistent with *Johnson v. Eisentrager*. Both Justice Jackson in *Eisentrager* and Chief Justice Rehnquist in *Verdugo* warned at length of the potential dangers of an expansive application of the Constitution overseas and the likelihood that it could disrupt military operations “outside this country . . . for the protection of American citizens or national security.”¹⁹⁰ As Justice Jackson stated in *Eisentrager*,

Such a construction would mean that during military occupation irreconcilable enemy elements, guerilla fighters and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press and assembly as in the First Amendment, right to bear arms in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.¹⁹¹

Justice Kennedy and the liberals on the Court struck a major blow against *Eisenstrager* and *Verdugo* with their finding in *Boumediene* that, indeed, the Constitution can apply to aliens overseas if, in the case-by-case opinion of judges, instead of the military and elected political branches, practical, functional considerations do not directly interfere with the application of its provisions.¹⁹²

What lessons can future administrations learn from the habeas litigation? The answer is that the Bush administration probably made the mistake of playing it too close and always attempting to get the most out of prior precedent while giving up the least. It could be argued that it would have made more

¹⁸⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 270 (1990).

¹⁹⁰ *Id.* at 274; *Eisentrager*, 339 U.S. 763, 784.

¹⁹¹ *Eisentrager*, 339 U.S. at 784.

¹⁹² *Boumediene v. Bush*, 128 S. Ct. 2229, 2253-58 (2008).

sense to secure the detainees further away from the U.S., instead of at Guantanamo where we had an indefinite lease. Major constitutional decisions should not be dictated by property law, yet the government opened up this possibility by choosing Guantanamo. The author is not convinced, however, that establishing the prison at a different foreign base would have been dispositive. A more solid criticism would be that in drafting the DTA, Congress established a process that basically complied with the minimum standards set by Justice O'Connor in *Hamdi*, but did not necessarily guarantee an active, contentious CSRT hearing guided by attorneys charged with representing the interests of their clients. The CSRTs were not unconstitutional in that there were no constitutional standards other than those set by *Hamdi*, and the Geneva Conventions only required a competent tribunal, but they were still subject to speculative charges of being very capable of detaining the innocent. It would also have been easy to structure an appeals process that did not contain the limiting language applied to the D.C. Circuit by the DTA.

As was the case with the two page affidavits it defended in *Hamdi*, the government tried to give up so little that it created the impression of a process that potentially would be neither accurate nor fair. The result was a questionable decision like *Boumediene* that, in its failure to establish rules for the future, has probably set back both detainees and the government.¹⁹³ But despite the government's mistakes, it is also clear that, contrary to the general impression and the arguments of many lawyers, the administration acted in good faith compliance with traditional Constitutional law when it sought to deny habeas to the detainees.

D. MOTIVATION

As has been demonstrated in the previous review, the Bush policies on detention, military commissions and habeas were essentially consistent with constitutional law as that law was understood when the policies were conceived. Yet the Supreme Court decisions in *Hamdi*, *Hamdan* and *Boumediene*

¹⁹³ See *id.* at 2293.

represented an extraordinary sequence of reversals which, historically, can only contribute to the impression that the administration was acting in a high handed manner outside of well established law. Some of the particular reasons behind each of these opinions have been noted in the summary of each decision. There were, however, aside from case specific objections, larger forces at work that led to the government's legal defeats. These were related to overall perception of the administration, substantive factors and a major blunder perpetrated by the Department of Defense in its initial legal approach to detainees.

It has been said that President Truman was "shocked, disappointed and disturbed"¹⁹⁴ when the Supreme Court in *Youngstown Steel*¹⁹⁵ blocked his attempt to seize the steel mills in an effort to settle a labor strike that threatened the continuous supply of steel to defense industries during the Korean War. He apparently believed that his actions were no different than those of President Roosevelt and that the Court would not have treated his predecessor in the same manner.¹⁹⁶ That there may have been something to Truman's belief was confirmed by Justice Jackson in his concurring opinion in *Youngstown Steel* when the Justice wrote, in characteristically abstract and poetic prose, that "[t]he opinions of judges . . . often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant."¹⁹⁷

Although President Truman probably did not have as strong a constitutional case in *Steel* as President Bush did in *Hamdi*, *Hamdan* and *Boumediene*, the fact is that President Truman, like President Bush, was not helped by perception and a variety

¹⁹⁴ DAVID MCCULLOUGH, TRUMAN, 900-01 (1992).

¹⁹⁵ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁹⁶ *The Youngstown Steel Seizure Case*, SHERIDAN: CON-LAW, Oct. 15, 2004, http://sheridan_conlaw.typepad.com/sheridan_conlaw/youngstown_steel_seizure_case_pres_as_legislator_war_power_limits_jacksons_concurrence/.

¹⁹⁷ *Youngstown Sheet & Tube*, 343 U.S. at 634.

of substantive factors. President Truman was not President Roosevelt and Korea was not World War II. President Truman, like President Bush, was a highly unpopular president involved in what, at the time, appeared to be a stalemated war.¹⁹⁸

The increasing public perception that the Bush administration had both made serious mistakes in Iraq and, as reflected in the many quotes in this article, was unconcerned about civil liberties,¹⁹⁹ probably had a significant effect from 2004-2008 on a Court majority which, in Jeffrey Toobin's words, was "determined never to stray too far from what the public believed."²⁰⁰ It may have been especially offensive, as Toobin points out, that the Abu Ghraib pictures suggesting low level abuse and high level support of torture were released on the day after the government argued in *Hamdi* that it would never torture.²⁰¹ Reflecting on the impact of a pervasive negative atmosphere surrounding the government, one which today is fueled by a constant bombardment of cable television news broadcasts, former Chief Justice Rehnquist has stated, "We read newspapers and magazines, we watch news on television, we talk to our friends about current events Judges are influenced by them."²⁰²

This atmosphere was promoted during the Bush administration by human rights groups such as Human Rights First, the Center for Constitutional Rights, Alliance for Justice and their associates in academia. Virtually every act of the administration designed to strengthen security was met by their

¹⁹⁸ *The Youngstown Steel Seizure Case*, *supra* note 196.

¹⁹⁹ See Head, *supra* note 2; Biskupic, *supra* note 3; Brownstein, *supra* note 4; Walker, *supra* note 5; Romero Press Release, *supra* note 6; CASSEL, *supra* note 7; ACLU, *supra* note 16; Human Rights First, *supra* note 16; Mell, *supra* note 16; Wong, *supra* note 16; Hilary & Kubasek, *supra* note 1; Cohn, *supra* note 94; Dorf, *supra* note 100; Egelko, *supra* note 100; and ALLIANCE FOR JUSTICE, *supra* note 146.

²⁰⁰ JEFFREY TOOBIN, *THE NINE* 274 (Anchor Books 2007) (2008).

²⁰¹ *Id.* at 271-74.

²⁰² WILLIAM H. REHNQUIST, *THE SUPREME COURT* 192 (Vintage Books 2002), as quoted in *The Youngstown Steel Seizure Case*, *supra* note 196.

press releases proclaiming how, in some way, the action infringed on civil liberties.²⁰³ These were particularly effective with regard to Guantanamo.²⁰⁴ The author is not aware of any significant number of detainees who were actually completely innocent, if guilt is defined as being a member, associate or supporter of al Qaeda, the Taliban and other anti-American terrorist organization, but these institutions certainly created the impression that detention of innocents was routine. As previously mentioned, the well publicized Seton Hall study determined that 92 percent of those imprisoned at Guantanamo had never carried arms for al Qaeda, contributing to a perception that many detainees were not at fault and the military that detained them was incompetent. An attorney for the Center for Constitutional Rights advised one of my classes that ninety percent of those held at Guantanamo were actually innocent, as if the Saudis, Yemenis, and Moroccans caught by the Pakistani army fleeing Tora Bora were just so many lost archeology students.²⁰⁵ The wide disparity between the conclusions of the human rights community and the Department of Defense may be traced to DOD's natural acceptance of the military detention model which concentrates on membership and support for the enemy's armed forces, whereas the liberal activists were focused on a civilian criminal law model demanding a showing of specific criminal conduct.²⁰⁶

²⁰³ See *supra* note 199, referring to the many citations in this article of such public statements attacking administration national security law programs. The remainder of the article will include additional citations.

²⁰⁴ See, e.g., CCR, *Beyond Guantanamo, Rescue the Constitution*, <http://ccrjustice.org/beyond-guantanamo> (last visited Sept. 14, 2009); HUMAN RIGHTS FIRST, *ARBITRARY JUSTICE* (2008), <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf> (last visited Sept. 14, 2009).

²⁰⁵ Speech to U.S. Law and National Security Class, Apr. 16, 2008. The author encourages those who hold contrary views to speak to his classes and does not want to discourage those who may wish to speak in the future by providing the name of a speaker whose conclusion he criticizes in this article.

²⁰⁶ Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *STANFORD L. REV.* 1079, 1080-81 (2008).

This subtlety, however, was probably lost on the casual listener or reader.

Finally, the public distrust of the Bush administration's policies with regards to the detainees was greatly enhanced by a highly effective defense bar. One is struck in reading national security litigation in general by how many times defense attorneys have artfully and successfully attacked statutes sponsored by the administration to correctly argue that a logical construction of these provisions could lead to injustice and disaster, regardless of what may have been the true intent of the legislation. Although there were often no real world cases that actually supported their claims, the language was such that, theoretically, to reference a few examples already mentioned, a client who received subpoenas might believe they could not contact their attorneys, military juries might receive critical and dispositive secret evidence, and new exculpatory facts might never be presented to a court.

An honest prosecutor might tell you that he supported military commissions because they make it easier to convict the guilty. He would not be interested in convicting the innocent because his job is to see that justice is done.²⁰⁷ Yet it is definitely a far less complicated matter to convict the guilty when you only have to convince two thirds of a seven member panel and reliable hearsay is admitted. An equally honest defense attorney, however, would have to admit that he hates military commissions and demands civilian trials because the later require unanimous twelve member jury verdicts and include panoply of technical rules and procedures that obstruct the government. This is especially true if the government is in possession of statements obtained without a *Miranda* warning, hearsay, classified information, and evidence obtained from reluctant foreign witnesses that demonstrate the defendant's guilt. The defense attorney's task is to prevent the admission of that evidence. He may also be dedicated to attempting to scrap, hinder, delay and discredit any new government system,

²⁰⁷ The Professional Canons are similar in each state but may occasionally utilize different numbering systems. In New York, the Code outlines the prosecutor's duty in DR 7-103 and EC 7-13. See New York Lawyers Code of Professional Responsibility, <http://www.law.cornell.edu/ethics/ny/code/> (last visited Sept. 26, 2009).

however constitutional, enacted to efficiently try and convict his client. He is not there to make the government's job easier. To him it may be completely irrelevant if his client is guilty because his job in our system is to represent his client's best interest and generally prevent his lengthy imprisonment regardless of what organization he supports or atrocity he may have committed.²⁰⁸ The defense bar, from a defense attorney's perspective, did a terrific job representing the detainees and influencing public opinion as well as the thinking of the courts.

Aside from the Court's perceptions of the Bush administration, the Justices also appear to have been affected by their substantive views of the war against al Qaeda. As noted by Professors Goldsmith and Chesney, "the enemy in this war operates clandestinely, (and) . . . the war has no obvious end" so that there is concern that there may be "an unusually high risk of erroneous long term detentions" with a military approach that "in its traditional guise lacks legitimacy."²⁰⁹ Recognizing these factors, Justice O'Connor gave the first hint that the Court might break away from established constitutional law principles recognized during wartime by stating in *Hamdi* that "[O]ur understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."²¹⁰

Hamdi, however, in holding that the Administration could hold the detainees as enemy combatants, adhered to the laws of war as well as the standard of deference to the executive in time of war. The Court in *Hamdan* and *Boumediene*, on the other hand, appeared to be swept up by the arguments that this war was different and thus overturned the well established

²⁰⁸ See *id.* at DR 7-101, EC 7-4 et seq. as to primary responsibility to represent client's interests within the bounds of the law. See also *id.* at EC 7-13 (the prosecutor's responsibility "differs from that of the usual advocate" in that he (alone) is to seek justice). See also Sievert, War on Terrorism, *supra* note 68; ABA Workshop Report, *supra* note 101 (discussing the difficulties in civilian prosecution of terrorists).

²⁰⁹ Chesney & Goldsmith, *supra* note 206, at 1081.

²¹⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

precedents of *Quirin* and *Eisentrager*. As Justice Kennedy stated in *Boumediene*, “[T]he cases before us lack any historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest war in American history.”²¹¹

The unfortunate implication of this scaled down, almost civilian, approach to the conflict with al Qaeda is that this is not a “real” war and that al Qaeda does not represent an existential threat to the U.S. as was the case with Germany and Japan. The overall Bush administration philosophy that we are really at war appears to be rejected. That a one vote majority has adopted this approach does not mean, of course, that they are right. If al Qaeda acquires weapons of mass destruction, they are a greater threat to the US than any of our previous enemies. As Judge Wilkinson noted in the Fourth Circuit’s opinion in *Hamdi*:

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the “unconventional aspects of the present struggle do not make its stakes any less grave.” *Hamdi II* 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the “political branches are best positioned to comprehend this global war in its full context,” *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the war-making authority entrusted to the executive and legislative branches.²¹²

In the end, however, the government contributed greatly to the problems of perception and substantive differences between

²¹¹ *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

²¹² *Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4th Cir. 2003).

this and other wars by making a major strategic error in its handling of the Guantanamo detainees. The Department of Defense took the position that those captured in Afghanistan, Pakistan and elsewhere were essentially soldiers who could be removed from the battlefield, detained for the duration and kept isolated from the civilian criminal justice system. As noted in *Hamdi*, this basic conclusion was legally correct.²¹³ The government also believed that the Geneva conventions did not apply to captured al Qaeda terrorists or their Taliban supporters because these organizations were not signatories, did not wear uniforms and did not follow the laws of war. This position, as understood at the time, was also legally correct as explained by the DC circuit in *Hamdan*.²¹⁴ But the logical result of these two correct legal interpretations was to hold the detainees in Guantanamo without any hearings at all to determine whether they were really members of al Qaeda or the Taliban or constituted a threat to the U.S. Thus, the legal black hole of Guantanamo.²¹⁵ Secretary of Defense Rumsfeld talked about eventually convening some type of “administrative review boards” but these were delayed indefinitely.²¹⁶ There was an increasing belief that the military scooped up human beings and left them to “rot[] in Guantanamo.”²¹⁷

The decision not to quickly hold reasonable hearings on the status of the detainees, from an equitable standpoint, was legally catastrophic for the administration. Any number of fair-minded judges were likely to rebel against this position based on equity alone. As noted, after the government took this stance in Guantanamo and with Yasser Hamdi, it was rejected by the Court’s call for tribunals in *Hamdi*. The Court then found additional examples in the Bush rules for military commissions, the DTA, and the MCA that met their preconceived notion that

²¹³ *Hamdi*, 542 U.S. at 517.

²¹⁴ *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005).

²¹⁵ TOOBIN, *supra* note 200, at 268.

²¹⁶ *Id.* at 269.

²¹⁷ *Id.* at 404.

DOD had no interest in fairness. The government, with this initial approach, set itself up for repudiation.

At the same time the Guantanamo policy opened the door for the Court to establish difficult precedents that will challenge all future administrations. As a result of *Hamdan*, the government will now have to repeatedly contend with arguments based on vague provisions of the Geneva Conventions with contrary international interpretations. This may even extend to other international agreements that to date have been held to be not self executing. Furthermore, with the decision in *Boumediene*, the civilian courts have now obtained a firm foothold in determining who may be captured and held by the military in the war against al Qaeda. The result has been endless debate over rules and the release of detainees.²¹⁸ It is highly probable that the Department of Defense in any future administration, Democrat or Republican, will greatly regret this new introduction of civilian judges and law into military affairs. Any interested observer reviewing the history of the Bush administration, and anyone considering administration policy in the future, cannot help but speculate that all of this may have been avoided if the Department of Defense had, from the beginning, created and implemented a reliable process to fairly adjudicate the status of the detainees.

IV.NSA SURVEILLANCE

On December 16, 2005, the *N.Y. Times* broke the story that the NSA was intercepting suspected al Qaeda communications between foreign nations and the U.S. without seeking the approval of the Foreign Intelligence Surveillance Court.²¹⁹ This court had been established by Congress in 1978 to review applications to monitor communications of agents of a foreign

²¹⁸ See, e.g., *Al Halmandy v. Obama*, 612 F. Supp. 2d 45 (D.D.C. 2009), *Zuhair v. Bush*, 611 F. Supp. 2d 69 (D.D.C. 2009), *Ameziane v. Obama*, No.1158843, slip op. (D.D.C. Apr. 30, 2009).

²¹⁹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?scp=1&sq=%22bush%20lets%20US%20spy%22&st=cse>.

power taking place at least partly in the U.S.²²⁰ What followed, as might be expected, was another public outcry that the Bush administration was acting illegally and in violation of fundamental Constitutional rights.²²¹ In a letter to both houses of Congress, fourteen legal scholars and former Clinton administration officials maintained that the program was “without plausible legal authority” and “violated existing law.”²²² The government’s action was consistently referred to as “warrantless wiretapping.”²²³ A more public relations savvy administration would just as accurately have conveyed to the media that this was a logical attempt by the Commander in Chief to “monitor enemy communications in time of war.”

We will probably never know how the courts would have decided the issue had they been forced to decide on the legality of NSA surveillance. The administration and Congress worked out a compromise in 2008 authorizing such surveillance with expedited FISA Court review containing rules that are still classified.²²⁴ But it is important to understand that, despite the media furor, there were very solid constitutional arguments supporting President Bush’s decision to intercept suspected al

²²⁰ 50 U.S.C. §§ 1804-1812 (2006); 50 U.S.C. §§ 1821-1829 (2006).

²²¹ *NSA Spying*, ELEC. FRONTIER FOUND.: OUR ISSUES: PRIVACY, (Elec. Frontier Found., San Francisco, C.A.), <http://www.eff.org/issues/nsa-spying> (last visited September 9, 2009) [hereinafter *NSA Spying*]; *ACLU v. NSA: The Challenge to Illegal Spying*, Dec. 20, 2005, <http://www.aclu.org/safefree/nsaspying/index.html> [hereinafter *ACLU v. NSA*]; *Domestic Surveillance: Warrantless Wiretapping*, BILL OF RIGHTS DEF. COMM.: CIVIL LIBERTIES ISSUES, (Bill of Rights Def. Comm., Northampton M.A.), <http://www.bordc.org/threats/spying.php> (last visited September 9, 2009) [hereinafter *Domestic Surveillance: Warrantless Wiretapping*].

²²² Letter from Constitutional law scholars to Congress, (Jan. 9, 2006), available at <http://www.nsawatch.org/DOJ.Response.AUMF.final.pdf> [hereinafter *Constitutional Scholars letter*].

²²³ *NSA Spying*, *supra* note 221; *ACLU v. NSA*, *supra* note 221; *Domestic Surveillance: Warrantless Wiretapping*, *supra* note 221.

²²⁴ See Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

Qaeda communications without going through the procedures required by the FISA court.

In 1972 the Supreme Court decided *United States. v. U.S. District Court*,²²⁵ a case involving executive surveillance of a purely domestic anti-war group connected with attacks on government buildings in the United States. The Court found that a magistrate should be required to authorize such monitoring, as opposed to the Executive Branch, and invited Congress to create a statutory mechanism that was perhaps less stringent than the Title III format²²⁶ established in 1968 for ordinary criminal cases.²²⁷ The Court, however, was quick to point out that it was referring to domestic cases, not foreign intelligence matters.²²⁸ There was reason to believe that, with regard to foreign intelligence, the President had inherent authority to act on his own. Speaking to this issue, Justice Powell stated:

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.^{FN20} Nor does our decision rest on the language of § 2511 (3) or any other section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act does not attempt to define or delineate the powers of the President to meet domestic threats to the national security.

FN20. See n. 8, *supra*. For the view that warrantless surveillance, though impermissible in

²²⁵ *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. 297 (1972).

²²⁶ 18 U.S.C. §§ 2517-2521 (2006).

²²⁷ See *U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. at 322.

²²⁸ *Id.* at 321-22.

domestic security cases, may be constitutional where foreign powers are involved, see *United States v. Smith*, 321 F.Supp. 424, 425-426 (CD Cal. 1971); and American Bar Association Project on Standards for Criminal Justice, *Electronic Surveillance* 120, 121 (Approved Draft 1971, and Feb. 1971 Supp. 11). See also *United States v. Clay*, 430 F.2d 165 (CA5 1970).²²⁹

Although the Court had confined itself to purely domestic matters and indicated that the President may have inherent constitutional authority with regards to foreign intelligence, Congress in 1978 passed the Foreign Intelligence Surveillance Act requiring that the executive branch obtain judicial approval before intercepting communications for foreign intelligence where any part of the conversation took place in the U.S.²³⁰ The government would have to show the newly created FISA court that there was “probable cause” that the target was a foreign power or an “agent of a foreign power.”²³¹ The probable cause standard was slightly different than required by Title III in ordinary criminal cases²³² but the process just as detailed and lengthy. Officials familiar with FISA practice have acknowledged that it can take experienced lawyers up to a week (the truth is weeks, even months, but the article does say a week) to complete the paperwork and that the “documents are like mortgage applications in their complexity.”²³³

²²⁹ *Id.*

²³⁰ 50 U.S.C. §§ 1804-1812 (2006); 50 U.S.C.A §§ 1821-1829 (2006).

²³¹ 50 U.S.C. § 1805(a)(2)(B) (2006).

²³² See *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (noting the close similarities between the probable cause standard regarding agents of a foreign power and the probable cause standard regarding facility to commit a criminal act).

²³³ Richard Lacayo, *Has Bush Gone Too Far?*, TIME, Jan. 9, 2006 at 24, 28, available at <http://www.time.com/time/magazine/article/0,9171,1145242,00.html>.

In the Cold War and peacetime atmosphere there was not too much objection to FISA. But one would not expect in the midst of an actual war that the President would have to go through these bureaucratic procedures in order to monitor the enemy. It is hard to imagine that Congress would really have believed that President Roosevelt, for example, should have had to present a sixty page probable cause affidavit to a court before intercepting communications between a suspected Nazi saboteur and a foreign country during World War II. In a real conflict there may not even be sufficient facts or time to establish "probable cause." A diligent Executive, nevertheless, would probably still feel bound to act to protect the country even if he just had a reasonable suspicion that an individual may be planning an attack or assisting the enemy. The Bush administration in fact acknowledged that it felt FISA did not provide "the speed and agility required for the early warning detection system"²³⁴ and it is likely the government did not have time after 9/11 to establish probable cause that every suspected al Qaeda member in the U.S. was a member of the organization.

Regardless of what one might expect, an objective reading of the 1978 FISA statute demonstrates that Congress did apparently intend it would apply during both peace and war. The statute provides that Title III and FISA will be the exclusive authority for interception.²³⁵ 50 U.S.C. § 1811 states that the statute may be suspended for fifteen days after a declaration of war with the obvious implication that it is in effect after fifteen days.²³⁶ FISA does state that it may be superseded by other statutes,²³⁷ and the administration argued that the Authorization

²³⁴ Letter from William E. Moschella, Assistant Attorney General, to Sen. Pat Roberts, Chairman of S. Select Comm. On Intelligence, Sen. John D. Rockefeller, Vice-Chairman of S. Select Comm. On Intelligence, Rep. Peter Hoekstra, Chairman of H.R. Perm. Select Comm. On Intelligence, and Rep. Jane Harman, Ranking Minority Member of H.R. Perm. Select Comm. On Intelligence (Dec. 22, 2005), *available at* <http://www.usdoj.gov/ag/readingroom/surveillance6.pdf> [hereinafter Moschella letter].

²³⁵ 18 U.S.C. § 2511(2)(f) (2006).

²³⁶ 50 U.S.C. § 1811 (2006).

²³⁷ 50 U.S.C. § 1809(a)(1) (2006).

for Use of Military Force overrode its provisions,²³⁸ but a statute as general as the AUMF does not negate one as specific as FISA.²³⁹ Whether Congress had thought the matter through or not in 1978, the statute as written shackled the President's ability to conduct interceptions in time of war.

President Bush thus, in all likelihood, violated the FISA statute. In most circumstances this would be an unconstitutional action. *Youngstown Sheet and Tube Co. v. Sawyer*,²⁴⁰ the seminal case on Legislative versus Executive power, stands for the proposition that when the President proceeds in direct violation of a statute he is often acting contrary to his fairly limited constitutional authority.²⁴¹ But there is an exception to the rule. If the legislative act improperly infringes on the President's constitutional war and foreign affairs power, then the legislation itself is unconstitutional and the President's act is legal.²⁴²

The President had a strong case that NSA surveillance was constitutional pursuant to his war and foreign affairs power and that the FISA statute was an unconstitutional attempt at congressional interference with that power. The Supreme Court held in *Hamdi* that the AUMF was congressional authorization for a war against al Qaeda and that the President's action to detain combatants without specific congressional authorization was permissible as a "fundamental incident of war."²⁴³ Certainly monitoring suspected enemy communications between a foreign country and the U.S. was also a "fundamental incident of war." In addition, not only did the Supreme Court note in 1972 in *United States v. U.S. Dist. Ct.* that there was a well recognized body of opinion that the President had inherent constitutional

²³⁸ Moschella letter, *supra* note 234.

²³⁹ Constitutional Scholars letter, *supra* note 222.

²⁴⁰ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁴¹ *Id.* at 637.

²⁴² *Id.* at 640.

²⁴³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004).

authority to conduct warrantless surveillance against agents of a foreign power,²⁴⁴ but every court to have decided the issue since that date had held that he had this authority.²⁴⁵ As the Foreign Intelligence Surveillance Court of Appeals stated in *In re Sealed Case*:

The Truong court,²⁴⁶ as did all other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.²⁴⁷

There were additional constitutional arguments that supported NSA interception without meeting FISA probable cause requirements. The Fourth Amendment dictates that searches with warrants be based on probable cause, but that warrantless searches must be basically "reasonable."²⁴⁸ There is a convincing case that intercepting international enemy communications during time of war is a logical balance between a nation's security interests and the privacy interests of the interceptees, and is therefore reasonable. It is also an established principle of law that the government may search any item crossing the border without probable cause²⁴⁹ including the

²⁴⁴ United States v. U.S. Dist. Ct. for Eastern Dist. of Mich., 407 U.S. 297 (1972).

²⁴⁵ See e.g., United States v. Brown, 484 F.2d 418 (5th Cir. 1973); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974); United States v. Hung, 629 F.2d 908, 911 (4th Cir. 1980).

²⁴⁶ Hung, 629 F.2d 908.

²⁴⁷ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

²⁴⁸ See U.S. CONST. AMEND. IV.; Illinois v. McArthur, 531 U.S. 326, 330 (2001).

²⁴⁹ United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

contents of a computer hard drive.²⁵⁰ As Professor Orin Kerr has explained, there is a credible reason to believe that this includes searching the contents of suspected enemy communications that traverse the border.²⁵¹ It must be remembered that NSA surveillance dealt with agents of a foreign power and global communications across borders. Yet the fourteen scholars and former government officials who wrote to Congress complaining about the legality of NSA surveillance and others who questioned the government often completely ignored the extraterritorial nature of the issue and concentrated solely on the domestic side of the interception.²⁵² As noted above, the foreign and international aspects of NSA monitoring cast the matter in an entirely different light.

It is in many ways unfortunate that the Supreme Court did not have an opportunity to weigh in on the NSA surveillance controversy because it potentially raises questions of great significance for the future. Once the Congress has authorized the President to go to war, how much can it control or limit his actions? Can Congress tell him how to conduct an invasion, what communications may be intercepted, which ships should be captured and what cities to attack? Congress sets rules for the governance of the Armed Forces,²⁵³ but how far does this right permit the Congress to encroach upon the President's powers as Commander in Chief? Even if Congress can set rules for the Armed Forces, can it control the NSA, CIA and civilian officials in time of war? On a larger scale, could Congress have directed in World War II that we attack Japan first instead of going after Hitler in Africa and Europe? Can Congress tell the President when to retreat, withdraw or surrender as it may have been contemplating, in different terms, with respect to Iraq in 2005-2006? The author would imagine that Congress holds

²⁵⁰ United States v. Ickes, 393 F.3d 501 (4th Cir. 2005).

²⁵¹ See Posting of Orin Kerr to Volokh.com, <http://volokh.com/posts/1135029722.shtml> (last visited Dec. 19, 2005, 16:02 EST)

²⁵² See *NSA Spying*, *supra* note 221; *ACLU v. NSA*, *supra* note 221; *Domestic Spying: Warrantless Wiretapping*, *supra* note 221.

²⁵³ U.S. CONST. art. 1, § 8.

sway over the major issues. Congress may commence war and Congress can probably end war.²⁵⁴ But it is equally likely when it comes to capture, interception and other such details, especially when conducted at the direction of civilians, that the courts will find that such matters fit squarely within the Commander in Chief's power to conduct an authorized war.

V.INTERROGATION

The purpose of this section is not to engage in the "torture" debate because, for the most part, that controversy related to a statutory interpretation of the language contained in the 1994 torture statute.²⁵⁵ The government argued that the phrase "severe mental or physical pain and suffering" in the statute²⁵⁶ essentially prohibited only serious non-transitory harm.²⁵⁷ As approximately 26,000 soldiers had been waterboarded in training with virtually no evidence of permanent harm, waterboarding was not, in their opinion, torture.²⁵⁸ Those who maintained that this was torture logically focused on the fact that the technique undoubtedly caused pain and suffering. The problem, of course, is that if pain and suffering is the only test to define torture, then all sorts of subjectively painful actions with no lasting effects, from lengthy standing, to cold cells or even forced exposure to personally irritating music, might legally

²⁵⁴ See Ronald Sievert, *Campbell v. Clinton and Congressional Efforts to Reassert Authority to Commence or Prevent War*, 105 DICK. L. REV. 2, 159 (2001).

²⁵⁵ 18 U.S.C. § 2340 (2006); 18 U.S.C. § 2340A (2006).

²⁵⁶ 18 U.S.C. § 2340(1) (2006).

²⁵⁷ See 2002 memo: *Had to be intent to inflict 'severe pain' to be torture*, CNN, Apr. 17, 2009, <http://www.cnn.com/2009/POLITICS/04/16/us.torture.documents/index.html> [hereinafter 2002 memo]. See also Memorandum from Jay Bybee, Assistant Attorney General, Dep't. of Justice, to John Rizzo, General Counsel, CIA, (Aug. 1, 2002), available at http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_o8012002_bybee.pdf [hereinafter Bybee memo].

²⁵⁸ Bybee memo, *supra* note 257.

constitute torture. Be that as it may, as of this date the Obama administration has declared it will not waterboard while leaving open what practices it may permit if confronted with a need to obtain information in the future.²⁵⁹

The constitutional issue that arose during the Bush administration, and threatens to become a serious matter for the Obama administration, relates to whether the government violated fundamental constitutional rights when it routinely interrogated detainees without Miranda warnings.²⁶⁰ Those wedded to the law enforcement model might naturally argue that the failure to read Miranda to those captured in the war on terror infringed upon Fifth and Sixth Amendment rights to counsel and against self incrimination.²⁶¹ It is likely, however, that this was not a violation as long as the information was obtained and utilized only for intelligence purposes. In an excellent analysis of the Miranda issue, Judge Sand stated that Miranda becomes relevant only when a statement is introduced in a criminal trial and that:

[t]o the extent that a suspect's Miranda rights allegedly impede foreign intelligence collection, we note that Miranda only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place.²⁶²

In *United States v. Lonetree*, the court even held that a defendant's statements given to CIA agents ten days before he was turned over to criminal investigators could be used against him in a criminal trial because the agents "analyzed appellant's

²⁵⁹ Exec. Order No. 13491, 74 Fed. Reg. 16 (Jan. 22, 2009) (discussing the implementation of a task force to determine appropriate interrogation techniques in addition to those allowed under the Army Field Manual).

²⁶⁰ See e.g. *United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

²⁶¹ See John Yoo, *supra* note 60.

²⁶² *Bin Laden*, 132 F. Supp. 2d at 189.

activities only for the purpose of ascertaining what damage may have occurred to the security of the United States and not for the purpose of perfecting a criminal prosecution.”²⁶³

As Judge Sands explained, however, if the statement is utilized in a criminal court and the interrogators contemplate prosecution, then questioning without full Miranda rights could be very problematic.²⁶⁴ In a trial before a military commission, the rules apparently permit admission of a statement obtained without Miranda as long as torture was not utilized,²⁶⁵ but this has not been tested. In a civilian court the government may only be able to argue the very narrow Quarles exception for admission of statements obtained by authorities in an emergency²⁶⁶ or that a later “clean” statement was untainted by the first unwarned admission.²⁶⁷ Otherwise, Miranda will apply and statements given without the warnings are likely to be suppressed.

President Bush, as indicated by the above cases, did not violate constitutional rights when detainees were routinely interviewed for intelligence purposes without Miranda. President Obama, however, recognizes that he has a problem if he intends to obtain and use such statements in the future in criminal trials or military commissions with new rules. On March 22, 2009 he stated on 60 Minutes that the nation need not fear that he would give Miranda rights to terrorists.²⁶⁸ On June 11, 2009, however, a Republican congressman complained

²⁶³ United States v. Lonetree, 35 M.J. 396, 404 (C.M.A. 1992).

²⁶⁴ *Bin Laden*, 132 F. Supp. 2d. 168.

²⁶⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, § 949a (2)(c); 948r, 120 Stat. 2600 (2006).

²⁶⁶ New York v. Quarles, 467 U.S. 649 (1984).

²⁶⁷ *Lonetree*, 35 M.J. 396 at 404. This can be very difficult as under the “cat out of the bag” theory the first statement can be found to taint the later Mirandized confession. See *Oregon v. Elstad*, 470 US 298, 311-12 (1985).

²⁶⁸ Posting of Ron Christie to The Hill’s pundits blog, <http://thehill.com/blogs/pundits-blog/homeland-security/30711-obama-and-miranda-warnings> (June 6, 2009, 9:56 EST).

that “military and CIA personnel . . . informed him that terrorist suspects were being read Miranda rights *before* interrogation.”²⁶⁹ This suggested a different policy than pursued by the Bush administration, which only utilized Miranda warnings when it attempted to secure admissible statements *after* intelligence interrogation had been completed by sending in FBI teams to start the interview process from the beginning.²⁷⁰ White House press secretary Robert Gibbs stated that the Congressman’s report “didn’t surprise him.”²⁷¹ His lack of surprise makes sense if the administration’s primary goal will be criminal prosecution. Such a policy, if it exists, however, would greatly hinder intelligence collection and would not be expected to stand the test of time.

VI. RACIAL PROFILING

Racial profiling, of course, was a highly sensitive subject in America even before September 11th, 2001.²⁷² The Bush administration came out early against racial profiling, with the President stating that racial stereotypes are harmful to a diverse democracy and proclaiming that the policy was “wrong and we will end it.”²⁷³ The government, nevertheless, was soon condemned by both scholars and human rights organization for

²⁶⁹ *Id.* (emphasis added).

²⁷⁰ Posting of Jason Linkins to HuffingtonPost.com, http://www.huffingtonpost.com/2009/06/11/miranda-rights-for-detain_n_214368.html (June 11, 2009, 13:30 EST). The *Huffington* article, however, did not really concentrate on the differences between *Miranda* warnings given after intelligence has been obtained and *Miranda* warnings given at the start.

²⁷¹ Christie, *supra* note 268.

²⁷² See e.g., Michael Higgins, *Looking the Part*, A.B.A.J., Nov. 1997, at 46-47.

²⁷³ Press Release, Dep’t of Justice, *Fact Sheet: Racial Profiling* (June 17, 2003), available at http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf [hereinafter DOJ Press Release].

actively engaging in racial profiling.²⁷⁴ This was inspired by the administration's concentration on Arabs and Muslims after 9/11 and its roundup of as many as 2000 immigrants from the Middle East prior to the 2004 elections.²⁷⁵ As stated by Professor Susan Akram and Maritza Karmely,

Legal scholars, commentators, and the media have critically examined the policies and laws that the government has claimed authorize its actions in these arrests and detentions, and most agree that these policies almost exclusively focused on Arabs and Muslims, whether justified by terrorism concerns or not²⁷⁶ The evidence detailed in the many reports leads to the conclusion that the widespread violation of detainee's rights were a deliberate part of the government's . . . strategy."²⁷⁷

Even the U.S. Commission on Civil Rights chastised the government for actions that "facilitated" racial profiling.²⁷⁸

There is no question that government law enforcement and security organizations occasionally engage in a degree of racial

²⁷⁴ See e.g. Press Release, ACLU, *Sweeping Homeland Security Investigation of Muslims Was Unconstitutional and Discriminatory, Says ACLU*, Oct. 31, 2008, available at <http://www.aclu.org/racialjustice/racialprofiling/37641prs20081031.html> [hereinafter ACLU, *Investigation of Muslims*]; Susan Akram and Maritza Karmely, *Immigration and Constitutional Consequences of Post 9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); William Fisher, *Bush policies encourage racial profiling, U.S. panel says*, FinalCall.com News, Dec. 1, 2004, available at http://www.finalcall.com/artman/publish/National_News_2/Bush_policies_encourage_racial_profiling_U_S_panel_1651.shtml.

²⁷⁵ See ACLU, *Investigation of Muslims*, *supra* note 274.

²⁷⁶ Akram, *supra* note 274, at 621.

²⁷⁷ *Id.* at 627.

²⁷⁸ Fisher, *supra* note 274.

profiling.²⁷⁹ The legally relevant question is whether it is unconstitutional racial profiling in violation of the equal protection provisions of the U.S. Constitution.²⁸⁰ This involves something more than targeting individuals for suspicion based on their race, ethnicity, religion or national origin.²⁸¹ The constitutional test, as stated in *United States v. Avery*, is whether the government “adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizens’ race, *without more*, [at which time] a violation of the Equal Protection Clause has occurred”²⁸² This important distinction is unfortunately ignored by many who criticize government for what they allege is improper racial profiling.²⁸³

In a 2003 published policy prohibiting racial profiling, the Department of Justice noted that in national security matters authorities could consider travel patterns, visits to countries known to harbor terrorists or support terrorist operations, and the country that issued a passport.²⁸⁴ This is essentially “country of origin profiling” rather than racial profiling with individuals associated with certain countries targeted whether they are white, black, brown or yellow. The DOJ policy went on to say that if information is received that members of a Middle Eastern organization or members of an ethnic group will be involved in an attack, than Middle Easterners could be subject to “heightened scrutiny” or the government could “focus

²⁷⁹ See James Zogby, *Stop the Intimidation*, A.B.A.J. April 1991; John Mintz and Michael Grunwald, *FBI Terror Probe Focuses on US Muslims*, WASH. POST, Oct. 31, 1998, at A-1.

²⁸⁰ U.S. CONST. AMEND. V; U.S. CONST. AMEND. XIV § 1.

²⁸¹ ACLU, *Investigation of Muslims*, *supra* note 274; Fisher, *supra* note 274.

²⁸² *United States v. Avery*, 177 F.3d 343, 355 (6th Cir. 1997) (emphasis added).

²⁸³ See e.g. ACLU, *Investigation of Muslims*, *supra* note 274; Akram, *supra* note 274; Fisher, *supra* note 274.

²⁸⁴ DOJ Press Release, *supra* note 273.

investigative attention” on the ethnic group. This is an extension of the type of “suspect profiling” sanctioned by the Second Circuit in *Brown v. City of Oneonta* when it held it was proper for the police to examine all 200 African-American males in a city after a victim had stated she had been robbed by an African-American.²⁸⁵ It might be labeled as “suspect class” profiling. As described by Professor Richard Banks:

The suspect description/profile determination is further complicated by the fact that the terrorist threat is posed by the criminal enterprise known as al Qaeda. When law enforcement officers investigate only individuals of a particular race in an effort to thwart a criminal enterprise organized along racial lines, the suspect description/profile distinction very nearly collapses. The use of race to apprehend members of a racially defined gang embodies aspects of both suspect description reliance and profiling. If law enforcement officers know that a particular gang has committed certain crimes and plans to commit additional crimes, then they have a suspect description. But the description is of a criminal organization rather than an individual. Suppose that the authorities know that the criteria for gang membership include race. Only African Americans are members of this gang. Given these facts, have law enforcement officers engaged in racial profiling if they investigate only African Americans? Should that sort of race-based investigation count as suspect description reliance so long as the officers are genuinely attempting to thwart that particular gang?....

The terrorism context presents precisely this circumstance. The terrorist threat is posed by a criminal enterprise known as al Qaeda, whose members, as with most gangs, are bound together

²⁸⁵ *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999).

by a shared social identity. Al Qaeda is a formally Muslim organization that defines its goals, at least in part, as the defense of Islam. While, of course, most Muslims are not members of al Qaeda, all al Qaeda members are probably Muslim. Moreover, al Qaeda members hail predominantly from certain countries and are more likely to speak some languages than others.²⁸⁶

The Supreme Court suggested that such suspect class profiling was not unconstitutional in the 1970's when it held that Hispanic ancestry could be considered as a factor by the Border Patrol in its decisions on which vehicles or individuals should be stopped or referred for secondary inspections at our southern border.²⁸⁷ The Court tackled the matter directly in the national security context in *Ashcroft v. Iqbal*.²⁸⁸ The plaintiff alleged that the FBI under the direction of Attorney General John Ashcroft and FBI Director Bob Mueller authorized an invidious policy of illegal discrimination based on race, religion and national origin by sanctioning the arrest of thousands of Arabs and Muslims after 9/11 and their subsequent detention under highly restrictive conditions.²⁸⁹ Justice Kennedy, writing for the 5-4 majority, responded that under long existing precedent "discriminatory purpose [requires more than] 'intent as volition or intent as awareness of consequences,'" but rather "a decisionmaker's undertaking a course of action 'because of, not merely in spite of [the action's] effects upon an identifiable group."²⁹⁰ Analyzing the facts of this particular case, he stated that:

²⁸⁶ R. Richard Banks, *Racial Profiling and Anti-Terrorism Efforts*, 87 CORNELL L. REV. 1201, 1215-16 (2004).

²⁸⁷ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

²⁸⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²⁸⁹ *Id.* at 1951.

²⁹⁰ *Id.* at 1948 (citing *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. . . . Purposeful, invidious discrimination . . . is not a plausible conclusion.²⁹¹

The Court's holding thus appeared to accept the suspect class profiling posited by Professor Banks.

It is tempting to speculate whether the swing votes on the Court may have been influenced to some degree by the fact that the Bush administration was out of power and the pressures detailed earlier were now absent. The case nevertheless stands for the proposition that President Bush and his government did not generally engage in illegal racial profiling as repeatedly charged by their critics. The constant public claims of blatant violations of established constitutional rights were not substantiated. Furthermore, *Iqbal* will clearly be important to all future administrations as they attempt to insure the nation's security with logical policies and procedures that still comply with the requirements of the U.S. Constitution.

²⁹¹ *Id.* at 1951-52.

VII.CONCLUSION

The writings and oral statements of commentators, the media, defense attorneys, academics and human rights organizations during the Bush administration created an image of a President who basically ignored the Constitution. Historical works and continuing public references to the Bush years will almost certainly echo these words and reinforce the impression they have produced. The legacy of high handed disregard of fundamental civil liberties, may, therefore, endure. It is hoped that historians and scholars honestly interested in the truth, however, will be able to find in articles such as this a far more accurate picture of national security law policies from 2001 to 2008.

At the same time, it is important that future governments study the Bush administration for lessons on exactly what can go wrong even when officials act in accordance with existing legal precedent. Public perception, changed circumstances and an absence of equity will result in repudiation by the courts no matter how much the government has complied with prior decisions. Efforts to take prior holdings to the absolute limit may have similar consequences. As a result, the ultimate legacy of the Bush administration may be one of disputed Supreme Court opinions limiting executive authority, inserting civilian courts into military matters, and introducing general international agreements as substantial authority in national security legal decisions. It should not, however, be one of an administration engaged in knowing violation of established constitutional rights.



FINDING A REASONABLE WAY TO ENFORCE THE REASONABLE EFFORTS REQUIREMENT IN CHILD PROTECTION CASES

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Abstract: Under federal law, state child protection agencies are required to exert “reasonable efforts” to reunite abused and neglected children with their parents before seeking to terminate parental rights and free the children for adoption. The scope of this requirement is undefined in federal statutes and in the statutory law of many states. As a result, it has fallen to appellate courts to determine the degree of effort a state agency must exert before the relationship between a parent and a child is severed.

This has proven no easy task. By the time a parental termination case has reached an appellate court, the children may have been in the care and protection of the state for a lengthy time and may have developed a bond with foster parents who are hoping to adopt them. This leaves the appellate court with a difficult choice if it finds that the efforts of the state agency have been insufficient or poorly matched to the needs of the family in question.

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Faced with these circumstances, many appellate courts have simply rubber-stamped the efforts of the state agency without much review, and in effect read the reasonable efforts requirement out of existence. Other appellate courts have done a more exacting examination of whether reasonable efforts were made. When these courts have found deficiencies, the almost inevitable effect has been to delay permanency for the children involved by requiring the agency to go back and make further attempts at reunification.

After reviewing appellate decisions of both types, this article concludes that neither approach is satisfactory. The article offers three ways to alleviate the thorny problems faced by appellate courts in these difficult cases. First, it contends that in the absence of a federal definition of reasonable efforts, states should develop more precise definitions of their own. Second, it argues that courts make better use of empirical research when evaluating whether a state agency has made reasonable efforts, so as to make a more accurate assessment of whether the state's efforts are satisfactory. Finally, it suggests that state courts discontinue the practice of considering reasonable efforts as a condition precedent to termination of parental rights.

The article acknowledges that these approaches singly or in combination will not completely resolve the issues raised by reasonable efforts cases, but asserts they will help ease the problems created by those difficult cases.

As an attorney who serves as appellate counsel for individuals in Massachusetts whose parental rights have been terminated, I have been quite surprised by the near universal failure of the "reasonable efforts" defense to the termination of those rights. In Massachusetts, as in almost every other state in the union,² the state child protection agency is required to show that it used reasonable efforts, both to prevent the removal of

² Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT'L L.J. 259, 293 & n.167 (2003).

children from their homes, and to reunite them with their families.³

The reasonable efforts requirement is consistent with the basic underpinnings of care and protection law. At the federal level, Congress requires states to use reasonable efforts to preserve families or forego federal funding for their child protection programs.⁴ In my own state, preservation of the biological family is cited as a fundamental purpose in the first section of the governing statute,⁵ and the state's departmental regulations require that it try to preserve the family unit in the course of carrying out its protective duties.⁶ In addition, there has long been a common law requirement in Massachusetts that the Department of Children and Families (the Department) establish that it tried to correct the conditions that led to its involvement before seeking to terminate parental rights.⁷ Massachusetts, like a number of other states, codified the reasonable efforts requirement in 1984, in response to the federal mandate.⁸

³ MASS. GEN. LAWS ch. 119, §§ 26(b), 29C (2008).

⁴ See *infra* note 21, and accompanying text; 42 U.S.C. § 671(a)(15).

⁵ MASS. GEN. LAWS ch. 119, § 1 (2009). The statute provides:

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure [sic] the rights of any child to sound health and normal physical, mental, spiritual and moral development.

Id.

⁶ 110 MASS. CODE REGS. 1.01 (2009) (explaining that the philosophy of the Department is to exert reasonable effort to keep families intact).

⁷ *In re* Dep't of Pub. Welfare to Dispense with Consent to Adoption, 381 N.E.2d 565, 571 (Mass. 1978).

⁸ MASS. GEN. LAWS ch. 119, § 29C (2008) (effective July 12, 1984).

In view of this legal landscape, I expected that the Department's efforts to keep children in their homes would be scrutinized carefully by appellate courts reviewing judgments terminating parental rights and/or placing children in the care and protection of the Department. However, after repeatedly having little success with my own "reasonable efforts" arguments on behalf of parents, I decided to explore the issue in more depth. My exploration revealed a fundamental predicament for appellate courts reviewing reasonable efforts cases. It is extraordinarily difficult to simultaneously hold the state to its obligation to use reasonable efforts to keep a family together and preserve permanency and stability for children.

A review of appellate decisions on reasonable efforts revealed that cases are rarely overturned on the grounds that the state has not done enough to try to reunite parents with their children. The practical reasons for this outcome are abundantly clear. When the appellate court of any state reverses a decision of a trial court in a care and protection or adoption case it may also be reversing years of work to obtain permanency, safety, and emotional well-being for children who are parties to the case. This is a hard path for an appellate court to take even when faced with lackluster, or downright hostile, attitudes towards reunification by the state. In essence, courts are aware that a decision enforcing the state's obligation to comply with the law may also upset stability for a child who has been previously neglected or abused. In such circumstances, courts may find it easier to rule that reasonable efforts need only mean meager or pro-forma efforts.

Such a results-driven approach has its own substantial drawbacks. If an appellate court always finds that the efforts made by the state are good enough, what motivation is there for the state to comply with its obligations in this regard? Indeed, my observation is that many service plans developed for parents who have children in the Massachusetts child protection system have a decidedly perfunctory feel to them. They routinely contain a mix of parenting classes, anger management workshops, and individual therapy, which when looked at in the context of the needs of the parents involved, appear to have little

to no chance of providing any actual help.⁹ Consistent judicial approval of these sorts of efforts certainly does little to encourage the state to exercise more creativity or vigor in carrying out its reunification efforts.

Moreover, there are unfortunate secondary effects to this approach. A judicial preference for preserving stability for children over enforcing the reasonable efforts requirement may benefit the children involved in a particular case, but be a detriment to children in state custody as a whole. The reasonable efforts requirement is born out of a policy decision at both the state and federal level that children do best when raised by their family of origin and that the family unit should be preserved.¹⁰ Regular disregard of the reasonable efforts requirement, however well-intentioned or inadvertent, hardly furthers this goal.¹¹

This article explores the question of whether the goals of enforcing the reasonable efforts requirement and preserving stability for children can be reconciled. Part I traces the origin of the reasonable efforts requirement in state and federal child protection law. Part II.A examines state law cases, of which Massachusetts is a typical example, that have elevated concerns about permanency for children over rigorous enforcement of the requirement. Part II.B examines decisions from other jurisdictions that have held the state to a higher standard, while at the same time creating an unacceptably high risk to the children involved. Finally, Part III investigates some approaches that might alleviate, although not completely

⁹ See Crossley, *supra* note 2, at 305 (criticizing the use of “boilerplate” service plans “unrelated to the conditions that gave rise to intervention”).

¹⁰ This is not an unsubstantiated concern. There is significant evidence that separating children from their families, even when the families have significant defects, can be psychologically devastating to the children. Nell Clement, Note, *Do “Reasonable Efforts” Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397, 418-19 & nn.135-42 (2008).

¹¹ Indeed, one author has concluded that the law governing reasonable efforts is a “hollow requirement” and a “dead letter.” Crossley, *supra* note 2, at 312.

resolve, the clash between enforcement of the reasonable efforts requirement and preserving stability and safety for children.

I. ORIGIN OF THE REASONABLE EFFORTS REQUIREMENT

There has long been a tension between whether the natural family or substitute caretakers are the best way to care for abused and neglected children. At times, child protection experts have taken the position that children should be permanently severed from abusive and neglectful homes and placed with new families without much regard for the children's biological parents.¹² However, this approach is not only controversial on child development and child psychology grounds, it has constitutional problems. The routine or automatic removal of children from their families cannot meet constitutional standards set forth in a series of United States Supreme Court cases. These cases hold that parents have a constitutional right to raise their children as they see fit without interference from the state.¹³ This right was specifically applied to the care and protection setting in 1982 when the Court decided *Santosky v. Kramer*.¹⁴ There, the Court determined that the state could not terminate parental rights without a finding, by clear and convincing evidence, that the parent was unfit.¹⁵

Nonetheless, this right is tempered by the state's *parens patriae* interest in protecting the health and welfare of

¹² Robert F. Kelly, *New Perspectives on Child Protection, Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L. Q. 359, 359 (2000).

¹³ See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that parents have constitutional liberty interest in choosing to enroll child in parochial school); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (identifying liberty interest in child-rearing choices).

¹⁴ 455 U.S. 745 (1982).

¹⁵ *Id.* at 769.

children.¹⁶ At times, the prevailing view has been that it is best to freely exercise this power to separate children from allegedly unfit parents as quickly and cleanly as possible. At other times, the pendulum has swung in the opposite direction.¹⁷ At these times, child protection experts have been more concerned about the problems inherent in separating children from not just the biological parents they love, but their communities, and perhaps their racial, ethnic or religious identities as well, and consequently fought to keep families together.¹⁸ Unfortunately, these efforts sometimes resulted in children returning, time and again, to parents who were utterly incapable of caring for them safely.¹⁹ At other times, it led to “foster care drift,” wherein the child would be placed with a series of foster families in lieu of a

¹⁶ *Id.* at 766-67.

¹⁷ See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8:1 THE FUTURE OF CHILDREN, 23 (1988), available at http://www.princeton.edu/futureofchildren/publications/docs/o8_o1_FullJournal.pdf. Schene asserts that this battle has been going on for a long time. She writes:

The history of the nation's response to child abuse and neglect has been marked by a tension between two missions: an emphasis on rescuing children from abusive or neglectful families on the one hand, and efforts to support and preserve their families on the other. The contemporary debate over the priority given to these competing goals, waged in the press and in scholarly journals, is actually more than 100 years old.

Id. at 24 (citation omitted).

¹⁸ See Kelly, *supra* note 12, at 359; see also Clement, *supra* note 10, at 418 (focusing on the problems created by separating children from their backgrounds contending, “[r]emoval of children from their families and cultural community has potentially devastating effects on the identity and psychological health of the removed children.”).

¹⁹ See Michele Ingrassia & John McCormick, *Why Leave Children with Bad Parents?*, NEWSWEEK, Apr. 25, 1994, at 52 (outlining a series of what the authors viewed as egregious errors by child welfare officials who left children with their families with disastrous consequences). See generally Elizabeth Bartholet, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

pre-adoptive family who would be willing to care for the child permanently.²⁰

The competing fears about each end of the separation-reunification spectrum serve as background to the reasonable efforts requirement. First, the concern about separating children from their biological parents too precipitously led states to require reunification efforts in their common-law decisions and then eventually to codification in federal child welfare statutes. However, by limiting the state's responsibility to exerting only "reasonable" efforts, the government addressed concerns about foster care drift and lack of permanence for children that can result from parents being given multiple "second" chances.

While many states already had common-law or statutory requirements that child protective agencies attempt to keep families together, the reasonable efforts requirement was first included in federal law in 1980.²¹ The Adoption Assistance and Child Welfare Act (AACWA) required states to exercise reasonable efforts at points in the child protection process. Specifically, the AACWA required that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."²² Thus, under the statute, reasonable efforts were required first to prevent a child's removal from the home and then to make it possible for him or her to return home.²³

²⁰ Bartholet, *supra* note 19, at 241.

²¹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(a)(1), 94 Stat. 500, 503 (1980). This provision of the reasonable efforts requirement was preserved when Congress enacted the Adoption and Safe Families Act in 1997. See 42 U.S.C. § 671(a)(15)(B) (2009).

²² Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15).

²³ The reasonable efforts requirement, along with other provisions of the AACWA, was intended to eliminate the unintended consequence of promoting foster care placement that resulted from previous federal legislation. Under the previous legislation, states received federal reimbursement for foster care placements, but not federal financial aid for providing reunification or adoption services. The AACWA, thus transformed the federal role from a "relatively

One goal of the AACWA was to discourage states from looking at removal of children from their homes as both a first and last resort. The legislation instead sought to encourage states to provide families with the services they needed to remain intact and functional.²⁴ One likely motivation for this goal was the explosion in foster care placements, which rose from 8,000 to 100,000 during the ten-year period prior to enactment of the AACWA.²⁵

However laudable this goal, following the enactment of the AACWA, the pendulum swung away from the goal of family reunification back to the goals of achieving permanency and avoiding foster care drift. At least one commentator posits that the primary reason for the swing was a series of high profile news reports of horrific child abuse that rightly or wrongly were blamed in part on the reasonable efforts requirement of the AACWA.²⁶ As a consequence, the reasonable efforts requirement was limited in the Adoption and Safe Families Act of 1997 (ASFA).²⁷ Perhaps the most fundamental change was

simple bill payment for foster care into a system of requirements that encouraged states to focus on services aimed at preserving families and achieving permanency for children.” Crossley, *supra* note 2, at 270.

²⁴ See Adoption Assistance and Child Welfare Act of 1980 § 103, 94 Stat. at 519 (codified at 42 U.S. C. § 625(a)(1) (2006)) (enumerating “preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible” as one of the purposes of child welfare programs).

²⁵ See Shawn L. Raymond, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1235 (1999).

²⁶ Crossley, *supra* note 2, at 273-82. According to Crossley, the vagueness of the reasonable efforts requirement in the AACWA led child protection caseworkers to believe that their hands were tied when faced with parents who endangered their children. *Id.* at 273-78. See also Cristine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 294-96 (placing the blame for a number of appalling child abuse and neglect cases on the AACWA; calling them “reunification murders”) (citations omitted).

²⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

that the legislation provided that the child's "health and safety" are the "paramount concern" for a judge determining whether reasonable efforts had been made.²⁸ Thus, for the first time, the question of whether the state had utilized reasonable efforts was explicitly linked to the child's safety. Given this new emphasis, states might well feel free to be less aggressive with the services they offer to families, knowing that the primary consideration for a judge will be not the strength of their efforts, but the health and safety of the child.²⁹

In addition, under the ASFA, states did not have to exercise reasonable efforts to keep children in their homes when certain enumerated conditions were met.³⁰ The ASFA also enacted timetables governing how long a child could be in foster care before the state was required to file a petition for termination of parental rights.³¹ In these ways, Congress tacitly limited the amount of time state child welfare agencies were required to dedicate to trying to preserve the family.³²

²⁸ 42 U.S.C. § 671(a)(15)(A) (2009).

²⁹ The evidence is that this indeed has been the case at least with regard to incorporating this standard into statutory law. According to one author, two-thirds of the states have incorporated into their child protection statutes the paramount nature of the health and safety of the child in the calculation of whether reasonable efforts have been made. See Crossley, *supra* note 2, at 294.

³⁰ 42 U.S.C. § 671(a)(15)(D). The ASFA excuses reasonable efforts when the parents' behavior has been particularly deplorable. These circumstances include when (1) the child has been abandoned; (2) the parental rights were involuntarily terminated (3) the parent has been convicted of murder or voluntary manslaughter of another of their children or aiding or abetting in that crime; (4) the parent has been convicted of assault or another crime that results in serious injury to the child or another of parent's children; (5) the parent has subjected the child to aggravating circumstances including the murder of another parent in front of the child, subjecting the child or other children in the home to sexual abuse or other conduct of a severe and repetitive nature that subjects the child to physical or emotional abuse. *Id.*

³¹ 42 U.S.C. § 671 (5)(C).

³² Although the ASFA significantly modified the reasonable efforts requirement, its effect on the states is uncertain. Crossley noted that many state statutes appear to be emphasizing child safety and permanency while deemphasizing reunification services in the wake of the ASFA. Crossley, *supra* note 2, at 294. Furthermore, another commentator views the ASFA as changing a presumption that reunification is in the best interests of the child to a

A number of factors have led to uneven treatment of the reasonable efforts requirement in the states. First, neither the AACWA nor the ASFA defined the reasonable efforts requirement. Second, under both statutes, the penalty to states for failure to comply with the requirement is to risk losing federal matching funds for their child protection programs.³³ This has proven to be an idle threat. Strict monitoring of compliance and denial of matching funds has rarely, if ever, occurred.³⁴ Finally, the United States Supreme Court has determined there is no private right of action to enforce the reasonable efforts requirement.³⁵ The combination of these factors means that states can essentially enforce the reasonable efforts requirement as rigorously or as loosely as they see fit.³⁶

presumption that termination of parental rights is in the best interests of the child if reunification cannot be accomplished within fifteen months. See Clement, *supra* note 10, at 397.

On the other hand, according to another commentator, most state courts did not vary their approach to the interpretation of the reasonable efforts requirement after the ASFA was passed. See Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324 (2005). I have noted that neither the AACWA nor the ASFA is mentioned in Massachusetts cases with any frequency, nor is there any indication in its judicial decisions that the change in the federal law has effected a change in the view of what constitutes reasonable efforts under Massachusetts law.

³³ 42 U.S.C. § 671(a)(15).

³⁴ See generally Raymond, *supra* note 25. See also Crossley, *supra* note 2, at 286-87 (commenting that federal funding is rarely withheld, leaving states to enforce the reasonable efforts requirement in any way they choose).

³⁵ Suter v. Artist, 503 U.S. 347, 364 (1992).

³⁶ State practices, at least to some extent, encourage a loose approach. Many states have pre-printed forms where judges can simply check off a box to fulfill their obligations to certify that reasonable efforts were made to prevent removal. Crossley, *supra* note 2, at 285. As Crossley notes, “[c]hecking a box on a pre-printed form . . . does not foster a hearing conducive to the individualized determinations that [the statute] had contemplated.” *Id.*

II. THE THORNY PROBLEM OF JUDICIAL REVIEW OF THE REASONABLE EFFORTS REQUIREMENT IN THE STATE COURTS

A. LOOSE ENFORCEMENT OF THE REQUIREMENT

Massachusetts serves as one example of a state in which judicial enforcement of the reasonable efforts requirement has been forgiving of uninspired state efforts. At first glance, this is an unexpected result. Although neither the ACCWA nor the ASFA required states to incorporate the reasonable efforts requirement into their statutory law,³⁷ Massachusetts was one of the states that chose to integrate the language of the federal statute into its own child protection scheme.³⁸ By adopting the federal language as its own, the Massachusetts legislature apparently intended to impose an obligation that can be relied upon by parents and children aggrieved of the state's efforts in its child protection system. This was not really a substantial change in the law; common-law decisions in Massachusetts had consistently cited the need for the Department to work with parents towards reunification before termination of parental rights could take place.³⁹

However, Massachusetts appellate courts have set the bar for complying with the reasonable efforts requirement quite low, rarely deciding that the state has not met its obligation.⁴⁰

³⁷ 42 U.S.C § 671(a).

³⁸ See MASS. GEN. LAWS ch. 119, §§ 24, 29C (2008). In addition to these explicit references to the reasonable efforts requirement, the Massachusetts statute governing termination of parental rights essentially incorporates the reasonable efforts requirement when setting forth the circumstances the court must consider when terminating parental rights. See MASS. GEN. LAWS ch. 210, § 3(c) (2008).

³⁹ See *In re Dep't of Pub. Welfare to Dispense with Consent to Adoption*, 381 N.E.2d 565 (Mass. 1978).

⁴⁰ Massachusetts appellate cases reversing judgments against parents on the basis of failure to exercise reasonable efforts are difficult to find. In one case, the Massachusetts Appeals Court reversed a judgment terminating a father's parental rights in part because the Department had done little to help the father find appropriate housing for him to care for the children. *In re Elaine*, 764 N.E.2d 917, 922 (Mass. App. Ct. 2002). The court found that the

Viewed from a results-oriented perspective, the advantages of this approach are clear. By the time a parent's rights are terminated, a child may have been in foster care or a pre-adoptive home for many months, if not years. The children may well have a stronger bond with the substitute caretaker by this point than they have with their biological parents. Moreover, it may appear to an appellate court that the biological parents in question are so impaired by drugs, disability, violent disposition or character flaws that no amount of effort by the state agency is likely to make a sizeable difference in their ability to care for their children.

Compounding the problem, an appellate court faced with a lackluster effort to preserve the family by the state agency has only unattractive options at its disposal. It could reverse the judgment of termination and remand to the trial court, essentially giving both the agency and the biological parents another opportunity to make the family work. However, taking this option could wreak disaster on the life of a young child. The child might be separated from foster parents with whom he or she has a warm attachment. Pre-adoptive families may decide they are not patient or flexible enough to put their plans on hold until the child's family falls apart again. Most worrying, the child may be subjected to additional abuse or neglect despite the best efforts of the state agency.

Given all of this, the lax enforcement of the reasonable efforts requirement by the Massachusetts courts is both practical and predictable. However, a review of Massachusetts appellate decisions related to the reasonable efforts requirement

Department's efforts, which amounted to giving the father "a list of places to call," were insufficient, especially given that it did not contact him until several days before filing a petition to terminate his parental rights. *Id.* However, in this case, there was very little evidence of the father's unfitness to uphold the judgment of termination, no matter what the Department's efforts. In an unpublished decision, the Appeals Court considered reasonable efforts to be a factor when it reversed a judgment of termination. *In re Talbot*, No. 01-P-1831, 2002 WL 31455226, at *2 (Mass App. Ct. Nov. 4, 2002). In that case, the court reversed because the trial judge relied on stale information and because the Department offered the mother a "paucity of services" in the face of her repeated requests for help from the Department. *Id.* at *1. Beyond these two cases, there do not appear to be instances where a judgment of termination was overturned by an appellate court on the ground that the Department did not use reasonable efforts to reunify the family.

reveals an essential lack of connection between what the court says is the law and what the court is willing to enforce as the law. Massachusetts appellate decisions continually stress that heroic efforts to preserve the family are not required.⁴¹ This raises no concern; state and federal statutes only require a reasonable effort. What does raise a concern is the amount of effort that the appellate courts are willing to view as reasonable. The appellate courts have often excused decidedly non-heroic efforts by the Department as good enough to meet its standards, especially when a failure to so find would undo the placement of the child.

For instance, in *Adoption of Gregory*,⁴² one of the first post-AACWA cases to address the reasonable efforts requirement, the state, working through a private agency, could hardly have done less to reunify the family in question. It made no efforts whatsoever to reunite the children with their parents for the first twenty months after they were removed from their custody.⁴³ Thereafter, it informed the institution where the children had been placed that reunification with the parents was a possibility and that therefore the facility should try to work with them.⁴⁴ At that point, the institution set up meetings with the parents to discuss their parenting problems, encouraged them to participate in services in the community and set up a visitation schedule. The agency's own efforts were limited to drawing up a service plan for the parents that identified the tasks the parents needed to complete before reunification could occur.⁴⁵

Despite these sparse efforts by the agency, the Massachusetts Appeals Court gave short shrift to the parents' argument that the Department failed to work to reunify them with the children. The court's direct discussion of reasonable efforts was relegated

⁴¹ See, e.g., *Adoption of Lenore*, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002); *Adoption of Abigail*, 499 N.E.2d 1234, 1238 (Mass. App. Ct. 1986).

⁴² See 501 N.E.2d 1179 (Mass. App. Ct. 1986).

⁴³ *Id.* at 1180-81.

⁴⁴ *Id.* at 1181.

⁴⁵ *Id.*

to a short paragraph at the end of the decision.⁴⁶ There, the court made clear its view that it was the parents' failings, and not the Department's, that made reunification impossible, noting that the parents did not consistently take advantage of those services that were offered.⁴⁷ More tellingly, the court focused on the children's fragile emotional state and their bond with pre-adoptive parents in deciding to uphold the decision to terminate parental rights.⁴⁸ The court determined that while the Department may have failed to follow its own regulations, "the breach was not such as to call for a present remedy,"⁴⁹ thus indicating that it was far more concerned with the practical result of a reversal of the termination decision on the children than whether the Department fulfilled its statutory obligation to use reasonable efforts to reunify.⁵⁰

The Appeals Court has also consistently excused the Department from making any effort to preserve the family when a post-hoc examination of the case permits the conclusion that

⁴⁶ *Id.* at 1186. The parents premised their claim on chapter 119, section 1 of the General Laws of Massachusetts which stresses the goal of "strengthening and encouragement of family life," as well as regulations that required the Department to develop service plans for the parents. *Id.*

⁴⁷ Adoption of Gregory, 501 N.E.2d at 1186.

⁴⁸ *Id.* at 1183.

⁴⁹ *Id.* at 1186.

⁵⁰ Other jurisdictions have taken a similar approach when faced with desultory efforts by their state child protection agency. For instance, the New Mexico Appeals Court expressed concern that despite all parties' agreement that a mother should obtain an evaluation that would permit her to receive a referral to parent-child therapy that was deemed necessary to reunification, she was unable to obtain the expert evaluation she needed to obtain a therapy referral. State *ex rel.* Children, Youth & Families Dep't, 47 P.3d 859 (N.M. Ct. App. 2002). In that case, the court commented that the state agency "simply let events take their course" until "time became an insurmountable obstacle" for the mother and termination of her parental rights was inevitable. *Id.* at 866. The court remarked that it was "troubled" by the state agency's actions and that it believed the state "agency [could not] be proud" of its actions, but found the reasonable efforts requirement was "barely satisfied" and upheld the judgment of termination. *Id.*

any efforts would have been futile.⁵¹ In *Adoption of Nicole*, for instance, the court acknowledged that “it is fair comment that the [agency charged with working with the father] did not do much for the father, but it is equally fair comment that [the agency] had little with which to work.”⁵² The court ruled that because the father was going to be incarcerated for a lengthy period of time, the Department did not have to “go through the motions” of providing reunification services when it had already settled on the plan of adoption.⁵³ The court also noted “parenthetically” that it was unwilling to penalize the child involved in the case because of mistakes made by the Department.⁵⁴ Thus, in this case, the Appeals Court signaled its view that if forced to choose between strict enforcement of the reasonable efforts requirement and preserving the placement of the child, it would choose the latter course.

⁵¹ Massachusetts courts are far from alone in deciding that the state does not have to make efforts to reunify if those efforts are likely to be futile. See Bean, *supra* note 32, at 337-43 (positing that the proliferation of cases finding that a state agency does not have to go through the motions of attempting to reunify if such efforts are likely to be fruitless is related to the more constricted view of reasonable efforts contained in the ASFA). However, at least in Massachusetts, the futility defense to a reasonable efforts challenge predates the AFSA. See *Adoption of Nicole*, 662 N.E.2d 1058, 1061 (Mass. App. Ct. 1996).

⁵² 662 N.E.2d at 1061.

⁵³ *Id.* at 1062. See also *Adoption of Abigail*, 499 N.E.2d 1234, 1238 (Mass. App. Ct. 1986) (finding that “it would have required a high and unreasonable measure of optimism” for the Department to create a specific plan to reunite a daughter with her mentally retarded mother). The child in *Adoption of Abigail* was removed from her mother’s care sixteen days after her birth. The court found that the Department fulfilled its obligation to attempt to reunify the family by allowing the mother to visit the child after the removal. *Id.* The court further found that even though there were signs that the mother had made significant progress in defeating her personal problems in the time between her daughter’s birth and the trial, the mother would be unable to meet the special needs of her child and thus termination of her rights was appropriate. *Id.* at 1237. Of note in this case is that the child had been placed with a foster family as a newborn and remained with them for the three and one-half years that it took for the case to move through trial and appeal. *Id.* at 1235. Thus, the court was indirectly posed with the question of whether it should delay and possibly disrupt adoption of a child who had been with the prospective adoptive parents since she was a new-born.

⁵⁴ *Adoption of Nicole*, 662 N.E.2d at 1062.

The Appeals Court has also made it clear that the Department's efforts are limited to linking parents to existing services and that it is not required to fill the gaps in available services on its own.⁵⁵ In fact, the Department is not even required to look very hard for available services and instead can rely on an expert opinion asserting that there are no services that would fill a particular need of a parent.⁵⁶

The Appeals Court has been similarly tolerant of reunification efforts by the Department that are so poorly matched to the parent in question as to raise a judicial eyebrow.⁵⁷ For instance, in *Adoption of Adam*, the court acknowledged that it was "unusual" for a Department case worker to serve as a "therapist" for a mother seeking reunification with her son.⁵⁸ The court nonetheless found that this service was reasonable because the case worker labored diligently to help the mother for three years and the mother found the contact to be beneficial.⁵⁹ The court did not comment

⁵⁵ See *Adoption of Lenore*, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002). In *Lenore*, the Department referred the parents to a number of services, but their applications to receive them were rejected. *Id.*

⁵⁶ *Id.* In *Lenore*, the Appeals Court chided the Department for relying on the expert's testimony that no services were available that would help the parents to raise their child, rather than investigating the availability of services itself. The court noted that the Department has the expertise to match parents and services and that it is obligated to use that expertise and urged that the trial court must remain "vigilant" in assuring that the Department fulfilled its obligations. *Id.* at 503 & n.3. Nonetheless, other than this mild rebuke in the footnote to a published decision, the Department suffered no consequence for its failure to use its expertise.

⁵⁷ A good example of this attitude by the Appeals Court is contained in the unpublished decision *Adoption of Madison*, No. 05-P-390, 2005 WL 2861460, at *1 (Mass. App. Ct. Nov. 1, 2005). There, the court remarked in a footnote that "this was not the Department's finest hour." *Id.* at *4 n.5. This was something of an understatement. Despite the fact that the Department had been involved with a very needy family for many years, it did not enter a single service plan that would have established its efforts to preserve the family into the record. *Id.* Although clearly disturbed by this apparent failure to fulfill its statutory obligation, the court found that the Department's efforts were reasonable because the parents had rejected some of the services offered. *Id.* at *4.

⁵⁸ *Adoption of Adam*, 500 N.E.2d. 816, 819 (Mass. App. Ct. 1986).

⁵⁹ *Id.*

on the fact that the evidence strongly indicated that serious psychological problems were the source of the mother's difficulties in raising her son and that generally a Department case worker will not have the same qualifications or skills as a trained psychotherapist to deal effectively with these problems. It also failed to note the possibility that the Department's case worker may well have had an adverse interest to the mother, given that the Department favored adoption over reunification as a plan for the child. Indeed, it is hard to see how using such a poorly matched resource to provide the crucial reunification service in a particular case could possibly be viewed as a "reasonable" way to effect reunification.⁶⁰

But perhaps the most potent means the Appeals Court has used to dispose of the reasonable efforts requirement is to routinely hold that the Department's obligation to offer services is contingent on the parents fulfilling their own obligations to work towards reunification.⁶¹ In these cases, the court's discussion has focused on the unreasonableness of the parents' efforts as opposed to an evaluation of whether the Department has acted reasonably.⁶² Whatever the initial appeal of this

⁶⁰ For an example of similar acceptance of poorly matched services in another jurisdiction, see *In re Charles A.*, 738 A.2d 222 (Conn. App. Ct. 1999). In this case, the trial court had heavily criticized the state Department of Children and Families for failing to recognize that the mother was not abusing her children, but rather, like the children, was a victim of her husband's abuse. The trial court found that the department had violated its own regulations with regard to the mother's situation and even took some responsibility upon itself for failing to appoint separate counsel to represent the mother. *Id.* at 223. Nonetheless, the trial court found that the mother had refused some of services proffered by the department and that therefore reasonable efforts to reunify her with the children were made. *Id.* at 224. The Appeals Court upheld this determination. *Id.*

⁶¹ See, e.g., *Adoption of Mario*, 686 N.E.2d 1061 (Mass. App. Ct. 1997); *Adoption of Serge*, 750 N.E.2d 498 (Mass. App. Ct. 2001); *Adoption of Eduardo*, 782 N.E.2d. 551 (Mass. App. Ct. 2003). Other states also judge the state's efforts in conjunction with the parents' efforts or lack thereof. See, e.g., *In re Guardianship of D.M.H.*, 736 A.2d 1261, 1274 (N.J. 1999); *In re Jason L.*, 810 A.2d 765, 767 (R.I. 2002); *In re M.B.*, 595 N.W.2d 815, 818 (Iowa Ct. App. 1999).

⁶² See, e.g., *Adoption of Mario*, 686 N.E.2d. at 1066; *Adoption of Serge*, 750 N.E.2d. at 504.

approach, there are at least two problems with its application. First, nothing in the Massachusetts statutes governing reasonable efforts, or the federal law those statutes are modeled upon, suggests that the Department's obligation is excused if the parents do not show initiative themselves. Thus, the Appeals Court interpretation creates an exception to the reasonable efforts requirement that is absent from the plain language of the statute.

Perhaps more importantly, this approach ignores a fundamental aspect of care and protection cases in general and the reasonable efforts requirement in particular. The cases excusing the Department's responsibilities on the ground that the parents have not fulfilled their own obligations catalogue the failings of the parents in great detail. The average reader, upon reviewing this litany of parental failures, might well determine that the parents have forfeited all right to services offered by the Department because of their bad behavior. However, this ignores that the Department's very existence is premised on the assumption that it will deal with dysfunctional, disturbed and/or irresponsible parents. Thus, it seems only fair that the reasonable efforts requirement be tailored to meet the propensities of those parents, and not those of the average, responsible parent who might be expected to eagerly accept available services. In short, the clientele served by the Department would seem to need extra measures of outreach, patience and aggressiveness to successfully link to services. In view of this dynamic, excusing the Department from any obligation at all if the parents do not show initiative in engaging in services is both counter-intuitive and unfairly shifts the burden to the parents.⁶³

This unfairness is particularly problematic when parents suffer from a disability such as mental illness or mental retardation. The decisions of the Massachusetts appellate courts

⁶³ Some states have noted this problem in reviewing their own reasonable efforts cases. The Connecticut Appellate Court, for instance, quoted New York's highest court with approval, stating "the parent is by definition saddled with problems: economic, physical, sociological, psychiatric or any combination thereof. The agency, in contrast, is vested with expertise, experience, capital, manpower and prestige." *In re Eden F.*, 710 A.2d 771, 783 (Conn. App. Ct. 1998) (quoting *In re Sheila G.*, 462 N.E.2d 1139, 1145 (N.Y. 1984)).

send a contradictory message on what constitutes reasonable efforts in these cases. On the one hand, these decisions have stressed that the Department has an obligation to tailor services in order to accommodate the disabilities of parents.⁶⁴ On the other hand, no decision has ever found that the Department failed to fulfill this obligation, no matter what the nature or severity of the disability involved.⁶⁵

This is perhaps most problematic when a parent suffers from a mental illness. Parents suffering from a serious mental illness such as schizophrenia or bi-polar disorder present a particular conundrum with regard to reunification services. One of the hallmarks of serious mental illness is denial that any problem exists. Oftentimes, people suffering from schizophrenia, for example, will be extremely paranoid and delusional while at the same time vociferously denying that there is anything wrong with them or that medication is required. Nevertheless, when a mentally ill parent refuses a Department recommended psychiatric evaluation or prescribed medication, on the ground that nothing is wrong with them, the Appeals Court has generally found that the Department has fulfilled its reasonable efforts obligation simply by making those services available.⁶⁶ Moreover, the Appeals Court has found that a parent who declined those services on the ground she did not need them has

⁶⁴ See, e.g., *Adoption of Gregory*, 747 N.E.2d 120, 126 (Mass. 2001) (reiterating earlier decisions that the Department was required to accommodate a parent's disabilities in provision of services, but held that the American with Disabilities Act, as codified in 42 U.S.C. § 12131, cannot be used as a defense in termination of parental rights proceedings).

⁶⁵ In *Adoption of Gregory*, the Supreme Judicial Court found that the Department sufficiently accommodated a father with cognitive disabilities by revising its visitation schedule, continuing to use a social worker trained in cognitive deficits to work with the father beyond the investigation stage, and referring the parents to a parenting group designed to work with cognitively limited parents. *Id.*

⁶⁶ Not all states require that their child protection agencies exert reasonable efforts to reunite parents suffering from a mental illness with their children. Indeed, several states have statutes that explicitly exempt the state from this requirement upon a showing that the parent has a mental disability. See Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112 (2007).

waived her claim that the Department failed to accommodate her disability by not raising the claim at the very time she refused the services.⁶⁷ In essence, such a holding places the responsibility for recognizing and accepting help for a mental illness on the parent at the very time the parent is clinically the least likely to do so. This practice hardly accommodates the disability. To the contrary, it treats the disability as if it did not exist and as if the mentally ill parent was equally capable of taking advantage of services as a parent not so impaired.

In short, at every juncture, the Massachusetts courts have taken an approach to the reasonable efforts requirement that minimizes the obligations of the Department and maximizes the need for difficult and impaired parents to take responsibility for resolving their own parenting problems before they can attain reunification with their children. Ultimately, the reason for this approach appears to be the principle first stated in *Adoption of Gregory*, that the failure to exert reasonable efforts is a breach for which there is no “present remedy”⁶⁸ and the “parenthetical” comment in *Adoption of Nicole*,⁶⁹ that the court would not allow the children involved to be penalized because of the deficiencies of the Department. In essence, by holding the Department to a minimal standard, the courts can preserve the placements of the children of parents who may have been poorly served. Nonetheless, while it is quite problematic for a state’s appellate courts to systematically minimize, or even ignore, the requirements of state statutory law, along with federal mandates, the potentially tragic consequences of a more rigorous approach to the reasonable efforts requirement approach are easy to see when reviewing decisions from other states.

⁶⁷ See, e.g., *Adoption of Eduardo*, 782 N.E.2d 551, 555 (Mass. App. Ct. 2003).

⁶⁸ See *supra* notes 49-50 and accompanying text.

⁶⁹ See *supra* note 54.

B. STRICT ENFORCEMENT OF THE REQUIREMENT

A number of states have applied more exacting standards in reasonable efforts cases at various points in the past. As a consequence, the outcomes in those decisions are sometimes starkly different from those in Massachusetts. For example, in California, the standard the state must satisfy is by design more stringent. The California parental rights termination statute requires the state to prove by clear and convincing evidence that it has used reasonable efforts to reunify the family before it will permit termination of parental rights.⁷⁰ One example of a reasonable efforts case from California suffices to illustrate how this more stringent standard can have radically different consequences in the life of a family.

In *In re Victoria M.*,⁷¹ the California Court of Appeal reversed a judgment terminating the parental rights of a mother in the following circumstances. The mother had seven children, none of whom were in her care at the time of the hearing on this matter.⁷² The case arose when the mother and three of her children, two girls and a boy, were about to be evicted from a motel. All of the children had head lice so severe that their heads needed to be shaved and the two girls had scabies. The boy had suffered an accidental burn that needed to be treated by a skin graft. The donor site for the skin graft had become so infected due to inadequate care that the skin grew over the bandage and his “trousers had to be peeled off” to treat the infection.⁷³

⁷⁰ CAL. WELF & INST. CODE § 361.5(b) (West 2008). Connecticut has a similar requirement of clear and convincing evidence. Crossley, *supra* note 2, at 301 nn.210-11. This is a requirement these states have imposed upon themselves. Proof by clear and convincing evidence of a parent’s unfitness is constitutionally required. *Santosky*, 455 U.S. at 769. However, most states have not required that same burden of proof with regard to the reasonable efforts requirement. The Massachusetts courts have not spoken to the burden of proof with regard to reasonable efforts.

⁷¹ 255 Cal. Rptr. 498 (Cal. Ct. App. 1989).

⁷² *Id.* at 500.

⁷³ *Id.*

The mother was mentally retarded and had a poor history with social service providers. In fact, one agency refused to work with her anymore because of her excessive use of services.⁷⁴ After the children were removed from her care, the mother was instructed to participate in numerous services and to meet certain goals such as obtaining appropriate housing and acting appropriately during visitation.⁷⁵ Although the mother actively participated in most of the services offered to her; because of her borderline IQ, she had difficulty benefitting from the services. The service providers uniformly proffered a poor prognosis for her ability to adequately parent the children.⁷⁶ She visited with the children regularly, although not as often as her service plan allowed. Furthermore, during the visits she had difficulty controlling all three children at the same time and the arrangements had to be revised so she could visit with the boy alone. At the time of the appellate decision, the girls, who had been in state custody for three years, were living with foster parents who were willing to adopt them. The prognosis for the boy was bleaker. Service providers predicted he would need institutional care because of his own disabilities.⁷⁷

On appeal, the California court accepted the mother's argument that the state did not prove by clear and convincing evidence that it had made reasonable efforts to reunify her with her children. The court found that the services offered were not specifically tailored to address the mother's limited intellectual abilities.⁷⁸ The court also criticized the state for not being more proactive in its efforts to assist the mother in obtaining housing, and expecting instead that the mother find housing on her very limited income by herself.⁷⁹ The court reached this conclusion even though the mother's counselor in her parenting class

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 501.

⁷⁷ *In re Victoria M.*, 255 Cal. Rptr. 498, 501 (Cal. Ct. App. 1989).

⁷⁸ *Id.* at 504-05.

⁷⁹ *Id.* at 504.

recognized her limitations but found that she was unable, even after three attempts, to understand the material in the classes or integrate them into her parenting style. The court was also unimpressed that the mother eventually became a client at an agency that specialized in working with mentally retarded individuals because the state had referred her to the agency because of her son's needs and not her own.⁸⁰ In short, because the state had failed to tailor its efforts to the mother's mental disabilities, the judgment of termination was reversed, creating the possibility that the children would be returned to the mother's care and guaranteeing that a permanent solution to their care and custody would be delayed. Conversely, a Massachusetts court reviewing similar facts would likely find that further efforts would be futile; or that the mother had not sufficiently cooperated in services herself; or that no services capable of curing the mother's parental deficiencies were available.⁸¹

Although other states do not share California's requirement of clear and convincing evidence with regard to reasonable efforts, some states share the concern about closely matching services to the parental needs. For instance, in an Oregon case,

⁸⁰ *Id.*

⁸¹ See *supra* Part II.A. In contrast, California courts have continued to strictly enforce the reasonable efforts requirement in recent years. For instance, in one case it found that reasonable efforts had not been made when a series of logistical problems, most of which related to the maternal grandmother who was caring for the child, led to a delay in counseling services. *In re Alvin R.*, 134 Cal. Rptr. 2d 210, 216-18 (Cal. Ct. App. 2003). In another case, the appellate court delayed the permanent placement of a child who had been in state custody since he was four days old because the state agency could not show that it provided services to the child's mother, who suffered from a serious mental illness. *In re Daniel G.*, 31 Cal. Rptr. 2d 75, 78-80 (Cal. Ct. App. 1994). Nonetheless, California's approach to the reasonable efforts requirement is somewhat schizophrenic. While the cases discussed here demonstrate that California has sometimes imposed more stringent requirements on its child protection agency than other states have imposed on theirs, California has completely eliminated the requirement in other cases. By statute, California allows the state to bypass reunification efforts entirely when two experts testify that the parent has a mental disability that renders him or her incapable of benefiting from those efforts. See Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 183-84 (2006).

the court reversed a judgment terminating a mentally ill mother's parental rights to her young child. The court found that the newborn had been "dumped in her mother's lap" without any immediate provision for the mother's considerable needs for mental health treatment. The court acknowledged that the child had formed a very real bond with foster parents during eighteen months of foster care and that it was troubling to break this bond to allow the mother another opportunity to raise her child. Nonetheless, the court decided to take this route.⁸²

Similarly, a New York appellate court reversed a judgment of termination of the parental rights of a mother who had been found wandering with her infant children.⁸³ The court found the state failed to use reasonable efforts because it did nothing to monitor the mother's outpatient treatment or link her with services after her discharge from the hospital. The court made this decision even though there was significant evidence that the mother would not have complied with mental health services even if the state had done more.⁸⁴ The court found that it would be improper to speculate on whether the mother would have participated in services had they been offered and provided the mother with another chance to raise her children.⁸⁵ The most remarkable thing about this case is that the children had been in foster care for ten years at the time of the decision; the mother had visited with the children infrequently, and at least at some points her proposed plan for the children was that they stay in foster care until they were ready for college.⁸⁶ Thus, it seems

⁸² See *State ex rel. Juvenile Dep't of Multnomah County v. Habas*, 700 P.2d 225, 230-31 (Or. 1985) (noting that failure to use reasonable efforts was not the sole reason for reversal in this case, as the court was also concerned about the state's failure to satisfy statutory pleading requirements).

⁸³ *In re Star A.*, 435 N.E.2d 1080 (N.Y. 1982).

⁸⁴ The dissent asserted that the state would have needed to make "relentless" efforts to assure the mother remained linked with services. *Id.* at 1085 (Meyer, J., dissenting).

⁸⁵ *Id.* at 1083.

fair to say that in this case, the court elevated the need to enforce the reasonable efforts requirements over the needs of the children for permanency.

In short, it is painful to contemplate the consequences of judicial decisions such as these, which strictly enforce the reasonable efforts requirement. When appellate courts take this approach, permanent placement for the children is delayed while the state again attempts to match the parents with services that satisfactorily demonstrate reasonable efforts. Indeed, the courts' decisions in these cases might well result in children being subjected to another round of upheavals in their living situations, shuttling between natural parent and foster or pre-adoptive parent. This is a disheartening result. As the Iowa Supreme Court has repeatedly noted, "[t]he crucial days of childhood cannot be suspended."⁸⁷

Nonetheless, the lax treatment of the reasonable efforts requirement described in Part B above is also seriously flawed. So what is an appellate judge faced with unimpressive efforts towards reunification to do? Is the judge truly provided only with the Hobson's choice of deciding between ratifying inadequate efforts by the state and delaying permanency and stability for abused and neglected children? The remainder of this article will focus on possible alternative approaches to this problem that would help avoid the quandary currently faced by appellate judges in these cases.

III. POSSIBLE SOLUTIONS TO THE REASONABLE EFFORTS CONUNDRUM

A. MORE PRECISE DEFINITION OF THE REASONABLE EFFORTS REQUIREMENT

One possible solution to the quandary faced by courts reviewing whether reasonable efforts have been exercised is for

⁸⁶ *Id.* at 1086 (Meyer, J., dissenting). It should be noted that given the new timeframes contained in ASFA it would be unlikely for a child protection case to drag on for such a long time without resolution at the present time. *See supra* notes 31-32 and accompanying text.

⁸⁷ *In re K.C.*, 660 N.W.2d 29, 35 (Iowa 2003) (quoting *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987)).

states to fill the gap created by the failure of Congress to define reasonable efforts. States can accomplish this goal by providing a more precise definition themselves. A number of states have taken this approach and enacted statutes that provide more direction to their child protection agencies regarding reunification services.⁸⁸

For instance, Minnesota has a detailed statute governing reasonable efforts. It defines reasonable efforts as “the exercise of due diligence by the responsible social service agency to use culturally appropriate and available services to meet the needs of the child and the child’s family.”⁸⁹ The statute further places the burden on the state to show that it has exercised reasonable efforts and requires the juvenile court to make findings of fact and conclusion of law on the question of reasonable efforts. Finally, the statute gives the juvenile court specific guidelines to consider when evaluating the state’s efforts. The court should consider whether the services were “(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.”⁹⁰

The Minnesota statute also codifies the circumstances under which reasonable efforts are excused.⁹¹ For the most part, this

⁸⁸ The federal government has attempted to give the states some guidance in this area. The Federal Children’s Bureau, a division of the Department of Health and Human Services, has issued guidelines for states with regard to reasonable efforts. These guidelines suggest courts use a variety of factors in determining whether reasonable efforts have been made. These factors include the specific dangers to the children involved, whether services relate specifically to the family’s needs, whether the state agency was diligent in arranging services, and whether those services were appropriate and timely. Crossley, *supra* note 2, at 313.

⁸⁹ MINN. STAT. ANN. § 260.012(f) (West 2008). This definition applies equally to the efforts the state must exert to reunify families and the efforts the state must exert to provide the child with a permanent placement once it has determined that reunification with the family of origin is not feasible. *See* § 260.012(a), (e).

⁹⁰ MINN. STAT. ANN. § 260.012 (h).

⁹¹ *Id.*

section of the statute mirrors the exceptions to the reasonable efforts requirement set out in the federal statute.⁹² Additionally, the statute permits the court to determine that reasonable efforts are not necessary when they would be futile and therefore unreasonable under the circumstances.⁹³ Minnesota thereby accomplishes by statute the practice of excusing states from “going through the motions” that many state courts have achieved by their common-law interpretations of the reasonable efforts requirement.⁹⁴ While the merits of this approach are certainly debatable,⁹⁵ at least Minnesota has stated a legislative preference for this means of dealing with difficult odds in reunification cases.

Colorado, likewise, has developed a more comprehensive definition of reasonable efforts in its statutes. Colorado requires that each of its counties and cities provides services to families and children who are in out-of-home placements.⁹⁶ The statute further provides that certain services “shall” be available to families in its care and protection system.⁹⁷ The statute goes on to require certain additional services “based upon the state’s capacity to increase federal funding or any other moneys appropriated.”⁹⁸ The enumerated services include concrete assistance, such as child care, transportation, in-home homemaker services, and financial services likely to be helpful to overwhelmed and embattled parents.⁹⁹ In addition, the services include mental health, drug and alcohol treatment,

⁹² Compare *id.*, with 42 U.S.C. § 671(a)(15).

⁹³ MINN. STAT. ANN. § 260.012(a)(5).

⁹⁴ See *supra* note 53 and accompanying text.

⁹⁵ See Bean, *supra* note 32, at 337-43.

⁹⁶ COLO. REV. STAT. ANN. § 19-3-208(1) (West 2008).

⁹⁷ COLO. REV. STAT. ANN. § 19-3-208(2)(b) (West 2008). These services include basic services such as screening, assessments and individual case plans, home based crisis and family counseling, referrals to private and public resources, visitation and placement, including emergency shelter. *Id.*

⁹⁸ COLO. REV. STAT. ANN. § 19-3-208(2)(d) (West 2008).

⁹⁹ *Id.*

presumably to address the problems that are at the root of so many care and protection cases.¹⁰⁰

The benefit of these statutes to an appellate court is clear. When a state more precisely defines reasonable efforts, the reviewing court can compare the efforts of the state actually made in a particular case against the efforts required by the statute to determine if the state has fulfilled its duty. By contrast, states that use the term reasonable efforts without further definition provide no guidance to the appellate court about how the reasonableness of the efforts is to be measured. Therefore, in states with a more precise definition of reasonable efforts, the danger that an appellate court will so significantly minimize the requirement as to adjudicate it out of existence is greatly reduced. Whatever one's position on the issue of whether services should be offered in the first place, it cannot be good practice for a state to establish a requirement in a statute and then systematically ignore that requirement in judicial decisions.

A more precise definition is also helpful in states that have been more demanding in their enforcement of the reasonable efforts requirement.¹⁰¹ In those states, the reviewing courts may apply expectations to child protection agencies that are simply unrealistic given issues such as difficult-to-access services, high case loads, and uncooperative parents. When the state legislature has more specifically defined the reasonable efforts requirement, appellate courts have some guidance on how to evaluate the reasonableness of the efforts. Thus, the more precise definition of reasonable efforts can guard against unnecessarily prolonging a child's drift in the foster care system.

But the greatest value of such legislation is probably at the front-end of the system - in the child protection agency itself. More precise definitions of reasonable efforts can be enormously helpful to front-line workers in state care and protection services. The challenges faced by these workers cannot be overstated. Every day they are charged with making difficult, value-laden decisions about the families torn by tremendous social and psychological problems. The

¹⁰⁰ *Id.*

¹⁰¹ *See supra* Part II.B.

consequences of making an incorrect decision about a family can literally be fatal.¹⁰² In addition, many of these front-line workers are undertrained and overworked. In view of these pressures, vagueness over how much effort they are required to exert to reunify families only serves to make an already difficult job nearly impossible. It seems only fair to give these workers, as well as the families and the courts, statutory guidance on what constitutes reasonable efforts.

The same considerations also apply to the upper levels of the child protection system. Burnout and rapid turnover consistently plague the highest administrative levels of child protection systems.¹⁰³ Often each change in administrators brings a drastic change in philosophy and clinical priorities for the department.¹⁰⁴ Thus, within a very short period of time, a state or local child protection system might be headed by different directors with entirely different views of the reasonable efforts requirement. This works a great burden on the front-line staff who must constantly adapt to changes in philosophy in their daily practice.¹⁰⁵

One example suffices to illustrate the difficulties. Social work professionals can have a reasonable difference of opinion as to whether parents should be offered concrete services such as transportation, housekeeping, or financial assistance when working toward reunification. One valid professional viewpoint is that providing such services fosters dependence and actually

¹⁰² See Kim, *supra* note 26, at n.63 (stating that “[t]here are far too many deaths to document,” but providing details of the deaths of eight children who died at the hands of their parent/abusers after or during the intervention of a state child protection agency).

¹⁰³ Jim Moye & Roberta Rinker, *It's A Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 383 (2002).

¹⁰⁴ *Id.* (referencing a twelve year study by the Urban Institute reporting that respondents to the study complained that their agencies continually fluctuated between a philosophy emphasizing family preservation and a philosophy emphasizing child safety).

¹⁰⁵ *Id.* (noting that such changes in leadership also have an impact on families in the system who may have come to expect multiple services under one administration only to have those services withdrawn in another).

discourages parents from taking the lead in attending to their parental responsibilities. Another equally valid professional viewpoint is that such concrete services are exactly what parents need to get their lives back on track and in fact are much more immediately helpful than any number of anger management or parenting skills classes.

When a state's statutes or regulations spell out at least generally what services should be included in the reasonable efforts package, there is no need to revisit this question each time there is a change at the upper levels of administration. Instead, front-line workers have a consistent understanding of what is and is not expected of them. Moreover, providing these front-line workers with more detail about how the state views the term "reasonable efforts," makes it easier for them to know what to do in the course of attempting to effect reunification. When this is the case, workers can exert their efforts to implement actual services as opposed to trying to discern what exactly they should be doing.

Another advantage of more detailed legislation is that there is some evidence that the mere act of providing a more precise definition in the statute leads to more aggressive delivery of reunification services by state agencies. Although it is difficult to tell whether this is a direct result of the more precise definition,¹⁰⁶ a review of both Minnesota and Colorado cases suggests a fairly rigorous approach to reunification efforts in those states. For instance, in *In re Welfare of Children of S.W.*,¹⁰⁷ the Minnesota Appeals Court found that the state had complied with the reasonable efforts requirement when the mother had received an impressive array of services, including intensive mental health treatment that involved almost daily contact with her mental health worker. The worker offered both concrete assistance in terms of arranging transportation and setting up appointments, and substantial emotional support. The mother also received parenting training, psychological

¹⁰⁶ At least one commentator has concluded that states that have defined reasonable efforts have more successfully complied with the obligation to exercise those efforts. See Crossley, *supra* note 2, at 313.

¹⁰⁷ *In re Welfare of Children of S.W.*, 727 N.W.2d 144 (Minn. Ct. App. 2007).

evaluations, individual therapy and a substantial number of supervised and unsupervised visitation ultimately totaling three weekly two-hour visits.¹⁰⁸ The court found that this encompassed all of the services available in the area.¹⁰⁹ In addition, the agency had extended the deadline for changing the goal for the children from reunification to adoption in order to allow the mother time to deal with her serious mental health problems.¹¹⁰ In short, the efforts of the state in this case seemed both exhaustive and specifically designed to assist this particular mother with her individual needs.

Moreover, the Minnesota cases reflect an effort by the state's Department to provide concrete services. For instance, in one case, the state provided a free bus pass and paid for babysitting services in order for a mother to attend visits with her children and school conferences on their behalf and for her to attend recommended drug treatment programs.¹¹¹ In another case, the state provided housekeepers, in-home skills counselor and in-home public health nurses, along with a broad array of outpatient services in an attempt to cure the parents' multifaceted problems dealing with four young children.¹¹² In each of these cases, the appellate court found reasonable efforts had been made and that termination of parental rights was appropriate; however, the broad range, number and aggressive nature of the services offered in these cases suggest that simply providing a more comprehensive definition of reasonable efforts

¹⁰⁸ *Id.* at 150. By contrast, this author has observed that the Massachusetts practice is to provide one-hour of weekly visits for children who are in foster care when the stated goal remains reunification. This is changed to once monthly visits for the period of time between the change of goal to adoption and termination of parental rights by a trial court.

¹⁰⁹ *Id.* at 148.

¹¹⁰ *Id.* at 150.

¹¹¹ *In re Welfare of D.T.J.*, 554 N.W.2d 104, 109 (Minn. Ct. App. 1996). There is some evidence that such concrete services are more effective in facilitating reunification than other, more insight-oriented services. *See infra* note 127.

¹¹² *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 258-59 (Minn. Ct. App. 1996).

in the state statute serves to motivate the state to take the requirement more seriously.

This hypothesis is borne out by reviewing decisions in Colorado. As in Minnesota, the mere existence of detail in the statute seems to have an effect on the number, type and intensity of services offered to families. For instance, in one case, a developmentally disabled mother challenged the state's efforts because the state did not assure that she received services from a specific agency specializing in serving individuals with developmental disabilities.¹¹³ The Colorado Court of Appeals found that the reasonable efforts requirement was nonetheless satisfied because for eleven months the mother received forty-four hours of weekly in-home family preservations services. These services included hands-on repetitive instruction about parenting skills, nutrition, budgeting, and basic life skills. The family preservation worker and the mother's case worker were aware of her developmental disabilities and adjusted their services to accommodate issues associated with her problems. Moreover, the mother ultimately received services from the agency specializing in developmental disabilities, including being placed with a host family. Thus, although the mother may have been disappointed with the outcome, the court's determination that the mother had received sufficient help from the state seems completely reasonable.¹¹⁴

A comparison of these Minnesota and Colorado decisions with the decisions examined in Part II of this article seems to demonstrate some clear advantages to developing a more precise statutory definition of reasonable efforts.¹¹⁵ As an initial matter, it appears that when a state statute more specifically defines reasonable efforts, the state care and protection agency may do more to attempt reunification. This is advantageous for several reasons. First, the state's efforts may work as intended—i.e. they might preserve families where permanent removal of

¹¹³ *People ex rel. J.M.*, 74 P.3d 475 (Colo. App. 2003).

¹¹⁴ *Id.* at 477.

¹¹⁵ Appellate judges in states that have not enacted legislation defining reasonable efforts might instead be guided by the federal guidelines designed to assist states in refining the term. See Crossley, *supra* note 2, at 313.

the children ultimately proves unnecessary. This is a highly desirable result if one assumes, as federal and state legislation does, that the best outcome for children is to remain with their natural families in a safe and healthy environment. Additionally, reunification preserves the state's scarce resources; because of the high cost of long-term foster care, effective reunification services that result in children being returned to their home more quickly are likely much more cost effective.¹¹⁶ Even if this was not true, no state has an inexhaustible number of potential adoptive families who are equipped to handle the substantial emotional challenges of caring for traumatized children who are not reunified with their parents.

In short, there seem to be multiple advantages and few disadvantages to further defining the reasonable efforts requirement at the state level. While there may be some concern that more precise definitions might lead to less flexibility for child protection agencies, the definitions themselves could be structured to allow for diversity in services. In fact, a definition that demanded that state child protection agencies use the best practices and research available at a given time might serve as an impetus to the further development of research in the reasonable efforts arena.

B. USE OF SOCIAL SCIENCE RESEARCH

Although hundreds of reasonable efforts decisions have been made around the country, I have found none that address the question of which specific programs have actually proven useful in reuniting troubled families. Courts rely on logic and intuition with regard to what services might help families reunite rather than any empirical proof of efficacy. Thus, it appears that courts may be ignoring a significant tool that would assist them in judging whether a state agency has used reasonable efforts to reunite a family. Certainly, it seems that part of the analysis should be whether the state is delivering services that have a proven record of success in child protection cases.

¹¹⁶ See, e.g., Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM J.L. & SOC. PROBS. 1, 33 (2002).

Nonetheless, this is no easy task. There has been very little research conducted on the question of the effectiveness of reunification services. Indeed, the existing research is “especially thin, even by child welfare standards.”¹¹⁷ Moreover, there are significant problems for judges in evaluating the quality of such research. Indeed judges attempting to evaluate research might feel that they are being pulled in opposite directions depending on what study they are reading.

This difficulty is well illustrated by reviewing research about a particular program in the related area of family preservation. The emphasis of a family preservation program differs from reunification programs because of the point of intervention. Family preservation programs are designed to intervene in a family’s life before the children are removed from the home; whereas family reunification programs are implemented after a child has been removed from the home.¹¹⁸ There has been substantial research about the value of one particular family preservation program; however, the problem is that the research itself is very conflicting.

The program at issue is “Homebuilders,” an intensive intervention model developed in Washington State in the early 1970s.¹¹⁹ Multiple studies of the use of this model have demonstrated that families who receive “intensive family preservation services” under this model fare better than families in a control group.¹²⁰ However, a federally funded study of five family preservation programs throughout the country debunked these findings and determined that families receiving intensive services were not able to avoid foster-care placement any better

¹¹⁷ Fred Wulczyn, *Family Reunification*, 14:1 THE FUTURE OF CHILDREN 95, 108 (2004), available at http://www.princeton.edu/futureofchildren/publications/docs/14_01_FullJournal.pdf.

¹¹⁸ Kelly, *supra* note 12, at 359.

¹¹⁹ Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129, 136-37 (2001).

¹²⁰ *Id.* at 141.

than families in a control group.¹²¹ This study, in turn, was heavily criticized by a professor at the University of North Carolina School of Social Work, who concluded that the study was defective on a number of grounds and therefore unreliable.¹²² Given this morass of conflicting evidence, both trial and appellate court judges might well throw up their hands and determine that there is little help to be found in social science research.¹²³

Despite this problem, it may be worthwhile for appellate court judges to review the evidence related to the reunification programs because there is some consistency with regard to the evidence. First, if nothing else, research has been able to identify characteristics of families most likely to benefit from reunification services. Specifically, reunification has been more successful with older children than younger children.¹²⁴ Moreover, families with multiple problems, or with children who have disabilities or serious emotional problems, are more difficult to reunify.¹²⁵ Different appellate judges may find this information enlightening for entirely different reasons. For

¹²¹ Westat et al., *Evaluation of Family Preservation and Reunification Programs: Final Report* (Dec. 2002), available at <http://aspe.hhs.gov/hsp/evalfampres94/Final/Vol1/index.htm>.

¹²² Wexler, *supra* note 119, at 142-43.

¹²³ Robert Kelly, who has studied the efficacy of family reunification programs, has along with a co-author, attempted to provide some assistance in assessing the validity of social science research to judges. See Robert F. Kelly & Sarah H. Ramsey, *Assessing and Communicating Social Science Information in Family and Child Judicial Settings: Standards for Judges and Allied Professionals*, 45 FAM. CT. REV. 22 (2007); Robert F. Kelly & Sarah H. Ramsey, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L.Q. 367 (2006). Both of these articles illustrate that unless a judge is thoroughly educated in research methods and statistics, it is a daunting task to evaluate the complexities of social science research.

¹²⁴ See Kelly, *supra* note 12, at 384. Kelly's work attempted to provide "a systematic review and synthesis of findings of evaluations of [family reunification programs] with the goal of developing a social science knowledge base for child protection legal practitioners (judges, court professional staff, and attorneys representing parents, children, and human services agencies)." *Id.* at 360-61.

¹²⁵ See *id.* at 385; Wulczyn, *supra* note 117, at 99-100.

instance, in one state, appellate courts may determine that fewer efforts should be required when a state agency is attempting to reunify a very young disabled child with parents who have multiple problems because reunification is less likely to be successful in the end. Or, a state's appellate courts could take the contrary view that the state must be much more aggressive when faced with such families and not limit itself to the steps taken when attempting to reunify an older, non-disabled child with parents who have fewer problems. Nonetheless, a court charged with evaluating reasonable efforts could certainly benefit from having this information about the relative difficulty of reuniting certain types of families in order to make an informed evaluation of whether the state has done enough.

In addition, while the empirical evidence about reunification programs may be thin, there is some evidence about which approaches are most effective. Robert Kelly, in his review of research studies evaluating family reunification programs, found that several approaches were apt to be more successful than others. First, he found that a "managed care" approach that focused on intensive in-home services was most likely to be successful.¹²⁶ Second, he found that concrete services, such as "emergency cash, housing, medical care, food, transportation, assistance with gaining employment, and/or assistance with securing public assistance" were associated with success, especially with very low-income families.¹²⁷ He also found that more lengthy treatment programs with well-trained and experienced staff tended to be successful.¹²⁸

Fred Wulczyn, in his article about reunification services stressed that because studies of reunification services are limited, professionals in this area must rely more on observation about what works than empirical evidence.¹²⁹ However, he noted that such observation demonstrates that there are several "promising practices" in reunification services.¹³⁰ These include

¹²⁶ Kelly, *supra* note 12, at 378-79.

¹²⁷ *Id.* at 380.

¹²⁸ *Id.* at 382-84.

¹²⁹ See Wulczyn, *supra* note 117, at 108.

¹³⁰ *Id.* at 108.

“strengths-based family services,” intensive family visitation, developmental awareness, ongoing aftercare and cultural sensitivity.¹³¹ He also noted that research establishes that comprehensive and theory based interventions that involve “thoughtful implementation of comprehensive and holistic approaches to addressing the needs of family and children in foster care can have positive effects.”¹³² Certainly appellate judges charged with having to assess the reasonableness of a state agency’s efforts could benefit from at least possessing knowledge of these observations.

The potential importance of such social science research is apparent when reviewing one easily isolated reunification service—visitation. The importance of visitation between natural parents and children placed in foster care has repeatedly been noted as crucial to reunification.¹³³ In addition, the quality of visitation is related to success. Child welfare agencies often limit visitation to one-hour or ninety minutes in a cramped room at a social services agency. During these visits, the parent might have to tend to the needs of multiple children of different ages under the eye of a social worker who is recording his or her observations. Research shows, however, that reunification is far more likely when visitation occurs at the foster home where the parent can engage in normal activities such as putting them to bed or feeding them a meal.¹³⁴ Given this evidence, an appellate judge should question whether the child protection agency that offers only visits in an office setting is truly exercising reasonable efforts.

In addition, it is crucially important for appellate judges to be aware of the research involving the importance of providing

¹³¹ *Id.* at 108-09.

¹³² *Id.* at 109.

¹³³ See, e.g., U.S. DEP’T. OF HEALTH AND HUMAN SERVICES, CHILDREN’S BUREAU: CHILD WELFARE INFORMATION GATEWAY, FAMILY REUNIFICATION: WHAT THE EVIDENCE SHOWS (2006), available at http://www.childwelfare.gov/pubs/issue_briefs/family_reunification/index.cfm; Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 336-37 (1996).

¹³⁴ Beyer, *supra* note 133, at 338.

“culturally competent” reunification services.¹³⁵ Culturally competent services are those that “have the capacity to . . . respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American.”¹³⁶ Culturally sensitive reunification services are vital given the over-representation of certain cultural groups in the nation’s child protection system.¹³⁷ Appellate judges must be sensitive to the need to tailor services to parents who may be outside the mainstream culture and face difficulties related to language barriers and cultural expectations.¹³⁸

In short, in view of even this limited research, judges should be reviewing child welfare agencies’ efforts with a view to whether they are providing concrete and comprehensive services rather than the scattershot menu of services so often seen in service plans. Indeed, without such review, the tendency of agencies can be to develop service plans only loosely connected with the needs of a family.¹³⁹

¹³⁵ It is beyond the purview of this article to extensively examine the need for culturally competent services, but it is imperative for any professional involved in the child protection system to be aware of this concern. At least one state, Minnesota, requires that services be delivered in a culturally competent way. *See supra* notes 89-90 and accompanying text.

¹³⁶ Terry Cross, *Developing a Knowledge Base to Support Cultural Competence*, 14 FAM. RESOURCE COALITION REP. 2, 3-4 (1995-96).

¹³⁷ According to one 2008 article, African-American children comprise less than one-half of the nation’s children, but more than one-fifth of the foster care population. *See Clement supra* note 10, at 413 (noting that African-American children in the child welfare system are more likely to be removed from their homes than white children). In addition, Latino and Native Americans make up a disproportionate number of children in the foster care system. *See also* Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1198-99 (1999).

¹³⁸ Cahn, *supra* note 137, at 1212.

¹³⁹ I have often been dismayed by the cookie cutter approach to reunification efforts contained in some of the service plans for my appellate clients. For instance, at times parents who have never shown signs of a drug problem must engage in random drug screens or parents must attend anger management groups that have not been evaluated for their effectiveness. Beyer has also criticized this approach at length, illustrating that it can do more harm than good. She provides an example of a highly typical component of a service

Judges may well be reluctant to question the clinical decisions of a child welfare agency, which after all, presumably will have some expertise on the issues before it. However, it seems entirely reasonable that judges should be provided with research about the most successful means of reunification when they are charged with assessing whether a child welfare agency has fulfilled its legal obligations in this regard. It would not seem a difficult matter to use some of the money set aside for states to effect reunification efforts to keep judges educated and updated on available information. If this were to happen, judges faced with seemingly perfunctory or mechanical service plans might be more apt to challenge child welfare agencies to do better by declining to rule that the reasonable efforts requirement has been satisfied.

C. DECOUPLING THE REASONABLE EFFORTS REQUIREMENT FROM THE TERMINATION OF PARENTAL RIGHTS DETERMINATION

Another, perhaps more radical approach to dealing with the reasonable efforts problem, is to rethink the rationale for making reasonable efforts a precondition for the termination of parental rights (“TPR”) and freeing children for adoption. Nothing in the ASFA requires states to make reasonable efforts a condition precedent to terminating parental rights.¹⁴⁰ Moreover, the constitutional standards governing TPR require only that a court find by clear and convincing evidence that a

plan: “Ms. Lawrence must attend parenting skills class.” Beyer, *supra* note 133, at 314-15. As Beyer notes, this component of the service plan does not examine the needs of the hypothetical Ms. Lawrence. If it did, it might note that while Ms. Lawrence loves her children, she often has difficulty coping with their needs for long periods of time and loses control of herself. This diagnosis indicates that Ms. Lawrence does not necessarily need parenting classes to help cope with her anger. She may instead need the services of a babysitter to give her an occasional break. The author also notes a further problem with this service plan; it is not logically connected to her needs. The consequences of this can be disastrous, because as Beyer notes, if Ms. Lawrence becomes defensive and does not attend parenting classes she may be accused of not caring for her children. *Id.* at 315. In such an instance, the service plan might actually act to impede, not encourage reunification. Certainly, such plans do not constitute a “reasonable effort” to reunify.

¹⁴⁰ See *supra* notes 27-30 and accompanying text.

parent is unfit and that termination is in the child's best interests.¹⁴¹ Nonetheless, approximately one half of the states have statutes requiring the state to show reasonable efforts before a parent's rights can be terminated and the child freed for adoption.¹⁴² Moreover, even in states where reasonable efforts are not explicitly a precondition to termination, statutes can implicitly create such a requirement.¹⁴³ In short, although neither Congress nor the constitution requires it, most states have assumed that child welfare agencies must make reasonable efforts before a parent's rights can be terminated.

The drawbacks of this approach are apparent from the cases outlined in Part II above in which children were deprived of permanency because of the state's failure to offer sufficient services to the parents during their time in foster care. Indeed, to many reasonable people the prospect of a vulnerable child being left to drift in foster care because of the combined failings of a child welfare bureaucracy and abusive or neglectful parents is simply intolerable. Given this, one must wonder why states have preconditioned permanency for their abused and neglected children on reasonable efforts.

Perhaps the most logical explanation is that there is an assumption that if reasonable efforts are not a precondition to termination, there would be no way to enforce the requirement at all. In essence, making termination dependent on reasonable efforts can be likened to the exclusionary rule in criminal law. The exclusionary rule has long been assumed to act as a deterrent; that is, police officers, faced with the opportunity to cut legal corners presumably do not because they know the

¹⁴¹ See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

¹⁴² Kim, *supra* note 26, at 304.

¹⁴³ See David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 178 (1992). Massachusetts is one such state. Its termination statute contains fourteen non-exclusive factors for the court to consider when deciding to terminate parental rights. MASS. GEN. LAWS ch. 210, § 3(c)(i)-(xiv) (2008). Four of these factors require the court to consider whether the parents were offered or received services to correct the problem but refused or were unable to productively utilize the services on a consistent basis. *Id.* § 3(c)(ii)-(vi).

evidence they will obtain under those circumstances cannot be used to convict a criminal. Similarly, child welfare workers who are tempted to cut corners in providing services to parents will likely be deterred if they know that the children they are working with cannot be freed for adoption until they fulfill their obligation.

Whatever the merits of this logic, it seems both a draconian and ineffective approach to dealing with the problem. If the reasonable efforts requirement is strictly enforced, it places the biggest burden of failure, not on the shoulders of negligent parents and lethargic or overwhelmed caseworkers, but on victimized children, effectively victimizing the children again. When judges strive to avoid this result, the requirement can be so watered down as to lose meaning.¹⁴⁴ Thus, the irony is that making TPR dependent on satisfying the reasonable efforts requirement imposes no deterrent effect on lax caseworkers and agencies whatsoever. When these parties can reliably predict that the reasonable efforts requirement will receive lenient treatment, families that might be reunited if reasonable efforts were employed do not receive the services they need. Given this perverse result, it would behoove states to consider decoupling the reasonable efforts determination from the decision about termination of parental rights. However, at the same time, states should add provisions to their laws that would encourage the delivery of services to needy families as intended by the federal legislation in the first place.

One possible approach is to remove reasonable efforts as a condition precedent to termination while at the same time requiring more judicial scrutiny of reasonable efforts at earlier stages of a child welfare case. As one author notes, there are usually multiple hearings in a child welfare case prior to a hearing on termination of parental rights. More vigorous monitoring of what services are being offered; whether those services are targeted at the problems the family is experiencing and whether they are likely to be effective could be done at these hearings.¹⁴⁵

¹⁴⁴ See *supra* Part II.A.

¹⁴⁵ See Herring, *supra* note 141, at 203-04.

Such an approach is essentially consistent with the ASFA which requires a judicial assessment of reasonable efforts at the point a child is removed from the home and then to establish that the state has made efforts to allow the child to return home.¹⁴⁶ While the ASFA does not require assessments at each stage of child protection legislation, its requirements provide a floor, not a ceiling. States are free to require reasonable efforts at as many junctures of a child welfare case as they choose.¹⁴⁷ This approach may indeed be more effective in enforcing the reasonable efforts requirement than to pair it with the decision on TPR. Certainly, stricter monitoring of whether a family is receiving effective services at an early stage of a child welfare case can be far more helpful in either salvaging the family or moving forward to permanency than a post-hoc determination of reasonable efforts at the termination stage.¹⁴⁸

In addition, states, by statute or common-law, could require more exacting scrutiny of reasonable efforts from judges. Currently, often the only documentation a judge makes with regard to reasonable efforts is to check off a box on a pre-printed form.¹⁴⁹ Check-off formats such as this not only permit casual assessments of reasonable efforts, they may in fact encourage them. To combat this, states could impose a requirement that judges make detailed, written findings with regard to reasonable

¹⁴⁶ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

¹⁴⁷ At least two states, California and Ohio, require by statute that the court make a reasonable efforts assessment at each stage of the court process. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 226-27 (1990).

¹⁴⁸ One commentator notes that in his experience practicing in the child welfare area in Pennsylvania, few judges assess reasonable efforts before the termination stage. See Herring, *supra* note 141, at 194 n.161. Herring notes that "Only when TPR procedures roll around do the courts take the reasonable efforts requirement seriously. . . . At this point, rehabilitation is usually hopeless and requiring the agency to make reasonable efforts at this late date merely punishes the child for the agency's failure." *Id.*

¹⁴⁹ See Crossley, *supra* note 2, at 285; Herring *supra* note 143, at 153-54.

efforts at each stage of the litigation.¹⁵⁰ Judges are surely familiar with mandate; because of the high evidentiary burden in TPR cases they are required to make detailed findings of facts and conclusions of law to support their decisions.¹⁵¹

Requiring judges to make detailed findings at early stages in the litigation has clear advantages. The child protection agency would have an early and clear message about whether the court believes it is fulfilling its legal obligations and if not, what more needs to be done. This information would be delivered in time for the agency to implement the judge's findings before deciding that efforts are hopeless and a TPR petition is necessary. Moreover, the approach has benefits even if not employed in stages of a case before the TPR hearing, and even when the state statute does not require reasonable efforts as a condition precedent to TPR. The judge could still make detailed findings of fact that would outline specifically why the reasonable efforts requirement was not satisfied. Although a negative finding would not derail the petition, the child protection agency would at least have guidance on whether it met its obligations and could adjust its methods accordingly in future cases.

Moreover, judges could use additional weapons if faced with repeated failures to exercise reasonable efforts. For instance, they could hold an agency in contempt or impose a fine.¹⁵² While judges may be reluctant to impose sanctions on an overburdened, underfunded agency assigned to protect vulnerable children, most would find it more palatable than denying a child a permanent home because the reasonable efforts requirement has not been satisfied.

In short, states are not required to link the reasonable efforts requirement to TPR. Instead they seem to be driven to do so by an intuitive sense that the only way to enforce the requirement

¹⁵⁰ Minnesota's reasonable efforts statute requires that judges make findings of fact and conclusions of law on the issue of reasonable efforts. See *supra* note 89 and accompanying text.

¹⁵¹ See, e.g., *Custody of a Minor*, 389 N.E.2d 68, 70 (Mass. 1976) (holding that given the constitutional concerns implicated when terminating parental rights, judges must make "specific and detailed findings demonstrating that close attention has been given to the evidence").

¹⁵² See Herring, *supra* note 141, at 204.

is to do so. Given that alternatives not only seem to be available, but might actually be more effective in delivering reasonable efforts, states should explore changing their statutes to separate the reasonable efforts requirement from TPR determinations. The ironic and welcome consequence of such action might well be overall better enforcement of the reasonable efforts requirement.

IV. CONCLUSION

There are no perfect solutions to the dilemma posed by the reasonable efforts requirement. It is almost certainly a good thing to require agencies that remove children from their families to make realistic attempts to return them at the earliest possible date. Nonetheless, failures will inevitably occur and courts will repeatedly be faced with instances where the state has not met its legal obligation in this regard.

Courts have sometimes addressed this failure by requiring a “do-over” and requiring states to reinitiate its attempts to reunite children with their families. The drawbacks of this approach are so clear, and so potentially damaging to children, that courts have on many occasions instead glossed over the legal requirement of reasonable efforts.

The child protection system, faced with this problem must pursue at least the best inadequate solution that it can. The approaches outlined in this article—giving social services clear guidelines on what is expected of them; constantly monitoring social services research to determine what is most likely to help troubled families; providing judicial scrutiny of whether agencies are meeting their obligations at early rather than late stages; and imposing sanctions least likely to affect already victimized children—hold promise in making incremental change.



SPECIAL EDUCATION ASSESSMENT POLICY UNDER THE NO CHILD LEFT BEHIND ACT AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Regina R. Umpstead¹

INTRODUCTION

Since its passage in 2001, the No Child Left Behind Act (NCLB)² has been a source of controversy in the education policy community because of the law's far reaching requirements that expanded the role of the federal government in the areas once reserved for states – strengthening curricular content standards for all publicly funded schools, raising the qualification standards for all teachers, designing assessment regimens that apply to all public school students, and implementing accountability measures for schools whose students do not demonstrate proficiency against those standards. Calls for modifications to the law started before the U.S. Department of Education (USDE), tasked with the law's implementation, published its first set of regulations and guidance.

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² No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2006 & Supp. II 2008).

Eight years later, the new federal administration has clear intentions to define national expectations and outcomes for all students and teachers further, as evidenced by the requirements placed on the School Finance Stabilization Funds and the Department of Education's Race to the Top incentive grants. There is heightened anticipation that the Obama administration and Congress will push for substantive revisions to NCLB in early 2010, bringing with it relief for the law's most controversial provisions. What most commentators fail to appreciate, however, is the extent to which the Bush administration and Congress worked to modify the law's thorniest issues and align them with other education laws, specifically the Individuals with Disabilities Education Act (IDEA), to provide a tighter, more coherent federal vision for American's public education system.

Of particular interest was the significant consternation NCLB's passage caused in the special education community. Among its requirements, the landmark legislation provided sweeping guarantees that students with disabilities would be expected to achieve improved academic performance in step with their general education peers, a laudable goal sought by a generation of special education advocates. Yet concerns were raised about the means through which NCLB would achieve this objective. While most educators agreed with its principal purpose of improving educational results for students with disabilities, they were still concerned about the potential negative effects of the law on these students, the most notable of which was their inclusion in the common standardized testing regimen.³

Proponents described NCLB as an opportunity to enhance the educational rights and opportunities for students with disabilities.⁴ Several articles describe the potential benefit to

³ Christin E. Keele, *Is the No Child Left Behind Act the Right Answer for Children with Disabilities?*, 72 UMKC L. REV. 1111, 1117-18 (2004); Michael J. Wasta, *No Child Left Behind: The Death of Special Education?*, 88 PHI DELTA KAPPAN 298, 299 (2006).

⁴ Beth R. Handler, *Two Acts, One Goal: Meeting the Shared Vision of No Child Left Behind and Individuals with Disabilities Education Improvement Act of 2004*, 80(1) THE CLEARING HOUSE 5, 5-6 (2006); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU.

students with disabilities from NCLB's expectations for improved educational performance and closing the achievement gap among students found in the law's requirements that such students be included and make progress in the general education curriculum and participate in and achieve a proficient level on state academic assessments.⁵

Detractors saw NCLB as a threat to the substantial rights that were afforded to students with disabilities under the Individuals with Disabilities Education Act (IDEA) because, as enacted, NCLB required that students with disabilities be fully included in its standardized testing mandates.⁶ Two main categories of concern emerged. First, a shift from IDEA's focus on the unique needs of each child with a disability to a school's required level of attainment on the tests under NCLB was seen as a potential threat to the rights of students with disabilities under IDEA to a free appropriate public education (FAPE).⁷ Second, concerns arose regarding potential negative effects on the students themselves, such as increased anxiety, a shift in curriculum from life skills and personal success to test taking techniques, and the likelihood of a higher drop-out rate for

EDUC. & L.J. 561, 574-75 (2003); Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 HASTINGS WOMEN'S L.J. 1, 27-28 (2004).

⁵ Handler, *supra* note 4, at 6; Johnson, *supra* note 4, at 574-75; Rosenbaum, *supra* note 4, at 27-28.

⁶ Matthew R. Plain, Comment, *Results Above Rights? The No Child Left Behind Act's Insidious Effect on Students with Disabilities*, 10 ROGER WILLIAMS U. L. REV. 249, 257-58 (2004); Michael Metz-Topodas, Comment, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 79 TEMP. L. REV. 1387 (2006); Erin G. Frazor, Comment, *“No Child Left Behind” in Need of a New “IDEA”: A Flexible Approach to Alternate Assessment Requirements*, 36 GOLDEN GATE U. L. REV. 157, 159 (2006); Keele, *supra* note 3, at 1116-17.

⁷ Keele, *supra* note 3, at 1119; Plain, *supra* note 6, at 258; Metz-Topodas, *supra* note 6, at 1409. *See also* Bd. of Educ. of Twp. High Sch. Dist. 140 v. Sec'y of Educ., No. 07-2008, 2008 U.S. App. LEXIS 2937 (7th Cir., Jan. 15, 2008)(finding any potential conflict between NCLB and IDEA's FAPE and Individualized Education Program (IEP) requirements would be resolved in favor of NCLB as the later legislative enactment).

students with disabilities because of the increased academic pressure.⁸

At the same time as this seminal conversation unfolded, both NCLB and IDEA were being amended through administrative and legislative processes to address many of the concerns raised by commentators regarding the full inclusion of students with disabilities in NCLB's accountability systems. The 2004 reauthorization of IDEA specifically incorporated many of the key NCLB accountability requirements.⁹ In addition, the U.S. Department of Education issued regulations that permitted certain students with disabilities to take alternate assessments rather than the standardized general assessments required under the original version of the law.¹⁰

The subsequent modifications provided greater alignment between the two laws. First, there is an agreement in the overall purposes of the laws to improve the educational outcomes for students with disabilities.¹¹ Second, there is better coherence in their accountability provisions because both require the same performance goals and indicators for students with disabilities, that all students must participate in assessments, and that their scores must be reported and count towards a school's Adequately Yearly Progress (AYP) calculation.¹² Third, there is better consistency among their assessment requirements, which now permit alternate assessments.¹³

⁸ Keele, *supra* note 3, at 1119-22; Metz-Topodas, *supra* note 6, at 1397-99.

⁹ See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004); 20 U.S.C. § 1400 (2000 & Supp. IV 2004).

¹⁰ Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200), *available at*

<http://www.ed.gov/legislation/FedRegister/finrule/2003-4/120903a.pdf> (last visited Nov. 11, 2009).

¹¹ Handler, *supra* note 4, at 5.

¹² OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., ALIGNMENT WITH THE IDEA AND NCLB 4-5 (FEB. 2, 2007).

¹³ *Id.* at 5.

This article explores the tension between the rights and requirements IDEA and NCLB placed on students with disabilities and the ensuing negotiations that took place within the federal government policy-making process to relieve that tension. Sections II and III lay the foundation for the article by detailing the history of both IDEA and NCLB. Section II begins with a description of the history of NCLB and IDEA, which details the original form of their enactments in the 1960s and 1970s. Next, it contains the discussion of federal education policy for students with disabilities under both IDEA and NCLB, and examines the relevant portions of both laws. Using this information, it then explains the tension in the requirements of both laws and the debate that has ensued about including students with disabilities in general local and state standardized tests.

Sections IV and V examine the federal government's assessment policy for students with disabilities, as articulated in both NCLB and IDEA. It begins by tracing the development of NCLB's requirements for participation of students with disabilities in assessments issued by the U.S. Department of Education under NCLB and the resulting modifications to the full inclusion requirement in NCLB's original text to accommodate the concerns of special education advocates. It then details the ways in which the laws were aligned.

Section VI concludes the article with the finding that many of the concerns raised by state and local advocates about the participation of students with disabilities in federally required assessment systems have been resolved. It is evident that both Congress and federal administrative agencies listened to feedback on the topic and responded by modifying NCLB's assessment requirements, reducing the requirement from all students taking the same standardized test to establishing five different assessment options and a 3 percent exemption in AYP calculations for students with disabilities.

These modifications to NCLB were made within the first five years of the law's enactment. Moreover, Congress then deliberately changed IDEA to reference NCLB's new assessment requirements while still maintaining more flexibility regarding alternate assessment options. The manner in which these issues were redressed is a good illustration of the ever-evolving nature of the laws and the critical roles Congress and federal administrative agencies play in the policy development process.

I. FEDERAL EDUCATION POLICY

The 1960s and 1970s saw a number of federal legislative efforts enacted to address the specific needs of educationally deprived children. Most significantly, Congress first turned its attention to children from low-income families through the Elementary and Secondary Education Act of 1965 (ESEA) and then to children with handicapping conditions in the Education for all Handicapped Children Act of 1975 (EHA). Although both laws offered financial support in exchange for compliance with certain federal program requirements, the types of the requirements differed. ESEA focused on adopting effective programs while EHA established procedural rights for students and parents, and imposed substantive responsibilities on the school districts that educated them. Yet, although these laws were conceived separately, contained different goals, and primarily covered distinct sets of students, even in their initial form, there was some overlap in their coverage of students with disabilities.

HISTORY

The Elementary and Secondary Education Act,¹⁴ enacted in 1965, was promoted as an educational contribution to both the federal civil rights movement and the War on Poverty.¹⁵ It was designed to expand and improve the educational programs of the nation's elementary and secondary schools that met the special educational needs of children from low-income families.¹⁶ ESEA created a significant level of federal involvement in K-12 education by providing almost \$1 billion under Title I to support the schooling of educationally

¹⁴ Pub. L. No. 89-10, 79 Stat. 27 (1965).

¹⁵ LEE W. ANDERSON, CONGRESS AND THE CLASSROOM: FROM THE COLD WAR TO "NO CHILD LEFT BEHIND" 62 (2007); CANDACE CORTIELLA, NAT'L. CTR. ON EDUC. OUTCOMES, NCLB AND IDEA: WHAT PARENTS OF STUDENTS WITH DISABILITIES NEED TO KNOW & DO (2006), *available at* <http://www.cehd.umn.edu/nceo/onlinepubs/parents.pdf>.

¹⁶ § 201, 79 Stat. 27.

disadvantaged children.¹⁷ ESEA was a categorical rather than a general aid program, having a funding formula under Title I of the Act that tied federal financial support to the number of children from impoverished families in each school district, thereby directing more aid to districts with higher concentrations of low-income families.¹⁸ States were directed to use federal funds to support programs of “sufficient size, scope, and quality to give reasonable promise of substantial progress” towards meeting the needs of these educationally deprived children.¹⁹ ESEA also called for measuring the educational achievement of the beneficiaries of Title I projects.²⁰

In Congress’s first amendment to the ESEA in 1966, it began offering grants through Title VI for the education of handicapped children through preschool, elementary, and secondary school programs.²¹ The 1970 amendments to ESEA gave these provisions the title of the “Education of the Handicapped Act,”²² and the 1974 ESEA amendments revised this section of the law’s purpose to promote “full educational

¹⁷ Anderson, *supra* note 15, at 63.

¹⁸ § 203(a)(2), 79 Stat. at 28; Anderson, *supra* note 15, at 63; EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY 79 (1969).

¹⁹ § 205(a)(1), 79 Stat. at 30.

²⁰ STEPHEN K. BAILEY & EDITH K. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 51 (1968) (“[T]hat effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children.” (quoting §205(a)(5), 79 Stat. at 31)).

²¹ Elementary and Secondary Education Act, Pub. L. No. 89-750, 80 Stat. 1191, 1204-08 (1966).

²² Elementary and Secondary Education Act, Pub. L. No. 91-230, 84 Stat. 171, 175-88 (1970).

opportunities to all handicapped children”²³ rather than just to assist with funding for school programs for these students.²⁴

In 1975, The Education for all Handicapped Children Act (EHA) was passed as a separate act. Although it was based in part on the earlier versions of ESEA’s Education of the Handicapped Act provisions, it greatly expanded the scope of the rights offered to students and parents and the responsibilities of the states who received funding under the law.²⁵ Its key provisions included a “child find and zero reject” policy, which required that all handicapped children be identified, evaluated, and offered educational services.²⁶ These special education and related services²⁷ were to be based on the unique needs of each child as embodied in their individualized education program that had a statement of the child’s current level of educational performance, specific annual goals, and the services that would be provided to the child.²⁸ A least restrictive environment mandate required that the education should take place, to the maximum extent appropriate, in classes with non-handicapped peers.²⁹ In addition, due process and procedural

²³ Elementary and Secondary Education Act, Pub. L. No. 93-380, 88 Stat. 580 (1974).

²⁴ Elementary and Secondary Education Act, Pub. L. No. 91-230 § 611(a), 84 Stat. 171, 178 (1970).

²⁵ Education for all Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). “It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.” *Id.* at § 3(c).

²⁶ *Id.* at § 612(2)(C).

²⁷ *Id.* at § 4(a).

²⁸ *Id.* at § 4(a)(19).

²⁹ *Id.* at § 612(5).

safeguards were included for the parents of handicapped children.³⁰

II. IDEA

The Education for All Handicapped Students Act (EHA) has been reauthorized through the years and today it is known as the Individuals with Disabilities Education Act (IDEA).³¹ IDEA continues to provide students with disabilities³² between the ages of three and twenty-one³³ with the basic guarantees introduced by EHA of a free appropriate public education³⁴ emphasizing special education³⁵ and related services³⁶ designed

³⁰ *Id.* at § 615.

³¹ The name of the statute was changed in the 1990 revision. Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1142 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006 & Supp. II 2008)).

³² The definition of a “child with a disability” has expanded over the years. The current definition is as follows: “a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities and who, by reason thereof, needs special education and related services.” 20 U.S.C. § 1401(3) (2006).

³³ 20 U.S.C. § 1412(a)(1)(A) (2006).

³⁴ *Id.*

³⁵ “Special education” means “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. . . .” 20 U.S.C. § 1401(29) (2006).

³⁶ “The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to

to meet their unique needs,³⁷ delivered in the least restrictive environment³⁸ as articulated in each student's individualized education program (IEP).³⁹ Providing full educational opportunity to all children with disabilities remains one of the law's primary goals,⁴⁰ and its basic statement of purpose has been expanded to clarify that the law is designed to prepare students with disabilities for "further education, employment, and independent living."⁴¹

In light of these provisions, special education policy under the IDEA traditionally has differed from general education in two significant ways: (1) the focus in special education has been on compliance with the procedures and requirements set forth in IDEA and (2) accountability for individual student performance has been "individualized, private, and based on the IEP review process," not benchmarked against educational standards and assessed through standardized testing and publicly reported.⁴²

In addition, students with disabilities generally have not participated in standardized testing. Their exclusion was motivated by several factors: (1) schools were not legally required to include them; (2) schools wanted to achieve the highest test scores possible; (3) teachers and parents desired to protect students from the stress of testing; (4) schools did not offer many accommodations to allow students with disabilities

benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A) (2006).

³⁷ 20 U.S.C. § 1400(d) (2006).

³⁸ 20 U.S.C. § 1412(a)(5) (2006).

³⁹ 20 U.S.C. § 1412(a)(4) (2006).

⁴⁰ 20 U.S.C. § 1412(a)(2) (2006).

⁴¹ 20 U.S.C. § 1400(d)(1)(A) (2006).

⁴² Margaret J. McLaughlin & Martha Thurlow, *Educational Accountability and Students with Disabilities: Issues and Challenges*, 17 EDUC. POL'Y 431, 435-36 (2003).

to take the tests.⁴³ A combination of the personalized rights offered under IDEA to students with disabilities and their general exclusion from standardized testing essentially established a dual system of education in the U.S.: one group system for regular, general education students, and another individualized system for special education students.⁴⁴

IDEA 1997

A significant shift in the philosophy of special education, with a change in focus from access to education to higher expectations for student performance, began with the 1997 revisions to IDEA⁴⁵ and continues in its latest version,⁴⁶ which was reauthorized in 2004.⁴⁷ One significant finding in the 1997 version of the Act driving this change was the fact that achievement of the IDEA's objectives had been impeded by "low expectations" and that research demonstrates having higher expectations for children with disabilities and ensuring "access

⁴³ National Transition Network, *Education Reform: What does it mean for students with disabilities?* (Sept. 1999), available at <http://ici2.umn.edu/ntn/pub/briefs/edre.html> (last visited Nov. 11, 2009).

⁴⁴ See generally Barbara Gaddy, Brian McNulty, & Tim Waters, Mid-continent Research for Educ. & Learning, *The Reauthorization of the Individuals with Disabilities Act: Moving Toward a More Unified System*, 4 (April 2002), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/42/ba.pdf (last visited Nov. 11, 2009).

⁴⁴ MARGARET A. WINZER, *THE HISTORY OF SPECIAL EDUCATION: FROM ISOLATION TO INTEGRATION* (1993).

⁴⁵ Pub. L. No. 105-17, § 601(c)(3)-(5), 111 Stat. 37, 39-40 (codified as amended at 20 U.S.C. § 1400(c)(3)-(5) (2006 & Supp. II 2008)).

⁴⁶ 20 U.S.C. § 1400(c)(3)-(5) (2006).

⁴⁷ Pub. L. No. 108-446, 118 Stat. 2738 (codified at 20 U.S.C. §§ 1400-1482 (2006 & Supp. II 2008)).

in the general curriculum to the maximum extent possible” was likely to make it more effective.⁴⁸

IDEA 1997 introduced a new form of accountability policy by requiring both a higher level of educational achievement for students with disabilities and the measurement of this attainment through general state and district assessment programs.⁴⁹ IDEA 1997 called for enhanced expectations for students with disabilities to be reflected in the academic and functional goals⁵⁰ and special education and related services⁵¹ provided to students in their IEPs with an overall goal of allowing them to “make progress” in the general curriculum.⁵² Schools and states were to be held accountable for the education of students with disabilities by setting high performance goals and indicators for them;⁵³ including them in the regular local and state assessments⁵⁴ or in alternate assessments if they were not able to take the general assessments;⁵⁵ and reporting their performance in the same manner as nondisabled students.⁵⁶

⁴⁸ Individuals with Disabilities Education Act, Pub. L. No. 105-17, § 601(c)(3)-(5), 111 Stat. 37, 39 (codified as amended at 20 U.S.C. § 1400(c)(3)-(5) (2006 & Supp. II 2008)).

⁴⁹ Gaddy, et al., *supra* note 44, at 4.

⁵⁰ 20 U.S.C. § 1414(d)(1)(A)(ii) (1994 & Supp. III 1997), *amended by* 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2000 & Supp. IV 2004).

⁵¹ *Id.* § 1414(d)(1)(A)(iii).

⁵² *Id.* § 1414(d)(1)(A)(i)-(iii).

⁵³ *Id.* § 1412(a)(16)(A)-(B).

⁵⁴ “Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary.” *Id.* § 1412(a)(17)(A).

⁵⁵ *Id.* § 1412(a)(17)(A)(i); McLaughlin & Thurlow, *supra* note 42, at 438.

⁵⁶ “The State educational agency . . . reports to the public . . . the number of children with disabilities participating in regular assessments . . . [and] alternate assessments . . . [and] [t]he performance of those children on regular assessments . . . and on alternate assessments. . . .” 20 U.S.C. § 1412(a)(17)(B)(i)-(iii) (1994 & Supp. III 1997) *amended by* 20 U.S.C. § 1412(a)(16)(D)(i)-(iv) (2000 & Supp. IV 2004).

These changes created greater alignment between the accountability systems for students with disabilities and general education students.⁵⁷ In addition, with these changes, IDEA 1997 implicitly defined participation in local and state assessments as conferring an educational benefit on students with disabilities.⁵⁸ Moreover, it altered IDEA's accountability scheme from one best characterized as legal compliance with the procedures contained in the law and the student's IEP to one of educational accountability that publicly reports aggregate student performance in relation to a common educational standard.⁵⁹

This change in the accountability system for students with disabilities under IDEA was reflective of broader changes in the overall general education accountability climate nationwide. Two dominant features of state accountability in place at the time were (1) a focus on student academic performance demonstrated by assessments and (2) consequences, through public reporting or rewards and/or sanctions, for failing to attain specific levels of performance.⁶⁰

Another manifestation of this climate of accountability is the requirements in the No Child Left Behind Act.

III. NCLB AND THE SPECIAL EDUCATION CONTROVERSY

ESEA has also been reauthorized several times since its original 1965 enactment. Its latest reauthorization is entitled the No Child Left Behind Act of 2001 (NCLB). Although its original focus was on educationally deprived children from low income households, and the law's funding still flows primarily to districts with high percentages of these students, NCLB's requirements now apply to all students in schools receiving

⁵⁷ McLaughlin & Thurlow, *supra* note 42, at 438.

⁵⁸ *Id.*

⁵⁹ *Id.* at 435-36.

⁶⁰ *Id.* at 433-34.

federal monies. This broadened goal is reflected in its purpose, which states that the Act is intended to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”⁶¹ It is based on four pillars: stronger accountability for results, more freedom for states and communities, proven education methods, and more choices for parents.⁶² The accountability principle is most relevant to this discussion.

NCLB’s school accountability system has three critical components: academic content standards, academic achievement standards, and a measurement of progress towards achieving these standards through assessments, adequate yearly progress, and public report cards.⁶³ Under the law, states specify their own rigorous content and achievement standards that include the same knowledge, skills, and levels of achievement expected of all elementary and secondary school students in math, reading or language arts, and science⁶⁴ and evaluate whether schools are successful in teaching students the

⁶¹ 20 U.S.C. § 6301 (Supp. I 2001) (amending 20 U.S.C. § 6301 (2000)) (emphasis added).

⁶² U.S. DEPT OF EDUC., FOUR PILLARS OF NCLB (July 1, 2004), *available at* <http://www.ed.gov/nclb/overview/intro/4pillars.html> (last visited Nov. 11, 2009). It has also been characterized as being guided by the following six principles: accountability, highly qualified teachers, scientifically based instruction, local flexibility, safe schools, and parent participation and choice. H. Rutherford Turnbull III, *Individuals with Disabilities Education Act Reauthorization: Accountability and Personal Responsibility*, 26 REMEDIAL AND SPECIAL EDUC. 320, 321-22 (2005).

⁶³ See Cortiella, *supra* note 15, at 17-18; Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200).

⁶⁴ “Each State plan shall . . . adopt challenging academic content standards and challenging student academic achievement standards. . . . The academic standards . . . shall be the same academic standards that the State applies to all schools and children. . . .” Subjects are determined by the State, “including at least mathematics, reading or language arts, and . . . science. . . .” 20 U.S.C. § 6311(b)(1)(A)-(C) (2006).

knowledge and skills defined by the content standards using academic assessments.⁶⁵

As enacted, NCLB permits students with disabilities to participate in the assessments using reasonable adaptations consistent with IDEA.⁶⁶ Assessments are to be administered every year in grades three through eight and at least once in high school.⁶⁷ NCLB sets a goal of having 100 percent of the students in this country achieve a “proficient” score, as defined by the state, on its assessments by the 2013-2014 academic year.⁶⁸ In the meantime, the law has states adopt an AYP standard that marks the way towards meeting student academic achievement goals and reducing the gaps in achievement among different student groups.⁶⁹ The law requires reporting of student achievement scores of all students and certain student groups, including economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.⁷⁰ Ninety five percent of all students enrolled must participate in the assessments for

⁶⁵ “Each State . . . shall . . . implement[] a set of high-quality, yearly student academic assessments . . . that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school . . . in enabling all children to meet the State’s challenging student academic achievement standards. . . . Such assessments shall be the same academic assessments used to measure the achievement of all children.” 20 U.S.C. § 6311(b)(3)(A)&(C)(i). *See also* Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200).

⁶⁶ 20 U.S.C. § 6311(b)(3)(C)(ix)(II) (2006).

⁶⁷ *Id.* § 6311(b)(3)(C)(v)&(vii).

⁶⁸ “Each State must establish a timeline for making AYP that ensures that, not later than the 2013-2014 school year, all students in each group . . . will meet or exceed the State’s proficient level of academic achievement.” 34 C.F.R. § 200.15.

⁶⁹ 20 U.S.C. § 6311(b)(2)(B). States are able to define their own student percentage achievement targets each year (e.g. step, continuous improvement, or growth model) until the one hundred percent proficiency goal requirement in 2014.

⁷⁰ *Id.* § 6311 (b)(2)(C)(v).

the results to count as valid.⁷¹ To calculate AYP, all students and each group of students within a school must meet or exceed the state's annual measurable objectives.⁷² Schools face sanctions if they do not meet these student achievement targets. If even one student group does not, the school does not meet its AYP target and it is subject to sanctions.⁷³

There are four stages of consequences for failure to make AYP. The initial two stages are called "*school improvement*" and stage one begins when a school fails to make AYP for two consecutive years.⁷⁴ The school must notify parents about its school improvement status, offer all students enrolled in the school the opportunity to transfer to a different public school that has not been labeled for school improvement, undertake professional development for its teachers, and develop a school plan to address the academic issues in the school.⁷⁵ If the identified school does not meet AYP for the third consecutive year, the students who remain in the school must be offered supplemental services that consist of extra academic help such as individual tutoring.⁷⁶

⁷¹ *Id.* § 6311(b)(2)(I)(ii).

⁷² 34 C.F.R. § 200.20(a)(2). States have flexibility in setting the minimum group size, so if there are not enough students within a school to meet the group size requirement, the school does not have to report the scores of students in a particular subgroup. *Id.*

⁷³ 34 C.F.R. § 200.20(a)(1). There is a "safe harbor" provision that allows a school to count a subgroup as meeting AYP even if it does not meet the state's annual measurable objections if the rest of the school makes AYP and the subgroup has a percentage of students in the group that are below proficient that has decreased by at least 10 percent from the previous year. 34 C.F.R. § 200.20(b).

⁷⁴ 20 U.S.C. § 6316(b)(1)(A) (2006).

⁷⁵ *Id.* § 6316(b)(1)-(3).

⁷⁶ *Id.* § 6316(b)(5); see also U.S. DEP'T OF EDUC., *Description of Supplemental Educational Services* (2007), available at <http://www.ed.gov/nclb/choice/help/ses/description.html> (last visited Nov. 11, 2009).

If the school does not meet AYP for the fourth consecutive year, it moves to the level three intervention called “*corrective action*.”⁷⁷ This stage involves significant changes including new curriculum, staff changes, a longer school day or year, the hiring of outside consultants, and the continuation of the earlier options offered to parents for school choice and supplemental services.⁷⁸

After one year on a corrective action plan, if the school still does not meet its AYP targets, it must be restructured under the step called “*restructuring*.”⁷⁹ This level four intervention requires either the replacement of most of the school’s staff or the implementation of an alternative governance system.⁸⁰

NCLB AND IDEA: TENSION BETWEEN THE REQUIREMENTS

Congress’s vision of a “high-quality education” in NCLB is that all students should have a “fair, equal, and significant opportunity” to obtain proficiency on state academic assessments that reflect challenging academic expectations.⁸¹ Its vision of an “appropriate” education in IDEA is one that is individualized to the child with a disability, affords them with the opportunity to receive an “educational benefit,”⁸² and prepares them for “further education, employment and independent living.”⁸³ Since both laws apply to students with disabilities, the educational community began to discuss the potential opportunities and problems for these students after NCLB’s passage. Some commentators saw NCLB as a positive development in the field, one which could raise the academic

⁷⁷ 20 U.S.C. § 6316(b)(7) (2006).

⁷⁸ *Id.*

⁷⁹ *Id.* § 6316(b)(8).

⁸⁰ *Id.*

⁸¹ 20 U.S.C. § 6301 (2006).

⁸² *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200-01 (1982).

⁸³ 20 U.S.C. § 1400(d)(1)(A) (2006).

expectations and opportunities for students with disabilities,⁸⁴ while others viewed it as a threat, one which could have a negative effect on their education.⁸⁵

The ideological battle was fought around the laws' requirements regarding the participation of students with disabilities in state standardized testing. NCLB requires the inclusion of students with disabilities in state and district standardized tests,⁸⁶ the separate reporting of their scores,⁸⁷ and that a sufficient number of them obtain a proficient score on these tests in order to count towards a school's AYP calculation.⁸⁸ Although IDEA 1997 also called for the participation of students with disabilities in state assessments, it provided more testing options, specifically alternate assessments in addition to the regular assessment system.⁸⁹ In its original form, NCLB contemplated that all students would take the regular state assessments using state grade-level content and achievement standards.⁹⁰

⁸⁴ Handler, *supra* note 4; Johnson, *supra* note 4; Rosenbaum, *supra* note 4.

⁸⁵ Keele, *supra* note 3; Metz-Topodas, *supra* note 6; Plain *supra* note 6.

⁸⁶ 20 U.S.C. § 6311(b)(3)((C)(ix)(I)&(II) (2006).

⁸⁷ *Id.* § 6311(h)(1)(C)(i).

⁸⁸ *Id.* § 6311(b)(3)(C).

⁸⁹ "Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations where necessary. As appropriate, the State or local educational agency – (i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and (ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments." 20 U.S.C. § 1412(a)(17)(A) (1994 & Supp. III 1997), *amended by* 20 U.S.C. § 1412(a)(16)(A) (2000 & Supp. IV 2004), available at <http://www.ed.gov/policy/speced/leg/idea/idea.pdf>.

⁹⁰ "Such assessments shall – (i) be the same academic assessments used to measure the achievement of all children; (ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards . . . ; (ix) provide for -- (I) the participation in such assessments of all students; (II) the reasonable adaptations and accommodations for students with

The commentators that viewed NCLB's assessment and reporting requirements as benefitting students with disabilities made four main points. First, NCLB sheds light on the students receiving special education services, many of whom do not really belong there and who can, with the proper support, achieve at the same level as their regular education counterparts.⁹¹ Since most students with disabilities spend the majority of their time in general education classrooms, including them in the accountability system is likely to raise educators' academic expectations for them.⁹² Second, students with disabilities, even those with the most significant cognitive disabilities, benefit instructionally from participation in standardized tests.⁹³ Third, assessments help schools evaluate the academic progress of all students.⁹⁴ Fourth, all kids, including those in special education, need to learn certain academic skills,⁹⁵ and in the past, many students with disabilities were not even taught basic academic concepts.⁹⁶

disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." 20 U.S.C. § 6311(b)(3)(C) (2006) (internal citation omitted).

⁹¹ Editorial, *Leaving Some Children Behind*, N. Y. TIMES, Jan. 27, 2004, at A22.

⁹² Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698 (Dec. 9, 2003) (to be codified at C.F.R. pt. 200).

⁹³ U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, 11 (July 20, 2007), *available at* <http://www.ed.gov/policy/speced/guid/nclb/twopercent.doc>.

⁹⁴ *Id.*

⁹⁵ U.S. DEP'T OF EDUC., WORKING TOGETHER FOR STUDENTS WITH DISABILITIES: INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) AND NO CHILD LEFT BEHIND ACT (NCLB) FREQUENTLY ASKED QUESTIONS [hereinafter U.S. DEP'T OF EDUC., *Working Together for Students*], Dec. 2005, *available at* <http://www.ed.gov/admins/lead/speced/toolkit/faqs.doc> (last visited Nov. 11, 2009).

⁹⁶ Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698 (Dec. 9, 2003) (to be codified at C.F.R. pt. 200).

Those commentators that were concerned about NCLB's potential negative effects on students with disabilities also had four primary concerns. First, teachers would shift their focus from an individual student's improvement to the overall school's academic success⁹⁷ thereby potentially creating a substantive violation of IDEA by denying students with disabilities an educational benefit.⁹⁸ Second, teachers would teach to the tests rather than impart the broader range of knowledge and skills that students need to learn.⁹⁹ Third, including students with disabilities in standardized testing could create a high level of anxiety in them.¹⁰⁰ Fourth, the pressure to perform well on these tests could produce a backlash against students with disabilities and induce higher drop-out rates for them.¹⁰¹

It is the first concern that best describes the underlying legal tension between IDEA and NCLB. Without individual consideration of the student's educational status and needs, NCLB was seen as undermining a cornerstone of IDEA, the individually crafted education plans with realistic goals that are specifically designed to confer an educational benefit on a particular student.¹⁰² In essence, it was argued, NCLB "transforms the philosophy of special education from individual-based assessment" to a group-based "standardized accountability" based on an arbitrary number of students participating and the scores received.¹⁰³ NCLB was also seen as a threat to a special education student's right not to participate in an assessment at all if the student's IEP team, a team that has both educational expertise and familiarity with the child, determines that the child would receive a greater educational

⁹⁷ Keele, *supra* note 3, at 1119.

⁹⁸ Plain, *supra* note 6, at 250.

⁹⁹ Keele, *supra* note 3, at 1119-20.

¹⁰⁰ *Id.* at 1120.

¹⁰¹ *Id.* at 1119.

¹⁰² *Id.* at 1133; Plain, *supra* note 6, at 257.

¹⁰³ Keele, *supra* note 3, at 1116.

benefit from not participating,¹⁰⁴ even though IDEA directed them to be included either through regular or alternate assessments. Although states were required to offer students with disabilities access to and the ability to make progress in the general curriculum,¹⁰⁵ under IDEA 1997, they were not required to engage in the curriculum in the same manner, practice the same skills, or even make the same academic progress as general education students.¹⁰⁶ In light of these concerns advocates argued that a broader range of testing methods than was offered under NCLB should be available to utilize with the identified learning styles of students with disabilities.¹⁰⁷

Both the U.S. Department of Education (USDE) and Congress responded to these concerns about the alignment of the laws and the advisability of including all students with disabilities in a state's general standardized assessment system. The USDE promulgated regulations under NCLB and Congress revised IDEA in its reauthorization process.

IV. ALTERNATE ASSESSMENTS: THE FEDERAL GOVERNMENT'S RESPONSE TO CONCERNS ABOUT INCLUDING ALL STUDENTS WITH DISABILITIES IN NCLB'S ACCOUNTABILITY REQUIREMENTS

The USDE acted quickly to modify No Child Left Behind's (NCLB) original assessment provisions that did not allow students with disabilities to take alternate assessments as part of its accountability regime. These changes transformed NCLB's rigid definition of assessments, with every student taking the exact same test, to a more flexible requirement of every student taking an assessment based on the same content standards, with some having alternate or modified achievement standards better

¹⁰⁴ Plain, *supra* note 6, at 252-53.

¹⁰⁵ 20 U.S.C. § 1414(d) (2006).

¹⁰⁶ Keele, *supra* note 3, at 1126.

¹⁰⁷ *Id.* at 1133.

suited to their abilities. Congress, in its 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA), specifically incorporated NCLB's revised assessment requirements into its text, thereby bringing the laws' assessment requirements into greater alignment.

THE CURRENT STATUS OF NCLB ASSESSMENT POLICY FOR STUDENTS WITH DISABILITIES

Under NCLB, students with disabilities, except for a small percentage who may participate in alternate assessments, must take and successfully perform on the regular academic standardized tests.¹⁰⁸ Currently, there are five different ways in which students with disabilities may participate in the state assessment systems: (1) a general grade-level assessment; (2) a general grade-level assessment with accommodations;¹⁰⁹ (3) an alternate assessment based on grade-level academic achievement standards; (4) an alternative assessment based on modified academic achievement standards; or (5) an alternate assessment based on alternate academic achievement standards.¹¹⁰ USDE regulations permit students with the most significant cognitive disabilities, up to 1 percent of the total population of students in the grades assessed, to take alternate tests based on alternate academic achievement standards and have their proficient or advanced scores count towards AYP.¹¹¹ Similarly, the regulations allow students with disabilities, who have been unable to achieve grade-level proficiency within the one year period covered by an IEP, to take alternate tests based

¹⁰⁸ 20 U.S.C. § 6311(b)(3)(C) (2000 & Supp. III 2003); 34 C.F.R. § 200.13.

¹⁰⁹ Reasonable adaptations and accommodations for students with disabilities are permitted when necessary to measure the academic achievement of students. 20 U.S.C. § 6311(b)(3)(C)(ix)(II). These accommodation guidelines are set by states. 20 U.S.C. § 1412(a)(16)(B). Accommodations may include: changes in presentation, changes in response mode, changes in timing, or changes in setting. Keele, *supra* note 3, at 1124.

¹¹⁰ U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 93, at 11.

¹¹¹ 34 C.F.R. § 200.13(c)(2)(i); 34 C.F.R. § 200.1(d).

on modified academic achievement standards.¹¹² Up to 2 percent of the total population of students may utilize this option and have their proficient or advanced scores counted in the school's AYP calculation.¹¹³ The combined total of scores that may count towards proficient in a state's AYP calculation may not exceed 3 percent of all students in the grade assessed.¹¹⁴

But that is not how NCLB's assessment requirements were originally written. Over the course of five years, NCLB assessment requirements for students with disabilities evolved from all students taking the same test, some with accommodations, to three alternate assessment options, in addition to the general state assessment. An "alternate" assessment is an assessment that is an "alternate" to a general assessment.¹¹⁵ It is intended to evaluate what students know and can do in situations where students cannot demonstrate these skills on the general assessments.¹¹⁶ To qualify as an alternate assessment, it must be aligned with the state's content standards, must yield results separately in both reading/language arts and mathematics, and must be designed and implemented in a manner that supports use of the results as an indicator of AYP.¹¹⁷ All of the alternate assessments permitted by NCLB are based on state academic content standards.¹¹⁸ It is the academic achievement standards¹¹⁹ that may be altered for two of these assessments.

¹¹² 34 C.F.R. § 200.13(c)(2)(ii); 34 C.F.R. § 200.1(e)(2).

¹¹³ 34 C.F.R. § 200.13(c)(2)(ii); 34 C.F.R. § 200.1(e)(2).

¹¹⁴ 34 C.F.R. § 200.13(c)(3).

¹¹⁵ U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 93, at 22.

¹¹⁶ *Id.* at 12.

¹¹⁷ U.S. DEP'T OF EDUC., *Working Together for Students*, *supra* note 95.

¹¹⁸ "Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn." U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 93, at 13.

NCLB: CHANGES TO THE ASSESSMENT REQUIREMENTS FOR STUDENTS WITH DISABILITIES IN THE REGULATORY PROCESS

The evolution of NCLB's testing requirements for students with disabilities has occurred in four phases: (1) the original enactment of NCLB that included all students with disabilities in the general state assessment systems with accommodations but without alternate assessments; (2) the first rule-making round that directed states to incorporate alternate assessments based on the regular academic achievement standards into their general state assessment system; (3) the second rulemaking round that introduced the 1 percent rule for alternate assessments using alternate academic achievement standards for students with the most significant cognitive disabilities; and (4) the third rule-making round that established the 2 percent rule for alternate assessments using modified academic achievement standards for students with disabilities that affect their ability to reach grade-level proficiency within one academic year. In its description of the changes, the U.S. Department of Education documents state that they are motivated by clarifying the statute and providing flexibility¹²⁰ and in response to the experience of the states and recent research.¹²¹

Within one month after the passage of NCLB, the U.S. Secretary of Education issued a notice of meetings to conduct a negotiated rulemaking process.¹²²

¹¹⁹ "Academic achievement standards are explicit definitions of how students are expected to demonstrate attainment of the knowledge and skills reflected in the content standards." *Id.*

¹²⁰ Improving the Academic Achievement of the Disadvantaged, Part II, 67 Fed. Reg. 50987 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).

¹²¹ Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA)--Assistance to States for the Education of Children With Disabilities, 70 Fed. Reg. 74624 (Dec. 15, 2005).

¹²² Office of Elementary and Secondary Education; Title I of the Elementary and Secondary Education Act of 1965, as Amended (ESEA); Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 9223 (Feb. 28, 2002).

First Rule-Making: Alternate Assessments using Grade-Level Content and Achievement Standards

The first draft regulations, published in February 2002, proposed “one or more alternate assessments for those students with disabilities who cannot participate in all or part of the regular State assessments, even with reasonable adaptations and accommodations.”¹²³ The final regulations, which were published later that year, adopted this change, thereby allowing students to take alternate assessments as part of NCLB’s accountability scheme.¹²⁴ The regulations were then reissued to clarify that alternate assessments must yield results for the grade in which the student with disabilities is enrolled, i.e. the alternate assessments must be based on grade-level content and achievement standards just like the regular assessments.¹²⁵

Second Rulemaking: One Percent Rule

The rule regarding the students with the most significant cognitive disabilities was initially proposed by the Secretary of Education on August 6, 2002.¹²⁶ It was designed to allow state

¹²³ DRAFT REGULATIONS FOR NEGOTIATED RULEMAKING, INCLUSION OF ALL STUDENTS, Feb. 28, 2002 at 14 (to be codified at 34 C.F.R. § 200.6(a)(3)(i)), *available at* www.ed.gov/policy/elsec/reg/drafttitlei.doc (last visited Nov. 11, 2009).

¹²⁴ “Alternate assessment. (i) The State’s academic assessment system must provide for one or more alternate assessments for a child with a disability as defined under section 602(3) of the Individuals with Disabilities Education Act (IDEA) whom the child’s IEP team determines cannot participate in all or part of the State assessments . . . , even with appropriate accommodations. (ii) Alternate assessments must yield results for the grade in which the student is enrolled in at least reading/language arts, mathematics, and, beginning in the 2007-2008 school year, science.” Improving the Academic Achievement of the Disadvantaged, Part IV, Inclusion of All Students, 67 Fed. Reg. 71715 (Dec. 2, 2002) (to be codified at 34 C.F.R. § 200.6).

¹²⁵ Improving the Academic Achievement of the Disadvantaged, Part IV, Inclusion of All Students, 67 Fed. Reg. 45041 (July 5, 2002); *see also* 67 Fed. Reg. 71715 & 71741 (Dec. 2, 2002).

¹²⁶ Improving the Academic Achievement of the Disadvantaged, Part II, 67 Fed. Reg. 51005 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).

and local educational agencies to evaluate students with the most significant cognitive disabilities, such as those with autism, multiple disabilities, and traumatic brain injury,¹²⁷ learning to use alternate achievement standards that reflected the “highest achievement standards possible for those students”¹²⁸ rather than the general state standards. The rule was also designed to have the students’ proficient and advanced scores on these alternate assessments counted in their AYP calculation.¹²⁹ Alternate achievement standards set a less complex expectation of performance for students than the regular grade-level achievement standards, usually based on a very limited sample of content, yet are still aligned with the state’s academic content standards.¹³⁰ They may include prerequisite or enabling skills

¹²⁷ U.S. DEP’T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES NON-REGULATORY GUIDANCE, 20 (2005), *available at* <http://www.ed.gov/policy/elsec/guid/altguidance.pdf>.

¹²⁸ “Alternate academic achievement standards. For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards –

Are aligned with the State’s academic content standards;

Promote access to the general curriculum; and

Reflect professional judgment of the highest achievement standards possible.”

34 C.F.R. § 200.1(d) (2009).

¹²⁹ 34 C.F.R. § 200.13(c)(1) (2009). “(1) In calculating AYPs for schools, LEAs, and the State, a State must, consistent with § 200.7(a), include the scores of all students with disabilities. (2) With respect to scores based on alternate or modified academic achievement standards, a State may include (i) The proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those scores at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics.” *Id.* § 200.13(c).

¹³⁰ U.S. DEP’T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES NON-REGULATORY

that are part of a continuum of skills that culminates in grade-level proficiency.¹³¹ States define who is eligible to take the alternate assessments and individual IEP teams determine how, not whether, a student will participate in the state assessment system.¹³²

In its original form, the proposed regulation contained a 0.5 percent limit.¹³³ This limit was increased to 1 percent in the rule that was proposed on March 20, 2003,¹³⁴ and it was adopted on December 9, 2003.¹³⁵ The 1 percent limit is calculated using the total number of students enrolled in the grade tested at the state and local educational agency level, not within individual schools.¹³⁶ This limit is consistent with the national incidence rates of students with the most significant cognitive disabilities, which are between 5 percent and 10 percent of students with disabilities and roughly translates to 0.5 percent to 1 percent of all students.¹³⁷ The rule is set forth in the three regulations.¹³⁸

GUIDANCE, *supra* note 127, at 20; U.S. DEP'T OF EDUC., *Working Together for Students*, *supra* note 95, at 15.

¹³¹ U.S. DEP'T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES NON-REGULATORY GUIDANCE, *supra* note 127, at 27 (See the Appendix 3.1 for an example).

¹³² *Id.* at 23-24.

¹³³ Improving the Academic Achievement of the Disadvantaged, Part II, 67 Fed. Reg. 50987 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).

¹³⁴ Improving the Academic Achievement of the Disadvantaged, Part III, 68 Fed. Reg. 13797-98 (Mar. 20, 2003) (to be codified at 34 C.F.R. § 200.1(d) and § 200.13(c)(1)).

¹³⁵ Improving the Academic Achievement of the Disadvantaged, Part II, 68 Fed. Reg. 68703 (Dec. 9, 2003) (to be codified at 34 C.F.R. § 200.1, § 200.6 and § 200.13).

¹³⁶ Improving the Academic Achievement of the Disadvantaged, Part II, 68 Fed. Reg. 68706 (Dec. 9, 2003).

¹³⁷ Improving the Academic Achievement of the Disadvantaged, Part III, 68 Fed. Reg. 13799 (Mar. 20, 2003).

¹³⁸ 34 C.F.R. § 200.1(d) (2009); 34 C.F.R. § 200.6(a)(2)(ii)(B); 34 C.F.R. § 200.13(c)(1).

These regulations do not limit the number of students who may take alternate assessments using alternate achievement standards; instead they only limit the number of student proficient and advanced scores on these tests that may be included in a school's AYP calculation.¹³⁹

Third Rulemaking: Two Percent Rule

The formal process for adopting the 2 percent rule was initiated in December 2005.¹⁴⁰ The U.S. Secretary of Education proposed allowing for 2 percent of all students in a grade assessed, approximately 20 percent of students with disabilities, to have their proficient and advanced scores on assessments included in a district and state AYP calculation.¹⁴¹ This regulation was designed to cover “students, who because of their disability, have significant difficulty achieving grade-level proficiency, even with the best instruction.”¹⁴² The modified academic achievement standards must be aligned with the state's content standards for the grade in which the student is enrolled and set at a level that is challenging enough for the students taking the assessment but less difficult than the regular grade-level achievement standards.¹⁴³ States may use a variety of strategies to make the assessment less rigorous than the general assessment, including, but not limited to, modifying the general test by replacing the most difficult items, simplifying the

¹³⁹ Improving the Academic Achievement of the Disadvantaged, Part II, 68 Fed. Reg. 68706 (Dec. 9, 2003).

¹⁴⁰ Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA)--Assistance to States for the Education of Children With Disabilities, 70 Fed. Reg. 74624 (Dec. 15, 2005).

¹⁴¹ *Id.* at 74625.

¹⁴² *Id.* at 74624. “The student's progress to date in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such that, even if significant growth occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student's IEP.” 34 C.F.R. § 200.1(e)(2)(ii)(A) (2009).

¹⁴³ 34 C.F.R. § 200.1(e)(1)(i)&(ii) (2009).

language, or eliminating a distracter answer if it is a multiple choice test.¹⁴⁴ States may also develop a completely separate test based on the modified achievement standards.¹⁴⁵ The goal of these assessments is to provide students with access to the curriculum so that they can move closer to grade-level achievement, thereby maintaining high expectations for their academic performance.¹⁴⁶ As with the 1 percent rule, this 2 percent cap is only a limitation on the number of students whose proficient and advanced test scores may count in an AYP calculation, not on the number of students who may actually participate in this type of assessment. The decision on how an individual student should participate in an assessment is made by that student's IEP team.¹⁴⁷ To make this change, five NCLB regulations were amended,¹⁴⁸ along with one under IDEA addressing student participation in assessments.¹⁴⁹

The following tables provide an overview of the current alternate assessment options available to states under NCLB. Table 1 links the type of assessment with the relevant student population, state achievement standards, and NCLB AYP

¹⁴⁴ U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 93, at 25.

¹⁴⁵ *Id.*

¹⁴⁶ Rules and Regulations, 72 Fed. Reg. 17755 (Apr. 9, 2007).

¹⁴⁷ "For each student with a disability, as defined under section 602(3) of the IDEA, appropriate accommodations that the student's IEP team determines are necessary to measure the academic achievement of the student relative to the State's academic content and academic achievement standards for the grade in which the student is enrolled. . . ." 34 C.F.R. § 200.6(a)(1)(i)(A) (2009).

¹⁴⁸ 34 C.F.R. § 200.1(a)(e)&(f) (2009); 34 C.F.R. § 200.6(a)&(c); 34 C.F.R. § 200.7(a); 34 C.F.R. § 200.13(c); 34 C.F.R. § 200.20(c)&(g); Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA)--Assistance to States for the Education of Children With Disabilities, 72 Fed. Reg. 17778-81 (Apr. 9, 2007).

¹⁴⁹ 34 C.F.R. § 300.160 (2009); Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA)--Assistance to States for the Education of Children With Disabilities, 72 Fed. Reg. 17778-81.

calculations. Table 2 lists the alternate achievement standards options.

TABLE 1 – ASSESSMENT SYSTEM FOR STUDENTS WITH DISABILITIES UNDER NCLB & IDEA¹⁵⁰

Student Group	Achievement Standards	Assessment	NCLB AYP Calculation
Students working on grade level who complete it with or without accommodations	Grade-level achievement standards	Based on grade-level achievement standards	No exemption ¹⁵¹
Students working on grade level who are not able to complete all grade-level material in the course of a year	Modified achievement standards that are aligned with grade-level content standards, but are modified so that they reflect reduced breadth or depth of grade-level content	Based on modified grade-level achievement standards	2% exception
Students with most significant cognitive disabilities	<p>(1) Grade-level achievement standards</p> <p>OR</p> <p>(2) Alternative achievement standards</p> <p>- Align with the State's academic content standards & promote access to</p>	<p>Alternative assessments based on either:</p> <p>(1) grade-level achievement standards</p> <p>- Assessment procedures may differ from the regular assessment (e.g., include</p>	1% exemption applies

¹⁵⁰ Letter from Edward Roeber & Jacquelyn Thompson, Michigan Department of Education (Feb. 28, 2006) (on file with author); U.S. DEP'T OF EDUC., *Working Together for Students*, *supra* note 95.

¹⁵¹ All students with disabilities who do not qualify for an exemption should be in this category.

	<p>the general curriculum but cover a narrower range of content (e.g., fewer objectives under each content standard) & reflect a different set of expectations in the content areas (reduced complexity or modified to reflect pre-requisite skills) than do regular assessments, or alternate assessments based on grade-level achievement standards.</p>	<p>body-of-work or performance tasks instead of multiple choice)</p> <p>OR</p> <p>(2) Alternative achievement standards</p> <p>- Assessment procedures may differ here too.</p>	
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Table 2 – Characteristics of Alternate Achievement Standards¹⁵²

Alternate Assessment based on Alternate Academic Achievement Standards (1%)	Alternate Assessment based on Modified Academic Achievement Standards (2%)	Alternate Assessment based on Grade-Level Academic Achievement Standards
An alternate academic achievement standard is an expectation of performance that differs in complexity from a grade-level achievement standard, usually based on a <u>very limited sample of content</u> that is <u>linked to</u> but does not fully <u>represent grade-level content</u> .	A modified academic achievement standard is aligned to grade-level content standards for the grade in which a student is enrolled and <u>challenging for eligible students, but may be less difficult than grade-level achievement standards</u> .	A grade-level academic achievement standard defines a level of “proficient” performance <u>equivalent to grade-level achievement on the State’s regular assessment</u> .

¹⁵² U.S. DEP’T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 93, at 52 (emphasis added).

V. IDEA 2004 ACCOUNTABILITY PROVISIONS: GROWING ALIGNMENT WITH NCLB

The 2004 reauthorization of IDEA aligned the law with NCLB in its high expectations for the educational success of students with disabilities and accountability for this success.¹⁵³ The common vision shared by both laws is for improved educational outcomes for students with disabilities.¹⁵⁴ The articulation of this vision is found in the laws' stated purposes¹⁵⁵ and the inclusion of students with disabilities in NCLB's accountability scheme, as reflected in its requirement that students with disabilities be taught core academic content¹⁵⁶ and participate in the common assessment system.¹⁵⁷ The two primary means Congress used to accomplish this alignment was through the use of direct references to NCLB and parallel language in the text of the laws.¹⁵⁸

PURPOSE OF IDEA

IDEA aims to prepare students with disabilities for further education, employment, and independent living.¹⁵⁹ This goal is consistent with NCLB's goal to provide a high quality education

¹⁵³ See generally Handler, *supra* note 4; U.S. DEP'T OF EDUC., IDEA REGULATIONS: ALIGNMENT WITH THE *NO CHILD LEFT BEHIND (NCLB) ACT* (Feb. 2, 2007), available at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C3%2C> (last visited Nov. 11, 2009) [hereinafter U.S. DEP'T OF EDUC., *IDEA Regulations*].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ NCLB specifically mentions IDEA at least thirty-eight times in its text. Handler, *supra* note 4, at 5.

¹⁵⁹ 20 U.S.C. § 1400(d)(1)(A) (2004).

for low achieving kids, including those with disabilities, so that they may achieve academic proficiency as demonstrated on local and state assessments.¹⁶⁰

CORE ACADEMIC CONTENT

NCLB requires states to establish academic content and achievement standards in mathematics, reading or language arts, and science.¹⁶¹ IDEA 2004 accomplishes alignment with NCLB's focus on core academic subjects through two provisions: (1) performance goals and indicators and (2) IEP goals and services that promote access to the general education curriculum.¹⁶² The law was revised specifically to require states to apply their NCLB adequate yearly progress performance goals to students with disabilities.¹⁶³ IDEA 1997 only called for states to have goals for the performance of children with disabilities that: (i) promoted the "purposes of this Act" and (ii) were "consistent, to the maximum extent appropriate, with other goals and standards for children established by the State."¹⁶⁴ IDEA 2004 kept these two stipulations and added the requirements that the goals for students with disabilities match those defined by NCLB and that they assess students with disabilities' progress towards annual adequate yearly progress objectives.¹⁶⁵ This change emphasized not only that the state's

¹⁶⁰ 20 U.S.C. § 6301 (2004).

¹⁶¹ *Id.* § 6311(b)(1)(A)-(C).

¹⁶² Handler, *supra* note 4, at 6.

¹⁶³ 20 U.S.C. § 1412(a)(15)(A)(ii) (2004); 34 C.F.R. 300.157(a)&(b) (2009); 20 U.S.C. § 6311(b)(2)(C) (2004).

¹⁶⁴ 20 U.S.C. § 1412(a)(16) (1997), *available at* <http://www.ed.gov/policy/speced/leg/idea/idea.pdf> (last visited Nov. 11, 2009), as amended 20 U.S.C. § 1412(a)(15) (2004).

¹⁶⁵ "The State – (A) has established goals for the performance of children with disabilities in the State that . . . (ii) are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the Elementary and Secondary Act of 1965 [20 U.S.C. § 6311(b)(2)(C)]." 20 U.S.C. § 1412(a)(15)

academic standards apply to everyone, but also that students with disabilities, according to IDEA's own terms, would be included in NCLB's formal accountability system. IDEA's expanded focus on core academic skills was also manifested in its IEP components section that require a description of the child's measurable annual goals, and special education and related services that permit the child to be "involved and make progress in the general education curriculum."¹⁶⁶ IDEA 2004 specifies that the IEP goals should be academic and functional and contain a description of how the child's progress toward meeting these goals will be measured.¹⁶⁷

ASSESSMENTS

IDEA 1997 initiated the requirements that children with disabilities participate in state and district-wide assessments and permitted them to use accommodations where necessary.¹⁶⁸ IDEA 2004 stresses that all children with disabilities participate in state and district assessments, allowing for the option of using accommodations or taking alternate assessments, and it specifically references the assessments required by NCLB.¹⁶⁹

(2004). The highlighted section of NCLB requires the same high standards of academic achievement for all students and separate measurable annual objectives for continuous and substantial improvement for students with disabilities. 20 U.S.C. § 6311(b)(2)(C)(i)&(v) (2004).

¹⁶⁶ 20 U.S.C. § 1414(d)(1)(A)(i)(II)&(IV) (2004).

¹⁶⁷ *Id.* § 1414(d)(1)(A)(i)(III).

¹⁶⁸ 20 U.S.C. § 1414(d)(1)(A)(v) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(A)(i)(vi) (2004); Turnbull, *supra* note 62, at 321. IDEA 1997 directs states to develop alternate assessment guidelines for children who cannot participate in the regular assessments. 20 U.S.C. § 1412(a)(17)(A) (1997) *amended by* 20 U.S.C. § 1412(a)(16)(A) (2004).

¹⁶⁹ "All children with disabilities are included in all general State and district wide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 6311], with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs." 20 U.S.C. § 1412(a)(16)(A) (2004). The IEP team is directed to indicate the appropriate accommodations necessary to measure the child's academic achievement and functional performance on the standardized tests or

The change between the two IDEA versions, therefore, is not that children with disabilities take some form of assessment, but that it specifically aligns itself with NCLB.¹⁷⁰ In addition, IDEA 2004 adds a section on alternate assessments, which specifies that the content and achievement standards upon which these assessments are based must be aligned with NCLB.¹⁷¹

ANALYSIS: FEEDBACK RESULTING IN GREATER ALIGNMENT OF NCLB AND IDEA THROUGH THE POLICY-MAKING PROCESS

Although including students with disabilities in a state's formal accountability program was first required by IDEA 1997, it was NCLB that stipulated that they take the same standardized tests given to the general education population, allowing only for accommodations. IDEA 1997 permitted alternate assessments. The original version of NCLB did not mention these alternate assessments and would not allow the score on such tests to be included in an AYP measure – the primary means for determining progress and holding schools accountable under this law. This discrepancy in the requirements of the two laws was the source of considerable controversy and feedback from the field, a sign that the federal government had overstepped its license to act in this area, so it acted quickly to resolve the tension between them.¹⁷²

The opportunity to amend these laws arose when the policy windows opened for the rule-making process under NCLB and the reauthorization process for IDEA.¹⁷³ The USDE's rule-making authority was the primary mechanism used by the

the appropriate alternate assessment if the child cannot participate in the regular/ test. *Id.* § 1414(d)(1)(A)(VI).

¹⁷⁰ Turnbull, *supra* note 62, at 321.

¹⁷¹ 20 U.S.C. § 1412(a)(16)(B)(ii) (2004); 34 C.F.R. § 300.160 (2009).

¹⁷² See generally, PAUL MANNA, SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA (2006).

¹⁷³ See generally, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1995).

federal government to address the considerable concerns expressed by experts, parents, and educators of students with disabilities regarding their inclusion in NCLB's accountability regime, a program that relies heavily on standardized tests.¹⁷⁴

Within one month of NCLB's enactment, the USDE, through its rule-making process, proposed creating alternate assessments for students with disabilities to be permitted in the law's accountability regime. They were allowed later that year. In 2003, the USDE passed new regulations creating a 1 percent exemption for students with the most significant cognitive disabilities to take alternate assessments based on alternate achievement standards. In 2007, the USDE promulgated another set of regulations permitting up to 2 percent of students to take alternate assessments tied to modified academic achievement standards. Thus, NCLB evolved from requiring all students to participate in the general assessments based on challenging academic content and performance standards to a total of five options, three of which involve alternate assessments, within the course of five years. These assessment options were then also written into IDEA's most recent reauthorization and its regulations.¹⁷⁵

Congress' 2004 reauthorization of IDEA incorporated some key concepts from NCLB regarding high academic expectations for students with disabilities as evidenced by improved educational outcomes on academic assessments. Using language from NCLB and references to the law itself, Congress accomplished greater alignment between the two education laws in their similar purposes that promote high quality education for students with disabilities, the requirement that students with disabilities be taught core academic content, and in its assessment requirements. This also allowed alternate assessments using alternate or modified academic achievement standards.

¹⁷⁴ The USDE has also included additional guidelines on the assessment requirements in its non-regulatory guidance documents. See U.S. DEP'T OF EDUC., *Modified Achievement Standards*, *supra* note 93; U.S. DEP'T OF EDUC., *Alternate Achievement Standards*, *supra* note 127.

¹⁷⁵ 34 C.F.R. § 300.160(c) (2009).

As it currently stands, up to 30 percent of students with disabilities may participate in NCLB's accountability program and have their proficient and advanced scores included in the AYP calculation. This means that USDE officials expect seventy percent of students with disabilities to be able to take and earn at least a proficient score on the regular local and state standardized tests with or without accommodations. This is considerably less than the 100 percent requirement originally contained in NCLB. IDEA 2004 does not have a limit on participation in alternate assessments.

The USDE cited flexibility, experience, and developments in research as motivating forces behind its regulatory changes to NCLB. Thus, the regulatory policy mechanism can be considered successful because it gave flexibility to Congress in passing laws by allowing administrative agencies to modify the details that, according to the feedback the agency received, did not work in the field.

VI. CONCLUSION: POLICY DEVELOPMENT: THE EVOLUTION OF ASSESSMENT OPTIONS FOR STUDENTS WITH DISABILITIES.

The diversification of assessment requirements under the No Child Left Behind Act (NCLB) for students with disabilities from one option to five options, including three types of alternate assessments, within five years of the landmark education law's enactment stands a dynamic example of the U.S. regulatory process and provides encouragement to federal, state, and local policymakers and educators alike. What was once thought of as a cumbersome law-making process has proven to be much more flexible and adaptive in accommodating implementation concerns. What is more, Congress, following NCLB's enactment, used the reauthorization of the Individuals with Disabilities Education Act of 2004 (IDEA) to more closely align the special education law with its general education counterpart by employing similar goals, language, and specific references to NCLB. This provides both clarification to and an underscoring of the essential aims of federal policy as it relates to assessment, accountability, and providing for the needs of special student populations. With this understanding, lawmakers and their aides can act with greater confidence in the 2010 ESEA

reauthorization process knowing that, regardless of the level of change required or controversy surrounding a particular measure, effective regulatory processes are in place to adjust and align even the most poorly juxtaposed policies. Moreover, legislators can give education policy and programs adequate time to implement, knowing both regulatory processes and subsequent legislative activity will provide an opportunity to address any points of conflict that may exist between the laws. State and local policymakers and educators can also be assured that federal regulatory mechanisms exist to address perceived conflicts and barriers that threaten the effective implementation of the federal legislation and their own goals to promote the best education for the children of their community. This illustration of the federal regulatory and legislative process in action, which highlights its adaptability to the surrounding policy environment, is designed to promote a better understanding of how the process works, a goal which may provide state and local officials with a fresh perspective and approach to new policies emanating from Washington D.C.

APPENDIX

DIFFERENT PERFORMANCE LEVELS FOR
ELEMENTARY LEVEL WORD RECOGNITIONⁱ

TABLE MI-ACCESS EXAMPLE

Grade Level English Language Arts (ELA) 2 nd Grade Content Expectations 2 nd Grade ⁱⁱ	MI-ACCESS ELA Functional Independence 3 rd Grade Performance Level Descriptors ⁱⁱⁱ	MI-ACCESS ELA Supported Independence Elementary Performance Level Descriptors ^{iv}	MI-ACCESS ELA Participation Elementary Performance Level Descriptors ^v
Automatically recognize frequently encountered words in print whether encountered in connected text or in isolation.	Use picture- printed word associations to identify many common vocabulary words, including personally meaningful words, <ul style="list-style-type: none"> frequently encountered words, and functional words. 	Recognize some: <ul style="list-style-type: none"> frequently encountered/ personally meaningful words (e.g., name, address, family members) functional words (e.g., exit, danger) 	Recognize <i>some</i> frequently encountered objects and/or pictures paired with words (e.g., name, survival words/symbols).
Make progress in automatically recognizing the 220 Dolch basic sight words and 95 common nouns for mastery in third grade.			

ⁱ This example is taken from Michigan, which has three alternate assessments.

ⁱⁱ MICH. DEP'T OF EDUC., MICHIGAN SECOND GRADE ELA GRADE LEVEL CONTENT EXPECTATIONS, (Dec. 2005), *available at* http://www.michigan.gov/documents/ELA_02_87352_7.pdf. (last visited Nov. 11, 2009).

ⁱⁱⁱ MICH. DEP'T OF EDUC., MI-ACCESS FUNCTIONAL INDEPENDENCE ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS (June 9, 2006), *available at* http://www.michigan.gov/documents/mde/FI_PLD-ELA-FINAL_FOR_POSTING_2_01_06_OPTION_2_266142_7.pdf (last visited Nov. 11, 2009).

^{iv} MICH. DEP'T OF EDUC., MI-ACCESS SUPPORTED INDEPENDENCE ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS (June 1, 2007), *available at* http://www.michigan.gov/documents/mde/010607_SI_ELA_PLD_198307_7_266144_7.doc (last visited Nov. 11, 2009).

^v MICH. DEP'T OF EDUC., MI-ACCESS PARTICIPATION ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS (June 1, 2007), *available at* http://www.michigan.gov/documents/mde/60107_P_ELA_PLDs_198305_7_266146_7.doc (last visited Nov. 11, 2009).