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MILITARY LAW REVIEW

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NATO'S ROLE IN PEACE OPERATIONS: REEXAMINING THE TREATY AFTER BOSNIA AND KOSOVO

MAJOR J.D. GODWIN[1]

I. Introduction

The North Atlantic Treaty[2] contains no provisions that allow its members to participate in peace operations[3] under Chapter VIII of the United Nations (UN) Charter.[4] Nevertheless, in 1993, the North Atlantic Treaty Organization (NATO) began flying missions over Bosnia[5] to protect UN

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2. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter North Atlantic Treaty].

3. The term "peace operations" needs to be defined up front because scholars, diplomats, and military planners tend to expand or contract the concept to fit their own conceptual framework. For purposes of this article the term is to be given the comprehensive scope contained in U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 2 (Dec. 1994) [hereinafter FM 100-23]. The manual definition of peace operations includes support to diplomacy, peacekeeping, and peace enforcement.

peacekeeping forces and to monitor the so-called safe havens declared by

4. U.N. CHARTER arts. 52-54. Chapter VIII states:

> Article 52:
> 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
> 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
> 4. This Article in no way impairs the application of Articles 34 and 35.
>
> Article 53:
> 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken Under regional arrangements or by regional agencies without the authorization of the Security council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
> 2. The term enemy state as used in paragraph 1 of this Article applies to any state, which during the Second World War has been an enemy of any signatory of the present Charter.
>
> Article 54:
> The Security council shall at all times be kept fully informed of activities undertaken or in contemplation Under regional arrangements or by regional agencies for the maintenance of international peace and security.

Id.

5. *NATO's Role in Bringing Peace to the Former Yugoslavia*, NATO Basic Factsheet No. 4 (last modified Mar. 1997) <http://www.nato.int/docu/facts/bpfy.htm> [hereinafter NATO Factsheet No. 4]. Flying in support of the UN, NATO fired its first shot ever in anger shooting down four aircraft violating the no-fly zone declared by the Security Council. *Id.* at 3.

the Security Council.[6] At the same time, NATO naval forces were the primary component enforcing the UN arms embargo imposed on the warring factions within the Federal Republic of Yugoslavia.[7] By December 1995, mediators negotiated an unlikely cease-fire and an unprecedented agreement to hand off UN peacekeeping duties to a multinational force under NATO's command and control.[8]

The Bosnia mission was the first of its kind by NATO. As events in Kosovo have demonstrated, however, it is not its last.[9] The end of the Cold War significantly reduced the chances of super-power confrontation; however, lower nuclear tension frequently masks increased regional violence grounded in historical ethnic, cultural, and religious differences.[10] The

6. S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993). After repeated cease-fire violations by both sides, but in particular the Bosnian Serbs, the Security Council attempted to create safe areas in and around major cities, which were to be off-limits to attack. When the sanctity of these areas was not honored, the Security Council, in what was a radical departure from their time-honored philosophy of peacekeeping, authorized use of force to protect the safe havens. *See* S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

7. Steven R. Rader, *NATO*, *in* CHALLENGES FOR THE NEW PEACEKEEPERS 142 (Trevor Findlay ed., 1996). NATO began monitoring compliance with UN sanctions against the factions of the Federal Republic of Yugoslavia (FRY) in July 1992 in conjunction with a provisional West European Union (WEU) naval task force in the Adriatic. In November 1992, NATO and the WEU decided to enforce the embargo. The two organizations merged into a single chain of command, essentially the NATO military structure, in June 1993 (Operation Sharp Guard). *Id.* at 146. Between 22 November 1992 and 18 June 1996, Operation Sharp Guard forces challenged over 74,000 merchant vessels, boarded and inspected nearly 6000 of those vessels, and spent almost 20,000 ship days at sea. *See Operation Sharp Guard*, Allied Forces Southern Europe Fact Sheet (visited Mar. 18, 1998) <http://www.fas.org/man/dod-101/docs/SharpGuardFact Sheet.htm>.

8. General Framework Agreement for Peace in Bosnia and Herzegovina-Croatia, Yugoslavia, December 14, 1995, 35 I.L.M. 75 (1996). The pertinent military aspects are contained in Annex I-A. The General Framework Agreement for Peace "invited" the UN Security Council to adopt a resolution authorizing a multinational force with the understanding that all forces, NATO and non-NATO, would operate "under the authority and subject to the direction and political control of the North Atlantic Council . . . through the NATO chain of command." The UN quickly accepted the invitation. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995). Acting under Chapter VII, the Security Council directed the parties to cooperate with the multinational force. It "welcomes the willingness of the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to assist the parties to the Peace Agreement by deploying a multinational implementation force." *Id.* para. 12. It then authorized the implementation force (IFOR) "under unified command and control in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement." *Id.* para. 14. The IFOR (NATO) was further authorized to "take all necessary measures" including enforcement actions. *Id.* para. 15. The UN acknowledged this arrangement was as had been agreed in the General Framework Agreement for Peace. *Id.* paras. 15, 17.

conflicts in Bosnia and Kosovo are prime examples, but there are many others simmering within Europe and on its periphery. An incomplete list of recent examples includes near civil war in Albania,[11] continuing friction between Greece and Turkey,[12] and religious and political violence in Algeria.[13] Meanwhile, the UN is spread thin attending to disturbances around the globe.[14]

For a variety of reasons, the UN will not be able to keep pace with the growing cycle of violence. Political disagreements have disrupted the

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9. As this article was prepared for publication, NATO was negotiating for peace in Kosovo between the Muslim majority and the FRY. NATO members envisioned that up to 28,000 NATO troops would help implement the deal on the ground. *See, e.g.*, William Claiborne, *United States Kosovo Plan Faces 2-Front Fight*, WASH. POST, Mar. 11, 1999, at A23. When the Yugoslavian Government proved intransigent and instead escalated its attacks on its own Albanian Kosovar population, NATO began air operations to compel the government to sign a deal protecting the human rights of their Muslim members. NATO envisions a political settlement that will in time enable the Kosovo region to operate autonomously. *See* Secretary General Javier Solana, Statement by the NATO Secretary-General on Ordering Air Strikes, Mar. 23, 1999, *available at* <http://www.abcnews.go.com/sections/world/Daily News/solana_transcript.html>.

10. *See, e.g.*, Ralph Peters, *After the Revolution*, PARAMETERS, Summer 1995, at 7; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; ALVIN & HEIDI TOFFLER, WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY (1995); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

11. *No Plans for WEU Intervention in Albania: Bonn*, XINHUA ENGLISH NEWSWIRE, Mar. 14, 1997, *available in* 1997 WL 3750650. A pyramid scheme collapsed leading to riots across Albania. The government requested peacekeeping troops from both WEU and NATO, but the request was rejected. *See* Kevin Done, *Albania Declares State of Emergency over Riots*, FIN. TIMES, Mar. 3, 1997, *available in* 1997 WL 3777226 (quoting President Berisha that conditions threatened "to engulf Albania in a civil war"). By July 1997 a semblance of order returned to Albania allowing special elections. Western countries reportedly are keeping an eye on the situation for fear that further unrest would spark more refugees. *See A New Government Awaits Albania*, STAR-TRIB. (Minneapolis-St. Paul), July 1, 1997, at A7.

12. The two NATO countries nearly went to war in January 1996 over an uninhabited 10-acre islet in the Aegean Sea after journalists from both sides planted flags there. In 1987, they nearly fought over mineral rights in the Aegean. They did fight in 1974 when Turkey invaded Cyprus to support Turkish Cypriots against Greece. Patrick Quinn, *War For a Pile of Rocks? Greece, Turkey Rattle Sabers*, N. N.J. RECORD, Jan. 31, 1996, at A9. Due to these and other disputes over territorial waters, airspace, and islands, the two countries continued arms build-up while most of Europe has downsized. Mike Theodoulou, *Saving Greece and Turkey from War Keeps United States Busy*, CHRISTIAN SCI. MONITOR, Feb. 8, 1996, at 7. Tensions again increased recently after Turkey was excluded from the European Union. The Turks were also insulted when the European Union decided to open talks with Cyprus instead. *See, e.g.*, *Face-off in Aegean*, PITTSBURGH POST-GAZETTE, Jan. 3, 1998, at A4 (reporting challenges between Turkish and Greek naval vessels in the Aegean).

Security Council almost from the beginning.[15] "Peacekeeping was discovered like penicillin . . . [by accident],"[16] because super-power competition during the Cold War blocked the Security Council from effectively performing its intended peace-enforcement role.[17] Many heralded the end of the Cold War as the renaissance of collective security.[18] Conflicts such as those in Rwanda, Somalia, Bosnia, and Kosovo seem to demonstrate that these predictions were unfounded. For example, off and on since the Gulf War, Security Council members have been at loggerheads over measures against Iraq. Their political differences often encourage Saddam Hussein to defy the UN.[19]

Financial and technical shortcomings also limit the UN's ability to respond effectively. As its peacekeeping activities expanded, the UN's peacekeeping budget increased almost fifteen times.[20] The Secretary General sharply criticized the member states in his *Supplement to An Agenda for Peace*, released in early 1995, for their failure to provide funding for UN peace operations.[21] He warned that many operations could not be pur-

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13. Geneive Abdo, *Militant's Threaten Algeria Regime's Grip*, DALLAS MORNING NEWS, Oct. 30, 1994, at A1. When Islamic fundamentalists won majorities in local elections in 1991, a joint military-civilian junta canceled the next year's national elections and outlawed the main Islamic party, the Islamic Salvation Front (FIS). The FIS spawned several groups that try to intimidate the government by using terrorist methods. The government reputedly responds in kind. By 1994, the official death toll was about ten thousand. Unofficial sources estimated thirty thousand deaths. *Id*. For further information on the background to the Algerian Civil War, *see Algeria: Background to a Civil War*, JANE'S DEF. WKLY., Dec. 1, 1994, at 3. The cycle of violence continues to grow. A 1998 report set the death toll at 75,000. The violence on Europe's doorstep, coupled with the fear that terrorism will spread across the Mediterranean into Europe along with Algerian refugees prompted a recent visit by an European Union fact-finding mission. *See* Charles Trueheart, *European Mission to Algeria Cites Mixed Success*, WASH. POST, Jan. 21, 1998, at A17.

14. *Supplement to an Agenda For Peace: Position Paper Of Secretary Boutros-Ghali On The Occasion Of The Fiftieth Anniversary Of The United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 (1995), U.N. Sales No. E.95.I.15 (1995) [hereinafter *Supplement to an Agenda for Peace*]. The Secretary General provided eye-opening statistics in his report showing that the number of peace operations conducted under UN authority grew from five in January 1988 to seventeen in December 1994. During the same period the number of troops deployed increased from less than 10,000 to almost 74,000. *Id.*

15. Sir Brian Urquhart, former UN Under-Secretary General with peacekeeping responsibilities, *quoted in* Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain,"* 7 DUKE J. COMP. & INT'L L. 35, 46 (1996).

16. *Id.*

17. *Id.*

18. *See generally,* Patrick Reilly, *Comment: While the United Nations Slept: Missed Opportunities in the New World Order*, 17 LOY. L.A. INT'L & COMP. L.J. 951 (1995) and the sources cited therein.

sued or, if pursued, could not be performed "to the standard expected."[22] Nevertheless, some major contributors, including the United States, continually refuse to pay their assessments.[23]

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19. Robert H. Reid, *United States Fails to Persuade Russia to Back Wider Iraq Sanctions*, SUN-SENTINEL. (Ft. Lauderdale, Fla.), Oct. 22, 1997, at A18. In October 1997, Russia blocked initiatives backed by the United States and the United Kingdom to impose new sanctions on Iraq. Along with France, Russia reportedly has agreements with Iraq, which will enable it to profit on newly released oil when the sanctions are lifted. Apparently emboldened by the discord, Saddam Hussein's government moved to have the sanctions lifted entirely. Later, Iraq blocked UN weapons inspectors from sites around the country. It demanded a change in the composition of the team and pushed to have the sanctions lifted. Russia stepped in to negotiate. After it promised to support Iraqi demands, Saddam Hussein allowed the monitors back into Iraq. Although China backed the Russian initiative, none of the other Security Council members did. *See* Anne Penketh, *U.N. Security Council Meets after Russia Fails on Iraq Agenda*, AGENCE FRANCE-PRESSE, Nov. 22, 1997, *available in* 1997 WL 13439725. However, it quickly became apparent that Iraq intended to bar the inspectors from important sites. The United States and Britain began to lobby for the right to use force to compel Iraq to permit the inspectors to do their job. Russia, initially supported by France, insisted force was not an option. *See* Anne Swardson, *France, Russia Urge Diplomacy in Iraqi Impasse*, WASH. POST, Jan. 29, 1998, at A23. Although France later indicated it might support use of force under some conditions, the likelihood that Russia and China would veto any action by the Security Council left the United States hinting that it might take unilateral action. *See* Barton Gellman, *Paris Lends Support to United States on Iraq*, WASH. POST, Jan. 30, 1998, at A1. Finally, in December 1998, the United States and the United Kingdom launched a series of strikes on Iraq after UN reports revealed Iraqi violations and Iraq again refused to cooperate with UN inspectors. *See Timeline of the Iraqi Crisis: Road to the Brink*, BBC NEWS SERVICE, Dec. 21, 1998, *available at* <http://news2.thdo.bbc.co.uk/hi/english/events/crisis_in_the_gulf/road_to_the_brink/newsid_216000/216264.stm>.

20. *See Supplement to an Agenda For Peace*, *supra* note 14, para. 11. The budget grew from 230 million dollars in 1988 to 3.6 billion dollars in 1994. *Id.*

21. *Id.* para. 97.

22. *Id.*

> The failure of Member States to pay their assessed contributions for activities they themselves have voted into being makes it impossible to carry out those activities to the standard expected. It also calls in question the credibility of those who have willed the ends but not the means - and who then criticize the United Nations for its failures.

Id.

23. By late 1996, the UN reported over $700 million in outstanding contributions. *U.N. Secretariat, Status of Contributions as at 30 September* 1996, at 9, U.N. Doc. ST/ADM/SER.B/499 (1996). The United States portion continued to rise. In 1997, United States domestic political infighting led the Congress to delete funds that had been intended to help pay for United States delinquent dues. The UN warned of possible bankruptcy by the end of 1998. Of delinquencies, the United States owed about 61%. John M. Goshko, *United States Refusal to Pay Debt Alarms U.N.*, WASH. POST, Nov. 15, 1997, at A1.

Command and control of forces engaged in UN peace operations are a continual source of friction between the Security Council and the troop-contributing nations. The Secretary General contends operational and strategic control of the forces belongs to the UN alone.[24] This position is unacceptable to many nations, especially the United States.[25]

To survive the systemic problems, the UN has increasingly turned to regional organizations for help. This is a marked evolution for the UN. The drafters of the UN Charter very nearly did not recognize the rights of regional organizations. Chapter VIII and the self-defense measures of Article 51 were included only after the Latin American states insisted.[26] European members who feared a re-emergent Germany joined them.[27] After the Charter's ratification, the role of regional organizations was ill defined and often distrusted, as in the intervention of the Organization of American States in the Dominican Republic.[28] Recent developments in Liberia, Bosnia, and Haiti, however, reflect the trend toward cooperation between the UN and regional organizations.[29]

The political and military importance of NATO makes it an attractive partner to the UN. The UN's move toward regional cooperation has met

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24. *See Supplement to an Agenda For Peace*, *supra* note 14, paras. 38-42. The Secretary General identifies three fields where he admits the UN system is lacking: (1) command and control, (2) troop availability, and (3) communications problems. As to command and control, he argues strongly that the troop-supplying nations have to butt out and that he will consult and dialogue with the Security Council and member nations so that all are informed of the current status of deployments. *Id.*

25. *See infra* note 114 and accompanying text for a discussion of the Constitutional and practical issues associated with command and control.

26. Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3, 5-18 (1996).

27. U.N. CHARTER art. 51.

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. See generally Arend, *supra* note 26, at 3, 5-18 (providing detailed background of the Dumbarton Oaks and San Francisco Conferences that led to the ratification of the UN Treaty).

NATO's willingness to take on a role in peace operations.[30] This is a development for NATO as well.

For almost five decades, NATO members insisted that the Alliance was not a Chapter VIII regional organization.[31] Instead, the members carefully tied NATO's mission to collective self-defense.[32] The North Atlantic Council's motive for limiting its agreement was partially driven by the fear that operating under Chapter VIII would give the UN Security Council an opportunity to meddle in the alliance's affairs.[33] The North Atlantic Coun-

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28. LINDA B. MILLER, WORLD ORDER AND LOCAL DISORDER 159 (1967). Many within the UN saw this as a power grab by the United States and called for UN involvement. The United States contended no UN involvement or approval was required because this was not an "enforcement action" under Article 52. The United States also argued that UN involvement would result in "two international organizations doing the same thing in the same place at the same time." *Id.* The UN proved especially wary whenever one of the Cold War powers was involved. For example, the same concerns were reflected when the United States invaded Grenada after the Organization of Eastern Caribbean States (OECS) invited intervention. *See* John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 153 (1984). On 2 November 1983 "the UN General Assembly voted, by a larger majority than in the condemnation of the Soviet invasion of Afghanistan, to condemn the mission as a violation of international law . . . ." *Id.*

29. *See infra* notes 270 to 368 and accompanying text.

30. *Final Communiqué Issued by the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-1 (92) 51, para. 11, June 4, 1992 [hereinafter Oslo Declaration].

31. *See* Jane E. Stromseth, *The North Atlantic Treaty and European Security after the Cold War*, 24 CORNELL INT'L L.J. 479, 482 (1991) (detailing these historical reasons for distinguishing NATO from a Chapter VIII regional organization). *See also* Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 423-4 (1993).

32. The North Atlantic Treaty, *supra* note 2, art. 5. Article 5 states in part:

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

33. *See, e.g.*, Meyer, *supra* note 31, at 423-4. *See also* Stromseth, *supra* note 31, at 479, 482; Christopher J. Borgen, *The Theory and Practice of Regional Organization Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797 (1994) (asserting the purpose was to intentionally avoid oversight by the UN).

cil particularly wanted to avoid the possibility of a Soviet veto over NATO initiatives.

Ironically, the abrupt collapse of the Soviet Union left NATO without a focus for its overarching mission. North Atlantic Treaty Organization tried to justify its continued viability in the face of arguments that other European mechanisms were more appropriate.[34] Rather than agreeing to disband, NATO took the initiative and declared in 1992 that it was willing to support peace operations conceived by the Conference on Security and Cooperation in Europe[35] on a case-by-case basis.[36] The following year, NATO extended the same pledge to the UN.[37] The Partnership for Peace initiative and the concept of NATO expansion occurred at substantially the same time.[38]

These ambitions could be aptly characterized as a full employment guarantee for NATO. The events in Bosnia quickly demonstrated that the existing European security structure was incapable of handling the crisis without the presence of United States armed forces.[39] NATO moved to fill the gap. The recent addition of Hungary, the Czech Republic, and Poland to the alliance, perhaps with others to follow, will risk NATO involvement in the traditional ethnic or religious conflicts and border disputes, which have characterized the region. The same is true concerning the Partnership

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34. James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 60-61 (Lori Fisler Damrosch ed., 1993). For example, France has been particularly insistent that Europe should conduct most military operations through the WEU. *Id.*

35. Now called the Organization for Security and Cooperation in Europe (OSCE).

36. *See* Rader, *supra* note 7, at 143. This was the so-called "Oslo Declaration" of 1992. Interestingly, this initiative received almost no attention in the strategic concept document released less than a year before. The communiqué released after the Rome conference in 1991 reflected the alliance's traditional emphasis on collective self-defense. *See* NATO Communiqué, *The Alliance's New Strategic Concept* (last modified Nov. 8, 1991) <http://www.nato.int/docu/comm/c911107a.htm> [hereinafter *The Alliance's New Strategic Concept*].

37. *See* Rader, *supra* note 7, at 143.

38. The Partnership for Peace movement had its origins in the liberation of Central Europe. NATO invited the Central Europeans to "dialogue" on security and related issues. The North Atlantic Cooperative Council grew out of these efforts. Following the dissolution of the Soviet Union, the number of NACC members swiftly grew. The original NACC structure proved inadequate to the members' needs. Additionally, the Central Europeans felt their interests were inappropriately lumped with the former Soviet members and sought entry into NATO. As a compromise, NATO offered the Partnership for Peace alternative in December 1994 as a mechanism for security cooperation and possible expansion. Jeffrey Simon, *The PFP Path and Civil-Military Relations*, *in* NATO ENLARGEMENT: OPINIONS AND OPTIONS 49-52 (Jeffrey Simon ed., 1995).

for Peace initiative.[40] Events such as in Iraq and the continuing strife within the countries of the former Soviet Union may warrant NATO attention as well.[41] Competition for Caspian Sea oil may well add fuel to the flames of war.[42]

To meet these challenges, the alliance's vision must be as clear today as it was when the partnership was formed. The North Atlantic Treaty is fifty years old. It was designed to enable Western Europe to withstand the onslaught of the Soviet Union. That threat is gone, at least for the imme-

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39. *See* Steinberg, *supra* note 34, at 38 (detailing the European Union's inability to broker a durable cease-fire or construct a viable WEU's peacekeeping force). In the early part of the Bosnian conflict France insisted on broad European conduct under the WEU. This resulted in confusing command relationships in the Adriatic where both NATO and the WEU sought to enforce the embargo. Many of France's WEU partners became reluctant to act without the United States. *Id.* at 60-61.

40. Christopher Burns, *European "Roundtables" to Hear Rights Disputes*, PHOENIX GAZETTE, May 28, 1994, at A10. The European Union has recognized ethnic tensions would burden many of the Eastern European nations seeking to join it. Of prime concern are the large Hungarian minorities present in the Czech Republic and also to a greater extent within Romania. Russian minorities in the Baltic countries also could be a problem. Poland seeks guarantees for the rights of Poles in the Ukraine, and Germans are a prominent ethnic group within the Czech Republic. Recognizing that it will face the same problems when selecting candidates for expansion, and wary of admitting problems similar to the Turkey/Greece dispute, NATO has encouraged these nations to sign "friendship" treaties in hopes these will keep disputes from spinning out of control. *Id.* The Hungarians have concluded agreements with both the Romanians and the Slovakian Republic with uncertain prospects for success. *See* Tom Hundley, *Hungary Taking the High Road in Bid to Join NATO*, CHICAGO TRIB., Apr. 6, 1997, at 6.

41. *See Caucasus Region Torn By Independence Struggles*, ASSOCIATED PRESS, Oct. 20, 1997, *available in* 1997 WL 4888688 (cataloging persistent fighting across the former Soviet republics, including Nagorno-Karabakh featuring Armenian versus Azerbaijani; Chechnya pitting predominantly Muslim groups against Russia; and, rebellions in Abkhazia and South Ossetia, breakaway provinces of Georgia). Tensions heightened between Armenia and Azerbaijan recently when the moderate president stepped aside after a rift developed between his party and hard-liners. The president had called for negotiations over Nagorno-Karabakh, but members of his own party would not back him. The new president was the leader of Nagorno-Karabakh during its six-year war against Azerbaijan. Hasmik Mkrtchyan, *Backers of Ex-Armenian Leader Quit*, WASH. POST, Feb. 5, 1998, at A21.

42. Three regional powers, Russia, Turkey, and Iran have struggled for control of the Caspian Sea area for centuries. Each has an ethnic card to play justifying its interest in the area. Meanwhile, Western interests recently concluded oil deals with Azerbaijan. The huge petroleum reserves can only be exported via pipeline. Current plans call for the main line to exit Azerbaijan then cross Georgia and Turkey to the port of Ceyhan. Russia and Iran are unhappy about the proposal and have recently strengthened ties with Armenia–Azerbaijan's nemesis. Phil Reeves, *Black Gold: West Lays Its Bets As the Caspian's Oil Bonanza Begins*, THE INDEPENDENT (London), Nov. 13, 1997, at 17.

diate future. Meanwhile, threats along NATO's expanding periphery indicate that the alliance must prepare to perform humanitarian missions and to support fledgling democracies in a broader area to thwart the spillover of violence into its own region.

This article argues that NATO does not need express UN Security Council approval before it can legally perform peace operations under Chapter VIII of the UN Charter, particularly when NATO performs humanitarian interventions and interventions on behalf of democratic governments. Many critics argue that these are not internationally accepted authorities for use of force.[43] Just as peacekeeping evolved from Chapter VI without a textual basis,[44] as Chapter VIII becomes energized, regional organizations will undertake peace operations in which the parameters are not discernible from the dry words of the UN Charter.

The proposals that NATO should conduct peace operations within or adjacent to the North Atlantic region when prompted by humanitarian or democratic concerns, are in accord with the current practice of nations.[45] NATO should recognize them as legitimate aims. The treaty should reflect the Alliance's right to intervene when a regional government's action or inaction leads to an imminent humanitarian disaster. Likewise, the organization should have the ability to intervene on behalf of democratic governments that are overthrown by unconstitutional means. New members joining NATO understand that they are bound to maintain a democratic

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43. *See infra* notes 184-191 and accompanying text.

44. *See, e.g.*, Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing an Agenda for Peace*, WASH. Q. 51 (Winter 1993).

45. For example, the UN Security Council authorized "all necessary means" to restore the Aristide government in Haiti, specifically finding a "threat to security and peace in the region" in a situation traditionally recognized as an internal affair. *See* S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 4, U.N. Doc. S/RES/940 (1994) [hereinafter Resolution 940]. According to one commentator, the Security Council took great pains to emphasize the "unique" nature of the situation in Haiti hoping to avoid establishing the unique as the norm. The same commentator, however, acknowledges the difficulty of unmaking precedent. *See* Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 430-432 (1996). Likewise, the Security Council praised the Economic Community of West African States humanitarian intervention in Liberia even though it did so in the midst of an internal struggle. *See* S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992) (finding the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole" and commending Economic Community of West African States for its efforts).

form of government, that their militaries submit to civilian control, and that they will settle long-standing ethnic and border disputes.[46]

Reaffirming these basic values in the North Atlantic Treaty would emphasize the goals and aspirations of the present members. Endorsing these principles should be the price of admission for those nations seeking to join the alliance. Therefore, this article argues that the members of the North Atlantic Treaty should consider amending the treaty to clarify NATO's authority as a Chapter VIII regional association to perform peace operations beyond collective self-defense in the North Atlantic area.

As noted above, NATO is already performing peace operations. The utility of changing the treaty to reflect what is already a *fait accompli* is questionable. The suggested changes, however, define the legal basis for future alliance action. The treaty defines both the rights and obligations of its members. Without a textual basis, NATO does not have a clearly defined legal right to conduct peace operations in its own charter. Conversely, NATO members have no affirmative obligation to participate in operations beyond the clear text of the treaty. Updating the treaty will clarify the legal foundation for NATO peace operations, which is currently based on strained re-interpretation of the treaty.[47]

The amendments should also clarify the position of NATO members concerning out-of-area conflicts. The present treaty permits military action only within the North Atlantic region and only for collective self-defense.[48] In all other instances, members are bound only to "consult" when an individual member's interests are threatened.[49] Most of the conflicts that NATO will be called upon to help resolve originate in areas immediately adjacent to, but not within, the North Atlantic region. To

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46. Bureau of European-Canadian Affairs, United States Dept. of State, *Minimum Requirements for NATO Membership* (last modified Aug. 15, 1997) <http://www.state.gov/www/regions/eur/fs_970815members. html>.

47. This hypothesis is supported by recent events. One need look no further than the firestorm of controversy surrounding the Grenada invasion to find arguments that the invasion was illegal because, among other reasons, the Charter of the Organization of Eastern Caribbean States (OECS) did not permit the action. The Grenada incident is discussed *infra* at notes 176 to 191 and accompanying text. The legality of intervention by the Economic Community of West African States (ECOWAS) in Liberia is also in dispute despite the implied authority granted to that action by the Security Council. *See infra* notes 231-267 and accompanying text. After NATO began bombing the FRY, Yugoslavia's representative to the UN charged in an emergency meeting of the Security Council that NATO was disregarding its own "statute." U.N. SCOR, 54th Sess., 3988th mtg., U.N. Press Release SC/6657 (1999) at 12.

48. North Atlantic Treaty, *supra* note 2, art 5.

maintain the advantages that derive from using the NATO structure, such as command and control, interoperability, and standardized procedures, the members must be prepared to act outside the strict regional parameters written into the treaty.

It is not at all clear that NATO members are currently prepared to act "out of area." For example, despite the German government's recent pronouncements,[50] it is uncertain when that nation will permit its armed forces to participate in NATO operations other than collective self-defense. At least in the early stages of the Bosnia conflict, Germany did not permit its ground troops to aid the UN Protection Force in Bosnia-Herzegovina.[51]

The German government also refuses to participate in countries where there is lingering hostility towards Germany due to occupation during World War II.[52] Similarly, France has been reluctant to participate in the European Union fact-finding efforts in Algeria due to its own historical involvement in that country.[53] Others, for political or practical reasons, may also be reluctant to commit out-of-area without prompting by treaty obligations.

The amendments suggested in this article offer distinct advantages over two alternatives that are typically advanced to keep peace operations within the sole control of the United Nations. First, maintaining the NATO command and control structure during peace operations avoids the inevitable confusion arising from the ad hoc coalitions typically used by the UN. Second, it is a viable alternative to the extinct concept of a universal force formed under Article 43 of the UN Charter.[54]

From the United States' perspective, the suggested amendments present two further advantages. First, placing responsibility for peace operations in NATO keeps the United States firmly engaged in Europe,

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49. *Id*. art. 4. "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." *Id.*

50. Hans Georg Ehrhart, *Germany, in* CHALLENGES FOR THE NEW PEACEKEEPERS 32, 40 (Trevor Findlay ed., 1996).

51. UN Protection Force was the multinational force that preceded NATO intervention in Bosnia. Further details are provided *supra* notes 333 to 368 and the accompanying text.

52. *See* Ehrhart, *supra* note 50, at 40.

53. *See* Trueheart, *supra* note 13. The Algerian Government criticizes France for any comments it makes about the situation, while suffering terrorist bomb attacks from the Algerian opposition. *Id.*

whereas the United States would be excluded if another security structure, such as the West European Union, took on the duty. Most NATO allies will welcome continued United States involvement. As a practical matter, they have demonstrated reluctance to engage in peace operations without the United States' commitment.[55] Additionally, action within NATO seems to be a more politically acceptable alternative to most United States lawmakers.[56] Forces devoted to NATO do not face the same personnel and funding limits found in the UN Participation Act.[57]

Part II of this article explores why the United Nations is unable to function as the sole guarantor of international peace and security. The focus is on the practical constraints acting on the international organization. Part III discusses the role of regional organizations and their relationship with the UN. Deriving their legal authority from Chapter VIII of the UN Charter, these regional arrangements have evolved to the point that their importance in maintaining regional peace can be nearly as great as that of the United Nations.

Case histories concerning regional action in the Dominican Republic, Grenada, Liberia, and Haiti record the emerging partnership between the UN and regional organizations. Those missions also demonstrate the creation of customary international law favoring regional action, especially in the field of humanitarian relief and democratic intervention.

Part IV narrows the focus on regional organizations to the role of NATO in Bosnia. It examines the factors supplying the impetus for transforming NATO from a west European collective-security arrangement to a sponsor of regional peace and security. Part V explains why NATO does not need UN Security Council authorization to conduct humanitarian and democratic intervention peace operations. It also argues that the member

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54. Article 43 of the UN Charter envisions that the Member States will "make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities . . . ." UN CHARTER art. 43. Some have inaccurately described this arrangement as the creation of a UN standing army. Whatever its form, no nation has concluded such an agreement, or is it likely to ever be implemented. *But see* Henrikson, *supra* note 15, at 63-70 (asserting Article 43 is the most effective way the UN can constrain the newly powerful regional organizations).

55. *See* Steinberg, *supra* note 34, at 60-61.

56. *Cf.* 22 U.S.C.A. § 287 (West 1999) (setting United States troop contribution to UN peacekeeping operations at no greater than one thousand men and the funding parameters for the same).

57. *Id.*

nations should amend the treaty to define clear and consistent goals for the organization in the twenty-first century. A clear legal basis for conducting humanitarian and democratic peace operations promotes unity of purpose and vision for the alliance. The members must commit themselves to their new mission and redefine their operational area.

II. Why UN Peace Operations Need Regional Help

The UN faces growing limits on its ability to conduct peace operations. This part examines the practical shortcomings of the organization, which lead it increasingly to ask for regional help. The structure of the UN Charter and external influences beyond the UN's control cause these problems.

One problem built into the structure of the UN Charter is the veto power. The power, controlled by the permanent members of the Security Council, is often blamed for the UN's inconsistent approach to peace operations. Peace operations during the Cold War era were often blocked due to East-West competition.[58] Article 27 of the charter provided a convenient mechanism for the opponents to thwart resolutions they thought were advantageous to the other side.[59] This provision allows any one of the five permanent members to obstruct actions supported by the other members of the Security Council.[60] Over the course of forty-five years, the veto power prevented the UN from taking a decisive role in over one hundred major conflicts that resulted in about twenty million deaths.[61] From 1945 through 1990, the permanent members used the veto 279 times.[62]

A rare episode, when the veto failed to block UN enforcement action, occurred at the beginning of the Korean Conflict.[63] With Soviet backing, North Korea launched an invasion of its sister state on 24 June 1950. The United States immediately called for the Security Council to convene. Fortunately, the Soviet representative was absent.[64] The Council voted nine to zero, with one abstention, to condemn the invasion and demanded immediate North Korean withdrawal.[65] A second resolution, taken before the Soviet representative could hasten back to New York, gave UN members authority to "repel the invasion and restore peace."[66]

The Soviets did not make the mistake of boycotting the Security Council again. Boxed in by the competition, the UN developed peacekeeping as a sort of "Chapter Six and a half" measure[67] to address situations where East-West interests did not conflict, or where, often for

different reasons, those interests coincided.[68] For example, in 1960, the

58. *See* Major General V.A. Zolotarev, *The Cold War: Origins and Lessons*, *in* INTERNATIONAL COLD WAR MILITARY RECORDS AND HISTORY 11 (William W. Epley ed., 1994) for an interesting view from the Russian perspective on the forces driving the Cold War. General Zolotarev believes:

> Looking for a culprit in the 'Cold War' is in our opinion a useless exercise because everything in world politics is inter-connected. Thus, any action of one party, which at first glance provided an incentive for the escalation of hostility, if studied thoroughly, will turn out to be a response to some measure of the opponent. One should be forthright: both opposing parties did not act with pristine motives and this led to increased tensions on a global scale in the post-war period, even though the cooperation reached during World War II created conditions for the coordinated solving of problems.

Id. at 12. In his view the desire of the Soviet Union to establish pro-Communist regimes in Eastern Europe received impetus from perceived slights when the West attempted to accept German surrender in Italy without Soviet participation and then abruptly halted Lend-Lease activities. By 1947 the Soviet fears were confirmed by Winston Churchill's famous "Iron Curtain" speech and the announcement of the Truman Doctrine that was designed to thwart Soviet aims of establishing a pro-Communist government in Greece. The Soviets viewed the Marshall Plan as an attempt to collapse their buffer zone and blocked its extension into Eastern Europe. To provide a counter to the Marshall Plan, the Soviets then created the Information Bureau of Communist Parties. This was supported by a system of friendship, cooperation and mutual aid treaties, which General Zolotarev admits were of a decidedly "anti-Western" character. The West reacted by creating the WEU in 1948 and NATO in 1949. The Warsaw Pact formally came into being in 1955. By then the arms race was in motion, especially in the nuclear field. *Id*. at 12-14.

59. U.N. CHARTER art. 27(3) states in pertinent part: "decisions of the Security Council on . . . [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."

60. *Id.*

61. *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, para. 14, U.N. Doc. A/47/277/S/ 24111 (1992) [hereinafter *An Agenda For Peace*].

62. *Id*.

63. BRIAN CROZIER ET AL., THIS WAR CALLED PEACE 92, 93 (1984).

64. The Soviets were protesting the presence of the Chinese Nationalists on the Council in lieu of the Communist government. *Id*. at 93.

65. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., para. 1, U.N. Doc. S/INF/5/Rev.1 (1950).

66. S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., para. 5, U.N. Doc. S/INF/5/Rev.1 (1950).

67. *See* Weiss, *supra* note 44, at 52 (crediting Secretary General Dag Hammaskjold with this description of military operations which had no reference in the Charter, but which seemed to bridge the gap between the Chapter VI mandate for pacific settlement of disputes and the Chapter VII enforcement provisions).

new Republic of the Congo appealed to the United States for assistance when its former colonial overlord, Belgium, sent troops there to protect its citizens following a breakdown of law and order in that country.[69] For a variety of reasons, the United States was unwilling to devote its time and manpower to the problem.[70] On the other hand, the United States feared that the Soviets would intervene, so they referred the Congolese to the UN Security Council.[71]

If the disturbance was a purely internal matter, the Security Council may also have declined to get involved if they believed Article 2(7) was a prohibition.[72] The Congo government, however, complained that Belgian troops had violated its nation's sovereignty by entering under the "pretext" of protecting Belgian citizens.[73] This placed the Security Council in a quandary. The Western powers were anxious to avoid sanctions against Belgium, but feared that invoking Chapter VII would inject Soviet ground troops into the area.[74] Likewise, the Soviets were eager to ensure that United States forces would not intervene.[75] Ultimately, both sides were happy to let the Secretary General handle the situation using peacekeeping procedures.[76] The Security Council empowered the Secretary General to

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68. *See* Trevor Findlay, *The New Peacekeepers and the New Peacekeeping*, *in* CHALLENGES FOR THE NEW PEACEKEEPERS 1 (Trevor Findlay ed., 1996) (tracing the evolution). Findlay states, "Neither mentioned by name nor given a specific legal basis in the UN Charter, peacekeeping evolved pragmatically in response to the limited room for maneuver afforded the UN by East-West conflict." *Id.*

69. BRIAN URQUHART, A LIFE IN PEACE AND WAR 145-177 (1987).

70. *Id.*

71. *Id.*

72. U.N. CHARTER art. 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII." The accepted reading of Article 2(7) then was that it demanded strict non-intervention. This interpretation has evolved with time, however. *See An Agenda For Peace supra* note 61, para. 17 ("The time of absolute and exclusive sovereignty . . . has passed.").

73. William J. Durch, *The UN Operation in the Congo: 1960-1964*, *in* THE EVOLUTION OF UN PEACEKEEPING 315 (William J. Durch ed., 1993). The Congo had been a Belgian colony. In the de-colonization movement, Belgium abruptly divested itself of its protectorate in June 1960. Within days the Congo was in chaos. Belgium quickly re-introduced its troops to protect roughly 100,000 of its citizens there. In reality, the peacekeeping action in the Congo involved not only persuading Belgian troops to leave, but to keep the Congolese factions from tearing the country apart. *See* MILLER, *supra* note 28, at 77.

74. *See* MILLER, *supra* note 28, at 77.

75. *Id.*

"take steps" to render aid, including military assistance, to the Congo government.[77]

As tempting as it is to blame the Cold War for Security Council deadlock, the presumption is not entirely accurate. For example, both Britain and France used their veto to block Security Council action during the Suez Crisis, hoping to preserve their political interests in the area despite opposition from their allies.[78] Then, after the brief moratorium on vetoes noted in *An Agenda for Peace*,[79] it has reappeared in the post-Cold War Security Council as members continue to protect their own political inter-

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76. In accordance with guiding principles set by Secretary General Hammarskjold during the Suez action the Security Council decided that permanent members of the Security Council should not contribute forces to peacekeeping efforts. This principle was still honored when forces were identified for the Congo. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING 48, 221 (2d ed., 1990) [hereinafter THE BLUE HELMETS]. According to the official UN version of events, the Secretary General felt that it was unnecessary to invoke the enforcement provisions of the Charter because he "assumed that, were the United Nations to act as proposed, the Belgian Government would withdraw its forces from Congolese territory." *Id*. at 219.

77. *See* S.C. Res. 143, U.N. SCOR, 15th Sess., 873d mtg., U.N. Doc. S/4387 (1960) (including authority "to provide . . . such military assistance as may be necessary"). This brief unanimity among the permanent Security Council members would not last. By February 1961 it was apparent the main threat to the Congo was from the Congolese themselves as various provinces attempted to break away. Within what may be referred to loosely as the central government there was internal squabbles and attempted coups. Further attempts to refine the mission moved fitfully after vetoes and threats of veto as one member and then another supported the various factions. *See* MILLER, *supra* note 28, at 77-81.

78. THOMAS M. FRANCK, NATION AGAINST NATION 41-45 (1985). Egypt nationalized the Suez Canal in July 1956. Israel attacked the area in October because they claimed feyadeen were raiding from the Sinai. The attack was calculated to draw a response from Egypt. By pre-arrangement with the Israelis, British, and French paratroopers then took the canal after warning "both" sides to back off. Their vetoes blocked any action by the Security Council. The British and French proposed using NATO to restore order, but the United States insisted the UN was the proper forum. The General Assembly convened in emergency session while Secretary-General Hammarskjold and Canada's foreign minister Lester B. Pearson worked out a behind the scenes deal to peacefully intervene using a multinational peacekeeping force (but without troop contributions from the "Big Five"). This United Nations Emergency Force (UNEF) was the first true peacekeeping force providing the model followed by the UN for decades thereafter. A former UN official gives most of the credit for the idea to Secretary General Hammarskjold for creating a "conceptual masterpiece in a completely new field, the blueprint for a non-violent, international military operation" in response to the abortive raid. URQUHART, *supra* note 69, at 133. It is an interesting piece of trivia that the UNEF was equipped with United States surplus World War II helmets spray-painted United Nations blue to distinguish them from other forces. The blue helmets are now a fixture of peacekeeping. *Id*. at 134.

79. *See An Agenda For Peace*, *supra* note 61.

ests.[80] This has led some member states to complain that the decisions of the Security Council reflect only the interests of the powerful permanent members, not the organization as a whole.[81] Many have lobbied for either an expanded Council and/or limitation on the veto power.[82] Despite these initiatives, the veto is likely to continue as an impediment to many future UN peace operations.

There are other practical limits preventing the UN from effectively performing peace operations. The UN frequently does not receive the forces and logistics it needs to respond to threats to peace.[83] Additionally, the world organization is often at political odds with important members, particularly the United States, and it suffers financial reverses because of these disagreements.[84] Finally, the UN has not developed the necessary

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80. A sampling of recent vetoes include: A United States veto blocking a resolution condemning Israel's east Jerusalem settlement policy (*see Chance to Effect Change at the UN*, BUS. TIMES (London), Mar. 25, 1997, *available in* 1997 WL 2966637); a United States veto preventing a second term for then Secretary General Boutros-Ghali (*see Top U.N. Post Now Wide Open*, ARIZ. REPUBLIC (Phoenix), Dec. 5, 1996, at A16 (casting the lone dissenting vote on the fifteen member Security Council)); a United States veto threat following a proposal to remove punitive sanctions against Iraq (*see United States Vows Veto on Iraq*, PITTSBURGH POST-GAZETTE, Aug. 3, 1995, at A9); a United States veto over a resolution demanding Israel stop its settlements in East Jerusalem, (*Indonesia Disappointed Over United States Veto on Security Council*, KYODO NEWS INT'L, May 22, 1995, *available in* 1995 WL 2225306); and a Russian veto to apportion the cost of peacekeeping efforts in Cyprus to all UN members (*Russia Uses Veto on Security Council to Kill Cyprus Plan*, ORANGE COUNTY REG. (CA), May 12, 1993, at A14 (citing the lone dissenting vote on the Council)).

Recently, the Russians insisted the United States needed further authority from the Security Council before launching an attack against Iraq to compel that country to comply with UN sanctions imposed following the Gulf War. Russia hinted that it would then veto the proposed action. Daniel Williams, *Yeltsin Says Bombing Iraq Might Bring 'World War,'* WASH. POST, Feb. 5, 1998, at A21. Russia initially blocked a proposed arms embargo against Serbia following unrest in the Kosovo region. William Drozdiak, *West Vows New Sanctions on Yugoslavia*, WASH. POST, Mar. 26, 1998, at A26. The arms embargo was approved only after Russia forced the other members to delete a paragraph calling the Kosovan situation a threat to international peace and security. John M. Goshko, *Arms Embargo on Yugoslavia*, WASH. POST, Apr. 1, 1998, at A24.

81. INTERNATIONAL TASK FORCE ON THE ENFORCEMENT OF U.N. SECURITY COUNCIL RESOLUTIONS, UNITED NATIONS ASS'N OF THE UNITED STATES OF AMERICA, WORDS TO DEEDS: STRENGTHENING THE U.N.'S ENFORCEMENT CAPABILITIES 34 (1997) [hereinafter WORDS TO DEEDS].

82. *Id.*

83. *See infra* Part II. A.

84. *See infra* Part II. B.

command, control, and logistics framework necessary to direct large-scale interventions.[85]

A. Article 43: Gone But Not Forgotten

While the liberal use of the Security Council veto mirrors the members' distrust of each others' political agendas, their refusal to establish a permanent on-call force for UN peace operations reflects distrust of the world organization itself. Article 43 is the legal authority for such a force.[86] The article came closest to implementation right after World War II when the Security Council produced a draft of general principles to guide negotiation of Article 43 agreements.[87] However, the draft was never approved. Although there were several reasons given for this failure,[88] the original motivation was probably political disagreement founded in Cold War distrust.[89]

Just as the Cold War did not cause all of the Security Council vetoes, it also was not the sole barrier to implementing Article 43. In a burst of enthusiasm, the Secretary General greeted the conclusion of the Cold War by stating, "the improvement of relations between States east and west affords new possibilities, some already realized, to meet successfully threats to common security."[90] He judged that the time was right to ask UN members to negotiate Article 43 agreements "essential to the credibility of the United Nations as guarantor of international security."[91]

The response to the Secretary General's plea was less than overwhelming. No state has negotiated an Article 43 agreement.[92] The United

85. *See infra* Part II. C.

86. *See supra* note 54 and accompanying text.

87. *General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations*, U.N. Doc. S/336 (1947).

88. U.N. SCOR, 2d Sess., 139th mtg. (1947) indicates that the main points of contention were over numbers and types of military support to be given by the permanent members and the logistics required to base, supply, deploy, and re-deploy the troops. *Id*. at 956-975.

89. *See, e.g.*, Henrikson, *supra* note 15, at 63; James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL. 227, 231-233 (1994); Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 775 (1993).

90. *See An Agenda For Peace*, *supra* note 61, para. 8.

91. *Id*. para. 43.

States flatly rejected the proposition,[93] as did China.[94] Political reality quickly set in.

When the Secretary General supplemented *An Agenda for Peace*, without directly addressing Article 43, he conceded that the United Nations did not have the "capacity to deploy, direct, command, and control operations" for the purpose of peace enforcement.[95] He also stated that "it would be folly to attempt to do so at the present time when the organization is resource starved and hard pressed to handle the less demanding peacemaking and peacekeeping responsibilities entrusted to it."[96]

Commentators give wide-ranging reasons for countries failing to implement Article 43.[97] For instance, there are several political rationales advanced against creating a UN army. First, nations resist participating in actions in areas where they have no defined strategic interests.[98] Second, smaller states and those without a permanent seat on the Security Council fear that they will be the object of UN intervention, whereas the permanent members could block intrusions into their own sovereignty through the use of the veto power.[99] The third reason is the likelihood that the permanent members would be unable to agree on a politically acceptable and compe-

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92. *But see infra* notes 102-112 (discussing the recent formation of the U.N. Stand-by Forces High Readiness Brigade [SHIRBRIG]). The SHIRBRIG countries have not signed Article 43 agreements, although their pledges support the principles of Article 43.

93. BUREAU OF INT'L ORG. AFFAIRS, UNITED STATES DEPT. OF STATE, PUB. 10161, PRESIDENTIAL DECISION DIRECTIVE (PDD) 25: THE CLINTON ADMINISTRATION'S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS, *reprinted in* 33 I.L.M. 795, 802 (1994) [hereinafter PDD 25] ("The United States does not support a standing UN army, nor will we earmark specific United States military units for participation in UN operations.").

94. Paul Lewis, *U.N. Set to Debate Peacemaking Role*, N.Y. TIMES, Sept. 6, 1992, at A7.

95. *See Supplement to an Agenda For Peace*, *supra* note 14, para. 77.

96. *Id.*

97. On the technical level, the drawbacks reported in 1947 remain valid today: Under what circumstances would a member be permitted to withdraw forces dedicated to the UN? If granted the right to withdraw, could the forces be pulled while the UN was actually engaged in combat? How would the UN determine the nationality of the commanders? How are troop contribution obligations determined? What form would UN basing rights take? And, would the UN establish time limits for withdrawal after termination of hostilities? *See* Miller, *supra* note 89, at 800-805.

Modern concerns added to this litany include: Who has command and control of the forces? How would the UN army be trained to ensure uniform tactics and doctrine? How would the UN ensure interoperability among forces with different languages and equipment? *See* Rossman, *supra* note 89, at 245-247.

98. *See* Rossman, *supra* note 89, at 245.

99. *Id*. at 246.

tent military commander.[100] Finally, a deadlocked Security Council may block any action to prevent or to stop aggression.[101]

The outline of a scaled-down Article 43 can be seen in the recently established Planning Element for the UN Stand-by High Readiness Brigade.[102] Although France suggested a UN rapid reaction force in 1992, the idea never moved past the talking stage.[103]

The Secretary General repeated the call for a rapid reaction force in 1995.[104] The UN members discussed several ideas, but seven countries, led by Denmark,[105] took the first affirmative step in December 1996 when they agreed to form the UN Stand-by High Readiness Brigade with a command headquarters near Copenhagen, Denmark.[106]

Despite its designation as a "UN" force, however, the Stand-by High Readiness Brigade is actually a multilateral agreement to which the UN is not a party.[107] The parties to the agreement envision a force that will be based in their home countries and assembled only for training purposes or for peace operations approved by both the Security Council and their own national governments.[108] Additionally, the agreement contains an opt-out

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100. *Id.*

101. *Id.*

102. *Secretary-General Says Initiative is Milestone in Efforts to Enhance UN machinery for Peace*, M2 PRESSWIRE, Sept. 4, 1997, *available in* 1997 WL 13654073.

103. *See* Paul Lewis, *France's U.N. Plan at Odds with United States*, N.Y. TIMES, Feb. 2, 1992, at 7 (reporting France's offer to put 1000 French soldiers on 48-hour notice for UN peacekeeping duty–a plan the United States did not endorse. It is interesting to note that although the French proposed the idea in 1992 they never implemented it, nor are they a member of SHIRBRIG).

104. *See Supplement to an Agenda For Peace*, *supra* note 14, para. 43.

105. The original parties to the agreement were Denmark, Sweden, Canada, Poland, Norway, Austria, and the Netherlands. *SHIRBRIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, JANE'S DEF. WKLY., Jan. 8, 1997, at 20.

Later, Argentina, Belgium, the Czech Republic, Finland, and Ireland agreed to participate as observers. *UN Head Urges Support for New Standby Force*, JANE'S DEF. WKLY., Sept. 10, 1997, at 8. By December 1997, however, Poland had not yet joined the steering committee for the group. *Dutch Join UN SHIRBRIG*, JANE'S DEF. WKLY., Dec. 10, 1997, at 14.

106. *See SHIRBRIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, *supra* note 105.

107. *Id*.

108. *Id*.

provision wherein each country can decide not to contribute forces for a particular operation, while the other members can press ahead.[109]

This last provision calls into question the actual utility of the force, especially in light of its composition and logistics. Manned with a maximum of only 4000 troops, it is designed for light peacekeeping duties in "potential conflict areas but where there is little danger of fighting breaking out."[110] The force will also be dependent on logistical support and airlift from other nations.[111] Obviously, even a small opposing force would quickly outgun this modest force if the situation turned hostile. One expert noted that they would serve as little more than a "trip-wire," putting a "would-be aggressor on notice that moving his forces . . . would involve him in armed conflict with the Security Council and the entire world."[112]

Its status as a trip-wire should be small comfort to any rapid reaction force. Even strong supporters of the UN have concluded that the most ambitious UN standing army will probably not boast enough force to oppose a "medium grade belligerent."[113] Those forces would, of course, be dependent on a logistics tail composed of expensive air- and sea-lift–forces that the UN also does not possess. To assist these components, the national forces of the members would have to respond quickly after all. In the final analysis, then, without an Article 43 force or a credible UN rapid response force, the UN is totally dependent on the uncertain political will of the supporting member states.[114]

B. Political Disagreements and Financial Woes

> The truth is that neither the United States nor the Soviets had ever really developed the political commitment to the central idea of the [UN], which would have been necessary to make it work, the sort of commitment, for example, which the constituents of our domestic system have to the United States Constitution. That takes not merely political will but reciprocal

109. *Id*.

110. *See UN Head Urges Support for New Standby Force*, *supra* note 105.

111. *See Dutch Join UN SHIRBRIG*, *supra* note 105.

112. Professor Robert Turner, *quoted in* Rossman, *supra* note 89, at 258.

113. *See* WORDS TO DEEDS, *supra* note 81, at 33. The Secretary General hypothesizes that he currently has a commitment of about 88,000 troops from 70 countries "potentially available." *See Secretary-General Says Initiative is Milestone in Efforts to Enhance UN machinery for Peace*, *supra* note 102.

> confidence, rooted in trust that the other side will play by the rules established in the fundamental document if we do.[115]

The above quote was written during the Cold War, but the reality is that political division in the UN has never been limited strictly to the East-West conflict. President Charles de Gaulle reportedly was fond of calling the institution the "Disunited Nations," devoting itself to "world disorder."[116] Speaking in 1961 against the backdrop of the Congo peacekeeping initiative, de Gaulle had the opportunity to witness first hand the trends that are now familiar when peace operations go wrong.[117] In the Congo, states that initially supported the operation were disillusioned when it dragged on, and what we now call "mission creep" changed the fundamental nature of the operation.[118] In an attempt to impose their political will on the peacekeeping process, members voted against the resolutions, withheld funds, had on-scene proxies work at cross-purposes, and even threatened to withdraw troops and logistical support.[119]

It should come as no surprise that the divergent political views among nations and between the states and the UN result in frequent deadlocks.[120] These impasses need not be exclusively Security Council vetoes. Security

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114. *See* WORDS TO DEEDS, *supra* note 81, at 32-33. Despite the current optimism over the rapid reaction force, whether it is the SHIRBRIG or some other force, the enthusiasm is not universal. Apparently some countries with less than sterling civil rights records or with skeletons in their closets concerning the way they came to power, fear the force will be used against them. Others do not want their nationals to spend extended periods under UN command. Costs are always a concern. *Id*. In the United States, there is strong support for the proposition that the President can never relinquish command to the UN. *See* David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 399, 439 (1995). Critics argue that the President abrogated his constitutional responsibility as commander and chief in Bosnia and Somalia because he allowed non-United States actors to decide when and where United States force would be employed. *Id.* This led President Clinton to declare: "The President retains and will never relinquish command authority over United States forces." His declaration, PDD 25 also says that large-scale combat deployments should be under United States command and operational control or "through competent regional organizations such as NATO or ad hoc coalitions," and "[n]o president has ever relinquished command over United States forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. "[But if operational control is given to a UN commander], United States commanders will maintain the capability to report separately to higher United States military authorities, as well as the UN commander." *See* PDD 25, *supra* note 93, at 807-809.

115. *See* FRANCK, *supra* note 78, at 59.

116. Charles Burton Marshall, *Revision of the United Nations Charter*, *in* THE UNITED NATIONS IN PERSPECTIVE 77 (E. Berkeley Tompkins ed., 1972).

117. *Id.*

Council inaction is almost as common. Arguably, the Security Council's aversion to becoming involved in quagmires in the Federal Republic of Yugoslavia, Liberia, and Haiti actually prolonged the strife in those areas.[121] This type of stalemate is also dangerous because the effort to craft politically acceptable mandates may leave Security Council resolutions vague and subject to differing interpretations by those tasked to carry them out. Setbacks often lead to backlash against the UN.[122]

Perhaps the damaged relationship between the UN and the United States best illustrates the political and financial problems facing the organization. The United States was one of the founding states of the United Nations.[123] It made the UN a pillar of its foreign policy.[124] When the first enforcement action was launched, the United States led the way into Korea.[125] It even insisted against its own allies that the Suez Crisis be resolved through the auspices of the UN.[126]

The UN grew rapidly in its first twenty-five years. Membership expanded from fifty-one at or near inception to 127 members by 1972.[127] Most of the new members were from developing nations.[128] The General Assembly came to be dominated by their voices calling for economic aid for development.[129] The "nonaligned" bloc of newly admitted states often

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118. The goal of Resolution 143 was to facilitate the withdrawal of Belgian forces from the Congo and enable the Congolese forces to restore order. When secessionist movements continued to threaten the country's stability, the Security Council authorized its force to maintain the territorial integrity and political independence of the country. *See* S.C. Res. 161, U.N. SCOR, 16th Sess., 942nd mtg., U.N. Doc. S/4722 (1961). Still later in November 1961, the Security Council authorized U.N. forces to arrest and deport all foreign mercenaries in the country who were there (usually with the backing of an outside government) supporting the various secessionist forces. *See* S.C. Res. 169, U.N. SCOR, 16th Sess., 982nd mtg., U.N. Doc. S/5002 (1961). From a declared policy of neutrality and non-intervention, these resolutions transformed the operation to a situation where "self-defense" increasingly took on an offensive overtone. *See, e.g.*, MILLER, *supra* note 28, at 96-99; Durch, *supra* note 73, at 327.

119. MILLER, *supra* note 28 at 79-80. For a survey of what options the major players chose, *see* Durch, *supra* note 73, at 322-326.

120. For example, the Secretary General is extremely protective of the UN's claimed prerogative of strategic command and control of forces placed at its disposal for peacekeeping. *See Supplement to an Agenda For Peace*, *supra* note 14, paras. 38-42. *But see* PDD-25, *supra* note 93, at 801 (defining United States reasons for involvement in UN peace operations as first, "to persuade others to participate in operations that serve United States interests," and second, "to exercise United States influence over an important UN mission without unilaterally bearing the burden").

121. *See* Borgen, *supra* note 33, at 829. Perhaps the current situation in Kosovo is yet another example of this phenomenon. *See* Drozdiak, *supra* note 80.

voted against the interests of the United States.[130] Since the United States was the major contributor to the UN budget, United States policy-makers debated the wisdom of the investment.[131]

At first, the United States focused on the nonaligned and Soviet blocs as the source of its disillusionment.[132] Later, the target of United States displeasure shifted to the world organization itself, with some United States interests advocating that the United States use its financial clout to motivate the UN to make needed organizational changes.[133] For a brief

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122. *See* WORDS TO DEEDS, *supra* note 81, at 9, 48. The Congo operation was an early illustration of this phenomenon. There are additional examples. Somalia, where the mission to protect humanitarian relief turned into a manhunt for a warlord which ultimately got twelve Americans killed. Bosnia, before IFOR got involved when the UN's mandate switched uncertainly between humanitarian aid to setting up safe havens, and then using force to actively engage violators of the safe zones. *See* Address by Ambassador Richard Gardner, *Franklin Roosevelt and World Order: The World We Sought and the World We Have*, *in* 142 CONG. REC. S12458 (daily ed. Oct. 21, 1996) (statement of Sen. Kennedy) [hereinafter Address by Ambassador Richard Gardner].

> In Somalia and the former Yugoslavia, there were large gaps between the ambitious Security Council mandates and the capacity of the world organization to carry them out. The inevitable result has been disillusionment with the UN, particularly within the United States. These UN operations, as well as the crisis in Rwanda, have called into question a central presumption of collective security–the willingness of democratic countries to risk casualties in conflict situations 'anywhere in the world,' where they do not see their vital interests as being at stake.

Id. See also FRANCK, *supra* note 78, at 174.

123. ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 174 (1994).

124. *See id.* (arguing that the UN "was at the center of United States foreign policy" during the 1950s and 1960s as it argued for an expansive view of what the UN could take on, while conversely the Soviets advocated a very conservative approach).

125. S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. S/INF/5/Rev.1 (1950) delegated the Security Council's command and control of UN operations in Korea to the United States.

126. *See supra* note 78 and accompanying text.

127. Carlos P. Romulo, *Crosscurrents in the U.N.*, *in* THE UNITED NATIONS IN PERSPECTIVE 92 (1972).

128. *Id.*

129. *Id.*

130. *Id.* at 92-95. *See also* Opinion, *A Poor Investment*, SAN DIEGO UNION-TRIB., Mar. 19, 1984, at B6 (describing the UN as "a sounding board for diatribes against America" and stating that UN members vote against the United States 75% of the time; additionally, the nonaligned nations of Africa, Asia, and Latin and South America voted with the United States only about 20% of the time).

period during the Reagan administration, Congress followed through on its threats, drastically cutting back United States contributions to the UN.[134] The administration came to believe, however, that the cuts hurt the United States more than they helped, because they undermined United States foreign policy goals.[135]

When President Clinton took office, he reportedly backed increased participation in UN initiatives.[136] A Republican majority in Congress, however, became even more critical of the UN bureaucracy than had been members of the Reagan administration.[137] Their perceptions that the UN was an overblown and inefficient organization were enhanced by the UN's operational failures in Somalia and Bosnia.[138] This time, the United States

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131. By the early 1980s the United States Ambassador to the UN, Jeanne Kirkpatrick, began to describe the organization as "a very dismal show." Jeanne Kirkpatrick, Address to the American Legion, *quoted in* Editorial, "*Dismal Show" Deplored*, OKLA. CITY TIMES, Feb. 23, 1982, *available in* 1982 WL 2393074. She believed that the General Assembly allowed small countries to dominate the discussion and that their involvement actually helped polarize the world making conflict resolution more difficult. *Id.* Ambassador Kirkpatrick began to support the idea of selective cuts in United States funding for the UN. *See* Editorial, *Waffling on the UN*, DAILY OKLAHOMAN, Oct. 8, 1983, *available in* 1983 WL 2169569; *see also* Opinion, *supra* note 130 ("What's worse, the United States pays for this abuse. The United States treasury bankrolls a quarter of the United Nation's total budget. And because most nations fail to pay their share of the bill, the American contribution usually rises to more than a third.").

132. *See, e.g.*, Andrew Radolf, Opinion, *United States Turns Up Heat on Bias at the U.N.*, SAN DIEGO UNION-TRIB., Apr. 29, 1984, at C5 (describing the results of a "report card" which helped the United States determine how much foreign aid it should allocate to a country based on its UN voting record).

133. *See id.* The Nichols Amendment to the UN Participation Act, called for a review of "how well the UN is fulfilling [its] mandate . . . to maintain international security and promote 'peaceful relations among states.'" The UN budgeting process came under attack. *See U.N. Wasting United States Tax Money, Heritage Says*, SAN DIEGO UNION-TRIB., June 19, 1984, at A4.

134. *See, e.g., Reagan Reverses Stance, Tries to Restore U.N. Funding*, N.Y. TIMES, Sept. 14, 1986, at A2.

135. *See Reagan Urges Congress to Restore U.N.'s $79.2 Million*, L.A. TIMES, July 22, 1987, at 1.

136. *See GOP Casts Pall Over U.N. Anniversary*, DALLAS MORNING NEWS, Jan. 1, 1995, at A23.

137. *Id.*

138. *See, e.g., GOP Casts Pall Over U.N. Anniversary*, DALLAS MORNING NEWS, Jan. 1, 1995, at A23; Christian Chaise, *Clinton Has No "Instant Solution" to UN Debt Problem*, AGENCE FRANCE PRESSE, Oct. 20, 1995, *available in* 1995 WL 7870821; Bob Dole, *Dole to Introduce Bill Targeting Outrageous U.N. Taxation Schemes*, Jan. 17, 1996, *available in* 1996 WL 5167019; Editorial, *Split Policy at the U.N.*, WASH. POST, Sept. 24, 1997, at A20. Political differences prevented any money from being appropriated for UN purposes in fiscal year 1998. *See* Goshko, *supra* note 23.

removed almost all monetary backing for the UN, plunging it into its present financial morass.[139]

The UN did not help its cause. It moved too slowly to implement the organizational changes, which it finally admitted needing all along.[140] In part, the developing nations hindered change because they insisted that the UN's major function should be rendering economic aid.[141] Nevertheless, United States complaints about the speed of reform led directly to the ouster of Boutros-Ghali from the Secretary-General post.[142]

Meanwhile, the financial debacle caused other ripple effects. Because of the shortfall in funding, the UN cannot reimburse participating states for their peacekeeping activities.[143] In turn, those states cannot, or will not, participate in future operations without such funding.[144] When the UN cannot fill the peacekeeping role, regional organizations are the logical entities to step in to impose a solution.

C. Command and Control of Resources and Troops

In the golden age of peacekeeping following the Suez Crisis, peace operations occurred after two sovereign nations agreed to stop fighting and were willing to have the UN help them to keep their promises by deploying along their borders.[145]

Secretary General Harmmarskjold set three straightforward rules for deploying peacekeeping troops: (1) the nations consent to their presence, (2) minimum use of force in self-defense or to defend the mission, and (3) the peacekeeping force must remain strictly neutral.[146] The first expansion of those concepts occurred in Lebanon and Jordan when the UN agreed to deploy peacekeeping forces within a state upon its consent if there was evidence that outside forces were influencing internal events.[147]

Events in the Congo strained the basic rules to the limits–most would say past the cracking point. The Congo operation prompted a commenta-

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139. *See supra* note 23 and accompanying text.

140. John M. Goshko, *U.N. at Odds Over Needs of Africa*, WASH. POST, Sept. 26, 1997, at A19.

141. *Id.*

142. *See Top U.N. Post Now Wide Open*, *supra* note 80.

143. *See* Findlay, *supra* note 68, at 30.

144. *Id.*

145. ARTHUR LEE BURNS & NINA HEATHCOTE, PEACE-KEEPING BY U.N. FORCES 18 (1963).

146. *Id.*

147. *Id*. at 22.

tor to observe, "The moment a peace-keeping force starts killing people it becomes part of the conflict it is supposed to be controlling, and therefore a part of the problem."[148] He apparently believed that taking sides or using force in any way beyond self-defense would cause the UN to lose its aura of international respect.

Nevertheless, the spectrum of peace operations has continually expanded. Peacekeeping itself seems to include everything from traditional border watch to the more "robust" actions now called "peace enforcement."[149] Peace enforcement is the most radical new concept. First authorized in Somalia to protect humanitarian relief operations, peace enforcement allows forces carrying out the Security Counsel mandate to use "all necessary means" to protect the mission without the consent of the state or the parties involved.[150] At the same time, the intervenors maintain the fiction that they are not a belligerent force.[151]

This evolution in peacekeeping places heavily armed troops, often without specific training in peace operations, in situations where ceasefires are uncertain or nonexistent.[152] This has triggered an enormous debate within the peacekeeping community.

Proponents of the so-called "Scandinavian model" agree with Sir Urquart that use of force only demeans the international organization and

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148. URQUHART, *supra* note 69, at 179.

149. *See* Findlay, *supra* note 68, at 17, 18. The author identifies the range of activities now considered peacekeeping: disarmament (Somalia, Haiti); promotion and protection of human rights (Cambodia, El Salvador); mine clearance, training, and awareness (Afghanistan, Cambodia); military and police training (Cambodia, Haiti); boundary demarcation (Kuwait-Iraq); civil administration (Cambodia); refugee assistance and repatriation (FRY, Somalia, others); reconstruction and development (Somalia); maintenance of law and order (Cambodia and Somalia). *Id.*

150. Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 105-107 (1996).

151. *Id.*

152. *See* Findlay, *supra* note 68, at 1. The end of the Cold War has actually complicated matters. More forces have been freed up for peacekeeping duties, but have little training for it.

At the same time, peacekeeping has become much more complicated as "second generation peace-keeping" attempts to impose a solution on the conflict by either diplomatic or military means. *Id.* at 13. Often consent is weak, or missing entirely by the time the forces are on the ground. *Id.* at 24.

leaves it open to charges of favoritism.[153] Conversely, advocates of the "British model" of "robust" peacekeeping seem to be prevailing.[154]

The complexity of new peace operations reveals the failings of the UN command structure. "[T]he ad hoc, amateurish, almost casual methods of the past simply could not keep pace, resulting in disorganization, mismanagement and waste."[155] Coordination between the civilian and military arms of the UN has always been difficult during armed conflict.[156] Command and control is now critical. Despite prodding by the United States and others, a recent report from a pro-UN American group still characterizes the results of the UN reform effort as "woefully inadequate."[157]

Regional organizations are increasingly called to fill these gaps in the UN peace operations system. From a political and operational standpoint, it makes sense for the regional organizations to conduct peace operations. First, they are more likely to act in areas where they perceive that their vital national interests are threatened. Second, they are less likely to sabotage the mission when their own troops are on the ground. Third, they train together regularly, usually under identified chains of command, and have forged common doctrine, rules of engagement, and divisions of labor. Finally, while members of the regional organization will surely have their political differences, they form bonds over time that are usually absent from short term "coalitions of the willing."[158]

III. Legal Basis for Regional Efforts

The legal basis for regional involvement in peace operations is already in place. Chapter VIII of the UN Charter protects the rights of regional organizations to exist and to deal with regional matters "consis-

153. *Id.* at 24.

154. *Id*. at 24-27.

155. *Id.* at 18.

156. *See, e.g.*, MILLER, *supra* note 28, at 88, note 35 (detailing the problems involved with coordinating the Congo mission: language problems, incompatible equipment and procedures, lack of common training and staff structures, and twisting chains of command); Findlay, *supra* note 68, at 25.

157. *See* WORDS TO DEEDS, *supra* note 81, at 6.

158. This phrase is used often to describe missions undertaken by nations with common interests, but which do so in an ad hoc manner without being compelled by membership in a security arrangement. *See, e.g.*, Thomas G. Weiss, *The UN's Prevention Pipe-Dream*, 14 BERK. J. INT'L L. 423, 430 n.28 (1996) (describing the difference between these ad hoc organizations and a theoretical organization under the complete command and control of the UN).

tent with the purposes and principles of the United Nations." [159] These rights were hard won and, until recently, somewhat hollow, as the UN has attempted to define the regional organizations' role very narrowly. The reasons for this approach are rooted in the history of the Charter negotiations and in historical fears of establishing "spheres of influence."[160]

A. Legal Framework

In 1945, during negotiations at Dumbarton Oaks in Washington, D.C., the preliminary draft proclaimed the UN the only international organization to which disputes between states could be submitted.[161] One bloc, led by the Latin American nations, complained that this arrangement would take away their ability to respond in self-defense.[162] They also felt that the proposed Charter would encroach too deeply on their capacity to resolve local issues and bypass regional organizations already in existence.[163]

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159. *See* U.N. CHARTER art. 52(1).

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> [T]here are undoubtedly . . . considerations . . . which point to the need for great caution in admitting such [regional] arrangements into a global system. For one thing, they have too often in the past been the occasion for fear and suspicion instead of inspiring confidence and cooperation. . . . . Furthermore, they tend to emphasize limited commitments, whereas modern war and the increasing interdependence of the modern world reduce the possibility of thinking realistically in such terms.

LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 310 (1949). *See also* ROBERT C. HILDERBRAND, DUMBARTON OAKS 24, 25 (1990) (relating Secretary of State Cordell Hull's fears that regionalism would inhibit free trade and would be subject to abuse by the Great Powers who would dominate them. He also wished to avoid an excuse for United States isolationism, which might recur if the United States were given the choice of only participating in the Western Hemisphere).

161. Arend, *supra* note 26 at 7-18. Within the American camp, opinion was apparently split. As related, fearing a slip back into American isolationism, Secretary of State, Cordell Hull believed in a strong, central UN. *See* HILDERBRAND, *supra* note 160, at 24. Conversely, Senator Vandenberg, the American delegate to the regional committee at the San Francisco Conference, wanted to support the Latin American proposals. *Id.* at 6, 11-12. *See also* Borgen, *supra* note 33, at 798-799 (agreeing that it was a push from the Americans, North and South which led to the drafting of Chapter VIII).

162. *See* Arend, *supra* note 26, at 7-18

163. *Id.*

Another group, the victorious Allied Powers, wanted the flexibility to deal with a possibly resurgent Germany and Japan.[164]

Diplomats opposed to regional organizations feared that if these groups were coequal with the UN they would render the world organization impotent and lead to regional hegemony by a few powerful states or alliances.[165] Ultimately, the parties compromised on Chapter VIII and the "inherent right to self-defense" principle of Article 51.[166]

In an effort to balance the competing interests between the world body and the regional organizations, the drafters developed a complex scheme of articles requiring states to move between Chapter VI and Chapter VIII. No matter how nimbly the reader jumps, however, these competing provisions are difficult to harmonize. For instance, Article 33 says that

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164. *Id.* at 7-18.

165. Arend, *supra* note 26, at 12. Essentially, this is the "spheres of influence" argument mentioned above. The resistance to participation by regional organizations in peace activities did not go away with the adoption of Chapter VIII. Apprehension of "spheres of influence" is still one of the leading non-legal arguments for resisting expansion of the regionals role. *See, e.g.*, Stromseth, *supra* note 31, at 498 (arguing that a greater out-of-area role for NATO might be viewed by weaker states as colonial power strong-arming); Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping–Lessons Learned from Liberia*, 8 HARV. HUM. RTS. J. 129, 148 (1995) (decrying the role Nigeria has taken in Liberia because "the broad power given to regional organizations raises the risk of regional expansionist tendencies that could jeopardize the perceived impartiality of the United Nations and eventually discredit the peacekeeping process"); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 228-229 (1996) (reasoning that the regional organization's proximity and familiarity with the warring parties may generate more bias or self-interest than other states might have and that their actions may conceal driving interests of the regions most powerful members); *but see id.* (supporting regional involvement because multilateral decision-making requires consensus among states which have diverse interests lessening chance that acts are purely in self-interest and "the member states are likely to have a greater expertise on issues driving the conflict and greater familiarity with the warring parties than extra-regional actors"); WORDS TO DEEDS, *supra* note 81, at 42 (admitting regionals are often more familiar with the problems, the players, the history, and the subtleties of the situation).

166. *See* U.N. CHARTER art. 51. Those critical of the compromise term the deal the "three concessions." *See* Henrikson, *supra* note 15, at 38-41. The concessions are: (1) the right to submit disputes to a regional organization first; (2) continued operation of existing mutual defense pacts and recognition of right to preemptive enforcement actions in those regions; and (3) the inherent right to individual and collective self-defense. *Id. But see* GOODRICH & HAMBRO, *supra* note 160, at 309 (arguing that the inclusion of these provisions was probably inevitable given the limited ability of most states to project power far beyond their borders, that national interests drive the decisions of states, and the demonstrated willingness of states in the past to enter into such arrangements when they have common interests at stake).

members "may" seek to resolve disputes at the regional level before resorting to the Security Council.[167] On the other hand, Article 52 says that members of regional arrangements "shall" resort to the regional forum first before referring disputes to the Security Council.[168] The article also directs the Security Council to refer disputes to the regional organization for pacific settlement.[169] Finally, the same article purports to take away with one hand what it has just given with the other.[170] Article 52, Section 4, says that despite the language of the first three paragraphs, the Security Council's power to investigate disputes which may endanger international peace and security,[171] and the ability of member states to bring these disputes to the attention of the Security Council, is not impaired.[172]

What is left unsaid in Article 52 is perhaps as important as what is said. By retaining a niche for the Security Council in Article 52(4), does the Charter imply that the Security Council has the sole power to "recommend appropriate procedures or methods of adjustment" under Article 36[173] and the sole power to "decide whether to take action under 37?"[174] These are the provisions commonly regarded as the basis for the "Chapter Six and a half" peacekeeping powers.[175] If so, the rest of Article 52 is rendered meaningless. Conversely, if Article 52 retains meaning, it could support the theory that a regional organization may do anything short of enforcement action as long as it is consistent with the purposes and principles of the UN Charter.[176]

Article 52 does not require the regional organization to seek approval of the Security Council before embarking on attempts to peacefully resolve disputes.[177] It also does not require the organization to cease its efforts once the Security Council becomes involved in a matter.[178] This contrasts with Article 53, which requires regional organizations to gain Security Council approval before conducting enforcement actions.[179] Accordingly,

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167. U.N. CHARTER art. 33.
168. *Id.* art. 52(2).
169. *Id.* art. 52(3).
170. *Id.* art. 52(4).
171. *Id.* art. 34.
172. *Id.* art. 35.
173. *Id.* art. 36(1).
174. *Id.* art. 37(1).
175. *See* Weiss, *supra* note 44, at 51.
176. This concept will be explored more extensively *infra* notes 180-191 and accompanying text.
177. U.N. CHARTER art. 52.
178. *Id.*

an expansive reading of Article 52 provides the regional organizations a flexible tool with which to perform peace operations.

Commentators writing shortly after the approval of the Charter attempted to reconcile the provisions concerning regional organizations by saying that, by its terms, Article 52 was limited to "local disputes."[180] By local, they meant between members of the regional organization itself.[181] The Security Council would then exercise its pre-eminent right to maintain international peace and security if there was a dispute not involving a member of a regional organization or if the regional organization was unable or unwilling to resolve the dispute.[182] In practice, regional organizations do not always confine dispute resolution to member states, and the line between what is and what is not enforcement action is blurred.[183]

At one end of the spectrum, an argument can be made for a narrow interpretation of Article 52. The narrowest interpretation would prohibit use of force by a regional organization except in cases of collective self-defense in response to armed attack, or after bringing a situation to the Security Council's attention and obtaining its authorization to use force.[184]

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179. *Id.* art. 53.

180. *See* GOODRICH & HAMBRO, *supra* note 160, at 314, 315.

181. *See id.* (acknowledging that the Chapter VIII provisions are "not wholly in harmony with the procedures laid down in Chapter VI"; and attempting to reconcile the inconsistencies by limiting regional action to instances that "exclusively involve states which are parties to such regional arrangements"); *see also* NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 112 (1950) (interpreting the provisions to mean that the regional councils must handle local disputes unless the regional arrangement does not provide for dispute resolution or the matter is beyond its capacity to handle).

182. U.N. CHARTER art. 24.

183. *See supra* note 4. Article 53 of the UN Charter accords the regional organization the right to perform enforcement actions only after approval of the UN Security Council. On the other hand, the Security Council is empowered to task regional organizations with enforcement duties if appropriate. *Id.*

184. *See* Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 411-412 (1994) (asserting that the Security Council has the sole prerogative to determine threats to international peace and security, and seeing liberalization of this standard as an invitation to the regional organization to justify their intervening in civil wars at will). Some writers seek to redefine what is meant by "use of force" to include actions such as economic sanctions which can have a profound impact on the internal order of a state. *See* Borgen, *supra* note 33, at 800 (asserting that the pre-Charter debates indicated the term "enforcement actions" should be a broader concept than the one currently embraced by the Security Council; and noting that during the Cuban missile crisis the Council adopted a more restrictive interpretation to include only affirmative use of force).

In other words, the regional organization must use diplomacy unless a member state is attacked, but otherwise it must wait for the Security Council to act under Article 53 before responding. The danger of this approach is that if the UN is frozen because of a veto or indifference, regional action is also handcuffed. For example, had NATO followed this model in the Kosovo situation, it would have had to stand idly by as Yugoslavian security forces slaughtered the Albanian Kosovars and drove them from their homes.

A more relaxed interpretation would allow the regional organization to use force without Security Council authorization, but only within strictly prescribed parameters. The most widely accepted examples are intervention based on invitation of lawful authority and for the limited purpose of rescuing foreign nationals trapped within a combat zone.[185] Although this is normally a workable and widely accepted definition, it could be considered too narrow. For instance, the charter neither clarifies the legal options of a regional organization if a central government of a state collapses or condones widespread human rights abuses, nor does it define the point at which such a situation becomes "a threat to international peace and security."[186]

Those espousing a more liberal interpretation of Article 52 claim that a regional organization can project force into the sovereign territory of another nation without Security Council approval as long as it does so "in conformity with the purposes and principles of the UN Charter."[187] The argument is that regional action is lawful if its aims are primarily to address "humanitarian" concerns for the victims of the breakdown of law and order. Although the intervenors are not expected to abrogate all self-interest, their actions must not be motivated primarily by a desire to change the

185. Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 803 (1993).

186. *Compare* U.N. CHARTER art. 42 ("Should the Security Council consider that measures . . . would be inadequate . . . it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.") *with* U.N. CHARTER art. 52 ("Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security. . . . ").

187. *See* U.N. CHARTER art. 52(1). *See also id.* art. 2(4) (prohibiting the use of force or threats thereof against the political independence or territorial integrity of a state or for any other end inconsistent with the purposes and principles of the UN Charter).

receiving state's form of government, or an excuse for regional hegemony. Attempts to redefine borders are especially frowned upon.[188]

Currently, the widest expansion of Article 52 is espoused by writers asserting that states have "both the right and the duty" to intervene if a democratically elected government is over-thrown.[189] Many scholars are uncomfortable with throwing the door to Article 52 action so wide open to interventionism.[190] They conclude that support for humanitarian or "democratic" intervention requires support either by a change to Chapter VIII, a specific authorization in the regional organization's charter, or both.[191]

After fifty years of debate, there is still no settled consensus on the meaning attached to the provisions in Chapter VIII.[192] At most, there is

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188. *See, e.g.*, Moore, *supra* note 28, at 145 ("Actions to restore order and self-determination in a setting of breakdown of authority are not enforcement actions, which would require Security Council approval, and may be taken at the initiative of a genuinely independent regional arrangement."); Nowrojee, *supra* note 165, at 131-132 (arguing that "genuinely independent regional intervention" is lawful in the context of humanitarian intervention); Lori Fisler Damrosch, *Introduction*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 3 (Lori Fisler Damrosch ed., 1993) (declaring that the present system is designed to keep states from unilaterally projecting force into another state to effect its internal government, and that it is not self-evident that the same constraints apply to altruistic collectives working for the common good). *See* FRANCK, *supra* note 78 at 166-167 (discussing India's ulterior motives for invading East Pakistan, now Bangladesh, disguised behind humanitarian motives).

189. Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163, 167 (1993). *See also* Damrosch, *supra* note 188, at 12 (listing democratic intervention as one instance where the international community has shown a recent willingness to support when pursued by a broad based coalition). The concept of democratic intervention will be discussed in more detail *infra* at notes 452 to 476 and accompanying text.

190. *See, e.g.*, Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 271 (1997) (asserting democratic intervention is not justifiable without Security Council approval). For that matter, many are also unwilling to accept the position that the United States took in the Cuban missile crisis and the Dominican Republic operation that a regional organization is authorized to perform enforcement actions as long as its actions are not condemned by the Security Council. David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 187 (Lori Fisler Damrosch ed., 1993).

191. *See, e.g.*, Borgen, *supra* note 33, at 799, 800 (explaining his thesis that to find "appropriateness" of regional action in today's world one must go outside the UN Charter to examine "the charters of the regional organizations themselves"; reporting the Organization of American States position that an action requiring use of force must not only be authorized by Chapter VIII, but also under the regional organization's own charter; and, advocating a change to Chapter VIII to clarify what actions are permissible under Article 52).

only agreement that there is a "gray area" in which use of force by a regional organization short of direct enforcement action is permissible.[193] As the case studies that follow demonstrate, this ambiguity and its resulting tension between the UN and regional organizations greatly influenced their legal relationship.[194]

B. The Beginning of Customary International Law on Peace Operations

Before 1965, there was little reason to resolve the balance of power between the UN and regional organizations, because the regional organizations did not often act. There were two attempts to involve NATO in peacekeeping, once in the Suez[195] and again in Cyprus, but neither was implemented.[196] During the Cuban missile crisis, the United States sought and received the backing of the Organization of American States to estab-

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192. John F. Murphy, *Force of Arms*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 120 (Christopher C. Joyner ed., 1997).

193. *Id.* at 118. *See also* Wippman, *supra* note 165, at 231.

> The denotation of [the force] as a peacekeeping force frees the [Security Council] delegates from having to consider awkward questions about retroactive validation of . . . use of force under chapter VIII . . . they do not distinguish . . . actions that might constitute peaceful regional measures under article 52 . . . and actions that might more appropriately be considered regional enforcement action under article 53 . . . .

Id. Joachim Wolf, *Regional Arrangements and the U.N. Charter*, *in* 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 289, 291 (Max Planck Institute ed., 1983) (asserting the appropriateness of regional action is based on the existence of a local dispute and on the regional organization's choice of peaceful means to settle it).

194. While approving the concept that the disagreement over what is and what is not enforcement action has enhanced the tension between the UN and regional organizations, Anthony Clark Arend argues that just as often conflict results because the "initial jurisdiction" of a dispute is unclear. Either one organization takes action at the expense of the other, or alternately both organizations may hesitate while waiting to see if the other will act. He uses the examples of the Gulf War, where some members of the Arab League complained the UN acted too precipitously before the League had a chance to resolve the situation; the Balkans, where the UN's first inclination was to try and let Europe work out a solution; and Haiti where the Organization of American States took the lead although that organization wanted UN involvement. *See* Arend, *supra* note 26, at 18-26.

195. *See* URQUHART, *supra* note 69. In 1956 the United States turned down a joint plan by Britain and France to have NATO separate the forces. *Id*.

196. *See* MILLER, *supra* note 28, at 121. In 1964 the British attempted to work out a cease-fire arrangement between Greece, Turkey, and Cypriot forces. A 10,000 man NATO force was to supervise the agreement. The United States backed the plan, but ultimately the Cypriot President, Archbishop Makarios, nixed the idea. *Id*.

lish a partial blockade of the island. Only U.S. vessels carried out the "quarantine" of Cuba, however. Of course, no ground troops were sent to the island.[197]

1. The Dominican Republic

The Dominican Republic operation by the Organization of American States was the first real test of a regional force in action under Chapter VIII. On 25 April 1965, a coup toppled the military government that had itself disposed of a democratically elected president two years prior.[198] After the rebels (or "Constitutionists") installed a new president, Loyalist troops attacked, and a civil war began.[199] On the same day, the United States ordered a naval task force to the island, anticipating a need to evacuate American citizens.[200] Before the evacuation occurred, the United States received information that indicated that the rebel government was Communist-dominated.[201]

The mission was modified. Washington directed the task force to "restore law and order, prevent a Communist take-over of the country, and protect American lives."[202] These directions, which were later made public,[203] caused some embarrassment to the United States in convincing the rest of the world that this was a legitimate intervention under Chapter VIII.[204] Nevertheless, the American naval forces, joined by the 82nd Air-

197. *See* Murphy, *supra* note 192, at 119-120. The action was specifically taken under the auspices of the Organization of American States acting as a Chapter VIII regional organization. The United States argued that the quarantine was not an enforcement action and therefore required no Security Council blessing. Alternately, the United States said even if the action could be classified as enforcement the Security Council had implicitly endorsed the action by failing to adopt a draft Soviet resolution condemning the quarantine. *Id. See also* Wippman, *supra* note 190, at 186, 187 (noting the United States stance, but also acknowledging that most states rejected the United States view).

198. Chronology of events taken from LAWRENCE A. YATES, POWER PACK: UNITED STATES INTERVENTION IN THE DOMINICAN REPUBLIC 181-186 (1969) [hereinafter POWER PACK]. Power Pack was the United States code name for the Dominican operation. *Id.* at 183.

199. *Id.* at 181-186.

200. *Id.*

201. *Id.*

202. *Id.* at 182.

203. White House press release, May 2, 1965, *reprinted in* DEPARTMENT OF STATE BULLETIN, No. 1351, May 17, 1965, *cited in* MILLER, *supra* note 28, at 151.

204. *See* MILLER, *supra* note 28, at 151.

borne, quickly established a separation zone between the combatant forces.[205]

After the United States intervened, the Organization of American States immediately called for a cease-fire.[206] A number of Organization of American States members were convinced that the United States intervention violated the Organization of American States Charter[207] and were prepared to condemn the United States action.[208] However, a majority adopted a resolution to "internationalize" the peacekeeping force and agreed to form the Inter-American Peace Force.[209]

The provisions accompanying the resolution stated that the goals of the Inter-American Peace Force were to "cooperate in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishing of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions."[210] The resolution informed the UN Security Council of its action, but did not request its blessing.[211] The Inter-American Peace Force assumed control of all military operations on 29 May 1965.[212] Thereafter, the Organization of American States forces, including up to 10,000 American troops, remained in effective control of the Dominican Republic. After presidential elections were held in June 1966, the Organization of American States ended the Inter-American

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205. *Id.*

206. M. MARGARET BALL, THE OAS IN TRANSITION 472 (1969).

207. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. At the time of the action articles 15 and 18 read, respectively and in pertinent part, "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State . . . ." and, "[t]he American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." *Id.*

208. *See* BALL, *supra* note 206, at 474.

209. Resolution Adopted in the Third Plenary Session of the 10th Meeting of the Consultation of Ministers of Foreign Affairs of the Organization of American States, OAS Doc. 39 Rev. Corr. (1965), *reprinted in* 4 I.L.M. 594 (1965) [hereinafter Resolution 39]. Six out of twenty countries represented at the Consultation believed the United States action was an outright violation of the OAS Charter, before reaching the question whether it was in violation of the UN Charter. Those countries were Ecuador, Chile, Uruguay, Peru, Venezuela, and Mexico. Despite its belief, Venezuela abstained from the vote, probably because they were having problems with Cuban supported guerrilla groups at the time. *See* BALL, *supra* note 206, at 474, 475.

210. Resolution 39, *supra* note 209, para. 2.

211. *Id*. para. 7.

Peace Force mandate.[213] All foreign forces withdrew by September 1966.[214]

As noted above, the United States stated three reasons to justify its intervention. First, it claimed the right to protect its citizens' lives.[215] Although the initial United States intervention may have been warranted on this basis, the operation quickly progressed beyond the parameters of self-defense.[216] The second justification asserted by the United States was that the Dominican insurgency was being directed and controlled by an outside force, namely Communist Cuba.[217] By implication, the United States mission was prosecuted by virtue of anticipatory self-defense. The Organization of American States' reaction, however, clearly did not support that view.[218]

The third objective, supported explicitly by the Organization of American States, was to restore law and order.[219] Yet, the Organization of American States' action did not fit the classic mold of peacekeeping. As discussed previously, peacekeeping, as understood in 1965, first required consent from all the warring parties.[220] The United States, however, did not obtain consent from both parties before entering the Dominican Republic. In fact, fighting was escalating at the time.[221] Furthermore, after the mission was turned over to the Inter-American Peace Force, the

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212. A Brazilian general assumed command of the force–one of the few times in its history that the United States government has surrendered tactical command and control of American soldiers to a foreign commander. *See* MILLER, *supra* note 28, at 158; POWER PACK, *supra* note 198, at 150. As discussed *supra* note 93, there is a strong constitutional argument that the executive may relinquish tactical control to a foreign commander only in emergency situations.

213. *See* POWER PACK, *supra* note 198, at 185, 186.

214. *Id.*

215. MILLER, *supra* note 28, at 151.

216. J.B.L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (Robert Lillich ed., 1973). Most authorities agree a state has an inherent right and duty to protect its citizens. A caveat to that right is the expectation that the intervention will be strictly limited to that purpose. The legal basis became less clear in the Dominican Republic as the United States force actively interposed itself between the combatants. Still later, the United States extended its security perimeter outwards, squeezing the rebel forces into a smaller area, but at the same time protecting them from Loyalist attacks. *See* POWER PACK, *supra* note 198, at 183-85. Shortly after they arrived United States forces established an International Security Zone (ISZ). That zone was extended on several occasions as the security needs of the force expanded, and the Inter-American Peace Force sought to enforce cease-fires. *Id.* The conclusion must be that at some point the United States intervention lost its legitimacy if it was based solely on protection of its nationals.

217. MILLER, *supra* note 28, at 151.

Organization of American States did not obtain consent either.[222] The insurgents lobbied for UN involvement rather than Organization of American States mediation, especially after an United States operation designed to enhance the security of the neutrality zone severely constricted the rebel operating area.[223]

The Inter-American Peace Force was on sounder footing regarding the other two elements of peacekeeping. Despite some lapses, the Inter-American Peace Force did manage to maintain its neutrality and limited its use of force to self-defense.[224]

Regardless of whether the action was called peacekeeping, protection of foreign nationals, or some other form of operation, the United States and the Organization of American States felt justified in relying on Chapter VIII of the UN Charter as the basis of their mission.[225] In any event, the

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218. There was some historical precedent for the United States position. During the Cuban missile crisis, the United States had managed to convince the Organization of American States that the "Marxist-Leninist" doctrine was a threat to the independence of the region's members constituting justification for self-defense. *See* Resolution VI of the Eighth Meeting of Consultation, Punta del Este, Uruguay, January 1962, *in* U.N. Doc. S/5075, 17 (1962).

However, on this occasion when the resolution came up for vote five Latin American countries felt strongly that the OAS Charter precluded intervention in a member state's internal affairs for any reason. The remaining Organization of American States countries voted for the resolution only after amending it to show that they did not approve of the initial United States intervention but were prepared to undertake a peacekeeping role anyway. *See* MILLER, *supra* note 28, at 153. Even those members who voted for the resolution permitting formation of the Inter-American Peace Force consented to an amendment, which specifically stated approval of the Organization of American States mission did not signify approval of the initial intervention. *See* BALL, *supra* note 206, at 480 (arguing this was just as much a defense by the Latin American states against the United States as it was the United States acting in self-defense against Communism; their chosen method was not to fight the Americans, but instead to assume the American's duties).

219. *See* Resolution 39, *supra* note 209.

220. *See* BURNS & HEATHCOTE, *supra* note 145, at 22.

221. *See generally* POWER PACK, *supra* note 198, at 181-186.

222. *See* MILLER, *supra* note 28, at 156, 162.

223. *Id.* Conversely, the Loyalists preferred Organization of American States mediation, even though they felt Organization of American States presence effectively kept them from controlling the rest of the country. *Id.*

224. *Id.* at 160, 161.

225. The position of the United States was that regardless of which justification was accepted the action in question was not enforcement action. *Id.* at 159.

international community did not rebut the United States assertion that the intervention was not enforcement.[226]

The UN was effectively excluded from the Dominican conflict. An early draft resolution by the Soviets seeking to condemn the American action failed.[227] When the UN sought to carve out a mediation role for itself, the Organization of American States termed the attempted involvement "obstructionist."[228] Meanwhile, the United States lobbied successfully in the Security Council to have it recognize that the Organization of American States was dealing effectively with the situation and that the UN's participation would be unwarranted duplication of effort.[229] In the end, the UN's role was limited to sending a representative of the Secretary General with two military advisors to "observe and report."[230]

The Dominican operation arguably provides the earliest evidence that customary international law supports an expanded role for NATO under Chapter VIII. First, it shows there is considerable room for maneuver in Article 52 regarding what response a regional organization may legally pursue without UN approval, short of active enforcement measures such as those in Korea and the Persian Gulf. Second, it demonstrates that an effective regional organization can accomplish significant results in peace operations without UN command and control. The Dominican example,

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226. *Id.*

227. *Id.* at 155, 156. Although the cynical might guess the resolution failed by reason of the United States veto, in fact the United States abstained from voting. This lends some credence to the United States argument that a Chapter VIII enforcement action need not be expressly approved by the Security Council. *See, e.g.*, Murphy, *supra* note 192, at 119, 120 (citing the United States position in both the Dominican and Grenadan actions that Security Council approval of regional enforcement action may be implied). In all, the Security Council considered the Soviet proposal in twenty-nine meetings over a three-month period, but never reached consensus on a resolution condemning the actions of the United States or the Inter-American Peace Force. *See* THE BLUE HELMETS, *supra* note 76, at 200.

228. OAS Doc. 81 Rev. (June 2, 1965), *in* U.N. Doc. S/6370 and Add. 1 & 2 (1965) (complaining vehemently that the UN was undermining its efforts to negotiate the formation of an interim government).

229. *See* FRANCK, *supra* note 78 at 70, 71 (quoting the United States Ambassador to the UN, Adlai Stevenson, that UN involvement would "tend to complicate the activities of the Organization of American States by encouraging concurrent and independent considerations and activities . . . when the regional organization seems to be dealing with the situation effectively."). *See also* MILLER, *supra* note 28, at 159 (restating the United States position against UN involvement).

230. THE BLUE HELMETS, *supra* note 76, at 200. Initiatives to expand the representative's role to permit him to supervise cease-fires and investigate complaints of human rights violations failed to receive any support. *Id.* at 203.

however, also cautions that regional organizations should have clear organizational guidelines to avoid confusion and dissension when deciding to conduct peace operations.

2. Grenada

When the United States next performed a peace operation in conjunction with a regional organization, reaction from the UN was even more hostile. On 25 October 1983, acting upon the invitation of the Organization of Eastern Caribbean States and cooperating with its forces, the United States invaded the island nation of Grenada.[231] A storm of international criticism washed over the United States for its action, including condemnation by the UN General Assembly.[232]

Nevertheless, the events leading up to the invasion justify the mission of the United States and the Organization of Eastern Caribbean States.[233] Grenada was one of seven members of the Organization of Eastern Caribbean States, along with St. Vincent, St. Lucia, Dominica, Antigua, St. Kitts, and Montserrat.[234] In March 1979, Maurice Bishop led a Communist coup, which overthrew its democratically elected government.[235] Bishop suspended the Constitution and replaced it with several "People's Laws."[236]

The new government invited Cuban advisors, expanded the armed forces, and began constructing a large aircraft runway which many believed would be used as a convenient point of departure for Soviet spy planes to land and refuel before continuing their mission to support the communist insurgency in Angola.[237] The Cubans were expected to use the island as a base for their operations in Latin America. The democratic governments of the other Organization of Eastern Caribbean States members

231. *See* Moore, *supra* note 28, at 145.

232. G.A. Res. 38/7, U.N. GAOR, 38th Sess., U.N. Doc. A/RES/38/7 (1993). The United States never got the chance to plead its case as the Assembly invoked its rule of cloture cutting off debate. U.N. GAOR, at 12-15, U.N. Doc. A/38/PV.43 (1983). The vote was 108 in favor of the resolution, 9 against, with 27 abstentions. *Id.* at 45-50.

233. *See* Moore, *supra* note 28, at 145; Beck, *supra* note 185, at 765.

234. *See supra* note 233 and accompanying text.

235. *See id.*

236. *See id.*

237. *See id.*

became concerned their own sovereignty would be threatened, but they were unable to attract much international support for their concerns.[238]

On 13 October 1983, members of his own government deposed Bishop.[239] Reportedly, these members believed he was not hard-line enough, and he had sought economic aid from Western countries against their wishes.[240] Country-wide rioting followed, and the government lost effective control of the nation.[241] The members attempted to impose a twenty-four hour curfew, with orders to Grenadan forces to "shoot on sight."[242] Even though a number of protesting civilians were killed by armed forces, the rioting continued.[243] Supporters attempted to free Bishop, but he was killed in the attempt.[244]

Meanwhile, the United States government had grown concerned for the safety of more than one thousand United States citizens trapped on the island, many were there attending medical school.[245] President Reagan directed his advisors to develop an evacuation plan and sent State Department officials to arrange permission from the remnants of the Grenadan government.[246]

Negotiation proved fruitless, mainly because it was impossible to determine who was in charge of the government.[247] It became clear that instead of arranging to let foreign nationals leave, the Grenadan negotiators were unwilling to allow an evacuation under any circumstances.[248] In light of the recent Iranian hostage crisis, President Reagan became convinced that he risked a similar situation if the United States did not take immediate steps.[249]

The Organization of Eastern Caribbean States members met continuously through the crisis.[250] On 21 October 1983, they extended an oral request for military assistance to the United States to help them "stabilize

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238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.*
246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*

the situation and establish a peace-keeping force."[251] The United States, mindful of the legal aspects in question, felt that it was important that it receive the request in writing.[252] A written request followed on 23 October 1983.[253] By the time the United States received word of an additional request for intervention by the Governor General of Grenada, the United States/Organization of Eastern Caribbean States operation was imminent.[254] The invasion was launched on 25 October 1983.[255] By 8 December 1983, most U.S. troops had been withdrawn.[256]

The Organization of Eastern Caribbean States and the United States rested their legal justification for the invasion on three bases: (1) protection of foreign nationals, including U.S. medical students; (2) the request of lawful authority; and (3) collective action by a regional organization under Article 52 of the UN Charter.[257] As was the case in the Dominican operation, the main argument against protection of nationals was the scope of the mission.[258] Intervention based on invitation by lawful authority is also a well-recognized concept in public international law.[259] The unfortunate difficulty with justifying the intervention on this basis was that at the time Sir Paul Scoon made the request, the Grenada Constitution had

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250. WILLIAM C. GILMORE, THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION 104 (1984).

251. The invitation was also extended to Jamaica and Barbados, who are not members of Organization of Eastern Caribbean States, either. *Id*.

252. *Id*. at 100.

253. *Id*. An account of the behind the scenes negotiations between the United States, the Organization of Eastern Caribbean States, Jamaica, and Barbados is in Beck, *supra* note 185, at 783-86.

254. *See* Beck, *supra* note 185, at 789. Interestingly, these facts were mostly available soon after the Organization of Eastern Caribbean States intervention. Nevertheless, so great was the international backlash and scholastic sniping that opponents of the operation questioned the respective governments' beliefs that foreign nationals were in danger, whether the United States had attempted to resolve the matter peacefully at all, and whether the Governor General had even extended an invitation. Opponents also suggested the United States pressured the Organization of Eastern Caribbean States into acting, and charged that the Reagan administration had been planning the invasion all along. Finally, they disputed whether the Grenadan government had really collapsed. Writing ten years after the incident and drawing from a wide number of sources, Professor Robert J. Beck concluded that the facts were mostly in favor of the United States position, even though he also concluded the legal basis for the invasion was lacking. *Id*.

255. Moore, *supra* note 28, at 150, 151.

256. *Id.* at 152.

257. *See* Beck, *supra* note 185, at 770. Authorities discussing Article 52 in the context of the Grenada invasion mentioned, but did not rely on the concepts of humanitarian and democratic intervention. A discussion of those concepts, however, appears later in this article to reflect their evolution under Article 52.

been suspended. Bishop's "People's Laws" vested all executive and legislative power in his Communist government.[260]

The experts are in disagreement regarding the authority of the Organization of Eastern Caribbean States to intervene under Article 52. A broad reading of Article 52 leads to the conclusion that a regional organization may legitimately intervene to restore order when a state of anarchy prevails in the receiving state.[261] A narrow reading of Article 52 leads to an opposite result.[262] The political reaction of the world community at the

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258. Rather than establishing a beach-head and then withdrawing after the students were evacuated, the Organization of Eastern Caribbean States launched a full invasion, actively engaging forces throughout the island. (In point of fact it appears the Grenadan forces did little fighting. Instead, Cuban irregulars provided the main opposition). Accordingly, the Reagan administration never tried to assert protection of nationals as the sole basis of the intervention. *See* Moore, *supra* note 28, at 151.

259. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 317 (1963). In this instance, the Organization of Eastern Caribbean States asserted that the request for intervention by Grenadan Governor General, Paul Scoon, was alone sufficient justification of its action. Under the Grenada Constitution, the Governor General appears to wield broad executive powers, especially if for some reason the Prime Minister is unable to act. *See* Moore, *supra* note 28, at 145-48.

260. Commentators Beck and Joyner did not rest their arguments against the invasion solely on the illegitimacy of Governor General Scoon's request. *See* Beck, *supra* note 185, at 799-800; Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 138-139 (1984). Beck discounts the Governor General's authority, but also noted that his review of the evidence ten years after the event demonstrated that the United States had already made the decision to invade prior to receiving word of the request, so it had no impact on the decision. Joyner labels the question "polemical," but doesn't attempt to resolve the controversy. Nevertheless, since he decides the invasion was illegal the conclusion must be that he discounts the claim. *But see* Moore, *supra* note 28, at 153 (arguing that as the only constitutional representative of the government at the time the Governor General's request was alone sufficient legal authority to justify the invasion). At some level it is fundamentally distasteful that a democratically elected government could be forcefully overthrown by an authoritarian regime which could then set up the non-intervention provisions of the UN Charter, found at article 2(7), against the ousted government's plea for outside help. This article argues below that the time to recognize the so-called "democratic intervention" doctrine has arrived. However, at the time of the Grenada operation it must be conceded the democratic intervention doctrine had not received sufficient support to raise it as a serious justification of Organization of Eastern Caribbean States action. Accordingly, it will not be addressed at this point.

261. *See, e.g.*, Moore, *supra* note 28, at 145; *see* text accompanying note 189. *See also* Wippman, *supra* note 165, at 231 (arguing that in some instances a state no longer effectively exists, therefore the intervention is not against a state, and further that it is not an enforcement action under the UN Charter).

time affects the development and interpretation of customary international law. Therefore, the reaction of UN member states is instructive.

The General Assembly resolution, however, condemning the invasion does not settle the issue. Such resolutions are not binding international law, although the resolutions may be evidence of international consensus that may lead to development of treaties or customary international law.[263] Further, there is much evidence that the Assembly's reaction was based on the perception that this was not truly a regional action. The evidence suggests that international backlash was driven by the belief that the invitation was a mere cover for United States policy objectives–ousting a Communist government in the western hemisphere and keeping a strategic airport out of Soviet and Cuban hands.[264] Therefore, the reaction of the only official organization to speak for the world community is ambiguous. At most, it stands for the proposition that the organization regarded the invasion as a power play by the United States, not a regional "humanitarian" peacekeeping action.

Another weakness in the Grenada mission was its lack of support in the Organization of Eastern Caribbean States Charter. The Organization of Eastern Caribbean States is a sub-regional organization. Therefore, it also must comply with the provisions of the Organization of American States Charter.[265] As in all matters in this controversial operation, the authorities are divided concerning whether the Organization of Eastern Caribbean States met those conditions.[266] The United States attached great

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262. *See, e.g.*, Beck, *supra* note 185; *see* text accompanying note 185 (asserting a very narrow band within which a regional organization may use force: collective self-defense, enforcement action after Security Council authorization; and, pursuant to invitation by lawful authority).

263. Christopher C. Joyner, *The United Nations as International Law-Giver*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 443-446 (Christopher C. Joyner ed., 1997).

264. *See* Brown, *supra* note 190, at 250 (asserting this belief was driven by the overwhelming composition of the force–1900 of 2200 participating troops were American–and the Organization of Eastern Caribbean States members were tiny Caribbean states with little voice inside or outside their region). There is much circumstantial support for this idea, especially when one reviews the facts surrounding the Liberian operation discussed *infra* at notes 270 to 301 and the accompanying text. The operation in Liberia was dominated by the forces of one regional power, Nigeria, acting without the consent of a legitimate government, and unauthorized by the Security Council. Yet, the operation drew not a peep of protest from the General Assembly. Under these circumstances, the Assembly's action, as one writer puts it, "speaks with Delphic ambiguity." Tom Farer, *A Paradigm of Legitimate Intervention*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 334 (Lori Fisler Damrosch ed., 1993).

265. *See supra* note 207 and accompanying text.

importance to the issue. It clearly believed that the Organization of Eastern Caribbean States had authority in its Charter to intervene in Grenada's internal affairs.[267]

Taking these events into consideration, by 1983 customary international law arguably established three conditions for the validity of regional peace operations. First, the operation must be based on regional charter authority. Second, the intervention must be a truly collective effort and not a mask for regional hegemony. Finally, and most controversially, prior Security Council authorization was not necessarily required. Recent regional peace operations also support this last proposition, while further defining the grounds upon which regional intervention can be justified.[268]

C. Recent Developments in the Customary International Law of Intervention

Despite the experiences of the United States in the Dominican Republic and Grenada, cooperation between the UN and regional organizations has improved tremendously in recent years. Whatever the reason for the change, this section demonstrates that it has been accompanied by an adjustment in attitude towards the available responses of regional organizations that seek to conduct peace operations. Case studies in this and the following section regarding recent peace operations in Liberia and Haiti, as well as the NATO operation in Bosnia discussed below in Part IV, sug-

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266. *See, e.g.*, Moore, *supra* note 28, at 157, 158 (Organization of Eastern Caribbean States acting in full compliance). *But see* Beck, *supra* note 185, at 803; Joyner, *supra* note 260, at 135-36 (Organization of Eastern Caribbean States violating both Charters); Brown, *supra* note 190, at 249 (invasion beyond the scope of the Organization of Eastern Caribbean States Treaty). Although it may have been just as restrictive at the time of the invasion, Article 1 of the current version of the OAS Charter, including provisional articles not yet ratified, specifically states, "The Organization of American States has no powers other than those expressly conferred on it by this Charter, none of whose provision authorizes it to intervene in matters that are within the internal jurisdiction of the Member States." OAS CHARTER art. 1, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, 721 U.N.T.S. 324, *as amended by* Protocol of Cartagena de Indias, Dec. 5, 1985, *in* 25 I.L.M. 529 (1986). The integrated text of the OAS Charter, including provisional Protocols of Washington (1992) and Managua (1993) appear at 33 I.L.M. 985 (1994).

267. *See* Beck, *supra* note 185, at 783-86.

268. *See infra* Part III.C.

gest that humanitarian and democratic interventions are legally valid under Chapter VIII, even without express UN Security Council approval.[269]

1. Economic Community of West African States in Liberia

Resistance to the dictatorship of Samuel Doe in Liberia ignited into civil war on Christmas Eve, 1989.[270] Within six months, there was no semblance of a central government.[271] The three factions struggling for power paid little regard to the civilian population, and human rights violations were widespread on all sides.[272] Appeals from neighboring states for UN action garnered no response.[273] In August 1990, the Economic Community of West African States decided to send a "peacekeeping" force, later known as the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG),[274] to Monrovia, Liberia's capital, citing a humanitarian need to stop the slaughter and restore regional peace and stability.[275] It announced a three-fold mission: (1) to establish a cease-fire, (2) to put an end to routine destruction of lives and property, and (3) to ensure free and fair elections would be conducted.[276]

The Economic Community of West African States is a collection of sixteen West African states, including Liberia, which decided to cooperate to enhance the economic prospects of its region. It is a sub-regional organization under the auspices of the Organization for African Unity.

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269. This thesis does not discuss the Somalia operation in detail even though it arguably opened the door to acceptance of humanitarian intervention. It is not included as a case study because the operation was carried out by a classic ad hoc coalition under UN authority rather than by a regional organization acting as such. Conversely, the Haiti mission is included despite the fact a UN multinational force conducted the operation. It is included both because it was prompted and to some extent guided by Organization of American States initiatives, and because it provides support for the hypothesis that democratic intervention is now regarded as a legitimate subject justifying external intervention into the internal affairs of a nation.

270. *See* Wippman, *supra* note 165, at 224-225, and Wippman, *supra* note 190, at 158-159.

271. *Id.*

272. *Id.*

273. *Id.*

274. The peacekeeping force was officially designated the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG) by the *Final Communiqué of the First Session of the Community Standing Mediation Committee, ECOWAS*, Banjul, Republic of Gambia, August 6-7, 1990, *reprinted in* Wippman, *supra* note 190, at 167 n.29.

275. *Id.*

276. *Id.*

Although its charter contains a provision permitting the organization to act in collective self-defense, this authority is a dubious basis on which to justify its intervention into the internal affairs of Liberia.[277] Several members apparently believed it did not. After a five nation standing committee recommended the response, some member states declared that Economic Community of West African States had overstepped its bounds and refused to join in the operation.[278] Nevertheless, the organization's majority vote rule allowed the effort to proceed.[279]

Immediately after the Economic Community of West African States announced its decision, and before it placed troops on the ground, at least one rebel faction, the National Patriotic Front of Liberia led by Charles Taylor, declared that it would forcefully oppose the peacekeeping force.[280] The Doe faction requested the force proceed, but there is much doubt whether Doe still constituted a "legal authority" who could consent to an armed intervention.[281] Apparently, the Economic Community of West African States did not attach much significance to the invitation either, because it never attempted to justify its action on that basis.[282] Accordingly, when the Economic Community of West African States force hit the ground in Monrovia in August 1990 and was immediately engaged by the National Patriotic Front of Liberia, it could not pretend that it was in Liberia by consent to enforce a cease-fire.[283]

After a sharp fight, the Economic Community of West African States forces drove Taylor's group from the capital and established a cease-fire.[284] It was a shaky peace that would not last. The opposing Liberian forces fractured and reformed several times, creating a politically chaotic situation that twelve peace-accords and seventeen cease-fires in the first

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277. *See* Wippman, *supra* note 190, at 166. The pact did permit the member states to provide mutual assistance if an internal conflict supported and engineered from the "outside" appeared likely to endanger the peace and security of Economic Community of West African States. What is deemed to be from "outside" is ambiguous. Does it mean from outside the member state experiencing the difficulty, or outside the region itself? There is no evidence any nation from outside the region was involved in fomenting the Liberian insurrection. On the other hand, some fingers pointed to Cote d'Ivoire as the source of arms and supplies for one or more of the rebel factions. *Id.* at 166 n.27.

278. *Id.* at 167.

279. *Id.*

280. *Id.*

281. *See* Wippman, *supra* note 165, at 224-225 (noting that by the time Doe "consented" he had long since lost control of anything except a small faction calling itself the Armed Forces of Liberia).

282. *Id.*

five-year period could not resolve.[285] The persistence of the group, however, eventually paid off as fighting subsided, and the factions agreed to national elections in 1997.[286] Although the elections were postponed on several occasions, outside observers certified a "free and fair" election in Liberia in July 1997.[287]

Although successful, the Liberian campaign by the Economic Community of West African States is legally controversial. From the outset, the regional organization justified its intervention solely on humanitarian grounds.[288] As noted, it did not claim that its operation was based on consent, and it could not claim that it was acting in self-defense. Some of its own members believed that the operation was impermissible under its own charter.[289] Most legal authorities reviewing the Economic Community of West African States Charter agree with that assessment.[290] Finally, there

283. The National Patriotic Front of Liberia accused Economic Community of West African States of being a cover for Nigerian expansionist motives. Nowrojee, *supra* note 165, at 135. Another accusation claimed Nigeria prompted the intervention because it was afraid success by the National Patriotic Front of Liberia would spark an uprising against its own military regime which itself had an appalling human rights record. Ofodile, *supra* note 184, at 397-99, 403. Although these claims may have merit, the critics admit Economic Community of West African States made obvious efforts during the course of the intervention to accommodate the National Patriotic Front of Liberia's reasonable demands. *Id.* at 385. Nevertheless, similar accusations surfaced during Economic Community of West African States' most recent intervention in Sierra Leone. Economic Community of West African States agreed to send ECOMOG forces into Sierra Leone after a military junta overthrew the elected president in May 1997. Economic Community of West African States brokered a deal designed to hand power back to the elected government in April 1998, but renewed fighting canceled the bargain. Despite the preference of some Economic Community of West African States members that diplomatic efforts continue, Nigeria apparently took matters in its own hands and decided to impose a military solution. *See, e.g.*, James Rupert, *Forces Press Sierra Leone Government*, WASH. POST, Feb. 11, 1998, at A27; James Rupert, *Nigerians Welcomed in Freetown*, WASH. POST, Feb. 15, 1998, at A27.

284. *See* Ofodile, *supra* note 184, at 385.

285. *See Untitled Article*, AGENCE FRANCE-PRESSE, Aug. 20, 1995, *available in* 1995 WL 7845970; Nowrojee, *supra* note 165, at 134.

286. Success is partially attributable to Economic Community of West African States members' ability to resolve their own differences. By the end of the first year of their peace operation all members agreed to create ECOMOG alleviating some concern that Nigeria was dominating the operation. *See* Wippman, *supra* note 190, at 167-69. When the Cote d'Ivoire, which had been suspected by some members to be providing arms and supplies to Taylor's forces, became a member of the standing committee, it was forced into a position where it was responsible for brokering a politically acceptable solution. *Id.* at 170-71.

287. Thalif Deen, *UN Mission Quits Liberia as Peace Goal is Reached*, JANE'S DEF. WKLY, Sept. 3, 1997, at 30.

288. *See supra* note 276 and the accompanying text.

289. *See* Wippman, *supra* note 190, at 167.

is no record that the Economic Community of West African States sought Security Council authority to conduct the operation.

As usual, the Security Council's reaction to the Liberian intervention was ambiguous. During the first two years of the operation, the Security Council issued two brief statements through its president.[291] The statements merely requested the warring parties to cooperate with the Economic Community of West African States in reaching a peaceful settlement to the conflict, but did not otherwise discuss the war or the ECOMOG's use of force.[292] When the fighting erupted again in November 1992, the Economic Community of West African States asked the Security Council to support its call for an embargo to deprive the Liberian factions of war material. The Council obliged by issuing a resolution, which determined that the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole." Recalling "the provisions of Chapter VIII," the Council commended the Economic Community of West African States and called upon them to continue their efforts.[293]

Eventually, the Security Council authorized the UN Observer Mission in Liberia to monitor implementing one of the early peace accords in 1993.[294] The Security Council, "not[ed] that this would be the first peacekeeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization."[295] It left

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290. *See, e.g.*, Ofodile, *supra* note 184, at 410-11 ("The Charter of ECOWAS did not empower the organization to involve itself in matters of peace and security."); Nowrojee, *supra* note 165, at 135 (citing "tenuous legal grounds" for intervention under ECOWAS Charter); Wippman, *supra* note 190, at 183-84 (supporting the proposition that a Chapter VIII organization is authorized to use force against a member state only if authorized by its own charter, the charter of any larger regional organization to which it belongs, and pursuant to Security Council authorization, and finding none of those elements clearly in favor of Economic Community of West African States action in this instance); Brown, *supra* note 190, at 256-57 (analyzing the ECOWAS Charter and determining it addressed only international armed conflicts, not internal wars).

291. *See* U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/22133 (1991); U.N. SCOR, 47th Sess., 3071st mtg., U.N. Doc. S/23886 (1992).

292. *Id.*

293. S.C. Res 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992).

294. S.C. Res. 866, U.N. SCOR, 48th Sess., 3281st mtg., U.N. Doc. S/RES/866 (1993).

295. *Id.*

the actual peacekeeping to ECOMOG while its ninety-member mission verified compliance with the peace accord and the disarmament process.[296]

The UN Observer Mission in Liberia did not change significantly after this accord broke down and was followed by three more years of intermittent fighting. Throughout the UN's association with the Economic Community of West African States, the Security Council praised the efforts of the regional organization and encouraged the parties to cooperate with the ECOMOG, but neither explicitly condoned nor condemned its initial intervention.[297]

What motive can be attributed to the Security Council's silence regarding the authority for the Liberian operation? Is it, as one commentator suggests, recognition that a legitimate regional organization needs no authority for this type of operation?[298] If so, it seems to validate the United States' position during the Cuban missile crisis and the Dominican Republic operation.[299]

Alternately, is the Security Council's reaction more than just "failure to condemn," but rather its approval, which can be fairly implied from the words of the resolutions?[300] Or is the Security Council's response merely

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296. This arrangement was hailed as a possible blueprint for the future. *See* Nowrojee, *supra* note 165, at 129. To some extent the model has been emulated between the UN and Organization of American States in Haiti, and the UN and NATO in Bosnia.

297. Besides Resolutions 788 and 866, *see, e.g.*, S.C. Res. 813, U.N. SCOR, 48th Sess., 3187th mtg., U.N. Doc. S/RES/813 (1993) ("welcoming the continued commitment of" Economic Community of West African States, and commending its efforts) and S.C. Res. 1100, U.N. SCOR, 52nd Sess., 3757th mtg., U.N. Doc. S/RES/1100 (1997) ("Noting with appreciation the active efforts of Economic Community of West African States to restore peace, security, and stability to Liberia, and commending the States which have contributed to the ECOMOG.").

298. *See* Brown, *supra* note 190, at 258. The former Secretary General, Perez de Cuellar reportedly lent his unexpected support to this viewpoint, when in response to questions he said Economic Community of West African States did not need the consent of the Security Council before intervening in Liberia. *See* Peter da Costa, *Peacekeepers Run to U.N. as Mediation Runs Out of Steam*, INTERPRESS SERVICE, Sept. 23, 1992, *available in* LEXIS, News Library, Inpres File.

299. *See supra* note 218 and accompanying text. *See also* Wippman, *supra* note 190, at 187 (comparing the Economic Community of West African States action which had at best "implicit" approval by the Security Council with the United States position during the Cuban missile crisis and Dominican Republic operation that "failure to condemn" is equivalent to authorization).

a pragmatic recognition of a *fait accompli* while trying to avoid establishing precedent?[301]

The fact remains that for the first time a regional organization undertook a humanitarian intervention without express Security Council approval while avoiding international censure. When studied in light of the Grenada and Dominican adventures, the implication is that no prior Security Council authorization is necessary when other regional organizations, such as NATO, undertake humanitarian intervention under the proper circumstances. This is an important principle for future NATO peace operations, and one that the organization has relied upon during its current operations in Kosovo.[302]

2. The Organization of American States in Haiti

Haiti has a long history of military dictatorships, often punctuated by coups and counter-revolutions.[303] After vigorous negotiations by the Organization of American States, the ruling junta permitted free elections in December 1990.[304] The Organization of American States and the United Nations extensively monitored the elections.[305] In February 1991, Jean-Bertrand Aristide took office as one of the few democratically elected

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300. The resolutions "recall" the provisions of Chapter VIII and refer to the ECOMOG as a peacekeeping force. *See supra* notes 293, 294, and 297. Professor Wippman argues that resolution 788, and the debates leading up to its adoption, reflect clear approval of the Economic Community of West African States initiatives. The resolution also may reflect the Council's strong sense of relief that the group was willing to try and settle a protracted conflict at a time when the UN was "over-stretched." Wippman, *supra* note 190, at 173-74.

301. *See* Ofodile, *supra* note 184, at 414 (endorsing the operation would have set a dangerous precedent, while condemning it would have contributed to further breakdown of law and order; asserting the reference to Chapter VIII in the resolutions merely recognizes Economic Community of West African States' status as a regional organization).

302. *See infra* notes 431-435 and the accompanying text.

303. For a brief sketch of Haiti's tortured political background, *see* Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 123-128 (Lori Fisler Damrosch ed., 1993).

304. *Id.* at 128-31.

305. *Id.*

presidents in the history of Haiti.[306] After only seven months, however, another military coup deposed Aristide.[307]

The Organization of American States did not hesitate to become involved. Drawing on the strength of the Santiago Declaration,[308] the Organization of American States Permanent Council issued a resolution condemning the coup, calling for immediate restoration of Aristide to power, and convening an ad hoc meeting of foreign ministers (the Ad Hoc Group).[309] The Organization of American States vigorously pursued sanctions against Haiti. The Ad Hoc Group issued a resolution reasserting the call for restoration of the Aristide government; announcing an embargo to effect a political, economic, and financial isolation of the Cedras regime; and implementing measures to monitor human rights.[310] When the regime immediately rejected its demands, the Ad Hoc Group announced that it would not recognize the de facto government, although it would send a civilian commission to negotiate.[311]

Although the Organization of American States began to lobby the UN to have the Haitian matter placed on its docket almost immediately after the coup, the UN took little action.[312] After the third Organization of American States resolution, the General Assembly passed a resolution in

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306. Aristide took 67% of the popular vote. *Id.* Additional details concerning the Aristide election are available in Felicia Swindells, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter*, 20 FORDHAM INT'L L.J. 1878 (1997).

307. The traditional Haitian power base backed the coup due to their fear of Aristide's reforms. The leader of the new junta, General Raoul Cedras, claimed that Aristide was persecuting the National Assembly and the armed forces. *See generally* Acevedo, *supra* note 303, at 131; Brown, *supra* note 190, at 259.

308. *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, O.A.S. General Assembly, 3rd Plenary Sess., June 4, 1991, at 1, O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991) [hereinafter the Santiago Declaration]. In the Santiago Declaration the Organization of American States expressed unequivocal support for representative democracy. The Declaration requires an immediate meeting of the Permanent Council whenever a democracy is irregularly removed. In turn, the Council must call for an ad hoc meeting of foreign ministers or of the Organization of American States General Assembly which then must decide whether to take action consistent with the OAS Charter and the Charter of the United Nations.

309. *Resolution in Support of the Democratic Government of Haiti*, CP/RES.567 (870/91). Sept. 30, 1991.

310. *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 1/91, doc. OEA/Ser.F/V.1, Oct. 3, 1991. With regard to Chapter VIII, Article 54, the resolution notified the UN of its actions. *Id.*

311. *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 2/91, Oct. 8, 1991.

support of the Organization of American States' actions and requested the world community to honor the embargo.[313] Thereafter, the Haiti situation did not engage the UN's attention for almost two years.[314]

The Organization of American States issued two more resolutions in 1992 in an attempt to strengthen its embargo.[315] The embargo effort was weakened, however, by several factors. First, the United States did not fully support the embargo.[316] Also, the Organization of American States Charter arguably did not permit the organization to impose its decisions on its members.[317] A final problem is that, even if it could line up support amongst its members, it could not enforce the embargo against the rest of the world without UN support.

In 1993, possibly influenced by increased refugee flows, the United States again threw its weight behind the Organization of American States' efforts before the UN.[318] The Security Council recognized the "unique and

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312. *See* Brown, *supra* note 190, at 259. *See also* Arend, *supra* note 26, at 22-23 (noting a clash in philosophy between the Organization of American States and the UN). Initially the UN did not put the item on its agenda because it considered it an internal matter mandating non-interference under Article 2(7). The Organization of American States disagreed, arguing that it was a matter of collective self-defense and therefore a proper matter for international jurisdiction. *Id.*

313. G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. 49, U.N. Doc. A/46/49 (1991).

314. *Id.*

315. *Restoration of Democracy in Haiti*, MRE/RES. 3/92, May 17, 1992 (calling for stronger measures and asking for UN support); *Reinstatement of Democracy in Haiti*, MRE/RES. 4/92, Dec. 13, 1992 (issuing yet another call to the UN for a possible global embargo).

316. *See* Acevedo, *supra* note 303, at 137. In February 1992, United States policy shifted from strict enforcement of the embargo to permitting exemptions on a case by case basis. Economic losses by American companies and efforts to reduce the flow of refugees from Haiti were suspected as the reasons for the policy change. *Id.*

317. *See* OAS CHARTER, *supra* note 207. Article 18 says:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, or cultural elements.

Id. Article 19 says: "No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." *Id.*

exceptional circumstances" existing in Haiti and issued Resolution 841 directing member states to comply with the Organization of American States embargo and directing the Secretary General to establish a working committee in conjunction with the Organization of American States to monitor compliance and progress in Haiti.[319] The UN appeared to try to limit the value of its resolution as precedent. Having found a "threat to international peace and security," it took the unusual step of authorizing the Security Council President to release a statement emphasizing once again the "uniqueness" of the situation and its decision to act only after the efforts of the Organization of American States and the General Assembly were unavailing.[320]

What were the "unique and exceptional" aspects to the Haiti crisis? Resolution 841 expresses concern about "mass displacements of population" and deplores the failure to "reinstate the legitimate government."[321] Yet, similar situations have occurred across the world in the past without the Security Council invoking Chapter VII authority.[322] No further clarification was forthcoming from the Security Council. Shortly after Resolution 841, the de facto government signed the Governors Island Agreement[323] with Aristide. The agreement was designed to work towards peaceful turnover of power.[324] Just as quickly, the Cedras regime reneged.[325] Thereafter, the UN sanctions referred to the military govern-

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318. *See* Acevedo, *supra* note 303, at 137, 138.

319. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993) [hereinafter Resolution 841]. Adopted 16 June 93, it (1) referenced the Organization of American States resolutions and GA resolutions calling for an embargo; (2) recalled Chapter VIII to stress the need for cooperation between the UN and the Organization of American States in the matter; and (3) then acted under Chapter VII to impose the embargo consistent with that called for by Organization of American States.

320. United Nations Security Council, Provisional Verbatim Record of the Three Thousand Two Hundred and Thirty-Eighth Meeting, U.N. Doc. S/PV.3238, 16 June 1993. For accounts of the events leading to the release of these documents, *see* Swindells, *supra* note 306, at 1916, and Perez, *supra* note 45, at 430-32.

321. *See* Resolution 841, *supra* note 319.

322. *See* Perez, *supra* note 45, at 430-33.

323. *Governors Island Agreement, in Report of the Secretary General: The Situation of Democracy and Human Rights in Haiti*, S.C. Doc., 48th Sess., at 2-5, U.N. Doc. A/47/975-S/26063 (1993). The agreement was supposed to allow Aristide's choice as Prime Minister to assume his role as part of a ten-step plan for restoring democracy to Haiti. *Id*.

324. *Id.*

325. *See* S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993).

ment's "failure to fulfill their obligations under the agreement" as constituting "a threat to peace and security in the region."[326]

Finally, exasperated by the de facto government's intransigence, on 31 July 1994 the Security Council authorized a multinational force to use "all necessary means" to enforce the Governors Island Agreement.[327] Other goals were to return the legitimate government to power, to establish and to maintain a secure and stable environment for implementation of the agreement, and to ensure the safety of a UN follow-on force.[328] The basis for the Security Council's decision was again the Governors Island Agreement, although concern for violations of civil liberties, and the plight of Haitian refugees caused the Council "grave concern."[329]

Despite the attempt to limit the Security Council's resolutions, for the first time the UN authorized the use of force to change the government of a nation not at war with its neighbors.[330] About thirty nations, ranging from "Bangladesh to Bolivia," prepared to enforce the resolutions.[331] By implication, they endorsed the concept of democratic intervention. Only the last minute abdication by the Cedras regime prevented the permissive use of force from occurring.[332]

The Haiti situation demonstrates that under the right circumstances the international community is prepared to support interventions based on democratic motives. This article argues that support for democracy is a fundamental principle on which NATO is based. History and the conditions within some new member states, and others on the periphery of NATO, make it foreseeable that the Alliance may need to engage in democratic intervention in the future. Since these operations may occur with-

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326. *See id*. (reversing the Security Council's decision ending the embargo rendered when it had looked like a political solution had been reached); S.C. Res. 875, U.N. SCOR, 48th Sess., 3293rd mtg., U.N. Doc. S/RES/875 (1993) (allowing stop and search of ships headed to Haiti).

327. *See* Resolution 940, *supra* note 45.

328. *Id.*

329. *See id.* pmbl., para. 4.

330. *See* Brown, *supra* note 190, at 259.

331. The appeal for a multinational force was directed particularly to the states "in the region." *See* Resolution 940, *supra* note 45, para. 12. But, response to the appeal was much broader. *See* Brown, *supra* note 190, at 259; Perez, *supra* note 45, at 236.

332. The multinational force entered Haiti unopposed in September 1994. Brown, *supra* note 190, at 259. Less than six months later the Security Council determined a secure and stable environment permitting entry of the UN Mission in Haiti had been achieved and began planning to deploy 6000 troops to keep the peace. S.C. Res. 975, U.N. SCOR, 50th Sess., 3496th mtg., U.N. Doc. S/RES/940 (1995).

out explicit Security Council approval, it is necessary that NATO lay the legal foundation for its involvement in advance by making the necessary adjustments to the North Atlantic Treaty.

IV. UN/NATO Cooperation in Bosnia: Charter-Based Regional Peace Operations

The inability of the UN to handle more robust peace operations was amply demonstrated in Bosnia and Somalia.[333] In an effort to put more "teeth" in its arsenal, it came to regard regional military alliances such as NATO as potential agents.[334] In 1995, Kofi Annan, the future Secretary General, predicted that the regional organizations would assume more of the peace operations role, but that the Security Council would maintain overall strategic command and control of the operation.[335] He was only partly correct. Within the year, NATO assumed complete command and control of the Bosnia mission.[336] Although the UN "invited" NATO to assume the role, it had little choice in the matter since NATO had already negotiated the turnover with the factions within Bosnia.[337]

In June 1992, NATO signaled the possibility of its assuming a peace operations role by issuing the Oslo Declaration.[338] The declaration stated in pertinent part that the North Atlantic Council agreed "to support on a case by case basis in accordance with [its] own procedures, peacekeeping activities under the responsibility of the Conference on Security and Cooperation in Europe"[339] (hereinafter called OSCE to reflect its name change). The Alliance extended a similar offer to the UN in December 1992.[340]

While all NATO members are also members of the UN and of the OSCE, the reverse is not true. When the Security Council, the OSCE, and NATO agree that a peace operation is appropriate, there is no conflict over authorization. The open question concerns whether NATO has legal authority to conduct peace operations when it desires to act, but the OSCE and the Security Council do not give permission. This article argues below

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333. *See* FM 100-23, *supra* note 3, at 6-12.

334. Kofi A. Annan, *UN Peacekeeping Operations and Cooperation with NATO*, *in* UN PEACE OPERATIONS 406 (Walter Gary Sharp, Sr. ed., 1995).

335. *Id.*

336. *See supra* note 8 and accompanying text.

337. *Id.*

338. Oslo Declaration, *supra* note 30, at 51.

in Part V that NATO can act independently of Security Council and OSCE permission.

Within days after the General Framework Agreement for Peace was signed, the Security Council issued Resolution 1031, extending its mantle of international legitimacy to the initiative.[341] In the years since the agreement, NATO has accomplished what neither the UN nor any other European security group was able to manage–an enforceable cease-fire between the warring parties which allows the parties to continue negotiating a political solution to the crisis.

Despite its success, NATO was not predestined to take the lead role in Bosnia. After the break up of the Soviet Union, some writers forecast that a uniquely European institution such as the OSCE, the West European Union, or the European Union would be the organization most likely to assume peacekeeping tasks in the European theater.[342] France became a fervent proponent of developing a European defense identity separate from NATO.[343] The West European Union was often its organization of choice.[344] When hostilities broke out in Yugoslavia, France insisted that the situation was a European problem and that it should be solved by European means.[345]

It was partly for that reason that the European Union found itself alone in 1991 trying to resolve yet another Balkan War without UN or NATO assistance.[346] Borrowing the authority of the OSCE,[347] the Euro-

339. *Id.* para. 11. As previously noted, the Conference on Security and Cooperation in Europe has become the Organization for Peace and Cooperation in Europe (OSCE). The OSCE, which has also been referred to as "the Helsinki process," was until recently little more than a forum for consultation for 55 countries across Europe and North America ("from Vancouver to Vladivostock" is the popular refrain). It allowed East-West discussion on issues other than military affairs. Like NATO, it sought a new role when the Soviet Union collapsed. Unlike NATO, OSCE explicitly transformed itself into a Chapter VIII regional organization formally linking itself to the UN system. As a recognized regional organization, it serves as a legal framework for peacekeeping operations. OSCE's drawback is that it has no military forces of its own, so it "subcontracts" with the WEU, NATO, and the Commonwealth of Independent States (CIS). Jerzy M. Nowak, *The Organization for Security and Co-operation in Europe, in* CHALLENGES FOR THE NEW PEACEKEEPERS 122, 127 (Trevor Findlay ed., 1996). *See also* NORTH ATLANTIC TREATY ORGANIZATION, BI-MNC DIRECTIVE, NATO DOCTRINE FOR PEACE SUPPORT OPERATIONS, E-2 (11 Dec. 1995) (citing the Security Council and the OSCE as the only sources of authority for NATO peace operations).

340. *Final Communiqué issued by the North Atlantic Council in Ministerial Session,* NATO PRESS COMMUNIQUÉ M-NAC-2 (92) 106, Dec. 17, 1992.

341. *See supra* note 8 and accompanying text.

pean Union tried to negotiate an end to the conflict. Although it arranged a brief cease-fire in September 1991, the European Union's inability to

342. *See* Stromseth, *supra* note 31, at 492. Without the benefit of hindsight, Professor Stromseth projected in 1991 that a "pan-European institution" might be a better option to keep the peace in Europe beyond the traditional NATO borders. She felt the NATO role should be narrowly focused as a "residual deterrent" for collective self-defense against a possible Soviet reformation. That would help avoid the inherent danger of rekindling Russian fears which NATO expansion was bound to arouse. *Id.* Professor Stromseth also felt allowing NATO "out of area" would infringe on the prerogatives of the Security Council. *Id.* at 497-98. Finally, she advocated WEU develop rapidly to become a pillar of both NATO and the European security structure–a concept which would later be called "dual-hatting." *Id.* at 499. *See also* JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER INTERNATIONAL LAW 334 (1992) (asserting that the broad authority of WEU would allow the European Allies to exercise out of area jurisdiction than the more strictly defined North Atlantic Treaty would allow).

343. *See* WOODLIFFE, *supra* note 342, at 336. France complains that NATO competes inappropriately for new roles, which one of the other European organizations is designed to fulfill now or for which it can develop to fill in the future. Rader, *supra* note 7, at 153. When NATO produced the first draft of its Doctrine for NATO Peace Support Operations, France complained that it did not address OSCE operations and stalled its implementation until the doctrine was redrafted. *Id.*

344. The WEU was created in 1948, the year prior to NATO. *See* Treaty for Collaboration In Economic, Social, and Cultural Matters and for Collective Self-Defense, March 17, 1948, 19 U.N.T.S. 51, *as modified by* Protocol Modifying and Completing the Treaty for Collaboration In Economic, Social, And Cultural Matters And For Collective Self-Defense, October 23, 1954, 211 U.N.T.S. 342 (also called the Brussels Treaty of 1948). After NATO was formed, the WEU folded its command structures into those of NATO. PAUL BORCIER, THE ASSEMBLY OF WESTERN EUROPEAN UNION 13-14 (1975). Its members resuscitated it in 1984 with a view to creating a "more cohesive European security and defense identity." WOODLIFFE, *supra* note 342, at 333. Its main operational achievements before the Yugoslavian conflicts were providing escort for oil tankers in the Persian Gulf during the Iran-Iraq War, and projecting a naval force into the area during the Persian Gulf War. *Id. See also* Stromseth, *supra* note 31, at 495-496. This meager experience did not prepare the WEU when in 1992 it answered the Security Council's request for member states to enforce the embargo against the warring Yugoslavian republics. It attempted, with limited success, to "operationalize" its activities by adding a planning staff and identifying European forces available for its missions. *See* Steinberg, *supra* note 34, at 58. The WEU was confirmed as the sole European institution competent to wield operational forces by the Treaty on European Union, February 7, 1992, *reprinted in* 31 I.L.M. 253 (1992) (also called the Maastricht Treaty). NATO announced it would aid the effort by allowing the WEU to use its assets and non-American commanders. *See* Brown, *supra* note 190, at 277.

345. Richard M. Connaughton, *European Organizations and Intervention, in* PEACE SUPPORT OPERATIONS AND THE UNITED STATES MILITARY 193 (Dennis J. Quinn ed., 1994).

346. The Security Council initially regarded the Yugoslavian conflict an internal affair. It still regarded article 2(7) as a bar to getting involved in the situation. Steinberg, *supra* note 34, at 38. The Council did agree to impose an arms embargo on Yugoslavia after repeated European Union requests. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991).

develop a credible West European Union peacekeeping force doomed the effort.[348]

When it became apparent that the European effort was failing, the Security Council finally agreed to establish the UN Protection Force, contingent on the parties establishing another cease-fire.[349] That was achieved in January 1992, and the first phase of the Yugoslavian conflict drew to a close.[350] It became clear that the forces were disengaging in Slovenia and in much of Croatia.[351] Unfortunately, the Bosnia situation rapidly deteriorated.[352] After the factions killed several European Union monitors, the UN devised forceful measures to secure the Sarajevo airport and to protect humanitarian relief programs.[353]

Shortly after the Oslo Declaration in June 1992, NATO began monitoring shipping traffic in the Adriatic Sea, and then shifted to active enforcement of the arms embargo imposed by Resolution 713.[354] At first, NATO worked in conjunction with the West European Union, but command relationships grew increasingly complex as the operation went along. Eventually, the two organizations merged into a single chain of

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347. Yugoslavia was not a member of the European Union, but it was a member of the OSCE. Therefore, European Union selected member states who were a member of both organizations to act as mediators. The idea was that the OSCE "provided the jurisdictional framework while the [European Union] provided a credible threat of economic sanctions." Borgen, *supra* note 33, at 809.

348. *See* Steinberg, *supra* note 34, at 38. Despite French optimism, its WEU partners proved unwilling to insert ground troops without United States support. *Id.* at 60-61. Gaps in the European approach to security outside of NATO were again revealed during the 1997-8 crisis concerning Iraq. The European Union was unable to develop a combined strategic approach to the crisis. Britain backed the United States initiative; France did not. Most other European Union nations were along the political spectrum in between. As soon as the crisis appeared in abatement the members verbally attacked Britain, which had the rotating European Union presidency at the time, for actions inconsistent with the European agenda. Charles Trueheart, *Europe Brought Many Sides to Dispute*, WASH. POST, Feb. 27, 1998, at A29.

349. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).

350. *See* Steinberg, *supra* note 34, at 40-41.

351. *Id.*

352. *Id.*

353. S.C. Res. 752, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/752 (1992).

354. *See* Rader, *supra* note 7, at 142.

command (Operation Sharp Guard), which was essentially the NATO chain of command.[355]

In the air, command relationships were just as confusing. In a short period of time, NATO went from monitoring flights in the Security Council proclaimed no-fly zone[356] to actively enforcing the no-fly zone,[357] to providing close air support to protect UN Protection Force personnel,[358] and eventually using force to protect the so-called safe areas.[359] Command and control of these operations required a cumbersome "dual-key" procedure.[360]

The dual-key approach began when the UN ground commander made a request for air support to the Secretary General.[361] The Secretary General then called the NATO Commander, Allied Forces in Southern Europe with his request. Finally, the Commander, Allied Forces in Southern Europe called the strike forces located at Aviano Air Base, Italy, to authorize the strike.[362]

Despite these drawbacks, the cumulative weight of the NATO air campaign forced the parties to the negotiating table. The General Framework Agreement was initialed in Dayton, Ohio, in November 1995.[363] The UN was a minor player in the General Framework Agreement for Peace, which was essentially brokered by NATO.[364] Although the Security Council was "invited" to approve the deal, there seems little doubt that NATO

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355. *Id.*

356. S.C. Res. 781, UN SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992).

357. S.C. Res. 816 , UN SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/816 (1993)

358. *See* NATO Factsheet No. 4, *supra* note 5, at 3. Soon after this authorization was granted the Serbian militia took several hundred UN Protection Force members hostage to protect themselves from the air-strikes. This illustrates an undesired side effect of "robust" peacekeeping–and validates the United States position in the Dominican Republic that two international organizations ought not be in the same place trying to do the same job at the same time. *See supra* note 229 and the accompanying text. *See also* Rader, *supra* note 7, at 149 (noting the hostages were in the unusual circumstance of being caught between their peacekeeping duties and another organizations "peace" mission).

359. S.C. Res. 836, UN SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

360. *See* NATO Factsheet No. 4, *supra* note 5, at 4.

361. *Id.*

362. *Id. See also* Kaye, *supra* note 114, at 439 (arguing that the United States President unconstitutionally relinquished his strategic command authority over United States troops and policy objectives in this instance).

363. *See supra* note 8 and accompanying text.

364. *Id.*

would have proceeded even without the Council's approval. Nevertheless, the Security Council approved the agreement in Resolution 1031.[365]

Resolution 1031 contained several unprecedented provisions. Besides handing over peacekeeping duties from the UN to a regional organization, it admonished the multinational force to respect the NATO chain of command and authorized NATO to "take all necessary measures" to achieve the humanitarian goals of the mission.[366]

The NATO peace operation in Bosnia was the first time a failed UN peacekeeping force handed off its responsibilities to a regional organization.[367] The mission is an object lesson in how a combined force, honed by years of joint training, succeeded where an ad hoc coalition, the kind typically employed by the UN, did not. The Implementation Force made sure it provided its components with technologically superior equipment and logistics, directed by a well-integrated command and control structure, and with a clear mandate to use force to effectuate its mission. This level of support cannot be duplicated by the typical UN-directed peacekeeping operation.

Despite the success of the mission, the legal basis for the operation is controversial. Although NATO's presence is authorized by a Security Council resolution promulgated under Chapter VII, NATO's own charter, the North Atlantic Treaty, does not address peacekeeping at all. Unlike the OSCE, the Alliance has no formal status with the UN as a Chapter VIII regional organization. In Bosnia, NATO papered over this deficiency by borrowing its legitimacy from the OSCE. This position places the Alliance in direct opposition to the stance that it has taken for over forty years that it is simply a collective defense organization. It also calls into question

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365. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

366. *Id.* A later extension of NATO's mandate was approved as a matter of course. *See* S.C. Res. 1088, UN SCOR, 51st Sess., 3723rd mtg., U.N. Doc. S/RES/1088 (1996). As of the date this article was completed, the Alliance planned to extend the mission into the foreseeable future. *See NATO to Extend Bosnia Force's Stay Past June*, WASH. POST, Feb. 19, 1998, at A24. Whatever form a follow-on force takes, the European allies have made it clear that their own commitment to Bosnia depends on the continued presence of American forces. *See* William Drozdiak, *NATO Ministers Agree Force Must Stay in Bosnia*, WASH. POST, Oct. 2, 1997, at A19 (detailing decision of North Atlantic ministers to stay beyond June 1998–as long as United States leadership and ground troops remain engaged).

367. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

NATO's traditional reason for avoiding classification as a Chapter VIII organization; that is, its desire to avoid limitations on its freedom of action.

Ultimately, the Bosnia action may be regarded as an anomaly. Its legal basis can be explained in terms of Security Council authorization, combined with host state consent. International pressure for action to stop the brutal human rights violations displayed daily through the electronic media probably had an impact as well.[368] Meanwhile, NATO, as an organization, was searching for a mission following the collapse of the Soviet Union. The OSCE became a convenient forum to leverage the organization into the conflict without needing to examine closely or directly refute the historical justifications for the Alliance.

The need for NATO involvement in future "Bosnias" may not generate the same pan-European consensus needed to support an OSCE action. The European Union's ineffectiveness in Bosnia and its recent rejection of Turkey as a candidate member also shows that it is not prepared to assume any important security role.[369] Additionally, it has already been demon-

368. *See, e.g.*, Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205 (Lori Fisler Damrosch ed., 1993) (crediting the electronic media with being the catalyst for international intervention in Somalia). *See also* Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?* 17 SUM FLETCHER F. WORLD AFFAIRS 199, 206-07 (1993) (asserting "there was little hope of assistance and protection for the victims of ethnic cleansing in Bosnia until television" prompted international response).

369. Apparently Turkey's status as the most important anchor on NATO's southern flank carries little weight with the European Union. At its December 1997 summit the European Union rejected Turkey's membership request placing the blame on purported human rights abuses. At the same time, it welcomed talks with six potential members who were until recently mortal enemies of Western Europe, and opened discussions with five others. *European Union Slams Door on Turkey*, ASSOCIATED PRESS, Dec. 13, 1997, *available in* 1997 WL 13312413. Turkey, angry over its rejection after working for membership for over ten years, accused the European Union of erecting "a new cultural Berlin wall." Lee Hockstader & Kelly Couturier, *Turkey Severs Ties with EU After Membership Snub*, LA TIMES, Dec. 15, 1997, *available in* 1997 WL 13145360. Reportedly, the Turks hinted that European Union's action could damage negotiations for a settlement in Cyprus. Rubbing salt into the wound, the European Union opened discussions with Cyprus, and countries with a reputation for economic and political turmoil, such as Slovakia and Bulgaria. *Id. See also* Ben Barber, *Turkey Threatens Partition of Cyprus*, WASH. TIMES, Dec. 19, 1997, at A17 (reporting the European Union rejection was based on a poor human rights record, continuing conflict with Greece over Cyprus, and economic difficulties within Turkey; Turkey accused some members, Germany in particular, of being culturally biased against Turkey and seeking to restrict flow of Turkish workers into Germany; European Union members permit free movement between their nations).

strated that Security Council stalemate still occurs despite the end of the Cold War. The North Atlantic Treaty Organization must be prepared to act pursuant to its own charter to address vital European security concerns without fostering its legitimacy from some other international organization.

V. Reexamining the North Atlantic Treaty after Bosnia and Kosovo

The rapidly developing events in the Balkans highlight NATO's transformation from an organization exclusively devoted to collective self-defense to an entity willing to ensure collective security by conducting peace operations. Developing customary international law supports this role whether NATO is acting pursuant to a UN Security Council grant of authority or not. Chapter VIII of the UN Charter, in conjunction with the Article 51 collective self-defense provision, is broad enough to guarantee NATO's traditional quest to preserve its freedom of action.

The North Atlantic Treaty Organization should amend the North Atlantic Treaty, however, to clarify the duties and responsibilities of its members within the reinvented Alliance. The North Atlantic Treaty Organization's goals have been too much subject to drift and uncertainty since the dissolution of the Soviet Union. Amending the treaty to reflect NATO's status as a Chapter VIII regional organization will help restore the clarity of vision the Alliance requires when it performs peace operations in the twenty-first century.

A. Preserving NATO's Freedom of Action

1. The Legal Framework for Regional Organizations

The North Atlantic Treaty Organization should discard the legal fiction that it is not a Chapter VIII regional organization. The drafters of the UN Charter deliberately left the exact meaning of "regional arrangement" unclear.[370] Some basic concepts, however, have been identified.

In practice, the interpretation appears to include states that are more or less geographically co-located, and within that group of states the mem-

370. *See* GOODRICH & HAMBRO, *supra* note 160, at 310-11. A proposal by the Egyptian delegation was rejected because it was feared that in some unforeseen fashion the definition might be too narrow. *Id.*

bers agree to a charter which governs their relationships to some extent.[371] Of course, NATO easily clears these hurdles, sharing as it does a common set of interests under the auspices of the North Atlantic Treaty. Yet, NATO has historically sought to avoid being classified as a Chapter VIII organization.[372]

The definition was debated extensively during the drafting of the North Atlantic Charter, but the members could not agree whether or not the Alliance constituted a regional arrangement.[373] They felt that the issue was significant because Article 53 obliged regional organizations to obtain Security Council authorization before engaging in "enforcement actions."[374] Apparently, the members believed that if they identified themselves as a regional organization they risked limiting their freedom of action. They reached this conclusion because a veto by a permanent member of the Security Council, presumably the Soviet Union, would block their ability to operate.[375] In the end, the drafters omitted any reference to Chapter VIII.

In light of international law developed since Chapter VIII was drafted, however, NATO's fictional status has little practical consequence. For instance, if NATO acts in self-defense, its operations are protected by Article 51, regardless of Security Council approval. Moreover, the devel-

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371. *See* Wippman, *supra* note 190, at 183-84. For a view that regional organizations can be more certainly defined, *see* Ofodile, *supra* note 184, at 410. The writer offers three factors: (1) there is a standing agreement between a subset of member states of the UN; (2) the agreement specifically deals with matters of international peace and security; and (3) the group has a direct relation to the region. *Id. But see* Borgen, *supra* note 33, at 799 (describing the scant requirements as self-identification and the willingness of member states to perceive the group as a regional organization).

372. *See infra* notes 373-375 and accompanying text.

373. *See* Stromseth, *supra* note 31, at 482

374. *Id. See also* Meyer, *supra* note 31, at 423-24 (asserting long-held position of NATO that it was created under the auspices of Article 51 and therefore solely concerned with collective self-defense).

375. *See* Henrikson, *supra* note 15, at 42.

> All of these agreements for common self-defense refer to Article 51, and thus can be said to avoid the constraints on 'regional arrangements or agencies' of Chapter VIII, and perhaps even the more general limitations imposed by the Charter on the resort to force by U.N. members viewing their own and their allies' vital interests.

Id. See also Borgen, *supra* note 33, at 797 (stating regionals intentionally sought to describe themselves as Article 51 collectives in order to avoid oversight by the UN).

opment of Article 52 demonstrates that consent-based peacekeeping is permissible with or without Security Council approval. Further, the UN's own campaigns have set the parameters for non-traditional peacekeeping short of enforcement action. Acting consistently with the "purposes and principles" of the Charter, precedent indicates that the community of nations is prepared to accept collective peace operations based on humanitarian concepts ranging from genocide to collapse of civil order.[376]

Ironically, under its present concept of peace operations, NATO subjects itself to the very oversight it sought to avoid during the Cold War. Russia wields veto power in both the Security Council and the OSCE.[377] Yet, its present stance only allows NATO to pursue peace operations at the behest of one or more of those organizations.[378] This effectively reduces the Alliance to little more than a subcontractor in peace operations.

Of course, the argument could be made that NATO preserved its independence by limiting its involvement to those it undertakes "on a case by case basis in accordance with its own policies and procedures."[379] If so, this is a curious sort of freedom where the Alliance grants another organization the right to choose what peace operation it will or will not pursue in exchange for the right to decline to perform the operation. It is more rational for the NATO members to amend their charter to allow them to perform the peace operations which international law allows without UN (or Russian) oversight.

2. The Russians Are Not Coming: They Are Already Here

The current concept of NATO peace operations subjects the Alliance to supervision by the Russian government.[380] If NATO agrees to pursue a

376. *See* Damrosch, *supra* note 188, at 12 (identifying the situations where approval most likely will occur as: genocide, interruption of delivery of humanitarian relief, violations of cease-fire agreements, collapse of civil order, and irregular interruption of democratic governance).

377. *See* U.N. CHARTER art. 27(3). *See also* Nowak, *supra* note 339, at 127.

378. *See* Oslo Declaration, *supra* note 30.

379. *Id.*

380. This section was written in 1998 before NATO's decision to intervene in Yugoslavia over Serbian aggression against the Albanian Kosovars. Immediately after the bombing campaign began, Russia recalled its representatives to NATO. *See Russia Cuts Ties to NATO*, ST. LOUIS POST DISPATCH, Mar. 25, 1999, at A1. At the time this article was submitted for press, it is unknown whether this is a permanent severance, or merely a pro forma diplomatic protest.

mission only after UN authorization, Russia's veto on the Security Council can block operations proposed by the Alliance. Furthermore, if NATO chooses to request authority from the OSCE, Russia also has an effective veto in that forum.[381] The result is that the Alliance completely loses its freedom of action without a separate basis for peace operations in its own charter.

The threat of a Russian veto over NATO peace operations is not unrealistic. For example, in 1995, Russia demanded a role in the Bosnia peacekeeping process and threatened to withdraw from the Partnership for Peace if its call was ignored.[382] Once inside the coalition, Russia used the presence of its 1400 troops as a bargaining chip for concessions in the way the mission was prosecuted.[383] This approach by the Russian government is consistent with its broader long-range goal to strengthen the OSCE at the expense of the North Atlantic Alliance.[384] It appears that Russia may have achieved this goal with enshrining the principle of OSCE supremacy in the Founding Act.[385]

It should come as no surprise that Russia's political interests are not necessarily congruent with those of the Alliance. As it struggles to reform itself, Russia seeks to maintain the illusion that it is still a superpower nation, even though it no longer has the means to preserve that status aside

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381. In theory the OSCE has a "consensus minus one" decision-making model, therefore Russia could not alone block an action favored by the rest of the organization. The reality is that the 52 member OSCE is too unwieldy to be a reliable forum for collective action since any dissent by a strong voice such as Russia's is likely to sway other members to vote against a proposed action. *See* Steinberg, *supra* note 34, at 61.

382. Mikhail A. Alexseev, *Russia's "Cold Peace" Consensus: Transcending the Presidential Election*, 21 SPG FLETCHER F. WORLD AFF. 33, 39 (1997). This was not the first time Russia used the Partnership for Peace to put pressure on the Allies. Aware that the West was anxious to have its participation, Russia at first declined to join, then later insisted on "special member" status as a condition for its participation. *Id.*

383. In September 1997, NATO considered bombing a Serbian-controlled radio station, which was broadcasting anti-NATO rhetoric. Russia warned that the action would be "an intolerable use of force" that might endanger the peacekeeping mission. *United States Dispatches 3 Planes to Bosnia to Jam Serbs' Anti-NATO Broadcasts*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 12, 1997, at 12A. The threat came during the first organizational meeting held in Brussels designed to establish the NATO-Russia Permanent Joint Council. The reported comment of "a senior NATO diplomat" was that, "It turned out to be a very disagreeable meeting. There was (sic) a lot of complaints around the table. This was not a good omen for the future work of the NATO-Russia council." William Drozdiak, *Moscow Warns NATO on Bosnia*, WASH. POST, Sept. 12, 1997, at A27.

384. Oskaras Jusys & Kaestutis Sadauskas, *Why, How, Who, and When: A Lithuanian Perspective on NATO Enlargement*, 20 FORDHAM INT'L L.J. 1636, 1658-59 (1997).

from its deteriorating nuclear arsenal.[386] Its relationship with the West remains very unstable while it deals with the fundamental questions about its future.[387]

The problem most likely to cause friction with the Alliance is Russia's pursuit of hegemony over the hinterlands it lost during the break up of the Soviet Union. Immediately after the fall of the USSR, Russia sought to reassert control by forming the Commonwealth of Independent States.[388] While the policy achieved some short-term success, it also multiplies opportunity for competition with the West. This occurs because several of the republics have developed important economic and political ties outside

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385. *See North Atlantic Treaty Organization, Founding Act on Mutual Relations, Cooperation and Security Between NATO and the Russian Federation, available at* <http://www.nato.int/docu/basictxt/fndact-a.htm> [hereinafter FOUNDING ACT] (declaring the OSCE the only pan-European security organization; committing the parties to choosing it to avoid "dividing lines or spheres of influence"; and acknowledging the OSCE as the "inclusive and comprehensive organization for consultation, decision-making and cooperation in its area and as a regional arrangement under Chapter VIII of the UN Charter").

386. *See generally* Sherman Garnett, *Russia's Illusory Ambitions*, 76 FOREIGN AFF. 61, Mar. 1997.

387. Unsettled questions include whether Russia will continue as a fledgling democracy or lapse back into its traditional authoritarianism, and whether private enterprise will triumph over the command economy. *See* Richard Pipes, *Is Russia Still the Enemy?*, 76 FOREIGN AFF. 65, (Sept. 1997) *available in* 1997 WL 9287483. Despite progress the Duma, Russia's parliament, is still in communist hands. The popular base for democracy is also "thin and brittle." Many people responding to a poll before the 1996 Presidential elections felt they were better off under the old Soviet-style government. Observers note that the professional military officers corps is "embittered and vindictive" over the loss of Russia's military power. Moreover, there is only nominal civilian control over the military with only one civilian executive appointed to the Ministry of Defense. *Id.*

388. *See id.* (claiming the CIS mutual security treaty effectively entrusted security of all signatories to the Russian army); *see also* Alexseev, *supra* note 382, at 40, 46 (asserting that the tempo to reintegrate the lost republics increased after the 1996 Presidential election despite the claims of some observers that the call for confederation was merely election year rhetoric, and that "Moscow's strategy is . . . to integrate the former Soviet republics into a Russia-led collective security system and increase Russia's sharing of their natural resources."); Garnett, *supra* note 386, at 66 (noting CIS integration remains a key element in Russia's claims to great power status). Some former republics voluntarily joined the organization, while others were coerced. After Georgia refused membership, Russia actively fomented a rebellion in the Abkhazia region. When Georgia was unable to handle the situation without Russian help, Russia negotiated an agreement allowing it to station 15,000 troops on Georgian soil in addition to the "peacekeeping" mission it sent to the Abkhazia region. As soon as Georgia allowed the force in the "rebellion" abated. *See* Pipes, *supra* note 387.

Russia's "near abroad" while accommodating Russian military presence within their borders.[389]

Meanwhile, NATO enlargement pushes the Alliance to the borders of the Ukraine and the Russian province of Kaliningrad, a small enclave on the coast of the Baltic Sea between Poland and Lithuania.[390] Russia fought the idea of NATO enlargement every step of the way, hoping to disband the Alliance or at least to wring concessions with its grudging cooperation.[391]

Reportedly, a "White Book" released in late 1995 by Russia's intelligence services advocated this strategy.[392] Examples of the policy are abundant. As bribes for its cooperation in recent years, Russia bargained for a seat on the G-7 economic summit by threatening not to participate in the Partnership for Peace.[393] It stalled ratification in the Duma of START II (Strategic Arms Reduction Treaty), the second stage of nuclear arms reduction, unless the West agreed to pay for it.[394] Russia also threatened to withdraw from the Conventional Forces in Europe Treaty unless it was permitted to increase troop levels north of the Caucasus.[395] A major con-

389. *See* Garnett, *supra* note 386, at 70-73. In September 1997 Russia had troops deployed in all the ex-Soviet republics with the exception of the Baltic states and Azerbaijan. *See* Pipes, *supra* note 387. Although the conflict may be some time away, observers perceive a "geopolitical fault line" opening up in Russia's south along the Caspian Sea and Central Asia. The area is likely to receive increased attention from the West due to its geopolitical importance and the presence of copious amounts of oil. For a discussion of the economic and military impact of the area, *see supra* note 41 and the accompanying text.

390. *Partnership for Peace*, NATO Basic Factsheet No. 9 (last modified Mar. 1996) <http://www.nato.int/docu/facts/fs9.htm>.

391. *See* Alexseev, *supra* note 382, at 33-34 (describing the Russian practice of realpolitik). According to Alexseev, the Russian perspective is that the world of geopolitics is a zero-sum game where a gain by the West is a loss to the Russians. He believes the approach will not soon change because it is accepted throughout the Russian system from the politicians to the intelligence services to the public. *Id*. at 33-37.

392. *Id.* at 37. The potential influence of this philosophy is supported by the fact that one of its sponsors was Yevgeny Primakov, then the head of Russia's Foreign Intelligence Service, now the Russian Prime Minister. *Id.* at 38.

393. *Id.* at 39.

394. *Id. See also* Jusys & Sadauskas, *supra* note 384, at 1663 (admitting that the Strategic Arms Reduction Treaty (START) delay may be blamed more on the technical and financial difficulties encountered by the Russians as they seek to destroy the outlawed multiple warheads, while producing single warhead missiles, but noting, "The possibility of hearing new excuses, however, should not be ruled out.").

395. *See* Alexseev, *supra* note 382, at 39-40. *See also* Jusys & Sadauskas, *supra* note 384, at 1662-63 (describing the bargain bitterly as a "needless one way concession" conducted in secrecy without the participation of non-Conventional Forces in Europe Treat members affected by it).

cession sought by Russia is to increase its role in the European decision-making process.[396]

The Permanent Joint Council resulted from Russian pressure against the enlargement process. The Permanent Joint Council allows Russia to bypass the OSCE and the Euro-Atlantic Partnership Council and come directly to the table with NATO without the presence of the other Partnership for Peace members or even the NATO membership candidates.[397]

The agreement purports to blunt any negative consequences to this arrangement by stating that consultations will be conducted "with respect to security issues of common concern," but that such consultations "will not extend to internal matters of either NATO, NATO member states, or Russia."[398] Additionally, it states, "Provisions of this Act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other nor do they infringe upon or restrict the rights of NATO or Russia to independent decision-making and action."[399]

Nevertheless, observers are skeptical of NATO's ability to keep Russia out of its internal affairs.[400] The initial Permanent Joint Council meetings demonstrate that there is validity to those observations. Russia used the very first ministerial meeting to demand that it be included in future Alliance decisions concerning action in Bosnia.[401] Subsequent meetings

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396. *See* Alexseev, *supra* note 382, at 46. Russia's other purported goals are to seek to balance Western influence in Asia and Middle East, and to intensify its efforts to dominate the CIS. *Id*. Former Russian general and defense minister (and probable future Presidential candidate), Alexander Lebed, reportedly stated that "greater interaction with NATO gives Moscow a chance to influence and exploit significant differences among NATO member-states, thus undermining NATO from within." *Id.* at 45.

397. *See* Jusys & Sadauskas, *supra* note 384, at 1659-61. One of the possible consequences of the Permanent Joint Council arrangement is that it allows Russia to participate in the NATO decision-making process for almost a year and a half before the next round of negotiations for NATO membership. *See generally* FOUNDING ACT, *supra* note 385.

398. *See* FOUNDING ACT, *supra* note 385, at 4.

399. *Id.* at 5.

400. *See, e.g.*, Martin Sieff, *First NATO-Russia Meeting Expected to Go Smoothly*, WASH. TIMES, Sept. 26, 1997, at A13 (quoting Peter Rodman, director of national security studies at the Nixon Center for Peace and Freedom, "[T]he existence of the Permanent Joint Council will make it a lot more difficult to keep Russia out of the room when NATO members are hammering out their decisions."); Tom Carter, *Kissinger Criticizes NATO-Russia Deal*, WASH. TIMES, Oct. 31, 1997, at A15 (quoting Henry Kissinger, former Secretary of State, that the act means "de facto membership"); Pipes, *supra* note 387, at 65 ("Russia has been given a seat on the Alliance's Permanent Joint Council, which assures it, if not of a veto, then of a voice, in NATO deliberations.").

established the tone where NATO members insist that certain matters are not "security issues of common concern," but where the Russians assert the contrary view.[402] What is certain is that the Permanent Joint Council gives Russia a forum to discuss peace operations matters. The Founding Act specifically identifies peacekeeping operations as an area of mutual interest.[403]

The inference is that NATO has managed to box itself into a corner when it considers peace operations. Arguably, if peace operations are a natural outgrowth of Article 5, these missions are an internal matter for NATO policy-making alone. Yet, the Founding Act justifies the opposite conclusion that peace operations are subject to the independent review of both the OSCE and the Russian government. The very brief history of the Permanent Joint Council indicates that the Russian government will be quite active in asserting its views at all forums available to it. This dilemma cannot be resolved without a clear declaration in the North Atlantic Treaty that peace operations are an integral responsibility of NATO.

B. The Evolving Law on Intervention

The time is quickly approaching when NATO members will not have the leisure to practice "the art of watching countries explode from a safe distance."[404] While Algeria festers in the south, refugees swarm into France.[405] Ethnic violence simmers around the Caspian Sea and cozies up to the border of Turkey.[406] The North Atlantic Treaty Organization

401. Laura Silber & David Buchan, *Moscow Demands a Say Over Bosnia*, FIN. TIMES (London), Sept. 27, 1997, at 2.

402. The Founding Act established a three-member panel to set the agenda and chair the meetings. The three members are a Russian delegate, the NATO Secretary-General, and another NATO member representative which rotates monthly. *See* FOUNDING ACT, *supra* note 385, at 5. The result of this arrangement has reportedly, "proved to be a formula for virtual paralysis." NATO members express fear that Russia seeks to use the agenda to undermine the organization's policy-making. William, *West, Russia Vow Closer Cooperation*, WASH. POST, Dec. 4, 1997, at A40. On their behalf, the Russians warn that if they are not allowed a "genuine voice" in the Permanent Joint Council, its utility is limited. James Morrison, *Lukin on the Line*, WASH. TIMES, Feb. 24, 1998, at A16.

403. *See* FOUNDING ACT, *supra* note 385, at 6.

404. This phrase was borrowed from Philip Golub, *The Art of Watching Countries Explode from a Safe Distance*, ASIA TIMES, Mar. 25, 1997, at 9 (criticizing the West, especially NATO, for failing to stop large scale humanitarian crises along its immediate periphery until it is too late to do more than "pick up the pieces, once the damage has already been done").

405. *See supra* note 13 and accompanying text.

enlargement produced candidate members with borders in close proximity with smoldering disputes.[407] It is only a matter of time before some potential conflagration ignites into a war that will force the Alliance from the sidelines.

For example, a civil war recently erupted in Kosovo, a province in what remains of Serbian dominated Yugoslavia.[408] As the violence spread during the spring and summer of 1998, it threatened to disrupt the fragile peace in Bosnia and draw Albania and Macedonia into the conflict.[409]

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406. *See supra* note 42 and accompanying text.

407. Poland borders on the Baltic nations, which have unstable relations with Russia, and adjoins Belarus, which is ruled by an autocratic holdover government from the communist era. *See generally* Jusys & Sadaukis, *supra* note 384. The Czech Republic survived its "velvet divorce" with Slovakia, but the latter nation has its own potential problems. *Cf.* Christine Spolar, *Lacking President, Slovakia is in Deadlock*, WASH. POST, Mar. 3, 1998, at A11 (reporting the Slovakian premier's bid to enlarge his powers, questioning the progress of democratic reforms, and highlighting the plight of ethnic minorities, the media, and the courts under the current regime). Hungary borders on the war-torn Balkan region.

408. Kosovo is 90% ethnic Albanian population (Muslims) has sought separation since the province's autonomous status was stripped in 1989 by the central government. The action was considered a prelude to the Bosnian conflict, because it set the tone for the drive towards the creation of "Greater Serbia." Although the main independence party advocated passive resistance, a more violent form of Kosovan nationalism emerged in the mid-1990s prompting thinly veiled threats from Serbian authorities that what happened to Bosnian Muslims could occur in Kosovo as well. *See* Philip Smucker, *Serbia's Tinderbox of Ethnic Strife, Kosovo Seethes*, PITTSBURGH POST-GAZETTE, Feb. 3, 1997. Serbia has a deep attachment to Kosovo because of its historical and religious significance to the Serbian Orthodox faith. The Battle of Kosovo in 1389 resulted in a crushing defeat for the Serbian forces by the Ottoman Turks. For 500 years, the Serbians suffered religious, ethnic, and social persecution at the hands of their Muslim conquerors. Their leaders vow that present-day Serbs will not suffer the same fate. *See* William Dorich, Commentary, *A Balkan Story the Media Ignored*, WASH. TIMES, Dec. 21, 1997, at B5.

409. *See, e.g.*, Philip Smucker, *More Albanian-Serbian Clashes Shake Yugoslav Region*, WASH. TIMES, Jan. 16, 1998, at A15 (warning of a sharp increase in violence in Kosovo accompanied by little diplomatic effort to stop it); Georgia Anne Geyer, Commentary, *Kosovo: The Balkan's Next Trouble Spot*, CHICAGO TRIB., Feb. 20, 1998, at 25 (predicting the "next Balkans" begins in Kosovo and noting the likelihood the violence would spread into Macedonia with its large Muslim minority); Guy Dinmore, *Albanian Rebels Fight with Serbian Police*, FIN. TIMES (London), Mar. 2, 1998, at 2 (reporting a Kosovan terrorist attack which in turn led to a Serbian crackdown in which twenty Kosovan civilians were killed; as the violence escalated the Albanian government warned that Serbia's actions created a "serious war situation"); Chris Hedges, *Serbia Police Crush Protest by Ethnic Albanians in Kosovo*, N.Y. TIMES NEWS, Mar. 3, 1998, *available in* 1998 WL-NYT 9806104804 (reporting a Serbian crackdown on civilian protests which followed the weekend massacre of 20 Kosovan civilians; the Serb government refused to negotiate with the Kosovan parties and warned western diplomats that Kosovo was "an internal affair").

Western governments feared that Turkey and Greece, with their own well-known animosities, might also become involved.[410]

Despite these fears and a Security Council threat to act,[411] the fighting continued to escalate. By September 1998, the Security Council estimated that over 230,000 Kosovars had been displaced from their homes, and noted that many of these refugees were flowing into Albania, Bosnia, and many other European countries.[412] "Concerned" that the situation was deepening into a humanitarian catastrophe, the Council declared the situation a "threat to peace and security in the region."[413] Nevertheless, the members of the Council could not reach agreement on a course of action beyond encouraging the parties to cooperate with regional efforts to negotiate a peaceful solution.[414] In the end, they resolved only "to consider further action and additional measures to maintain or restore peace and stability to the region."[415]

When the violence continued, NATO seized on the latest Security Council resolution to press for a more aggressive solution. Purporting to act pursuant to Resolution 1199, the Alliance issued an action order on 13 October 1998.[416] The action order authorized NATO military forces to

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410. A six-nation "contact group" composed of the United States, Russia, Britain, France, Italy, and Germany began attempts to negotiate a diplomatic solution. The United States vowed to press its allies to impose new economic and diplomatic sanctions against Serbia, but cautioned at the time that "the latest violence falls short of a threshold at which [it] would urge direct foreign military intervention." Jeffrey Smith, *United States Assails Government Crackdown in Kosovo*, WASH. POST, Mar. 5, 1998, at A23. Nevertheless, NATO hinted that direct military intervention was a possibility because of the potential impact of the Kosovan situation on the stability of the region. Colin Soloway, *Serbia Attacks Ethnic Albanians*, WASH. POST, Mar. 6, 1998, at A1. Inevitably, Russia's representative on the "Contact Group," indicated it would not support forcible intervention. Colin Soloway, *Kosovo Under 2nd Day of Heavy Serb Assault*, WASH. POST, Mar. 7, 1998, at A1.

411. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998). The Security Council purported to act under Chapter VII when it issued resolution 1160, but it never identified the specific threat to international peace and security. The Security Counsel imposed an arms embargo and threatened to "consider" additional measures unless constructive progress occurred. *Id.* at para. 19. The Security Council also seemed to favor direct interference with the internal political processes of the FRY by expressing, "its support for an enhanced status for Kosovo, which would include a substantially greater degree of autonomy and meaningful self-administration." *Id.* at para. 5.

412. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

413. *Id.*

414. *Id.*

415. *Id.* at para. 16.

begin air-strikes within ninety-six hours unless the warring parties reached a diplomatic agreement incorporating specific conditions supporting Resolution 1199.[417]

The action order forced the Yugoslavian Government to accept, for the time being, an air verification regime (Operation Eagle Eye) run by NATO, and a corresponding OSCE-run Kosovo Verification Mission on the ground.[418] Faced with another NATO decision negotiated without its active participation, the UN Security Council issued Resolution 1203 endorsing the NATO and OSCE agreements.[419] At the insistence of certain members of the Council, Resolution 1203 included a mild remonstrance that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council."[420]

Despite initial optimism following the agreements, the situation again deteriorated.[421] Anticipating a possible need to forcefully extract the Kosovo Verification Mission, the Alliance authorized Operation Joint Guarantor, a NATO ground force, which was deployed in the nearby Former Yugoslav Republic of Macedonia.[422] By late January 1999, NATO appeared fed up with both sides. It issued a forceful call for a peace con-

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416. Secretary General Javier Solana, Statement to the Press by the Secretary General Following Decision on the ACTORD, Oct. 13, 1998, *available at* <http://www.nato.int/docu/speech/1998/s981013a.htm>.

417. *Id*. According to NATO, in order to avoid bombing the Yugoslavian government must stop Serbian attacks on Kosovo. Also, Yugoslavian forces were required to return to barracks, the government had to start peace talks with the Kosovars, and refugees must be allowed to return to their homes. NATO further demanded that international aid agencies be permitted full access to Kosovo and that Yugoslavia must cooperate with the War Crimes Tribunal at the Hague. As a final condition to avoid the strikes, Yugoslavia was required to permit international monitoring. Flora Botsford, *Countdown Begins to Kosovo Strikes*, BBC NEWS SERVICE, Oct. 13, 1998, *available at* <http://new.bbc.co.uk/hi/english/world/europe/ newsid_192000/192253.stm>.

418. Secretary General Javier Solana, Statement to the Press by the Secretary-General Following the Meeting With Leaders of the FRY, Oct. 15, 1998, *available at* <http://www.nato.int/ docu/speech/1998/s981015a.htm>.

419. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

420. *Id*.

421. *See* Solana, *supra* note 418.

422. *See Statement on Kosovo, Meeting of the North Atlantic Council in Foreign Ministers Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (98) 143, Dec. 8, 1998.

ference, and warned both the Serbs and the Kosovars that they would face airstrikes if they failed to comply.[423]

With the threat of NATO action looming, the parties negotiated a conditional agreement at Rambouillet, France, on 23 February 1999.[424] The agreement foresaw political autonomy for Kosovo while seeking to maintain the territorial integrity of Yugoslavia, itself.[425] These so-called Rambouillet Accords, however, left many details unresolved. For example, the Serbs were unwilling to address the NATO proposal that its troops would deploy within Kosovo to enforce the deal.[426] Nevertheless, NATO officials confidently predicted that the parties would sign when the peace conference reconvened in March.[427]

Their optimism proved to be misplaced. The fighting continued to escalate, and Yugoslav President Milosevic issued a statement decreeing that his country would under no conditions permit NATO ground troops within its borders.[428] Although the Albanian Kosovars signed the deal on 18 March 1999, the Yugoslavian government refused to reciprocate despite repeated NATO warnings that it would begin an air campaign to force their compliance.[429] Instead, it appeared to step up its efforts to eradicate Kosovar opposition, and conducted seemingly indiscriminate massacres of Albanian Kosovars resulting in mass flights by refugees.[430] Finally, on 23 March 1999, NATO Secretary General Javier Solana announced that

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423. *See The Kosovo Conflict*, ASSOCIATED PRESS, Mar. 25, 1999, *reprinted in* ST. LOUIS POST DISPATCH, Mar. 25, 1999, at A11.

424. *See* Bridget Kendall, *Partial Deal in Kosovo Talks*, BBC NEWS SERVICE, Feb. 23, 1999, *available at* <http://www.bbc.co.uk/hi/english/world/europe/newsid_284000/284876.stm>.

425. *See Full Text of the Kosovo Agreement*, BBC NEWS SERVICE, Feb. 23, 1999, *available at* <http://www. bbc.co.uk/hi/english/world/europe/newsid_285000/285097.stm> [hereinafter the Rambouillet Accords].

426. *See* Kendall, *supra* note 424.

427. *Id*.

428. *See* Claiborne, *supra* note 9.

429. *See* Tom Raum, *Clinton Details Serb Bombing Plan*, ASSOCIATED PRESS, Mar. 19, 1999, *available at* <http://dailynews.yahoo.com/headlines/ap/international/story.html?s=v/ap/19990319/wl/us_kosovo_89.htm>.

430. President William J. Clinton, Clinton Statement at the White House on Kosovo, Mar. 22, 1999, *available at* <http://usa.grmbl.com/s19990322c.html>.

NATO had ordered its forces to commence air operations within the Federal Republic of Yugoslavia.[431]

The NATO Secretary General made it clear that the Alliance was forced to act to "halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo."[432] The Russian Federation called an emergency session of the UN Security Council, "to consider an extremely dangerous situation caused by the unilateral military action of NATO members against the Federal Republic of Yugoslavia."[433] In the face of Russian charges that they had violated the UN Charter, NATO members steadfastly proclaimed they were acting to prevent the spread of a humanitarian catastrophe.[434] The British representative stated a very clear rationale for NATO's intervention:

> Every means short of force had been tried to avert this situation . . . . In such circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention was legally justifiable. The force now proposed was directed exclusively to averting a humanitarian catastrophe, and was the minimum judged necessary for the purpose.[435]

As this article was being prepared to go to press, the Alliance denied any plans to deploy ground forces, although one spokesman appeared to qualify NATO's previous categorical denials by saying there are "cur-

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431. *See* Solana, *supra* note 9.

432. *Id*.

433. U.N. SCOR, 54th Sess., 3988th mtg., U.N. Press Release SC/6657 (1999) [hereinafter UN Press Release].

434. *Id*. at 2. The United States, Canada, the Netherlands, France, the United Kingdom, and Germany were present and defended their actions as legitimate use of force to prevent a looming humanitarian catastrophe. Representatives from Slovenia, Bosnia, Bahrain, and Albania supported them. Gambia and Argentina also made supportive statements without explicitly adopting humanitarian intervention as a legitimate exception for use of force. Conversely, the representatives of China, India, Belarus, and Yugoslavia joined Russia in condemning NATO intervention in strong terms. Namibia, Gabon, and Malaysia all clearly thought the dispute should be handled within the confines of the Security Council. *Id.* Meanwhile, in light of another UN Security Council stalemate, the UN Secretary-General issued a mild statement acknowledging the role of regional organizations under Chapter VIII, but reiterating his belief that the Security Council should have the primary responsibility for maintaining international peace and security. *See* Secretary General Kofi Annan, Statement on NATO Military Action Against Yugoslavia, Mar. 24, 1999, *available at* <http://www.un.org/News/Press/docs/1999/19990324.sgsm6938.html>.

435. *Id*. at 10.

rently" no plans for offensive ground operations.[436] The only restraint, however, on executing ground operations appears to be the political considerations of its members, not the force of positive international law.

1. NATO and Human Rights

The North Atlantic Treaty Organization is not only the logical security organization to deal with threats to its security such as the violence in Kosovo, it is the sole association of states capable of doing so in the face of UN stalemate and pan-European vacillation. The law justifies NATO's emerging role when the Alliance musters the political will to act. The dual doctrines of humanitarian and democratic intervention have achieved sufficient recognition in express and customary international law to permit NATO the freedom of action it requires to undertake these missions. When it conducts peace operations in furtherance of humanitarian or democratic goals, with or without Security Council support, NATO stands on the firm ground of customary international law.

While democratic governance may well be the primary human right from which all others flow,[437] wider acceptance of other basic human rights concepts has also generated broader support for humanitarian intervention.[438] Perhaps the reason is that nations more readily perceive that

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436. *See Ruling Out Ground Troops*, ABC NEWS, Mar. 27, 1999, *available at* <http://www.abcnews.go.com/ sections/world/DailyNews/kosovo990327_ bombing2.html>.

437. *See* W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794, 795 (1995). Professor Reisman states:

> It should not take a great deal of imagination to grasp what an awful violation of the integrity of the self it is when men with guns evict your government, dismiss your law, kill and destroy wantonly and control you and those you love by intimidation and terror. When that happens, all the other human rights that depend on the lawful institutions of government become matters for the discretion of dictators . . . . Military coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights.

Id.

438. *See* David Wippman, *Treaty Based Intervention: Who Can Say No?*, 62 U. CHICAGO L. REV. 607, 679 (1995).

the mass migration of refugees, which often accompanies internal repression or disasters, constitutes a threat to international peace and security.[439]

Fleeing war and repression, millions of refugees have crossed the borders into Western Europe since 1989.[440] In Germany alone, Kurdish refugees from Turkey and Iraq have increased 600% in recent years.[441] The arrival of so many in such a short period of time not only taxes the resources of the receiving states, but it also frays relationships among allies.[442] Under these circumstances, NATO intervention could be viewed as a form of self-defense.[443] Of course, given the "threat to international peace" analysis currently employed by the international community,[444] it is unnecessary to find that NATO is acting in self-defense of its own members in order for the Alliance to act. Nevertheless, the additional self-defense analysis may help NATO members identify humanitarian missions warranting the organization's involvement, and upon which the North Atlantic Council may reach the required consensus.

For example, recent Serbian assaults on its ethnic Albanian Kosovar population created an estimated 500,000 refugees in a matter of days.[445] While the bordering nations scrambled to prepare to receive their neighbors, NATO resisted calls for a ground campaign.[446] Luckily, fears that

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439. *See* David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 273 (1992). *See also* David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659, 672-73 (1997) (perceiving that the Security Council has lowered the threshold for what constitutes a "threat" by granting authority to use force in Iraq, Somalia, Rwanda, Haiti and Bosnia).

440. John Pomfret, *Europe's 'Rio Grande' Floods with Refugees* WASH. POST, July 11, 1993, at A1. *See also* William Drozdiak, *New Wave of Fleeing Kurds Highlights Europe's Vulnerability*, PITTSBURGH POST-GAZETTE, Jan. 11, 1998, at A3. For example, the numbers include 120,000 Moroccans to Spain, 600,000 Algerians to France, and 300,000 refugees fleeing to Germany alone during the Bosnian war. *Id.*

441. Many of the refugees make their way to Germany, which provides liberal benefits to newcomers. The Germans complain that their neighbors do little to halt the flow. *See* Elizabeth Neuffer, BOSTON GLOBE, Feb. 5, 1998, at A1.

442. *Id. See also* Peggy Polk, *Italy to Get Help with Influx of Yugoslav Refugees*, CHICAGO TRIB., Sept. 22, 1991, at 5 (detailing problems Italy encountered with refugees at the beginning of the conflict in the former Yugoslavia).

443. *See* Brian K. McCalmon, Note, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 229 (1996) (arguing the deliberate actions of "sending" states which cause massive cross-border flows of refugees places enormous burdens on the security of the "receiving" state triggering the inherent right of self-defense in the latter state).

444. *See* Resolution 841, *supra* note 319.

445. *See, e.g.*, *Humanitarian Woe*, ABC NEWS, Mar. 30, 1999, *available at* <http://www.abcnews.go.com/ sections/world/DailyNews/Kosovo990329_albanians.html>.

Greece and Turkey could be drawn into a broader conflict on opposing sides have not yet been realized.[447] This is a clear situation, however, in which a mandate in NATO's charter to address regional humanitarian concerns as a threat to regional peace would provide the tools and political direction the Alliance needs to deal with this type problem before it spirals out of control.

Another element dictating NATO involvement in humanitarian missions is the degree of media interest created by widespread disasters. This is often referred to as the "CNN factor."[448] The North Atlantic Treaty Organization will confront situations necessitating humanitarian involvement more often than it faces a need to perform democratic intervention.[449] The North Atlantic Treaty Organization is composed of many of the wealthiest and most technologically capable nations on Earth. Even if the members are not willing to become "the world's policemen," they are arguably morally obligated to relieve egregious human suffering in their area of competence and along the periphery of Europe. Chances are the electronic media will continue to provide the motivation in these instances when the political spirit would otherwise be weak.

At times, NATO will be blessed with the consent of the sitting government or governments and the approval of the Security Council, as it was in Bosnia. Unfortunately, as in Kosovo, it will often face host government opposition and Council deadlock. When that happens, NATO must be prepared to "go it alone." An amended, revitalized North Atlantic Treaty should commit its members to such missions and clearly state the criteria for NATO involvement in humanitarian ventures.[450]

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446. *See* David Phinney, *The Stakes Are Raised*, ABC NEWS, Mar. 30, 1999, *available at* <http://www.abcnews.go.com/sections/world/DailyNews/kosovopeace990329.html>.

447. *See, e.g.*, Terence Nelen, *Rumblings of a Balkan War*, ABC NEWS, Mar. 26, 1999, *available at* <http://abcnews.go.com/sections/world/DailyNews/kosovobkg312.html>.

448. *See supra* note 368 and accompanying text.

449. Humanitarian intervention can take place in a wide variety of situations from protecting religious and ethnic minorities, to ending large scale atrocities, to responding to mass suffering caused by natural or man-made disasters. *See* Scheffer, *supra* note 439, at 265.

450. *Id.* One suggested template is that intervention should occur when the humanitarian need is overwhelming, immediate action is required, and there is a clear threat to the security of a neighboring state or to regional stability. *Id*. at 290.

2. The Imperative of Democratic Action

The legal underpinning of humanitarian and democratic rights begins with the UN Charter itself. It is based on the principle of "respect for human rights and fundamental freedoms."[451] The UN's founding member nations, most of which had a grounding in democratic tradition, made a non-binding declaration that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[452]

Unfortunately, when the declaration was reduced to a binding agreement, the resulting convention watered down the Charter's vision to the point that most nations, even one-party states like the Soviet Union, felt no qualms about ratifying the agreement.[453] Until the past decade, little progress was made towards humanitarian and democratic goals, as autocratic rulers were allowed to turn democratic ideals upside down by hiding behind the concepts of "sovereignty," "domestic jurisdiction," and "internal affairs."[454]

When the United States invaded Panama, in part to restore the democratically elected Endara government, it suffered near unanimous disapproval.[455] In retrospect, the United States action signaled a change in the way the world viewed intervention to uphold democratic and humanitarian rights. In Europe, the OSCE's predecessor organization issued a series of proclamations strongly supporting both democratic[456] and humanitarian principles.[457] The Organization of American States, normally the most conservative of organizations, made a powerful declaration in favor of democracy.[458] Further, unlike the OSCE, which has no enforcement mechanisms or even a duty to consult following reported violations, the Organization of American States amended its Charter to permit sanctions against

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451. U.N. CHARTER art. 1(3).

452. *Universal Declaration of Human Rights*, art. 21(3), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc. A/810 (1948).

453. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1966), [hereinafter the ICCPR].

454. *See* Reisman, *supra* note 437, at 799-800.

455. *See* G.A. Res. 240, U.N. GAOR, 44th Sess., at 1, U.N. Doc. A/RES/44/240 (1989) (condemning United States action in Panama even though the elected government approved of the mission). *See also* CP/RES.534, Organization of American States Permanent Council, OEA/ser.G/P/RES.534 (800/89) corr. 1 (1989) (mirroring the General Assembly's condemnation).

the organization's members, which may come to power by overthrowing democratic governments.[459]

These declarations prompted a number of observers to declare that the moral obligation to support human rights and democratic movements had become a legal duty.[460] In principle, both the Secretary General of the

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456. *See Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 29 I.L.M. 1305 (1990) [hereinafter the Copenhagen Document]. Conference on Security and Cooperation in Europe members "recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights." *Id.* The Copenhagen Document lists seven characteristics of democratic systems and the rule of law: (1) free elections, (2) a representative government, (3) accountability of the executive to a legislature or electorate, (4) clear separation between state and political parties, (5) an independent judiciary, (6) military forces under civilian control, (7) other related human rights. *Id*. at 1308-09; *Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter*, Nov. 21, 1990, 30 I.L.M. 190, 193 (1991) [hereinafter the Charter of Paris]. The Charter of Paris states, "We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law . . . Democracy is the best safeguard . . . [for all these rights]." And, "Our states will cooperate with each other with the aim of making democratic gains irreversible." *Id.* at 195; *Document of the Moscow Meeting of the Conference on the Human Dimension Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Factfinding*, 30 I.L.M. 1670 (1991) [hereinafter the Moscow Document]. Article 17 of the Moscow Document states:

> The participating states (1) condemn unreservedly forces which seek to take power from a representative government of a participating state against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order; (2) will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of legitimately elected government of a participating state by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values; and (3) recognize the need to make further peaceful efforts concerning human rights, democracy and the rule of law within the context of security and co-operation in Europe, individually and collectively, to make democratic advances irreversible and prevent any falling below the standards laid down in the principles and provisions of the Final Act, the Vienna Concluding Document, the Document of the Copenhagen Meeting, the Charter of Paris for the New Europe and the present document.

Id. at 1677.

United Nations[461] and the President of the United States[462] endorsed these rights. More importantly, the entitlement to protection of human rights and democratic governance has been upheld in practice.[463]

The continued existence of NATO is predicated on exporting and maintaining the democratic ideal. The democratic standard is embedded in the North Atlantic Treaty,[464] declared in the Alliance's current strategic

457. *See* Charter of Paris, *supra* note 456, at 193-195 ("We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination . . . ."). *See also* the Moscow Declaration, *supra* note 456, at 1674-1676 (allowing experts to investigate suspected human rights violations with or without government consent and to offer advisory services with permission of the target government).

458. *See* Santiago Declaration, *supra* note 308.

459. *See Protocol of Amendments to the Charter of the Organization of American States*, Dec. 14, 1992, 33 I.L.M. 1005 (1994) (allowing the Organization of American States via Article 9 to suspend any member whose democratic government has been overthrown by force).

460. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 89 (1992) (stating, "Democratic entitlement," building on "free and fair elections," is becoming the international standard); Tom Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect*, 15 HUM. RTS. Q. 716, 721 (1993) (stating that placing pressure on non-democratic governments does not violate sovereignty because it resides with the people, not the government); Acevedo, *supra* note 303, at 141-42 (remarking that the Santiago Declaration signals consensus within the Organization of American States community that democracy should be protected); Halberstam, *supra* note 189, at 166-67 (declaring that the Copenhagen Document implicitly authorizes military intervention to protect democracy); Scheffer, *supra* note 439, at 260 (stating a belief that the "proliferation of international treaties and conventions" protecting human rights "has now reached a critical mass that imposes limits on national sovereignty"). For a view that democratic entitlement is not an emerging norm, *see* Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOCIETY INT'L L. PROC. 261, 264 (1992) (claiming "many nations do not practice democracy and do not ascribe to it as an aspiration").

461. *See An Agenda For Peace*, *supra* note 61, para. 10 ("[R]espect for democratic principles at all levels of social existence is crucial; in communities, within States and within the community of States.").

462. *See* PDD 25, *supra* note 93, at 802-03 (stating the United States is willing to commit to regional action under certain circumstances where there is an urgent humanitarian disaster coupled with violence, or where there is a sudden interruption of an established democracy or a gross violation of human rights coupled with violence or threat of violence).

463. Humanitarian interventions have garnered wide support in Liberia, *supra* notes 270-301 and the accompanying text; Bosnia, *supra* notes 333-369 and the accompanying text; Kosovo, and Somalia, *see* S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992). Haiti was the first multilateral intervention in support of the democratic right. *See supra* notes 303-332 and accompanying text.

concept,[465] and unanimously endorsed through its members' participation in the OSCE.[466] When the Soviet Empire collapsed, United States officials promoted several reasons to retain the Alliance, including the theory that NATO has a "proven record of sustaining democracy."[467] The North Atlantic Treaty Organization has acted consistently with that policy.

When the Alliance established the Partnership for Peace, it required prospective members to commit to promoting democratic principles and to establishing civilian control over their military forces.[468] These same principles became prerequisites to membership during NATO enlargement.[469] The Founding Act reiterates these principles.[470]

Under these circumstances, it is logical that NATO should be willing to conduct peace operations, even in a member state, if its democratically elected government is irregularly removed by armed force. Willingness to uphold democratically elected governments, if necessary through armed intervention, should be regarded as the price of admission into the Alliance. It ensures that NATO will not be forced to suffer a viper amongst its members. It also extends protection of this most basic of human rights to the fledgling democracies joining NATO, most of which have a short acquaintance with democratic governance.

This right can be lawfully conferred by treaty, even to the extent of permitting the use of armed force.[471] The North Atlantic Treaty Organiza-

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464. *See* North Atlantic Treaty, *supra* note 2.

465. *See The Alliance's New Strategic Concept*, *supra* note 36, para. 15 ("NATO's essential purpose . . . is to safeguard the freedom and security of all its members by political and military means . . . based on common principles of democracy, human rights and the rule of law . . . .").

466. *See supra* notes 339, 340 and accompanying text.

467. *See, e.g.*, Strobe Talbott, *Russia Has Nothing to Fear*, NY TIMES, Feb. 18, 1997, at A19; Jusys & Sadauskas, *supra* note 384, at 1643 (asserting the belief that NATO enlargement extends universal democratic values beyond Europe's limits and may contribute to the development of democracy within Russia, despite itself); Mircea Geoana, *Romania: Euro-Atlantic Integration and Economic Reform*, 21 FORDHAM INT'L L.J. 12, 13 (1997) (arguing that NATO membership ensures the democratic stability of its neighbors).

468. *See supra* note 390 and accompanying text.

469. *See NATO's Enlargement*, NATO Basic Factsheet No. 13 (last modified June 1997) <http://www.nato.int/docu/facts/enl.htm> at 2 [hereinafter NATO Factsheet No. 13].

470. *See* FOUNDING ACT, *supra* note 385, at 1. "NATO and Russia, based on an enduring political commitment undertaken at the highest political level, will build together a lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security." *Id.*

tion should endorse the democratic intervention doctrine by enshrining it in the North Atlantic Treaty.

The democratic intervention mission is bound to be the most controversial of NATO's new roles.[472] The compromise that produced the meaningless definition of democratic rights in the International Covenant on Civil and Political Rights means that in many cases the UN Security Council will be unable or unwilling to act. Critics who maintain that democratic intervention in Haiti was an anomaly point to the unique factors in that situation which led the Security Council to authorize intervention.[473] Specific details include intimate involvement by the UN and the Organization of American States in the electoral process and the organizations' responsibility for the economic plight of the Haitian people who suffered immensely because of the embargoes.[474] The critics say that intervention occurred because the international community had staked its reputation on delivering a solution in Haiti.[475]

The NATO advantage exists in the democratic tradition it has fostered. The North Atlantic Treaty Organization has staked its continued existence and membership on establishing democracy in its member states and advancing democracy elsewhere. Shaping a clear doctrine of democratic intervention within the Alliance creates the same international expectation that NATO will deliver and protect democracy by force if necessary. The concept of universal democratic rights is no less valid among non-NATO members as it is within the Alliance. Accordingly, NATO

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471. *See* BROWNLIE, *supra* note 259, at 321 ("In general, the right of forcible intervention on the territory of a state may still be lawfully conferred by treaty."). *See also* Farer, *supra* note 264, at 332; Wippman, *supra* note 438, at 670.

472. *See* Wippman, *supra* note 438. Professor Wippman believes democratic intervention is not a broadly accepted right. He also considers it unlikely to become one soon because there is no wide consensus on what democratic norms entail. Professor Wippman notes that despite recent advances international law is still highly biased towards claims of sovereign rights. Finally, he believes that the biggest road-block may be the overall lack of resources and political will to assert the right. Therefore, without Security Council approval, Professor Wippman says only state consent will permit forcible intervention. *Id.* at 671. *But see* Reisman, *supra* note 437, at 801-02. Professor Reisman asserts that democracy is *the* basic human right, and that unilateral initiatives may be the only available method to redeem the privilege. Therefore, "in the short run effective international protection of fledgling democracies will depend on decisive action by the great industrial societies." *Id.* at 803. He maintains that only in this manner will customary international law develop to protect the rights of free peoples. *Id.*

473. *See, e.g.*, Perez, *supra* note 45, at 430-32.

474. *Id.*

475. *See* Wippman, *supra* note 438, at 676-77.

should revise its treaty to serve notice that it will react when anti-democratic forces threaten regional peace.[476]

C. The Treaty as Charter for NATO's Mission

The NATO heads of state met in April 1999 for the fiftieth anniversary summit.[477] After the meeting, the members announced a new strategic concept.[478] Since the collapse of the Soviet Union, NATO has been an organization in search of a mission. The result has been a change in strategic direction every few years as the European situation evolves. As revolution swept Europe in 1990 and set the Warsaw Pact countries and Soviet satellite republics free, NATO called a summit in London and prepared to offer a hand of friendship to its erstwhile enemies.[479] The Alliance announced its determination to enhance its political component consistent

476. Although NATO based its recent intervention in Yugoslavia over Kosovo in terms of humanitarian intervention, some actions and statements by its members and representatives imply that democratic principles support the action as well. For example, the Rambouillet Accords were designed to secure political autonomy for Kosovo and to develop mechanisms for free and fair elections for the governance of the province. *See* Rambouillet Accords, *supra* note 425. The comments of representatives speaking before the UN Security Council following the commencement of NATO action also mentioned the extent to which Albanian Kosovars had been deprived of their political rights. *See* UN Press Release, *supra* note 433.

477. NATO Comminiqué, *The Alliance's Strategic Concept* (last modified Apr. 23, 1999) <http://www.nato.int/docu/pr/1999/p99-065e.htm>.

478. *Id*. The 1999 Strategic Concept reaffirms much of the 1991 version and alludes to operations such as those in Bosnia and Kosovo as "non-Article 5 crisis response operations." *Id.* para. 31.

479. NATO Communiqué, *London Declaration on a Transformed North Atlantic Alliance*, July 8, 1990 (visited Feb. 4, 1998) <http://www.nato.int/docu/comm/c900706a.htm> [hereinafter *London Declaration*]. The prime concern of the day was ensuring the conventional arms talks continued forward despite the upheavals. The other major provisions called for establishing regular diplomatic liaison with Warsaw Pact members, and negotiating a declaration that the two organizations were "no longer adversaries." *Id.*

with Article 2,[480] but also emphasized its primary mission to remain a purely defensive alliance.[481]

The following year, NATO issued a declaration identifying its four fundamental tasks.[482] The first task was to provide a foundation for a stable environment in Europe based on the growth of democratic institutions.[483] Second, NATO pledged to serve as a forum for Alliance consultations and for "appropriate coordination of their efforts in fields of common concern."[484] Of course, NATO agreed its continuing mission was to deter and to defend against any threat of aggression against the territory of any NATO member state. The final fundamental task was to preserve the strategic balance in Europe.[485] Of these four goals, the primary focus remained on collective self-defense.

In November 1991, the Alliance announced its first new strategic concept since 1967.[486] The new strategic concept reflected the collapse of the Warsaw Pact and recognized that the greatest threat to NATO was no longer a full-scale attack across the entire European front.[487] Instead, risks were more likely to occur from spillover from outside of the borders of NATO members.[488] Nevertheless, it reconfirmed the "core purposes"[489] and stated that "the maintenance of an adequate military capability and clear preparedness to act collectively in the common defense remain central to the Alliance's security objectives."[490] To the extent that it addressed a role for NATO in peacekeeping at all, it foresaw the Allies being called upon to provide forces for UN missions.[491] The implication was, however,

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480. *See* North Atlantic Treaty, *supra* note 2. "The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being . . . ." *Id.* art. 2.

481. *See London Declaration*, *supra* note 479.

482. NATO Communiqué, *NATO's Core Security Functions in the New Europe*, June 7, 1991 (visited Feb. 4, 1998) <http://www.nato.int/docu/comm/c910607b.htm>.

483. *Id.* para. 6.

484. *Id.*

485. *Id*.

486. *See* Simon, *supra* note 38, at 51. The new strategy called for a changed and smaller force structure to be maintained at lower levels of readiness. It focused on reducing nuclear arms and established the North Atlantic Cooperative Council to act as a liaison between NATO and the Central and Eastern European nations. *See generally The Alliance's New Strategic Concept*, *supra* note 36.

487. *See The Alliance's New Strategic Concept*, *supra* note 36, para. 7.

488. *Id.* para. 9.

489. *Id.* para. 20.

that NATO members would supply forces as individual nations rather than as a regional organization. The Alliance still considered the main threat, although admittedly a reduced one, to consist of the Soviet conventional and nuclear forces.[492]

The collapse of the Soviet Union occurred only one month later.[493] Suddenly, the single mission, which had justified NATO for over forty years was not merely diminished, it had virtually ceased to exist. It was against this background that NATO announced its decisions in June and December 1992 to support peacekeeping efforts by the OSCE and the UN, respectively.[494] In other words, less than a year after it released a new strategic concept that mentioned nothing about NATO peace operations, NATO was seeking a new mission beyond its traditional charter by offering its services to the OSCE.

The Partnership for Peace initiative and announcement of plans to expand NATO soon followed at the Brussels Summit in December 1994.[495] The North Atlantic Treaty Organization perceived peacekeeping as the function best suited for cooperation between itself and the Partnership for Peace members. To some extent, the Partnership for Peace countries may have believed that their candidacy for NATO membership depended on their willingness to undertake peacekeeping duties in conjunction with the Alliance.[496] Peacekeeping had become less the focus of NATO than a contest to determine the worthiness of the candidates. The real focus in the years since the Brussels summit has been on internal reor-

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490. *Id.* para. 30. This principle is repeated throughout the document. *See, e.g.*, *id.* para. 35 ("The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defense . . . ."); para. 53 (addressing a force restructuring plan permitting integrated multinational forces to replace national blocks in the planning of collective defense).

491. *Id.* para. 41.

492. *Id.* paras. 13, 14.

493. RICHARD SAKWA, RUSSIAN POLITICS AND SOCIETY 16-24 (1993).

494. *See* Oslo Declaration, *supra* note 30.

495. *Declaration of the Heads of State and Government Issued by the North Atlantic Council in Brussels, Belgium*, NATO PRESS COMMUNIQUÉ M-NAC-1 (94) 3, Jan. 11, 1994. The communiqué announced the additional plans to develop the European Security and Defense Identity (ESDI), and to strengthen the WEU. Although NATO made no promises to the Partnership for Peace nations that they would become NATO members, it certainly opened the door to the possibility. The possibility was confirmed later that year when NATO announced it "remains open to membership . . . and would welcome NATO enlargement . . ." *Final Communiqué of the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (94) 116, Jan. 11, 1994, at 3.

496. *See* Simon, *supra* note 38, at 52.

ganization and political developments, while paying lip service to "fundamental purpose of collective self-defense."[497]

Finally, the Alliance recognized that the strategic concept it had developed so recently was already obsolete. At the Madrid meeting in July 1997, NATO announced that it would reexamine the concept "to ensure that it is fully consistent with Europe's new security situation," with an eye towards revising the Strategic Concept at the April 1999 summit–the fiftieth anniversary of the Alliance.[498] The aim is to "confirm [NATO's] commitment to the core function of Alliance collective self-defense and the indispensable trans-Atlantic link."[499] Since that optimistic pronouncement, the United States has suggested that "banishing weapons of mass destruction . . . should be the 'unifying' threat that binds Europe and the United States in the post-Cold War era."[500] The United States vision also insists that NATO must expand its operations beyond its traditional borders and become "a force for peace from the Middle East to Central Africa."[501]

The European subset of the Alliance is not generally in agreement with the American assessment.[502] Despite the present expeditions to Bosnia and Kosovo, some European members are not keen on the prospect of pursuing peace operations away from the traditional NATO area of operations.[503] As late as the Gulf War, it was an article of faith that the Alliance would not act "out of area," and the NATO members remained true to form

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497. *See, e.g.*, *The Final Communiqué of the Ministerial Meeting of the North Atlantic Council in Sintra, Portugal*, NATO PRESS COMMUNIQUÉ M-NAC-1 (97) 65, May 29, 1997, covering topics ranging from NATO enlargement to establishment of a new Euro-Atlantic Partnership Council (EAPC) which merges the Partnership for Peace and the NACC, to the Founding Act between NATO and Russia. Also included are discussions of a NATO-Ukraine Charter, Mediterranean dialogue, the ESDI, cooperation with the OSCE, and upcoming agreements on non-proliferation of weapons of mass destruction. Additional items on the agenda noted the Chemical Warfare Treaty, the Conventional Forces in Europe Treaty, the START treaties, and the Ottawa Process for eliminating anti-personnel land mines. This process prompts the observation from some quarters that the political dimension of NATO has become more important than the military aspect. *See* Geoana, *supra* note 468, at 14-15. Nevertheless, the official line from the Alliance continues to be that it is purely a collective self-defense organization. *See generally* NATO Factsheet No. 13, *supra* note 469.

498. *Madrid Declaration on Euro-Atlantic Security and Cooperation*, NATO PRESS COMMUNIQUÉ M-1 (97) 81, July 8, 1997, para. 19.

499. *Id.*

500. William Drozdiak, *United States, Russia Clash Over Iraq Policy*, WASH. POST, Dec. 18, 1997, at A29.

501. William Drozdiak, *European Allies Balk at Expanded Role for NATO*, WASH. POST, Feb. 22, 1998, at A27.

502. *Id*.

during the conflict.[504] The North Atlantic Treaty Organization currently does not require such a commitment.[505] As one recent study suggests, most European allies simply have neither the inclination nor the means to conduct out of area operations.[506] True to form, only Britain has offered direct support to the United States during the continuing Gulf crisis.[507]

Admittedly, this is a political question that argues against the likelihood of amending the treaty.[508] Acknowledging the difficulty of amending the treaty, however, does not alter the need for the change. The march of

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503. *Id.* Reportedly, France expresses concern that expanding NATO's reach would make it little more than a global military tool for United States interests. A diplomat from another NATO country asked, "If NATO is changing a military destiny once based on geography to a defense of common values, then where do we draw the limits?" *Id.*

504. There can be little doubt the Gulf War presented a clear threat to the interests of all the Allies. Western Europe as well as the United States procures more than one half of its petroleum needs from Southwest Asia, and the border of one ally, Turkey, was directly adjacent to the area of conflict. Yet, NATO members could not agree to deploy their forces as a united force. NATO settled for sending a small air defense force into Turkey. *See* Stromseth, *supra* note 31, at 495-96. *See also Final Communiqué of the North Atlantic Council Chairman*, NATO PRESS COMMUNIQUÉ, June 7, 1991, para. 8, <http://www.nato.int/docu/comm/ c910607a.htm> (issuing self-congratulatory praise to the Alliance for its "political solidarity" and its "collective expression of support for the Ally facing a direct threat" and therefore "helping to deter a further expansion of hostilities"). Besides the United States (532,000 troops), the only NATO countries to send ground forces were Britain (35,000 troops) and France (13,500 troops). Italy contributed some air forces as well (eight aircraft). *See* JOHN E. PETERS & HOWARD DESHONG, OUT OF AREA OR OUT OF REACH? 5-24 (1995).

505. *See* Marc Rogers, *Will NATO Go Global?*, JANE'S DEF. WKLY., Apr. 14, 1999, at 24-26.

506. Drawing on the experiences of the Gulf War and surveying the aftermath, the study concluded: (1) few European countries demonstrated willingness to deploy out of area; (2) even the countries which deployed faced serious political opposition from their citizens over their involvement; (3) the allies do not have sufficient air or sea-lift capability to deploy and sustain significant forces; and, (4) even if they managed the deployment, uncoupling the forces from the other NATO structures, deploying, and then reconstituting their forces was accomplished only after great difficulty. *See* PETERS & DESHONG, *supra* note 504, at 24-27.

507. *See* Swardson, *supra* note 19 (noting Britain's consistent support of the United States on its Iraqi policy). The other European allies have thus far limited their support to offers to allow the United States to utilize their bases to transport material and manpower to the Gulf region. *See* Edward Walsh, *United States Downs Iraqi Plan for Weapons Inspections*, WASH. POST, Feb. 12, 1998, at A34. The three (then) candidate members for NATO expressed their support. They agreed to open up their bases, and possibly to contribute troops. Interestingly, the candidate members, Poland, the Czech Republic, and Hungary, also sent contingents to the Gulf during Desert Storm. *See* Christine Spolar, *East European NATO Aspirants Ready to Aid Possible Allied Military Strikes Against Iraq*, WASH. POST, Feb. 15, 1998, at A31.

world events will call upon the Alliance to perform peace operations. The North Atlantic Treaty currently does not clearly commit NATO to these missions, whether within or without the North Atlantic area.[509] The North Atlantic Treaty Organization should cease the current drift, which forces constant reinterpretation of its treaty and face squarely the necessity for formally defining itself and its mission in today's world, as opposed to the world it faced in 1949.

Some observers suggest that the evolution of NATO from an alliance predicated purely on collective self-defense to a collective peacekeeping organization is entirely consistent with the present treaty.[510] Advocates point to Article 2 of the treaty, arguing that peacekeeping capability contributes to "promoting conditions of stability and well-being." They also

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508. When the subject of out of area operations is broached, most point to the Germans as the source of the foot-dragging. For years the Germans claimed their Constitution and Basic Law for the Armed Forces prevented deployment of German forces beyond their country's borders in combat situations. *See* Stromseth, *supra* note 31, at 495-96. This was the excuse Germany employed in 1991 to justify its decision not to send forces to the Persian Gulf. This decision subjected Germany to so much questioning from other NATO members, however, that it may have influenced the government to modify its position. There is some evidence that the German government felt that its lack of participation in such operations might be harming its chances to become a permanent member of the Security Council in the event the Council was expanded. *See* Ehrhart, *supra* note 50, at 35. Beginning in April 1993, the German government allowed fire control officers to remain aboard NATO airborne warning and control aircraft (AWACS) enforcing the no-fly zone in Bosnia. The change was justified on the grounds that the AWACS were orbiting outside the combat zone and the mission was rendering "humanitarian aid." This and other decisions led the opposition party to protest that the ruling party was attempting to alter the law through creeping incremental changes. *Id*. Protests from the German opposition provoked a court battle, which eventually reached the Federal Constitutional Court (FCC) in 1994. The court concluded that German forces were constitutionally permitted to take part in NATO combat operations outside the German borders, and further, outside NATO borders if operating pursuant to collective security arrangements or UN authorization. The only limitations were that German forces could not operate outside the country as only a national force, and the German Parliament must approve the deployment either before or immediately after the action was taken. In reaching this decision, the FCC found that, although the North Atlantic Treaty did not literally permit NATO deployments outside the North Atlantic area, the organization's agreement to deploy to Bosnia acted as an "implicit" amendment to the treaty. Walter J. Lemanski, *The Reemergence of German Arms: How Far Will Germany's March Toward Full Use of Military Force Go?* 29 VAND. J. TRANSNAT'L L. 857, 870 (1996).

509. *See* Rogers, *supra* note 505, at 24, 25.

510. *Id.*

argue that the consulting provisions of Article 4 allow for consideration of actions outside the strict limits of the North Atlantic area.[511]

Finally, opponents of amending the treaty suggest that the Alliance should merely reinterpret the Article 5 language to permit out of area collective security despite the traditional understanding that it permits only collective self-defense.[512] The reasoning seems to be that since the North Atlantic Council provides strategic direction for NATO's military arm, and the North Atlantic Council in turn receives its guidance from the member states, logically the North Atlantic Council may reinterpret its treaty in whatever manner it chooses.

The changes to the form and function of NATO, however, have been so pervasive that the organization now registered with the UN seems to be a different agency from the one now aggressively conducting peace operations in Kosovo without pretending that it is acting in collective self-defense.

Against its historical posture as a collective self-defense agency with interests only in the North Atlantic area, NATO is transforming itself into an entity that conducts peace operations out of its traditional area. Instead of limiting its protective reach to its own members, NATO now offers itself in a broader scope to the OSCE. In essence, the members have developed a "secret treaty" that the UN, and before it the League of Nations, sought

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511. *See, e.g.*, 139 CONG. REC. E1576-02 (daily ed. June 22, 1993) (statement of Rep. Hamilton) ("As its history proves, the Treaty gives the Allies ample flexibility to take the steps necessary to pursue security and stability in Europe. The treaty is sufficiently flexible to permit the use of NATO forces for peacekeeping purposes"). Yet, ultimately Rep. Hamilton tied a NATO peacekeeping effort to the traditional collective self-defense purpose. "[T]he conditions that create the need for peacekeeping activity would be an appropriate subject for consultations if any of the Allies considered that the territorial integrity, political independence or security of any ally were threatened." *Id.* at 1578.

512. *See* Rogers, *supra* note 505, at 24, 25.

to prevent.[513] Cumulatively, these changes beg for formal amendment to the North Atlantic Treaty.

By declaring itself a Chapter VIII regional organization, NATO will preserve its traditional freedom of action. Under the current state of customary international law, very little is prohibited to a legitimate regional concern. As the case studies presented earlier in this article demonstrate, collective action is not only condoned, it is also encouraged as long as the regional organization concerned has a sufficient legal basis for its action. The charter, in this instance the North Atlantic Treaty, is NATO's legal contract between its members as presented to the rest of the world. The charter basis for regional action should be as clear as possible.[514]

VI. Conclusion

> [T]he time has come to recognize what the UN cannot do. Although the UN is still capable of traditional peace-keeping, it

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513. U.N. CHARTER art. 102(1) states in pertinent part: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." *Id.* This provision is designed to prevent secret diplomacy, which was blamed in part for the spread of conflict during World War I, as each European nation was pulled in through the provisions of a secret compact it had concluded with its neighbor. Often the new combatant had no national interest at stake beyond the treaty obligation. *See* BENTWICH & MARTIN, *supra* note 181, at 177.

514. *See, e.g.*, Acevedo, *supra* note 303, at 119 (placing emphasis on the Charter of Organization of American States not containing provisions to enforce economic sanctions against Haiti and therefore being unable to command compliance with its embargo on the Cedras junta); Wippman, *supra* note 190, at 183 ("[E]ven if a particular subregional organization can legitimately claim to be a chapter VIII organization, its authority to use force against a member state depends on compliance with its own charter and rules . . . ."); Moore, *supra* note 28, at 157-164 (pointing out the uproar following Grenada as to whether regional action there was consistent with the Organization of Eastern Caribbean States Charter). *Cf.* Damrosch, *supra* note 188, at 13. She writes:

> > The quest for *legitimacy* may begin, but need not end, with the powers and authorities granted to international institutions by their own charters, which by and large were written at a time when the perceptions of threats and needs were quite different from those of today. Existing institutions are being asked to take on functions that they were never intended to perform; they are being pushed to the limits of their own constitutions, or perhaps beyond them.
>
> *Id.*

> is not capable of effective peace enforcement against well-armed opponents who are not prepared to cooperate. This was amply demonstrated in Somalia and the [UN Protection Force's] experience in Bosnia. For the foreseeable future, the defeat of aggression and the enforcement of peace will have to be undertaken by United States-led "coalitions of the willing" as in Desert Storm, or by NATO-led coalitions such as [the] Implementation Force in Bosnia.[515]

The North Atlantic Treaty Organization enjoys advantages that neither the UN nor any other regional organization in the world can claim. It has wealth, technological superiority, and a professional force structure honed by years of training together. The Alliance is firmly grounded in the moral strength of its common democratic ideology. What NATO often lacks is the political will and the freedom of action it requires to perform peace operations without oversight from other international organizations.

The political dimension will take care of itself. Necessity will require NATO to perform peace operations despite the conservative tendencies of its European members. The Alliance assured itself of that by voting to enlarge its membership. In turn, enlargement places the Alliance in the middle of traditional religious and ethnic strife and nudges the "North Atlantic" border towards numerous trouble spots on its periphery. There is sufficient legal basis within Chapter VIII of the UN Charter, together with the Article 51 provisions on collective self-defense and the widespread acceptance of the humanitarian intervention doctrine, to justify NATO in conducting these missions with or without Security Council approval.

The North Atlantic Treaty, basically unchanged in almost fifty years, was written for the world of the 1940s. It does not address the world as it is today and as it will be tomorrow. It does not account for the evolution of international law. The North Atlantic Treaty Organization should amend its charter to reflect the accepted legal framework for peace operations, and to restore the clarity of vision the Alliance requires when it performs those missions in the twenty-first century.

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515. *See* Address by Ambassador Richard Gardner, *supra* note 122, at S12461.

JUDICIAL REVIEW OF THE *MANUAL FOR COURTS-MARTIAL*

CAPTAIN GREGORY E. MAGGS[1]

I. Introduction

The Uniform Code of Military Justice (UCMJ) establishes the basic structure of the military justice system.[2] It specifies the requirements for convening courts-martial,[3] defines the jurisdiction of courts-martial,[4] and identifies the offenses that courts-martial may punish.[5] Congress, however, did not intend the UCMJ to stand-alone. On the contrary, it specifically directed the President to promulgate procedural, evidentiary, and other rules to govern the military justice system.[6] The President has complied with this directive by issuing a series of executive orders, which make up the *Manual for Courts-Martial* (*Manual*).[7]

The *Manual* consists of five parts. Part I is the "Preamble," which explains the *Manual*'s structure and authority.[8] Part II contains the "Rules

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2. 10 U.S.C.A. §§ 801-946 (West 1998).

3. *See id.* § 822 (identifying the officers and government officials who may convene a court-martial).

4. *See id.* § 817 (defining jurisdiction).

5. *See id.* §§ 881-934 (stating offenses).

6. *See infra* Part II.A (describing the President's authority to make rules).

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM]. Footnotes in this article will refer to all editions of the *Manual* from 1984 until the present as "MCM," unless context otherwise requires. *See id.* at A25-1 through 34 (listing amendments to the *Manual* during this period). The 1984 version of the *Manual* replaced and substantially changed the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969) [hereinafter MCM 1969]. The 1969 *Manual* superseded the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter MCM 1951]. For history of the *Manual*, *see* MCM, *supra* at A21-1 through A21-2; Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation*, 130 MIL. L. REV. 5, 6-8 (1990).

for Courts-Martial," which govern pre-trial, trial, and post-trial procedures.[9] Part III states the "Military Rules of Evidence," which principally regulate the modes of proof at courts-martial.[10] Part IV describes and explains the "Punitive Articles" of the UCMJ (that is, the crimes that the UCMJ makes punishable), listing their elements, identifying lesser-included offenses, establishing the maximum punishments, and providing sample specifications.[11] Part V explains the "Nonjudicial Punishment Procedures" that commanders can impose under UCMJ Article 15 without a court-martial.[12]

The U.S. Government Printing Office (GPO) publishes the *Manual* as part of a single volume book. Military attorneys often refer to the entire book as the *Manual for Courts-Martial*, but this practice is somewhat misleading. The volume published by the GPO contains not only what the President has promulgated through executive orders, but also a variety of supplementary materials. These materials include short discussion paragraphs accompanying the preamble, the Rules for Courts-Martial, the punitive articles;[13] three treatise-like analyses of the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles;[14] and miscellaneous additional appendices.[15] Unlike Parts I through V, the President did not promulgate these materials by executive order, and therefore they are not actually part of the *Manual*.[16]

The Court of Military Appeals long ago described the *Manual* as the military lawyer's "Bible."[17] Anyone familiar with the military justice system could agree with this characterization. Judge advocates constantly must turn to the *Manual* for direction. Indeed, attempting to conduct a court-martial without referring to the *Manual*'s numerous rules would be impossible. Yet, if the *Manual* has the attributes of a holy scripture, then

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8. *See* MCM, *supra* note 7, pmbl.
9. *See id.* R.C.M. 101-1306.
10. *See id.* MIL. R. EVID. 101-1103.
11. *See id.* at IV-1 through IV-123; UCMJ arts. 77-134.
12. *See id.* at V-1 through V-9.
13. *See* MCM, *supra* note 7, pmbl. discussion.
14. *See id.*
15. *See id.*
16. *See id.*
17. *See* United States v. Drain, 16 C.M.R. 220, 222 (1954) ("This Court has, from the first, emphasized that the Manual for Courts-Martial constitutes the military lawyer's vade mecum–his very Bible."). Many cases refer to the *Manual* as the "Bible." *See, e.g*, United States v. Dunnahoe, 21 C.M.R. 67, 75 (1956); United States v. Deain, 17 C.M.R. 44, 52 (1954); United States v. Morris, 15 C.M.R. 209, 212 (1954); United States v. Hemp, 3 C.M.R. 14, 19 (1952).

the military courts[18] have seen more than a few heretics. In well over a hundred-reported instances, defense and government counsel have asked courts to invalidate or ignore *Manual* provisions.[19] The courts themselves have not entirely kept the faith; over the past few decades, they have refused to enforce the *Manual* in dozens of cases.[20]

Litigants often have a strong motive for wanting to avoid applying a *Manual* provision. The rules stated in the *Manual* may determine the outcomes of criminal trials or the length of sentences imposed upon conviction. In capital cases, the rules of the *Manual* may make the difference between life and death.

The judiciary, therefore, gives serious attention to challenges to the *Manual*. Indeed, the United States Supreme Court recently reviewed two cases that contested the validity of rules in the *Manual*. In *United States v. Scheffer*,[21] the accused contested the validity of Military Rule of Evidence 707(a), which bars the admission of polygraph results.[22] In *Loving v. United States*,[23] a capital defendant asked the Supreme Court to strike down Rule for Courts-Martial 1004(c), which specifies the aggravating factors that may justify imposing the death penalty.[24]

Oddly, despite the frequency and importance of litigation over the validity of the rules of the *Manual*, the topic has received little attention

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18. This article uses the term "military courts" to refer to courts-martial, the United States Army, Navy-Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals (and their predecessors, the Courts of Military Review and the Boards of Review), and the United States Court of Appeals for the Armed Forces (and its predecessor, the Court of Military Appeals). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

19. *See infra* Part IV (discussing challenges and leading cases).

20. *See id.*

21. 118 S. Ct. 1261 (1998).

22. *See* MCM, *supra* note 7, MIL. R. EVID. 707(a) ("Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.").

23. 517 U.S. 748 (1996).

24. *See* MCM, *supra* note 7, R.C.M. 1004(c) (identifying eleven aggravating factors, such as committing an offense in way that would cause "substantial damage to national security" or committing murder "for the purpose of receiving money").

outside of the courts. A few law review articles have addressed the President's authority to promulgate *Manual* provisions.[25] Yet, no work has comprehensively studied the numerous grounds upon which courts have invalidated portions of the *Manual.* This article seeks to perform this task.

Part II of this article describes the President's authority for promulgating the *Manual*, the ways in which challenges to the *Manual* arise, and the law governing these challenges. It explains that neither the Administrative Procedure Act (APA)[26] nor any other statute, specifies the grounds upon which courts may invalidate portions of the *Manual.* Military tribunals, consequently, have needed to devise their own doctrines for reviewing *Manual* provisions.

Part III proposes three principles to guide courts in developing rules for reviewing challenges to the *Manual*. First, courts should follow general principles of administrative law, such as those codified in the APA, unless military considerations require otherwise. Second, courts generally should defer to the *Manual* because the President promulgated it not only pursuant to statutory authority, but also in his capacity as Commander-in-Chief. Third, courts should strive for consistency in their treatment of challenges to the *Manual*.

Part IV describes and analyzes the following nine arguments that litigants have advanced when asking courts to ignore or invalidate *Manual* provisions:

(1) The *Manual* provision is merely precatory.

(2) The *Manual* provision conflicts with the UCMJ.

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25. *See* Eugene R. Fidell, *Judicial Review of Presidential Rulemaking under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049 (1976) (presenting the most comprehensive study of judicial review of the *Manual* to date); William F. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 890 (1959) (urging the Court of Military Appeals to exercise greater restraint in invalidating *Manual* provisions); Annamary Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 MIL. L. REV. 143 (1989) (addressing similar arguments with specific references to R.C.M. 1004(c)); Frederick B. Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A. J. 357, 361 (1968) (considering whether Congress properly delegated power to the President to promulgate the *Manual*).

26. *See* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in various sections of 5 U.S.C.).

(3) The *Manual* provision conflicts with another *Manual* provision.

(4) The *Manual* provision conflicts with a federal regulation.

(5) The President lacked authority to promulgate the *Manual* provision.

(6) The *Manual* provision is arbitrary and capricious.

(7) The *Manual* provision interprets an ambiguous portion of the UCMJ and a better interpretation is possible.

(8) The President promulgated the *Manual* pursuant to an improper delegation from Congress.

(9) The *Manual* provision violates the accused's constitutional rights.

II. Authority, Challenges, and Judicial Review

Before addressing how military judges should review *Manual* provisions, a few preliminary matters require discussion. The following sections document the President's statutory and constitutional power to promulgate the *Manual*. They further explain how challenges to the provisions of the *Manual* usually arise. Finally, they describe how the military courts have devised legal doctrines for evaluating these challenges.

A. The President's Power to Promulgate the *Manual*

The UCMJ contains three articles that grant the President power to promulgate the provisions of the *Manual*. Article 36 authorizes the President to create procedural and evidentiary rules, such as the Rules for Courts-Martial and the Military Rules of Evidence found in Parts II and III of the *Manual*.[27] Articles 18 and 56 authorize the President to set limits on the punishment for violation of the punitive articles of the UCMJ, which he has done in specifying the maximum sentence for offenses in Part IV of *Manual*.[28]

Even if the UCMJ did not contain these articles, the President may have inherent power to promulgate rules of evidence and procedure to govern courts-martial. His authority would come from the constitutional provision making him the Commander-in-Chief.[29] Although the Constitution

does not elaborate on the Commander-in-Chief's powers, he always has had the power to issue orders to the military. As discussed more fully below, the President could use this authority to create rules for courts-martial.[30] Indeed, during the previous century, the President directed the conduct of courts-martial without specific statutory authority.[31]

In discussing the President's authority for issuing the *Manual*, one important point deserves attention. As noted above, the President promulgated only Parts I through V of the *Manual* by executive order, and did not issue the supplementary materials that are printed with these parts.[32] Instead, the Department of Defense and the Department of Treasury prepared the supplementary materials largely for informational purposes.[33] These provisions, as a result, do not purport to have the force of law.[34] Thus, they raise no real issue about the President's statutory or constitutional authority.

B. How Challenges to the *Manual* Arise

Most challenges to *Manual* provisions come from the accused. A defendant who disfavors applying a rule of evidence or procedure may look for grounds for invalidating it. For example, in *Scheffer*, the accused

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27. *See* 10 U.S.C.A. § 836(a) (West 1998).

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

28. *See id.* § 818 ("[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."); *id.* § 856(a) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.").

29. *See* U.S. CONST. art. II, § 2, cl. 1.

30. *See infra* Part IV.E.2.

31. *See* Fidell, *supra* note 25, at 6050 & n.11; Wiener, *supra* note 25, at 361.

32. *See* MCM, *supra* note 7, pmbl.

33. *See id.*

desired to present evidence from a polygraph test.[35] He, therefore, asked the courts to invalidate the prohibition against polygraph evidence in Military Rule of Evidence 707(a).[36] Similarly, in *Loving*, the accused asked the court to invalidate the capital sentencing procedures so that he would not receive the death penalty.[37]

Government counsel rarely contest the validity of *Manual* provisions. Although individual prosecutors may not favor all of its procedural and evidentiary rules, the *Manual* states official policy. Attorneys for the government generally have no authority to question its requirements, even if these requirements sometimes make convicting the accused more difficult.

Occasions can arise, however, where prosecutors will challenge the *Manual*. Sometimes, a government counsel inadvertently will fail to follow one requirement of the *Manual*, and will seek to avoid the consequences of the error by contesting the enforceability of the provision. In *United States v. Solnick*,[38] for example, the government violated Rule for Courts-Martial 1107 when the officer exercising general court-martial jurisdiction instead of the convening authority approved the sentences.[39]

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34. *See id.*

> These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Courts of Appeals for the Armed Forces, or any other authority of the Government of the United States, and the do not constitute rules. . . . The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (include the authority of the Government of the United States whether or not included in the definition of "agency" in 5 U.S.C. § 551(1)).

Id.

35. United States v. Scheffer, 118 S. Ct. 1261, 1263 (1998).
36. *See id.* at 1264.
37. *See* Loving v. United States, 517 U.S. 748, 755-74 (1996).
38. 39 M.J. 930 (N.M.C.M.R. 1994).
39. *See* MCM, *supra* note 7, R.C.M. 1007.

> The convening authority shall take action on the sentence . . . unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall . . . forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

Id.

When the accused sought reversal, the government counsel argued that the court could not enforce Rule 1107.[40]

The accused and the government must act in a timely fashion if they wish to challenge *Manual* provisions. Failure to raise arguments at the trial, or sometimes even during pre-trial proceedings, may waive the right to present them later.[41] Counsel, accordingly, should object to *Manual* provisions that they consider improper at the earliest possible opportunity, and thus preserve the right to appeal unfavorable rulings.

C. Law Governing Challenges to *Manual* Provisions

Although military courts often say that the *Manual* has the force of law,[42] they have recognized a number of exceptions to its enforceability. As described more fully below, the courts have refused to enforce *Manual* provisions for a number of different reasons.[43] For example, they have ignored or invalidated rules that conflict with the UCMJ, that the President promulgated without authority, that they have found arbitrary and capricious, and so forth.[44]

Despite the willingness of the court to strike down *Manual* provisions, the authority for judicial review of the *Manual* remains surprisingly unclear. Nothing in the UCMJ or any other statute identifies the different grounds for striking *Manual* provisions. Although the *Manual* contains

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40. *See Solnick*, 39 M.J. at 934. *See also* United States v. Morlan, 24 C.M.R. 390, 394 (A.B.R. 1957) (involving a government challenge to the 1951 *Manual*, paragraph 126d, which precluded warrant officers from receiving bad conduct discharges).

41. *See* MCM, *supra* note 7, R.C.M. 905(e).

> Failure by a party to raise defenses or objections to make motions or requests which must be made before pleas are entered under subsection (b) of this rule [*i.e.*, pretrial motions] shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Id.

42. *See, e.g.*, United States v. Barton, 6 M.J. 16 (C.M.A. 1978); United States v. Smith, 32 C.M.R. 105, 118 (1962); Levy v. Dillon, 286 F. Supp. 593, 596 (D. Kan. 1968), *aff'd* 415 F.2d 1263 (10th Cir. 1969).

43. *See infra* Parts IV.A.-I.

44. *See id.*

rules that resemble administrative law, the APA does not apply to executive orders.[45] The APA, consequently, does not establish bases for invalidating the *Manual*, as it does for striking down federal regulations.[46]

The military courts, however, have not let the absence of explicit statutory authority impede judicial review. Instead, as shown later in this article, they simply have developed their own doctrines for review on a case-by-case basis.[47] In evaluating challenges to the *Manual*, the courts now rely on numerous precedents that have established a variety of grounds for striking *Manual* provisions.

Judicially created doctrines for reviewing the *Manual* seem almost inevitable. Although Congress could have given the courts express authority to evaluate the legality of the Rules for Courts-Martial, the Military Rules of Evidence, and the rest of the *Manual*, it did not. Given the serious consequences of criminal trials, however, the courts could not be expected to ignore challenges to the *Manual*. They, therefore, created their own rules for addressing them.

In fact, review of the *Manual* through court-made doctrines has become so thoroughly established that questioning their legality would serve little purpose. The military courts are not prepared to stop striking down provisions that they find improper under their precedents. This article, accordingly, does not attempt to address whether the military courts should have developed doctrines for adjudicating the validity of *Manual*

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45. *See* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the APA prescribes rules only for agencies, and the President is not an agency).

46. The APA authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions" if they find them:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C.A. § 706(2) (West 1998).

47. *See infra* Part IV.

provisions. Instead, it merely seeks to examine the doctrines that the courts have created, and to suggest ways that they might improve them.

III. General Principles for Judicial Review

The military courts have developed a number of principles to govern interpreting *Manual* provisions. The cases, for example, explain that courts should attempt to follow the intent of the President in promulgating the *Manual*.[48] They indicate that courts should construe the rules of evidence and procedure liberally so that the accused may present all valid defenses.[49] They state that courts generally should not apply new rules retroactively.[50] They assert that, where possible, courts should interpret the rules of the *Manual* to prevent conflict with the UCMJ.[51] They also declare that courts should follow the rule of leniency, construing ambiguities in the *Manual* against the government.[52]

In creating doctrines for reviewing the legality of *Manual* provisions, however, the military courts have acted in a largely ad hoc manner. As the following part of this article will show,[53] they have handled challenges to *Manual* provisions on a case-by-case basis. They generally have not attempted to harmonize their approaches to different kinds of problems with the *Manual*. They also have not articulated general principles to govern judicial review.

Several factors make the piecemeal approach of the military courts understandable. In the absence of explicit authority to review *Manual* provisions,[54] the courts have had little external guidance. Consequently, they may have hesitated to take broad steps. Gradually fashioning doctrines for reviewing challenges to the *Manual*, moreover, has allowed them to learn

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48. *See* United States v. Leonard, 21 M.J. 67, 68 (C.M.A. 1985); United States v. Clark, 37 M.J. 1098, 1103 (N.M.C.M.R. 1993); United States v. Fisher, 37 M.J. 812, 818 (N.M.C.M.R. 1993); United States v. Sturgeon, 37 M.J. 1083, 1087 (N.M.C.M.R. 1993).

49. United States v. Coffin, 25 M.J. 32, 34 (C.M.A. 1987); United States v. Clark, 37 M.J. 1098, 1103 (N.M.C.M.R. 1993); United States v. Czekala, 38 M.J. 566, 573 (A.C.M.R. 1993).

50. United States v. Leonard, 21 M.J. 67, 69 (C.M.A. 1985).

51. United States v. LaGrange, 3 C.M.R. 76, 79 (1952); United States v. Marrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994).

52. *See* United States v. White, 39 M.J. 796, 802 (N.M.C.M.R. 1994).

53. *See infra* Part IV (describing the development of different doctrines for reviewing the nine most common types of challenges).

54. *See supra* Part II.C. (explaining the lack of explicit authority).

from experience. On the whole, they have not produced many controversial results.

The following discussion, however, suggests and defends three general principles that the military courts should strive to follow when reviewing *Manual* provisions. First, the military courts should look to ordinary administrative law doctrines for guidance in reviewing *Manual* provisions, even if these doctrines do not bind them. Second, the military courts should accord great deference to policy choices that the President has expressed in the *Manual*. Third, the military courts should strive for consistency as they develop doctrines for reviewing challenges to the *Manual*.

These principles will not eliminate the need for courts to make difficult decisions when determining the validity of the Military Rules of Evidence, Rules for Courts-Martial, and other parts of the *Manual*. For reasons explained below, however, the principles should improve the decisions of the courts. Part IV of this article, consequently, will refer repeatedly to each of these principles when analyzing the leading cases on the various types of challenges to *Manual* provisions.

A. Reliance on General Principles of Administrative Law

Although no legislation directly addresses judicial review of the *Manual*, the military courts do not have to start fresh when deciding how to evaluate contested provisions. On the contrary, they can and should look to external legal sources for guidance. In particular, the courts can learn from the experience of the federal courts in reviewing administrative materials.

Challenges to regulations issued by federal administrative agencies often resemble challenges to *Manual* provisions. The federal courts, for example, have considered whether agencies have authority to promulgate regulations,[55] whether regulations conflict with statutes,[56] whether regula-

55. *See, e.g.*, Ramah Navajo School Bd., Inc. v. Babbitt, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (holding that an agency exceeded its statutory authority in promulgating fund allocation rules); Health Ins. Ass'n of America, Inc. v. Shalala, 23 F.3d 412, 418-20 (D.C. Cir. 1994) (holding that an agency exceeded its statutory authority in promulgating regulations concerning Medicare payment recovery).

56. *See, e.g.*, Time Warner Entertainment Co. v. Federal Communications Comm'n, 56 F.3d 151, 187 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1112 (1996); National Welfare Rights Organization v. Mathews, 533 F.2d 637, 647 (D.C. Cir. 1976).

tions are arbitrary and capricious,[57] and so forth. Their experience in assessing these challenges may aid the military courts as they evaluate similar challenges to the Military Rules of Evidence, the Rules for Courts-Martial, and other portions of the *Manual*.

The Supreme Court itself has recently relied on administrative law decisions when reviewing portions of the *Manual*. In *Loving v. United States*, the Court upheld Rule for Courts-Martial 1004(c) under the non-delegation and intelligible principle doctrines.[58] To support its decision, the Court cited numerous cases concerning the validity of regulations promulgated by administrative agencies.[59]

Despite the Supreme Court's example in *Loving*, the military courts generally have not looked to non-military cases and doctrines for guidance. Conversely, they appear to have seen little connection between the *Manual* and other forms of administrative law. In their numerous decisions reviewing *Manual* provisions, they have not cited the APA, the *Chevron* doctrine,[60] or other fundamentals of administrative law. Overlooking these non-binding, but potentially persuasive sources has made their work more difficult. In addition, as Part IV will show, it occasionally may have caused the courts to err.

B. Deference to the President

Administrative agencies enjoy a substantial legal advantage in litigation: namely, in cases of doubt, the federal courts tend to defer to them.

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57. *See, e.g.*, Bangor Hydro-Elec. Co. v. Federal Energy Regulatory Comm'n, 78 F.3d 659, 663-64 (D.C. Cir. 1996); Military Toxics Project v. Environmental Protection Agency, 146 F.3d 948, 955 (D.C. Cir. 1998).

58. *See* Loving v. United States, 517 U.S. 748, 768-73 (1996).

59. In support of its ruling on the non-delegation doctrine, the Supreme Court cited: United States v. Grimaud, 220 U.S. 506 (1911); Touby v. United States, 500 U.S. 160 (1991); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614 (1946); and other decisions. *See Loving*, 517 U.S. at 768. In addressing the intelligible principle doctrine, the Supreme Court cited: A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and other cases. *See Loving*, 517 U.S. at 771.

60. *See* Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984). The *Chevron* doctrine requires the federal courts to defer to an administrative agency when the agency adopts a reasonable interpretation of a statute that the agency administers. *See id.* at 843.

The federal courts generally uphold regulations passed by agencies, as well as their interpreting of statutes.[61]

In an influential article, Justice Antonin Scalia identified three arguments for judicial deference to administrative agencies.[62] First, the separation of powers principle generally requires courts to cede questions of policy to the other branches of government.[63] Second, Congress expressly or implicitly may direct and often has directed courts to defer to agencies.[64] Third, agencies have greater substantive expertise in many areas than the courts.[65]

These reasons for deferring to administrative regulations, as the following discussion will show, also apply to the executive orders issued by the President. Indeed, in the case of executive orders to the military, they may produce an even stronger argument for deference.[66] Courts, therefore, should hesitate before invalidating *Manual* provisions.

1. Separation of Powers

Some commentators have argued that courts should defer to administrative agencies because of the separation of powers principle. They have reasoned that the executive branch, rather than the judiciary, should settle questions of policy when statutes do not make them clear. Judges, therefore, should not substitute their judgment for those of the executive officers controlling the agencies.

This separation of powers concern is heightened in the case of executive orders. Overruling an agency encroaches on the President's policy-making authority, but only indirectly. The President has only limited control over the regulations issued by administrative agencies. He usually has

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61. *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 703 (1992); Thomas W. Merrill, *Deference to Executive Precedent*, 101 YALE L.J. 969, 1017 (1992). For discussion of the special rules concerning deference in the context of criminal law, *see infra* Part IV.G.2.

62. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

63. *Id.* at 515-16.

64. *Id.* at 516-17.

65. *Id.* at 514.

66. *See* Robinson O. Everett, *Some Comments on the Role of Discretion in Military Justice*, 37 LAW & CONTEMP. PROBS. 173, 176-184 (1972) (discussing generally the President's discretion over the content of the rules governing courts-martial).

the power to hire and to fire the head of the agency,[67] but generally cannot direct its day-to-day operations. For this reason, regulations promulgated by an agency–although they emanate from the executive branch of government–may not fully reflect the President's views or policy choices.

The same caveat holds less true for executive orders. The President has complete control over the content of executive orders because he alone signs them. Executive orders, therefore, necessarily embody policy choices that the President personally has made or approved. Therefore, when a court invalidates an executive order, it directly challenges the President's decisions. Respect for the head of the executive branch, for this reason, requires that courts take this step only with justification.[68] Although they may strike down Military Rules of Evidence and Rules of Courts-Martial Procedure for a variety of reasons (described in Part IV), they should defer to the President's lawful policy choices.

2. Delegation of Policy-Making Authority

All legislation contains some gaps or open issues. Accordingly, when Congress requires an agency to administer a statute, commentators have argued that courts should infer that Congress implicitly has delegated to the agency the authority to make policy choices.[69] Courts must recognize

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67. *See* Myers v. United States, 272 U.S. 52 (1926) (President may discharge executive officers). *But see* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Congress may limit the power of the President to discharge a member of an independent agency who exercises quasi-legislative power).

68. One author would disagree somewhat with this argument. Eugene R. Fidell asserts:

> [I]t is error to leave the impression that the role of the President is more than perfunctory in the adoption of *Manual* provisions. True, a presidential signature appears, and the President's attorneys may have a part in the review process, but the undeniable fact is that the essential work in this regard is performed by the Joint Service Committee on Military Justice.

Fidell, *supra* note 25, at 6055. Nevertheless, while the President may delegate the work of putting together the *Manual* as he delegates most work, by statute he retains ultimate responsibility for its content.

69. *See* Scalia, *supra* note 62, at 516 (finding this rationale most persuasive). Some courts have accepted this reasoning. *See, e.g.*, Process Gas Consumers Group v. United States Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc), *cert. denied* 461 U.S. 905 (1983); Constance v. Secretary of Health & Human Serv., 672 F.2d 990, 995 (1st Cir. 1982).

and uphold this implicit delegation, just as they would follow any other express or implied command in a statute.

The same reasoning applies to the executive orders that establish the UCMJ, only with more force. The UCMJ assigns to the President the task of creating rules, and therefore naturally invests some discretion in him.[70] That is not all. The Constitution also designates the President as the Commander-in-Chief.[71] In this role, he has broad discretion in military matters.[72] Courts, therefore, again should not upset his decisions lightly.

3. Expertise

As administrative agencies have expertise in the areas that they regulate, the President and his advisers have special knowledge about the needs and concerns of the military. This expertise extends not only to strategic and operational matters, but also to matters of discipline. Military necessity requires that the President have discretion to employ his expertise. As Professor William F. Fratcher explained nearly forty years ago:

> Good order, morale, and discipline in the armed forces are necessary to victory in war; their absence ensure defeat. The President, as Commander-in-Chief, is primarily responsible for the maintenance of order, morale and discipline in the armed forces and the system of military justice is one of the principal means of maintaining them. It is essential to national safety that the President have sufficient power to make the system of military justice work effectively under the conditions which actually exist in the forces . . . .[73]

Professor Fratcher added that, in recognition of these principals, it "is to be hoped that" the military courts "will exercise greater judicial restraint

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70. *See, e.g.*, Douglas Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277-78 (1988); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308-12 (1986).

71. U.S. CONST. art. II, § 2, cl. 1.

72. *See* Loving v. United States, 517 U.S. 748, 772-73 (1996); Reid v. Covert, 354 U.S. 1, 38 (1957).

73. *See* Fratcher, *supra* note 25, at 868.

in the exercise of its power to determine that regulations of the President are invalid."[74]

C. Consistency

In reviewing *Manual* provisions, the courts also should strive to act consistently and to explain any apparent inconsistencies in their decisions. Yet, they have not always treated the same types of challenges in a similar manner. For example, in two cases, defendants sought to have *Manual* provisions invalidated on grounds that they conflicted with Army regulations. In one decision, the Court of Military Appeals ruled that *Manual* provisions preempt service regulations when they conflict.[75] In the other case, however, the Court of Military Appeals struck down the *Manual* provision and upheld the regulation.[76] The court made no effort to reconcile these cases, leaving future litigants, and the lower courts with ambiguous guidance.

The military courts appear to have rendered most of their conflicting decisions inadvertently. The way to avoid problems of inconsistency, in this author's view, lies in enabling the military courts to recognize that they regularly perform judicial review of the *Manual*, and that challenges to rules of evidence and procedure tend to fall into a small set of discernible categories. Once the military courts see the similarities among the cases, they can harmonize their decisions. The following part of this article seeks to aid them in this endeavor.

IV. Grounds for Invalidating *Manual* Provisions

In preparing this article, the author has attempted to conduct an exhaustive survey of the challenges to the *Manual* since the UCMJ was enacted in 1950. This research has revealed that litigants have asked the military courts to invalidate *Manual* provisions on nine principal grounds. The courts have accepted these challenges in many instances, but rejected them in others. The following discussion addresses each of these nine

74. *Id.* at 860.

75. *See* United States v. Kelson, 3 M.J. 139, 140 (C.M.A. 1977) (invalidating rule promulgated by the Secretary of the Army as inconsistent with the *Manual*).

76. *See* United States v. Johnson, 22 C.M.R. 278, 283 (1957) (striking down *Manual* provision as inconsistent with Army regulation).

grounds, summarizing the leading cases, and then presenting the author's own comments and analysis.

A. The *Manual* Provision is Merely Precatory

Litigants in many cases have asked the military courts not to follow *Manual* provisions or passages in the supplementary materials on grounds that the President did not intend them to have a binding effect. In these cases, the litigants have characterized the disputed language as "precatory," meaning that it only provides guidance and does not have the force of law.[77] The courts have accepted this challenge in a number of instances.

1. Leading Cases

The cases indicate that two factors determine whether the military courts will characterize a *Manual* provision as precatory and thus feel free not to follow it. The first factor is the provision's location within the *Manual*. The second is the wording of the provision.

The published volume containing the *Manual*, includes two very important supplementary materials: the "discussion" accompanying the Rules for Courts-Martial and Military Rules of Evidence, and the "analyses" of these Rules and the Punitive Articles.[78] Military courts frequently cite and follow these supplementary materials, and judge advocates constantly rely on them for guidance. Nonetheless, the courts have characterized everything appearing in these supplementary materials as precatory, and often have refused to follow what they say.[79]

Actual *Manual* provisions–the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles–have received different treatment. Unlike the discussion and analysis, the courts have assumed that the President generally intended these provisions to be binding unless other-

77. *See* BLACK'S LAW DICTIONARY 1176 (6th ed. 1990) (defining "precatory" to mean "conveying or embodying a recommendation or advice or the expression or a wish, but not a positive command or direction").

78. *See* MCM, *supra* note 7, pmbl. discussion (describing these supplementary materials).

wise indicated. The military courts, accordingly, have followed them except when their language reveals that they merely provide guidance.

Most of the *Manual* provisions that courts have characterized as precatory have contained the word "should." This auxiliary verb often creates an ambiguity. If a rule says that someone "should" take a particular action, does the rule mandate that action, or only recommend it? This question unfortunately has no universal answer.

The characterization of "should" as permissive or mandatory depends on context.[80] In some cases, courts have held that rules containing the word "should" are precatory.[81] In other cases, they have found them to be binding.[82] In still other cases, the courts have raised the issue without deciding it.[83] To present a persuasive argument, litigants must be prepared

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79. For cases refusing to following the discussion, *see, e.g.*, United States v. Fisher, 37 M.J. 812, 818 (N.M.C.M.R. 1993) (refusing to follow discussion of R.C.M. 305(h)), *affirmed* 40 M.J. 293 (C.M.A. 1994); United States v. Robertson, 27 M.J. 741, 743 n.1 (A.C.M.R. 1988) (refusing to follow discussion of R.C.M. 1003(3)). For cases refusing to follow the analysis, *see, e.g.*, United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993) (analysis not followed), *cert. denied* 510 U.S. 1192 (1994); United States v. Marrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994) (refusing to follow statement in analysis indicating that R.C.M. 405(g)(1)(A) created a per se rule), *aff'd* 43 M.J. 35 (1995). *See also* United States v. Mance, 26 M.J. 244, 252 (C.M.A.), *cert. denied* 488 U.S. 942 (1988) (stating that the analysis is not binding); United States v. White, 39 M.J. 796 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Ferguson, 40 M.J. 823, 827 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Perillo, 6 M.J. 678, 679 n.2 (A.C.M.R. 1978) (appendix 8 to the *Manual* does not have the force of law).

80. *See* United States v. Voorhees, 16 C.M.R 83, 101 (C.M.A. 1954) (holding that while the word "should" is "normally construed as permissive," context may indicate that it has a "mandatory" meaning). *Cf.* United States v. Merritt, 1 C.M.R. 56, 61 (1951) ("[W]hile the word 'shall' is generally construed to mean imperative and mandatory, it may be interpreted to be permissive and directory.").

81. *See, e.g.*, United States v. Howard, 17 C.M.R. 186, 194 (1954) (holding that MCM 1951, *supra* note 7, ¶ 150b was precatory when it stated "the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him"); United States v. Hartley, 14 M.J. 890, 898 (N.M.C.M.R. 1982) (holding that MCM 1969, *supra* note 7, at A6-A4 was precatory when it stated: "A person on active duty belonging to a reserve component . . . should be described as such . . . .").

82. *See, e.g.*, United States v. Lalla, 17 M.J. 622, 625 (N.M.C.M.R. 1983) (holding that MCM 1969, *supra* note 7, ¶ 76b(1) was not precatory when it stated: "If an additional punishment is authorized because of the provisions of 127c, Section B, . . . the military judge . . . should advise the court of the basis of the increased permissible punishment."); United States v. Warner, 25 M.J. 64, 67 (C.M.A. 1987) (rejecting the argument that R.C.M. 1107(d)(2) was precatory when it stated: "When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial . . . unless requested by the accused.").

to compare these numerous precedents to the particular provision that they are challenging as precatory.

Although most cases in which courts have found *Manual* provisions precatory have involved rules employing the word "should," some have not. For example, in *United States v. Jeffress*,[84] the Court of Military Appeals concluded that it did not have a duty to follow a portion of the punitive articles that explained the elements of kidnapping. Although the punitive articles generally have a binding effect, the court characterized this particular explanation as non-binding "discussion."[85]

Another example of a challenge to a rule that did not use the word "should" appears in *United States v. Solnick*.[86] In that case, the government argued against enforcing Rule for Courts-Martial 1107, which directs the convening authority to act on a sentence unless "it is impracticable."[87] The government contended that the court should not enforce the provision or its impracticability requirement on grounds they "are essentially 'housekeeping' rules 'serving no purpose other than to provide guidance to commanders through the post-trial process and assist them in taking action on results of courts-martial . . . .'"[88] Although the court ultimately rejected the argument, it seriously considered the government's position.[89]

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83. *See, e.g.*, United States v. Francis, 15 M.J. 424, 428 (C.M.A. 1983) (questioning whether MCM 1969, *supra* note 7, ¶ 33h was mandatory or precatory in stating that all known charges "should" be tried at a single trial); United States v. Hoxsey, 17 M.J. 964, 965 (A.F.C.M.R. 1984) (suggesting that MCM 1969, *supra* note 7, ¶ 168 might be precatory when it stated that "[i]n general it is considered objectionable to hold one accountable under [art. 89] for what was said or done by him in a purely private conversation").

84. 28 M.J. 409 (C.M.A. 1989).

85. *See id.* (upholding UCMJ art. 92(c)(2) (West 1998)). For a similar case, *see* United States v. Turner, 42 M.J. 689, 691 (Army Ct. Crim. App. 1995). In *Turner*, the court upheld the definition of "dangerous weapon" in UCMJ art. 54c(4)(a)(ii), but did not appear to feel bound by the *Manual* provision. Instead, it simply agreed that the definition was logical. *See id.* The dissent described the definition in the *Manual* as "a nonbinding comment on the law." *Id.* at 694 (Mogridge, J., dissenting).

86. 39 M.J. 930 (N.M.C.M.R. 1994).

87. MCM, *supra* note 7, R.C.M. 1107.

88. *See Solnick*, 39 M.J. at 933.

89. *See id.* For another precatory language challenge not involving the word "should," *see* United States v. Latimer, 30 M.J. 554, 562 (A.C.M.R. 1990) (suggesting that R.C.M. 911 was precatory in stating that "[w]hen the trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn").

2. Analysis and Comment

At first glance, some observers might think that the military courts improperly are failing to defer to the President when they refuse to follow the discussion or analysis printed along with the *Manual*.[90] In reality, however, they are not. The President played no role in preparing these supplementary materials, and he did not promulgate them by executive order; on the contrary, these materials represent only the beliefs of staff personnel who worked on the *Manual*.[91] The courts, therefore, do not violate the principle of deference to the President when they disagree with them.

The discussion accompanying the preamble explains the development and role of these supplementary sources as follows:

> The Department of Defense, in conjunction with the Department of Transportation, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Courts of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules.[92]

The analysis of the Rules for Courts-Martial confirms this view of both the discussion and analysis:

> The Discussion is intended by the drafters to serve as a treatise. . . . The Discussion itself, however, does not have the force of law. . . .
>
> The Analysis sets forth the nonbinding views of the drafters, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. . . . [I]t is important to remember that the analysis solely represents the views of staff personnel who worked on the project, and does not

90. *See supra* Part III.B. (arguing that courts should defer to the President).
91. *See* MCM, *supra* note 7, pmbl.
92. *Id.*

> necessarily reflect the view of the President in approving it, or of the officials who formally recommended approval to the President.[93]

The military courts also correctly have presumed that they generally must follow actual *Manual* provisions, unless their language suggests otherwise. Rule for Courts-Martial 101 declares: "These rules govern the procedures and punishments in all courts-martial . . . ."[94] Military Rule of Evidence 101 similarly states that the rules of evidence "are applicable in courts-martial, including summary courts-martial . . . ."[95] These provisions reveal that the President generally intended actual *Manual* provisions to have the force of law, absent some other indication.

In deciding future cases, however, courts should take care not to dismiss the supplementary materials as irrelevant. Despite their precatory status, the courts should not simply ignore them. On the contrary, they generally should follow the "discussion" and "analysis" for three reasons.

First, the staff who prepared the supplementary material had significant expertise in the field of military law.[96] They drafted many of the rules in the *Manual*, and they attempted to explain the rules as thoroughly as they could. In cases of doubt, courts generally should assume that the drafters understand the implications of their statements, and follow their nonbinding guidance.

Second, judge advocates by necessity often must rely on the supplementary materials although they know (or should know) that they are not binding. In the field, trial and defense counsel often must give quick advice without having the opportunity to conduct extensive research. Naturally, they first turn to the *Manual* and the material printed with it.[97] Con-

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93. *Id.* at A21-3.
94. *Id.* R.C.M. 101.
95. *Id.* MIL. R.EVID. 101.
96. *See id.* pmbl. & A21-1.
97. *See* United States v. Smith, 32 C.M.R. 105, 119 (1962).

> It must be remembered that in many instances facilities of legal research are not readily available, so it is wholly understandable–perhaps even desirable–that the *Manual*, a handy compendium on military justice, include statements concerning substantive principles of law.

Id.

sequently, even if courts have no duty to follow precatory parts of the *Manual*, disregarding them may have negative practical consequences.

Third, following the precatory language would accord with the long-standing judicial practice of deferring to an agency's interpretation of the statutes that it enforces.[98] This doctrine strictly does not apply to the armed forces, but there is no pressing need for the military courts to have a different policy. Although the frequency of job rotations prevents many judge advocates from becoming truly expert in any one legal subject, the officers who prepared the "analysis" and "discussion" had long-term experience in military criminal law.[99] They thus resembled the staff of administrative agencies in terms of expertise.

With respect to actual *Manual* provisions, the courts have done well in trying to determine what the President intended. When the President promulgates rules containing words like "should," he may or may not want courts to enforce them. Indeed, the President could aid the courts significantly by eliminating the word "should" from future versions of the *Manual*.[100]

B. The *Manual* Provision Conflicts with the UCMJ

Outside of the military context, the APA permits courts to invalidate administrative rules and regulations that are "not in accordance with law."[101] This provision insures that legislation takes precedence over administratively promulgated materials. Under the APA, courts regularly strike down federal regulations that conflict with federal statutes.[102] Although the APA does not apply to the *Manual*, the military courts occa-

98. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 627-31 (1996).

99. *See, e.g.*, MCM, *supra* note 7, at A22-1 (indicating that then-Major Fredric Lederer prepared the initial draft of the analysis of the Military Rules of Evidence). *See also id.* at A21-1 through A21-2 (describing the other officers who worked on the extensive revisions to the *Manual* in 1984).

100. *See* OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REP., HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 61-62 (Ira B. Forester ed., 1995) (recommending use of the word "shall"); REED DICKERSON, LEGISLATIVE DRAFTING 125-29 (1954) (listing words that drafters should avoid in creating legal rules).

101. 5 U.S.C.A. § 706(2)(A) (West 1998).

sionally have invalidated *Manual* provisions on the ground that they conflict with the UCMJ.[103]

1. Leading Cases

The Court of Military Appeals began to invalidate *Manual* provisions that conflicted with the UCMJ shortly after the code went into effect. In *United States v. Wappler*,[104] the court refused to uphold a *Manual* provision that indicated a court-martial could confine to bread and water a person not attached to or embarked on a vessel.[105] The court found this provision to conflict with Article 55's prohibition on cruel or unusual punishments.[106] The court subsequently invalidated a number of other provisions in the 1951 *Manual* because the provisions conflicted with Article 27's requirement of certified counsel,[107] Article 31's prohibition on self-incrimination,[108] Article 37's rules on unlawful command influence,[109]

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102. *See, e.g.*, Abington Memorial Hosp. v. Heckler, 750 F.2d 242 (3d Cir. 1984) (invalidating a Medicare regulation under section 706(2)(A) on grounds that it conflicted with federal statutes).

103. *See* Fidell, *supra* note 25, at 6050-51 (discussing this type of challenge).

104. 9 C.M.R. 23 (1953). Professor Fratcher identifies *Wappler* as the first case in which the Military Court of Appeals held a *Manual* provision invalid. *See* Fratcher, *supra* note 25, at 870. *But see* Fidell, *supra* note 25, at 6051 n.17 (qualifying this assertion).

105. MCM 1951, *supra* note 7, ¶ 127b.

106. 10 U.S.C.A. § 855 (West 1998). Noting that Article 55 affords greater protection than the Eighth Amendment, the court held that the statute prohibits confinement to bread and water except as authorized in Article 15. *See Wappler*, 9 C.M.R. at 26. Because Article 15 authorized confinement to bread and water only for persons attached to or embarked on vessels, *see* 10 U.S.C.A. § 15(b)(2)(A), the *Manual* provision violated Article 55. *See id.*

107. United States v. Drain, 16 C.M.R. 220 (1954) (invalidating MCM 1951, *supra* note 7, ¶ 117a, which said that officers taking depositions need not be certified counsel, as contrary to article 27(a)).

108. *See* United States v. Rosato, 11 C.M.R. 143, 145 (1953) (invalidating MCM 1951, *supra* note 7, ¶ 150, which said that a person can be required to make a handwriting sample, as contrary to Article 31); United States v. Eggers, 11 C.M.R. 191, 194 (1953) (same); United States v. Greer, 13 C.M.R. 132, 134 (1953) (invalidating a statement in MCM 1951, *supra* note 7, ¶ 150(b) indicating that courts may compel an accused to utter words for the purpose of voice identification as contrary to Article 31); United States v. Kelley, 23 C.M.R. 48, 52 (1957) (apparently invalidating an unspecified *Manual* provision on admission of exculpatory statements as contrary to Article 31); United States v. Price, 23 C.M.R. 54, 56 (1957) (invalidating MCM 1951, *supra* note 7, ¶ 140(a), which said that evidence of a false statement was admissible even if no preliminary warning had been given, as contrary to Article 31); United States v. Haynes, 27 C.M.R. 60, 64 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 140a, which said that evidence found by means of inadmissible confession was itself admissible, as contrary to Article 31).

Article 51's rules on voting by the panel,[110] Article 66's rules on appeal,[111] Article 72's rules regarding suspension of sentences,[112] Article 83's rules on fraudulent enlistments,[113] Article 85's rules on desertion,[114] and Article 92's rules on disobeying orders.[115]

The conflicts that these cases addressed arose mostly because of a fundamental problem with the 1951 *Manual*. That version of the *Manual* strived to serve two competing functions. It sought to act not only as a list of rules but also as a handy treatise to aid judge advocates. The treatise-like aspects of the *Manual* simply went too far in many instances.[116]

A substantial revision of the *Manual* occurred in 1969.[117] Although this revision made the *Manual* more compatible with the UCMJ, the Court of Military Appeals continued to strike down its provisions.

In particular, it invalidated paragraphs as inconsistent with Article 38's rules with respect to representation of defense counsel,[118] Article 39's

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109. *See* United States v. Littrice, 13 C.M.R. 43, 50 (1958) (limiting the use of MCM 1951, *supra* note 7, ¶ 38, which denounces theft as a crime of moral turpitude, so as not to violate Article 37 on unlawful command influence).

110. *See* United States v. Jones, 22 C.M.R. 73 (1956) (invalidating a statement in MCM 1951, *supra* note 7, ¶ 8a's "guide to trial procedure," which said that the law officer may excused a challenged person, as contrary to Articles 41 and 51); United States v. Johnpier, 30 C.M.R. 90, 94 (1961) (invalidating a provision in MCM 1951, *supra* note 7, ¶ 55 that specified a procedure for suspending trial in order to obtain the views of the convening authority).

111. *See* United States v. Varnadore, 26 C.M.R. 251, 256 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 127b, which limited confinement to six months in the absence of a punitive discharge, as contrary to Articles 66).

112. *See* United States v. Cecil, 27 C.M.R. 445, 446 (1959) (invalidating MCM 1951, *supra* note 7, ¶ 88e(2)(b), which allowed the convening authority to suspend a sentence without giving the accused probationary status as contrary to Article 72).

113. *See* United States v. Jenkins, 22 C.M.R. 51 (1956) (invalidating MCM 1951, *supra* note 7, ¶162's definition of enlistment to include "induction" as contrary to Article 83).

114. *See* United States v. Cothern, 23 C.M.R. 382 (1957) (invalidating MCM 1951, *supra* note 7, ¶ 164a's inference of an intent to remain absent as contrary to Article 85).

115. *See* United States v. Curtin, 26 C.M.R. 207, 211-12 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 171b, which authorized conviction upon a finding of "constructive" knowledge, as contrary to Article 92(2)'s requirement of actual knowledge).

116. *See* Robert Emmet Quinn, *Courts-Martial Practice: A View from the Top*, 22 HASTINGS L.J. 201, 206 (1971) (explaining that many provisions of the *Manual* were struck down "because the *Manual* was both deficient and inefficient in effectuation of its purpose" and that the *Manual*'s "principal fault was that it tried to be an encyclopedia of military law, rather than a rule book of practice.").

117. *See supra* note 7.

provisions about what may take place at court sessions,[119] and Article 54's rules with respect to records of trial.[120]

The 1984 revision, which gave the *Manual* its present format, largely succeeded in eliminating existing conflicts. It did not, however, eliminate them all. For example, in *United States v. Davis*,[121] the Court of Military Appeals struck down a Rule for Court-Martial purporting to limit matters that the accused could submit to the convening authority when seeking clemency. In others instances, the courts have suggested that *Manual* provisions might conflict with the UCMJ, but ultimately have avoided making that determination.[122]

Ironically, despite the large number of cases in which the military courts have struck down *Manual* provisions since the inception of the UCMJ, they actually have hesitated to find conflicts. In a series of cases, the courts have interpreted *Manual* provisions to avoid conflicts even when their interpretations do not comport with the most natural reading of their text. The courts' practice in these cases resembles the familiar "rule of avoidance" that requires courts to interpret statutes in ways such that they do not violate the Constitution.[123]

An early example of interpreting the *Manual* to avoid conflicts comes from the 1952 case of *United States v. Clark*.[124] A provision in the *Manual*

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118. *See* United States v. McFadden, 42 C.M.R 14, 15-16 (1970) (invalidating a provision in MCM 1969, *supra* note 7, ¶ 47 that limited participation of uncertified assistant counsel as contrary to Article 38(e)).

119. United States v. McIver, 4 M.J. 900, 903-04 (N.M.C.M.R. 1978) (invalidating a provision in MCM 1969, *supra* note 7, ¶ 152 that prevented judges from ruling on motions to suppress evidence during a pre-arraignment session as contrary to Article 39).

120. *See* United States v. Douglas, 1 M.J. 354, 355 (C.M.A. 1976) (invalidating portions of MCM 1969, *supra* note 7, ¶ 145b, which relaxed the rule on admission of non-verbatim transcripts, as conflicting with Article 54).

121. 33 M.J. 13, 15 (C.M.A. 1991) (invalidating R.C.M. 1105 as conflicting with Article 60(b)(1)).

122. *See, e.g.*, United States v. Francis, 25 M.J. 614, 618-19 (C.G.C.M.R. 1987) (discussing possible conflict between Military Rule of Evidence 103(a) and Article 66).

123. *See, e.g.*, Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); Presser v. Illinois, 116 U.S. 252, 269 (1886). *See generally* Adrian Vermeule, *Savings Constructions*, 85 GEO. L.J. 1945 (1997). Outside of military law, no doctrine says that courts must interpret regulations to avoid conflicts with statutes.

Instead, the Supreme Court has made clear that federal courts must invalidate regulations that conflict with statutes. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In some cases, the courts do interpret ambiguous regulations to avoid conflicts with statutes. *See* Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 994 (10th Cir. 1996). The military courts, however, seem to have gone farther, and have extended this practice to *Manual* provision that do appear ambiguous.

specified that the law officer "may advise" a court-martial of lesser included offenses.[125] The Court of Military Appeals interpreted this provision to mean "*must* advise" the court, because a contrary interpretation would conflict with Article 51.[126] Subsequent cases have continued this effort to avoid conflicts even when it requires the court to adopt an unnatural or strained reading of a *Manual* provision.[127]

2. Analysis and Comment

The Constitution grants Congress the power "[t]o make [r]ules for the [g]overnment and [r]egulation of the land and naval forces."[128] Congress effectively would lack that power if the President could use executive orders to contradict legislation. The military courts have acted properly in allowing parties to challenge *Manual* provisions that conflict with the UCMJ.[129] The courts similarly might invalidate *Manual* provisions that conflict with federal legislation other than the UCMJ.

Statutory support for the courts' practice of striking down *Manual* provisions that conflict with the UCMJ comes from Article 36.[130] Article 36 specifies that the President may prescribe rules of procedure and evidence for courts-martial.[131] The article, however, insists that the rules prescribed "shall not be contrary to or inconsistent with this code."[132] Courts thus have an implicit statutory basis for striking down procedural and evidentiary provisions in the *Manual* if they conflict with the UCMJ.

The military courts, however, do not stand on as firm ground when they interpret *Manual* provisions to avoid conflicts with statutes.

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124. 2 C.M.R. 107 (1952).

125. MCM 1951, *supra* note 7, ¶ 73c.

126. *See Clark*, 2 C.M.R. at 109-110.

127. *See, e.g.*, United States v. LaGrange, 3 C.M.R. 76, 79 (1952); United States v. Marrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994).

128. U.S. CONST. art. I, § 8, cl. 14.

129. Other commentators also agree that statutory provisions take precedence over the *Manual*. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL X (2d ed. 1986) (stating that *Manual* provisions must fall if they conflict with a statute); EDWARD M. BRYNE, MILITARY LAW 12 (3d ed. 1981) (stating that *Manual* provisions must fall if they conflict with a statute); Fratcher, *supra* note 25, at 866 (discussing in depth the question of when presidential orders and congressional statutes take precedence over each other).

130. 10 U.S.C.A. § 836 (West 1998).

131. *See id.*

132. *Id.*

Although courts traditionally have interpreted federal statutes in ways to avoid constitutional questions, they generally have not sought to avoid conflicts between regulations and statutes.[133] Courts avoid striking down statutes because Congress passes laws only after great effort and because legislation generally reflects democratic choices. The same concern has less force in the area of administrative law. The President, unilaterally, issues the *Manual* by executive order. If its provisions conflict with the acts of Congress, they should fall. Invalidating *Manual* provisions does not create a substantial problem because the President easily can replace the stricken portions with new provisions that do not conflict with the statute. The military courts, accordingly, should reconsider their practice of adopting unnatural or strained interpretations of the *Manual* to prevent conflicts from arising with the UCMJ.[134]

C. The *Manual* Provision Conflicts with Another *Manual* Provision.

The *Manual* contains hundreds of pages of rules. Not surprisingly, a few of these rules have come into conflict with each other. In these situations, the military courts have to decide what to apply and what to ignore.

1. Leading Cases

The Court of Military Appeals recognized early that one *Manual* provision might clash with another. In a frequently cited passage, the court suggested that such a conflict might require the military courts to choose not to enforce one of the two provisions.[135] Subsequent lower-court cases have announced two rules for determining which *Manual* provision should prevail.

First, in *United States v. Morlan*, the Army Board of Review ruled that when a specific provision in the *Manual* conflicts with a general provision, the "specific terminology controls and imparts meaning to [the]

133. *See supra* note 123.

134. This conclusion applies only to cases where courts adopt interpretations that are contrary to the ordinary meaning of *Manual* provisions. In cases of ambiguity, the courts may decide that an interpretation that avoids a conflict is best because the President most likely intended to comport with the statute.

135. *See* United States v. Villasenor, 19 C.M.R. 129, 133 (1955) ("[W]here a [*Manual*] provision does not lie outside the scope of the authority of the President, offend against the Uniform Code, conflict with another well-recognized principle of military law, or *clash with other Manual provisions*, we are duty bound to accord it full weight." (emphasis added)).

general terminology."[136] Applying this rule, the Board of Review decided that a court-martial had improperly sentenced a warrant officer to a bad-conduct discharge.[137] Although paragraph 127c of the 1951 *Manual* said generally that a "bad conduct discharge may be given in any case where a dishonorable discharge is given," paragraph 126d said more specifically that "separation from the service of a warrant officer by sentence of court-martial is effected by dishonorable discharge."[138]

Second, in *United States v. Valente*, the Coast Guard Board of Review held that when *Manual* provisions clash, "the pertinent paragraphs should be read together and, if possible, the conflict resolved in accord with the overall intent of the *Manual*."[139] The Board used this standard in a case in which a court-martial had sentenced an accused to a bad-conduct discharge and confinement at hard labor for one year, but the convening authority conditionally had remitted the bad-conduct discharge.[140] In reviewing the legality of the convening authority's action, the Board had to consider three conflicting provisions in the 1951 *Manual.*[141]

Paragraph 88e(2)(b) appeared to authorize what the convening authority had done by stating that the convening authority "may suspend the execution of a punitive discharge."[142] Paragraph 88c, however, said that the convening authority could remit part of a sentence only if a court-martial could have imposed the remaining punishment.[143] A court-martial could not have imposed a sentence of confinement at hard labor for one year without a punitive discharge because paragraph 127b barred a court-martial from ordering confinement at hard labor for more then six months absent a punitive discharge.[144]

Although the Board of Review did not fully explain its reasoning, it concluded that the *Manual* prohibited the sentence.[145] The Board ruled that the overall intent of the *Manual* was to prohibit confinement with hard

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136. United States v. Morlan, 24 C.M.R. 390, 392 (A.B.R. 1957). *See also* United States v. Dowty, 46 M.J. 845, 848 n.10 (N.M. Ct. Crim. App. 1997) (stating this same canon of construction), *aff'd* 48 M.J. 102 (1998).

137. *See Morlan*, 24 C.M.R. at 392.

138. *See id.* (quoting MCM 1951, *supra* note 7, ¶¶ 126d, 127).

139. United States v. Valente, 6 C.M.R. 476 (C.G.B.R. 1952).

140. *See id.* at 476.

141. *See id.*

142. MCM 1951, *supra* note 7, ¶ 88(e)(2)(b).

143. *See id.* ¶ 88c.

144. *See id.* ¶ 127b.

145. *See Valente*, 6 C.M.R. at 476.

labor for more than six months without a punitive discharge.[146] It, therefore, remitted the portion of the accused's confinement in excess of six months, while retaining the conditionally remitted bad-conduct discharge.[147] Few other cases have identified conflicts within the *Manual*.[148]

2. Analysis and Comment

The two rules in *Valente* and *Morlan* for resolving conflicts between *Manual* provisions comport with the first two of the general principles for judicial review discussed above.[149] The court in *Valente* adopted a general canon of construction that both military and nonmilitary courts have applied in the context of conflicting laws.[150] The court in *Morlan*, moreover, afforded respect to the President by striving foremost to determine the overall intent of the *Manual* when reconciling disagreeing provisions.

On the other hand, the two decisions appear slightly inconsistent. In particular, the Coast Guard Board of Review might have reached a different result in *Valente* if it had considered the cannon that the Army Board of Review applied in *Morlan*. The Coast Guard Board of Review might have seen paragraph 88e(2) as the most specific provision, and thus held that it trumped paragraphs 127b and 88c. If the Board had reached this conclusion, it would have upheld the convening authority's action.

To reduce inconsistency, the military courts might prioritize their rules for addressing conflicts within the *Manual*. For example, they could decide first to apply the canon in *Morlan*, determining whether one *Manual* provision is more specific than another. Usually, they will have little difficulty with this issue. If, however, the *Morlan* canon does not resolve the case, the courts then could pursue the *Valente* case's inquiry into the more difficult issue of the "general intent" of the *Manual*. Although this

146. *See id.*

147. *See id.*

148. *Cf.* United States v. McCray, 15 M.J. 1086, 1089 (A.C.M.R. 1983) (rejecting argument that Military Rule of Evidence 609 conflicts with Military Rule of Evidence 403); *but see* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 526 (1989) (holding that Federal Rule of Evidence 609 trumps Federal Rule of Evidence 403).

149. *See supra* Part III.A., B.

150. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) (stating that *Manual* provisions must fall if they conflict with a statute); United States v. Dowty, 46 M.J. 845, 848 n.10 (N.M. Ct. Crim. App. 1997) (stating that *Manual* provisions must fall if they conflict with a statute), *aff'd* 48 M.J. 102 (1998).

example shows one possible way to prioritize, the courts probably should wait until they review more cases before deciding the best order for applying rules that address internal *Manual* conflicts. Although prioritizing will not eliminate all inconsistency in decisions, it should alleviate the problem.

D. The *Manual* Provision Conflicts with a Regulation

A great deal of administrative law outside of the *Manual* affects service members. The secretaries of the Departments of Defense and Transportation have statutory authority to pass a variety of regulations that affect the Armed Forces.[151] The secretaries of the Army, Navy, and Air Force, moreover, have authority under both statutes and the *Manual* to pass rules and regulations.[152] In addition, the judge advocate generals of the various services and the Court of Appeals of the Armed Forces also have power under the *Manual* to prescribe rules.[153]

Sometimes the *Manual* may conflict with other regulations. In these instances, the military courts have had to determine whether the *Manual* or the regulations should prevail. This question, unfortunately, has no easy or universal answer.

1. Leading Cases

In *United States v. Kelson*, the Court of Military Appeals upheld a *Manual* provision that clashed with an Army regulation.[154] In that case, the accused had moved to dismiss a specification as multiplicious.[155] The military trial judge refused to entertain the motion because the accused had not put it in writing before the Article 39(a) session as *Army Regulation 27-10* then required.[156] The Court of Military Appeals reversed, concluding

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151. *See, e.g.*, 10 U.S.C.A. § 580(e)(6) (West 1998) (delegation to the Secretaries of Defense and Transportation).

152. *See, e.g.*, *id.* § 2102(b)(3) (statutory delegation of the authority to the service secretaries); MCM, *supra* note 7, R.C.M. 106 (*Manual* delegation of authority to service secretaries). The Secretary of Transportation sometimes acts with respect to the Coast Guard in a capacity equivalent to the service secretaries. *See* 10 U.S.C.A. § 101(a)(9)(D) (defining "secretary concerned" to include the service secretaries and Secretary of Transportation).

153. *See, e.g.*, MCM, *supra* note 7, R.C.M. 109(a) (delegation to the Judge Advocate Generals), R.C.M. 1204(a) (delegation to the Court of Appeals for the Armed Forces).

154. United States v. Kelson, 3 M.J. 139 (C.M.A. 1977). *See* Fidell, *supra* note 25, at 6050 (discussing the *Kelson* decision).

155. *See Kelson*, 3 M.J. at 139-40.

that the regulation conflicted with paragraph 66b of the 1969 *Manual*,[157] which said that failure to assert a motion to dismiss in a timely manner did not waive the accused's rights.[158] Similarly, in *Keaton v. Marsh*, the Army Court of Criminal Appeals invalidated a provision of *Army Regulation 27-10* that conflicted with Rule for Courts-Martial 305(l).[159]

In another case, however, the Court of Military Appeals refused to follow a *Manual* provision that conflicted with a regulation. In *United States v. Johnson*, a soldier accused of desertion defended his absence on grounds that he had possessed a valid pass.[160] Relying on paragraph 164a of the 1951 *Manual*, the government argued that the accused had abandoned his pass by his conduct, and thus was absent without authority.[161] The court sided with the accused. Examining the Army regulation governing passes, the court concluded that a soldier had no power to alter or abandon his pass.[162] It thus rejected the *Manual*'s statement that a soldier could abandon a pass.[163] One dissenting judge would have upheld the *Manual*.[164]

2. Analysis and Comment

It is tempting to think that the *Manual* always should prevail over other rules and regulations because the *Manual* emanates from a higher authority. After all, the President issues the *Manual*, while subordinate secretaries and officers issue all other rules regulations. At least one military judge appears to have adopted this hierarchical theory, stating: "When a regulation promulgated by one of the Armed Forces directly conflicts with a *Manual* provision implemented by Executive Order, the conflicting provisions of that regulation are invalid."[165]

The relationship of the *Manual* to other regulations, however, requires a more sophisticated analysis. In particular, in cases of conflict,

156. *See id.*

157. *See id.* at 141; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (8 Aug. 1994) [hereinafter AR 27-10].

158. *See Kelson*, 3 M.J. at 141.

159. *See* Keaton v. Marsh, 43 M.J. 757, 760 (Army Ct. Crim. App. 1996) (holding that *Army Regulation 27-10* conflicted with R.C.M. 395(l) in purporting to authorize reconfinement in the absence of new evidence or misconduct).

160. United States v. Johnson, 22 C.M.R. 278, 282 (1957).

161. *See id.* at 282.

162. *See id.* at 283 (citing *Army Regulation 630-10*).

163. *See id.*

164. *See id.* at 286 (Latimer, J., dissenting).

whether the *Manual* or regulation should prevail depends on the authority for the *Manual* provision and the authority for the regulation. As the following discussion will explain, *Manual* provisions generally should prevail over regulations promulgated by executive officers pursuant to authority delegated by the President. Whether the *Manual* should prevail over regulations promulgated by executive branch officers pursuant to statutory delegations depends on the relationship of the statutes to the UCMJ. Regulations, nevertheless, always should prevail over the precatory portions of the *Manual.*

a. Regulations Passed by Executive Branch Officers under Authority Delegated by the President

The President has delegated some of his authority under the UCMJ to subordinates. In various provisions in the *Manual*, he has instructed the service secretaries and the judge advocate generals to pass rules and regulations.[166] When a conflict arises between the *Manual* and these rules and regulations, the *Manual* should prevail. Courts should presume that the President did not grant subordinates authority to negate the *Manual* provisions that he has issued by executive order.

The *Kelson* and *Keaton* cases provide excellent examples. The Secretary of the Army passed *Army Regulation 27-10* under authority granted by the President in the *Manual*.[167] Accordingly, when portions of the regulation conflict with the *Manual*, the regulation must fall. The President would not have delegated authority to the Secretary of the Army to prescribe rules for implementing the *Manual* that contradict the *Manual*.

b. Regulations Passed by Executive Branch Officers Pursuant to Statutory Authority

The Secretaries of Defense and Transportation and the various service secretaries prescribe some regulations pursuant to authority conferred

165. United States v. Schmenk, 11 M.J. 803, 808-09 (A.F.C.M.R. 1981) (Miller, J., dissenting) (asserting, while addressing an issue the majority did not reach, that an Air Force Regulation creating a privilege for a records in a drug abuse program violated Military Rule of Evidence 501).

166. *See* 10 U.S.C.A. § 940 (West 1998) (authorizing this delegation from the President); *supra* notes 151-52 (providing examples of delegations).

167. *See* AR 27-10, *supra* note 157, para. 1.1.

directly by statute, instead of delegated by the President. In these instances, no simple rule can determine whether the regulations or the *Manual* should prevail in cases in conflict. Instead, courts must determine what Congress intended. They must compare the UCMJ to the other statutes in question. They must ask whether Congress would have wanted regulations passed by the President under the UCMJ to prevail or vice versa.

Under this standard, the Court of Military Appeals probably reached the correct result in *Johnson*. Although the Court did not use this reasoning, the court could have determined that Congress did not intend the UCMJ to serve as the primary law on the validity of soldiers' passes. Passes, in general, have nothing to do with military justice. Accordingly, the court properly could have decided that the Army regulation on passes (issued pursuant to another statute) should take precedence over a *Manual* provision.

c. Supplementary Materials

While regulations may or may not trump *Manual* provisions, they always should prevail over the supplementary materials in the *Manual.* The President, as noted above, did not promulgate the "discussion" or "analyses" accompanying the *Manual*, and the courts properly have characterized them as merely precatory.[168] Accordingly, this supplementary material must fall to regulations that do have the force of law.

E. The President Lacked Authority to Promulgate the *Manual* Provision

The APA allows courts to strike down federal regulations promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[169] Outside of the military context, litigants frequently invoke this provision to challenge administrative law. They argue that Congress never delegated authority to an agency to make the rules or regulations, and therefore seek to have them invalidated.[170] Although the

168. *See supra* Part IV.A.

169. 5 U.S.C.A. § 706(2)(C) (West 1998).

170. *See, e.g.*, MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 233 (1994) (holding that the FCC did not have authority to promulgate a regulation eliminating a rate filing requirement).

APA does not apply to executive orders, litigants often challenge *Manual* provisions on essentially the same grounds.[171]

1. Leading Cases

An early example of the argument that the President lacked authority to promulgate a *Manual* provision appears in *United States ex. rel. Flannery v. Commanding General, Second Service Command*.[172] In that case, the President declared in a pre-UCMJ version of the *Manual* that discharges obtained by fraud could be canceled.[173] A federal district court invalidated the provision on the grounds that the President lacked authority to promulgate it.[174] The Articles of War, according to the court, "authorize[d] the President not to declare substantive law but only to prescribe rules of procedure."[175]

The military courts more recently have invalidated a variety of *Manual* provisions on grounds that the President exceeded his authority under the UCMJ. Many of the cases have involved idiosyncratic issues.[176] Two principles of general application, however, have emerged with respect to the President's authority.

First, the cases have indicated that the President does not have power to redefine the elements of punitive articles and thus change substantive criminal law.[177] For example, in *United States v. Johnson*, the accused was charged with conspiracy in violation of Article 81.[178] In reviewing the case, the Navy-Marine Corps Court of Military Review decided that it did not have to follow Part IV, paragraph 5c(1), which stated a rule for conspir-

171. *See* Fidell, *supra* note 25, at 6050-54 (discussing what falls within the scope of article 36).

172. 69 F. Supp. 661 (S.D.N.Y. 1946).

173. *See id.* at 663.

174. *See id.*

175. *Id.*

176. *See, e.g.*, United States v. Simpson, 27 C.M.R. 303, 305 (1959) (invalidating MCM 1951, *supra* note 7, ¶ 126e which called for automatic reduction in grade following conviction of certain offenses); United States v. Rapolla, 34 M.J. 1268 (A.F.C.M.R. 1992) (invalidating MCM, *supra* note 7, pt. IV, ¶ 46c(1)(b), which stated that larceny by wrongful withholding may arise "whether the person withholding the property acquired it lawfully or unlawfully" on grounds that the president lacked authority to define substantive crimes); United States v. Douglas, 1 M.J. 354 (C.M.A. 1976) (invalidating MCM 1969, *supra* note 7, ¶ 145b, which relaxed the rules on admission of non-verbatim transcripts on grounds that it exceeded the authority granted in article 36).

ators who join on-going conspiracies.[179] The court explained that "[w]hether an accused may be held criminally liable for the overt act alleged is a substantive issue. Therefore, we are not bound to follow the statement set forth in paragraph 5(c) . . . ."[180]

Second, the courts have held that the President cannot use his power to specify offenses under Article 134 (the general punitive article),[181] to reach conduct covered by the more specific articles. For example, in *United States v. McCormick*, the accused assaulted a twelve-year-old boy.[182] The United States charged him with violation of Article 134, instead of Article 128, which prohibits assaults. The court ruled that the Article 134 charge was improper, stating: "Congress has acted fully with

177. *See* United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (ignoring the definition of "distribute" in MCM, *supra* note 7, ¶ 37c(3), and stating that the "meaning and effect of this additional phrase need not be determined because in areas of substantive criminal law, the President has no authority to prescribe binding rules"); United States v. Everett, 41 M.J. 847, 852 (A.F.C.M.R. 1994) (stating that the President does not have authority to establish substantive rules of criminal law, but may establish a sentencing hierarchy); United States v. Sullivan, 36 M.J. 574, 577 & n.3 (A.C.M.R. 1992), *overruled by* United States v. Turner, 42 M.J. 689 (Army Ct. Crim. App. 1995) (invalidating the last sentence of MCM, *supra* note, pt. IV, ¶ 54c(4)(a)(ii), which states that a dangerous weapon does not include an unloaded pistol on grounds that President's authority is limited to matters of procedure and evidence and "does not include the power to exclude form the definition of 'dangerous weapon' those unloaded pistols used as firearms"). *See also* United States v. Jones, 19 C.M.R. 961, 968 n.12 (A.C.M.R. 1955) (expressing doubt that the President as commander in chief has authority to prescribe "substantive rules"); United States v. Perry, 22 M.J. 669, 670 n.2 (A.C.M.R. 1986) (expressing doubt that the President as commander in chief has authority to prescribe "substantive rules" in connection with MCM 1969, *supra* note 7, ¶ 199a's discussion of the elements of the crime of rape).

178. 25 M.J. 878, 884 (N.M.C.M.R. 1988).

179. *See id.*

180. *See id.*

181. *See* 10 U.S.C.A. § 934 (West 1998).

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id.

182. United States v. McCormick, 30 C.M.R. 26 (1960).

respect to this offense by passage of . . . Article 128. Hence, the statute is pre-emptive of the general article."[183]

Despite these contrary cases, most claims that the President lacked authority to pass *Manual* provisions fail. The principal reason for the lack of success is that the UCMJ grants the President broad authority. Article 36, as noted above, authorizes the President to create procedural and evidentiary rules.[184] Articles 18 and 56 further authorize the President to set the limits on punishments for violating the punitive articles of the UCMJ.[185] Nearly everything in the *Manual* falls within one of these categories.[186]

A good example of this principle appears in *Loving v. United States*.[187] In that case, the accused challenged the procedures by which he

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183. *Id.*

184. *See* 10 U.S.C.A. § 836(a).

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

See generally United States v. Smith, 32 C.M.R. 105, 114 (1962) (discussing the history of Article 36 and its predecessors under the Articles of War).

185. *See* 10 U.S.C.A. § 818 ("[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."); *id.* § 856(a) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.").

186. *See, e.g.*, United States v. Newcomb, 5 M.J. 4, 7 (C.M.A. 1978) (Cook, J., concurring) ("When Congress defines military crimes and provides for their prosecution by courts-martial, but does not particularize all procedures necessary to achieve its purpose, the President, or his subordinates in the military departments, must formulate rules"); United States v. Lucas, 1 C.M.R. 19, 21 (1951) (upholding MCM 1951, *supra* note 7, ¶ 73(b), which required the law officer to give the charge where a guilty plea has been entered, even though the Code does not impose such a requirement); United States v. Morlan, 24 C.M.R. 390, 394 (A.B.R. 1957) (upholding 1951 MCM, *supra* note 7, ¶ 126d which precluded warrant officers from receiving bad conduct discharges, as not in excess of the President's powers under Article 56).

187. 517 U.S. 748 (1996).

received the death penalty.[188] He argued in part that the President lacked statutory authority to promulgate a rule specifying the aggravating circumstances justifying capital punishment.[189] The Supreme Court rejected this argument, finding authority for the rule in Articles 18, 36, and 56.[190]

Challenges to the President's authority also fail because, even in the absence of statutory authority, the President may have inherent power as Commander-in-Chief to issue orders that affect courts-martial. In *Swaim v. United States*, a former Judge Advocate General of the Army sued the United States for his pay after a court-martial suspended him.[191] He argued, among other things, that the President had convened the court-martial without statutory authority.[192] The Court, however, held that "it is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial" even though the Articles of War did not grant such power.[193]

The Court in *Swaim* did not indicate what limits, if any, exist on the President's power to act with respect to courts-martial absent statutory authority. This issue remains unresolved. In *Reid v. Covert*, a plurality of the Supreme Court subsequently stated: "[I]t has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of the military courts in time of peace, or in time of war."[194]

A more recent recognition of the President's inherent authority appears in *United States v. Ezell*.[195] Paragraph 152 of the 1969 *Manual* gave commanding officers authority to issue search warrants.[196] The

188. *See id.* at 769-771.

189. *See id.*

190. *Id.* at 770. Two years later in *United States v. Scheffer*, Justice Stevens asserted in dissent that the President lacked power to under Article 36 to promulgate Military Rule of Evidence 707 banning admission of polygraph evidence. *See* United States v. Scheffer, 118 S. Ct. 1261, 1271 (1998) (Stevens, J., dissenting).

191. Swaim v. United States, 165 U.S. 553, 499 (1897). The court-martial convicted Brigadier General Swaim of conduct unbecoming an officer and a gentlemen in connection with a questionable business transaction. *See* Major General Thomas H. Green, *History of The Judge Advocate General's Department*, ARMY LAW., June 1975, at 13, 17.

192. *Swaim*, 165 U.S. at 555-56. The Articles of War allowed the President to convene a court-martial in situations in which the ordinary convening authority was disqualified because he was the accuser or prosecutor. *See id.* In *Swaim*, the ordinary convening authority–General Sheridan–could have convened the court-martial. *See id.* at 556.

193. *See id.* at 558.

defendant argued that no provision of the UCMJ authorized this paragraph, because it dealt with neither court-martial procedures nor evidence.[197] The Court of Military Appeals stated:

> While there may be doubt that paragraph 152 of the *Manual for Courts-Martial* represents a proper exercise of the President's Article 36 powers, we shall consider the lawfulness of paragraph 152 as an exercise of the powers conferred upon the President by Article II of the Constitution of the United States as Commander-in-Chief of the Armed Forces.[198]

The court, therefore, upheld the rule as properly promulgated.[199] Other cases have expressed similar views about the President's inherent power.[200]

2. Analysis and Comment

The military courts have properly recognized that the President has broad power to pass procedural and sentencing rules. Articles 18, 36, and 56, by their express terms, confer this authority. Nearly everything in the present version of the *Manual* falls within these categories: Part II includes the Military Rules of Evidence, Part III contains the Rules for

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194. Reid v. Covert, 354 U.S. 1, 38 (1957). The Court saw difficulties with allowing the President to make substantive rules. The Court said:

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Id. at 38-39. For further discussion of the President's powers as Commander-in-Chief, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also* Loving v. United States, 517 U.S. 748, 767 (1996) (holding that Congress does not have exclusive power to create rules for the military justice system).

195. 6 M.J. 307 (C.M.A. 1979).

196. *See* MCM 1969, *supra* note 7, ¶ 152.

197. *See Ezell*, 6 M.J. at 316.

198. *Id.* at 317-18.

199. *See id.* Congress subsequently amended Article 36 to cover "[p]retrial" procedures expressly. *See* 10 U.S.C.A. § 836 (West 1998).

200. *See, e.g.*, United States v. Woods, 21 M.J. 856, 871 (A.C.M.R. 1986) (assuming that the President has inherent authority to abate sentences).

Courts-Martial, Part IV specifies the sentences for the punitive articles, and Part V describes non-judicial punishment. For this reason, it should come as little surprise if courts can reject most claims that the President lacked authority to promulgate a *Manual* provision. Although these articles may not allow the President to make substantive criminal law or redefine the elements of crimes, he rarely has attempted to do that.

The scope of the President's power to create rules without UCMJ authority remains contested. Most scholars believe that the President, as Commander-in-Chief, has very broad power to make rules governing military justice. Professor Frederick B. Wiener, for example, has asserted that the President did not need UCMJ authority to promulgate the *Manual*. He has stated:

> [Articles 36 and 56] do not involve any delegation by Congress; to the contrary, they constitute recognition that the President is Commander-in-Chief of the armed forces through direct and explicit constitutional grant. . . . [T]he President would have power to prescribe much of what is now in the manual even without the present express authorizations in the code . . . .[201]

Professors Edward S. Corwin, William F. Fratcher, and Clinton Rossiter have expressed the same view.[202]

Not everyone agrees, however, that the President has authority to pass rules beyond what the UCMJ authorizes. Professor Ziegel W. Neff, for

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201. Wiener, *supra* note 25, at 361.

202. *See* EDWARD S. CORWIN, THE PRESIDENT, OFFICE AND POWERS 316 (3d ed. 1948) ("Also, in the absence of conflicting legislation [the President] has powers of his own" to promulgate rules and regulations for the internal government of the land and naval forces."); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 109 (1951) (stating that *Swain* stands for the proposition that "the exercise of discretion by the President as the fountainhead of military justice is not to be questioned in courts of the United States"); Fratcher, *supra* note 25, at 862-63.

> [U]nless restricted by express statute, the President has power, under the Constitution alone, without statutory authorization, to issue regulations defining offenses within the armed forces, prescribing the punishments for them, constituting tribunals to try for such offenses, and fixing the mode of procedure and methods of review of the proceedings of such tribunals.

Id.

example, has written a thoughtful essay expressing the contrary view.[203] He asserts that the Framers of the Constitution never intended for the President to have plenary power over military justice,[204] that Presidents have not exercised such power,[205] and that such power runs contrary to the intent of Congress in enacting the UCMJ.[206]

Were it not for the Supreme Court's decision in *Swaim*, Professor Neff's argument might "carry the day." The Constitution grants Congress the power to regulate the land and naval forces.[207] Congress exercised this power in the UCMJ. By specifying in Articles 18, 36, and 56 the kinds of military justice rules that the President can promulgate, ordinary statutory analysis would suggest that Congress preempted any inherent presidential power to issue other rules. The *Swaim* decision, however, rejected the idea of preemption, and held that the President had authority beyond that conferred by Congress. Accordingly, until the Supreme Court limits or overrules *Swaim*, the military courts must consider the possibility that the President has power to pass rules in excess of what the UCMJ expressly grants.

F. The *Manual* Provision is Arbitrary or Capricious

Litigants occasionally have challenged *Manual* provisions for being arbitrary or capricious. Their claims resemble those of litigants contesting federal regulations on the same grounds under the APA.[208] The cases considering this type of challenge fall into two categories. Some decisions suggest that the arbitrariness or capriciousness of a *Manual* provision does not matter. Others, however, indicate that the courts will not enforce arbitrary or capricious *Manual* provisions.

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203. *See* Ziegel W. Neff, *Presidential Power to Regulate Military Justice*, 30 JUDGE ADVOCATE J. 6 (1960).

204. *See id.* at 6-11.

205. *See id.* at 12.

206. *See id.* at 12-13.

207. *See* U.S. CONST. art. I, § 8, cl. 14.

208. *See* 5 U.S.C.A. § 706 (West 1998) (authorizing courts to set aside regulations that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

1. Leading Cases

The Court of Military Appeals upheld an admittedly arbitrary rule in *United States v. Lucas.*[209] In that case, although the accused had pleaded guilty to an offense stemming from an unexcused absence, he sought reversal of his conviction.[210] He argued that the law officer had not instructed the court-martial about the burden of proof as required by paragraph 73(b) of the 1951 *Manual*.[211] This instruction would have served little purpose given the accused's guilty plea. The Court of Military Appeals, however, reversed the conviction.[212] It explained: "While we may be unable to ascertain any virtue in the [*Manual*'s] requirement, we cannot ignore the plain language used."[213] Other decisions have shown a similar reluctance to review *Manual* provisions for arbitrariness or capriciousness.[214]

The Supreme Court, however, considered the substance of a *Manual* provision in *United States v. Scheffer.*[215] In that case, the accused asked the Supreme Court to strike down Military Rule of Evidence 707(a) on grounds that it arbitrarily banned polygraph evidence.[216] Citing non-military precedents, the Court declared that an evidence rule cannot arbitrarily "infringe[] upon a weighty interest of the accused."[217] Ultimately, however, the Court upheld the rule.[218] It explained that the government has a legitimate interest in excluding unreliable evidence and that "there is simply no consensus that polygraph evidence is reliable."[219] Other decisions

209. 1 C.M.R. 19, 22 (1951).

210. *See id.* at 21-22.

211. *See id.* at 22.

212. *See id.* at 25.

213. *Id.* at 22.

214. *See, e.g.*, United States v. Kunak, 17 C.M.R. 346, 355 (1954) (upholding the 1951 *Manual* provisions on insanity); United States v. Smith, 32 C.M.R. 105, 119-120 (1962) (upholding MCM 1951, *supra* note 7, ¶ 140a, which prohibited convictions based on uncorroborated confessions but resting the "decision on the ground that regulations within a properly delegated legislative authority have the force of law" rather than the wisdom of the rule); United States v. Timmerman, 28 M.J. 531, 535 (A.F.C.M.R. 1987) (upholding R.C.M. 1102(d), which limited proceedings in revisions, even though the court said that the rule produced a result that was "most unfortunate, and a situation we are not sure was intended, or for that matter even considered when the present *Manual* was being drafted.").

215. 118 S. Ct. 1261 (1998).

216. *See* at 1265.

217. *See id.*

218. *See id.* at 1264.

219. *Id.*

similarly have reviewed *Manual* provisions for arbitrariness or capriciousness.[220]

2. Analysis and Comment

The general principles for judicial review of the *Manual*, which were discussed in Part III above, provide conflicting guidance on the issue whether military courts should invalidate arbitrary or capricious *Manual* provisions. On one hand, the idea that administrative law rules found in the APA and elsewhere should guide the military court support this type of review. On the other hand, the principle of deference to the President suggests that the military courts should hesitate to second-guess the wisdom or merit of *Manual* provisions.[221]

The following rule might reconcile these competing ideas and eliminate the apparent inconsistencies in the cases described above: Military courts may review *Manual* provisions for arbitrariness or capriciousness, but only if they prejudice "a weighty interest" of the accused. This rule affords deference to the President, except where the deference might run afoul of the Fifth Amendment's requirement of Due Process. Although the rule may not square with all military justice precedents, it does accord with the leading cases described above. In *Lucas*, the Court refused to second-guess a *Manual* provision that imposed a burden only on the government. In *Scheffer*, by contrast, the Court reviewed the substance of a rule that prejudiced the accused.

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220. *See, e.g.*, United States v. Ettleson, 13 M.J. 348, 360 (C.M.A. 1982) (holding that the table of maximum punishment in MCM 1969, *supra* note 7, was not "arbitrary and capricious" in characterizing cocaine as a "habit-forming narcotic drug"); United States v. Prescott, 6 C.M.R. 122, 124-25 (1952) (upholding MCM 1951, *supra* note 7, ¶ 127, which required increased sentences for prior offenders, as not being "an unreasonable or arbitrary exercise of executive power" because the provision was "not new or foreign to the customs and traditions of the several military departments"); United States v. Firth, 37 C.M.R. 596, 600 (A.B.R. 1966) (upholding MCM 1951, *supra* note 7, ¶ 126k, which limited confinement at hard labor to three months, on grounds that it "is not arbitrary or capricious, but is based on reasonable considerations and is in keeping with established precedent and the administrative needs of the Armed Forces").

221. *See supra* Part II.B.

G. The *Manual* Provision Interprets an Ambiguous Portion of the UCMJ and a Better Interpretation is Possible

Like other complex statutes, the UCMJ contains some ambiguities. The *Manual* interprets many of these ambiguities, but litigants often ask the military courts to ignore the *Manual* interpretations. They argue that, whenever the UCMJ contains an ambiguity, the court has the power to adopt its own interpretation.

1. Leading Cases

The leading cases reveal three trends. First, the courts generally have not deferred to the *Manual*'s interpretation of the punitive articles other than Article 134.[222] Second, they have deferred to the *Manual*'s interpretation of Article 134.[223] Third, they have not deferred to the President's views about the meaning of the non-punitive articles in UCMJ.[224] The following discussion describes these categories of cases.

a. Punitive Articles Other than Article 134

When interpreting ambiguous portions of the punitive articles of the UCMJ, the courts have concluded that they do not have an absolute duty to follow the *Manual*. For example, in *United States v. Mance*,[225] a court-martial convicted the accused of wrongful use of marijuana in violation of Article 112a based on urinalysis results.[226] On appeal, the accused argued that the government had not shown that he had the requisite knowledge to sustain the conviction.[227] This argument presented difficulty because Article 112a did not make clear the state of knowledge required of the accused.[228]

In Part IV of the *Manual*, the President had interpreted Article 112a's requirement of wrongfulness to imply that lack of knowledge of the true nature of a substance constituted an affirmative defense.[229] The Court of Military Appeals, however, stated in *Mance* that it did not have to follow

222. *See* 10 U.S.C.A. §§ 877-933 (West 1998).
223. *See id.* § 934.
224. *See id.* §§ 801-870, 935-36.
225. 26 M.J. 244 (C.M.A.).
226. *See id.* at 246.
227. *See id.* at 248-51.
228. *See id.* at 249.
229. *See* MCM, *supra* note 7, pt. IV, ¶¶ 37(c)(2) & (5).

the interpretation of the Manual. The court explained: "Of course, while the views of . . . the President in promulgating [the *Manual*] are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses–at least, those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code."[230]

Although courts have concluded that they do not have a duty to follow the President's interpretation of ambiguous portions of the punitive articles, they do not automatically reject them. Sometimes courts accept the President's interpretations,[231] and sometimes they do not.[232] The outcome simply depends on whether the courts think that the President has adopted the best reading of the ambiguous language. Only in a few cases have the courts expressed conscious deference to the *Manual*'s interpretation of the punitive articles other than Article 134.[233]

b. Article 134

Courts have treated the *Manual*'s interpretation of Article 134 differently. Article 134 authorizes courts-martial to try any person subject to their jurisdiction for "all disorders and neglects to the prejudice of the good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."[234] The President has included in Part IV of the *Manual* a non-exclusive list of fifty-three different specifications of disorders and conduct that he believes would fall within the open-ended language of Article 134.[235]

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230. *Mance*, 26 M.J. at 252.

231. *See, e.g.*, United States v. Turner, 42 M.J. 689, 690 (Army Ct. Crim. App. 1995) (following MCM, *supra* note 7, pt. IV, ¶ 54c(4)(a)(ii)'s interpretation of when an unloaded pistol is a "dangerous weapon" for the purposes of Article 128).

232. *See, e.g.*, United States v. Jenkins, 22 C.M.R. 51, 52 (1956) (refusing to follow MCM 1951, *supra* note 7, ¶ 162, which interpreted "enlistment" to include induction, as an unreasonable interpretation of article 83); United States v. Rushlow, 10 C.M.R. 139, 142 (1953) (refusing to follow MCM 1951, *supra* note 7, ¶ 164a, which said that a contingent purpose to return may be considered as intent to remain away permanently for the purpose of Article 85).

233. *See, e.g.*, United States v. Margelony, 33 C.M.R. 267, 269-70 (1963) (stating that the *Manual*'s interpretation of article 123a is entitled to great weight).

234. 10 U.S.C.A. § 934 (West 1998).

235. *See* MCM, *supra* note 7, pt. IV, ¶ 61-113.

These include everything from fraternization[236] and gambling[237] to involuntary manslaughter[238] and kidnapping.[239]

The courts generally have deferred to the President's specifications when reviewing Article 134 cases. For example, in *United States v. Caver*,[240] a court-martial convicted the accused of violating the *Manual*'s specification of "indecent language" under Article 134 when he called a soldier a derogatory name.[241] The accused challenged the specification and argued that his words did not violate Article 134.[242] Rejecting this argument, the Navy-Marine Corps Court of Criminal Appeals stated:

> Great deference is accorded the determinations of Congress and the President relating to the rights of servicemembers. . . . Accordingly, we are of the view that as long as language uttered by a servicemember is "indecent," as defined by the President in the *Manual for Court-Martial*, and is "to the prejudice of good order and discipline in the armed forces" or "of a nature to bring discredit upon the armed forces," as proscribed by Congress in Article 134, it may be the basis for disciplinary action under the Code . . . .[243]

Other cases interpreting Article 134 have shown similar deference to the President's specifications,[244] although at least one decision has not.[245]

c. Other UCMJ Articles

Courts have shown less deference to the President's interpretation of the non-punitive articles of the UCMJ. For example, in *United States v. Ware*, the Court of Military Appeals rejected the President's interpretation

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236. *See id.* ¶ 83.
237. *See id.* ¶ 84.
238. *See id.* ¶ 85.
239. *See id.* ¶ 92.
240. 41 M.J. 556 (N.M. Ct. Crim. App.. 1994).
241. *See* MCM, *supra* note 7, pt. IV, ¶ 89.
242. *See Caver*, 41 M.J. at 561 n.4.
243. *Id.*
244. *See, e.g.*, United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986) (following specification of fraternization under Article 134), *aff'd* 24 M.J. 347 (C.M.A. 1987) (summary disposition); United States v. Love, 15 C.M.R. 260, 262 (1954) (following MCM 1951, *supra* note 7, ¶ 209, which defined the term "structure" to include a "tent" for the purposes of the unlawful entry specification in Article 134).
245. *See* United States v. Asfeld, 30 M.J. 917, 927 (A.C.M.R. 1990) (refusing to defer to the *Manual* specification of obstructing justice).

of Article 62.[246] Article 62 says that the convening authority may send a ruling back to the court-martial for reconsideration.[247] The 1969 *Manual* interpreted Article 62 to imply that the military judge, upon reconsideration, had to "accede" to the convening authority's views.[248] The court rejected this interpretation, concluding that "reconsider" does not mean "accede."[249] Other cases also have rejected the *Manual*'s interpretation of non-punitive UCMJ articles.[250]

2. Analysis and Comment

The general principle that the military courts should defer to the President supports the cases that have followed the *Manual*'s interpretation of Article 134.[251] Article 134 contains such broad language that its enforcement inevitably raises policy questions. The courts have respected the separation of powers by not undertaking to answer these questions themselves. Instead, they have deferred to the President who, as Commander-in-Chief, has expertise in the area of military justice. Congress presumably intended this approach; the open-ended language of Article 134 exhibits a need for narrowing by the President.[252]

Despite the general principle of deference, some arguments may support the position that the courts do not have to follow the President's interpretation of the punitive articles other than Article 134. The federal courts generally do not defer to the Department of Justice when it advances interpretations of the United States Criminal Code.[253] Moreover, an inference that Congress intended the military courts to defer seems less likely in the

246. United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

247. *See* 10 U.S.C.A. § 862 (West 1998).

248. *See* MCM 1969, *supra* note 7, ¶ 67f.

249. *See* 1 M.J. at 285.

250. *See, e.g.*, Ellis v. Jacob, 26 M.J. 90, 93 (C.M.A. 1988) (invalidating Military Rule of Evidence 916(k)(1) as an improper interpretation of article 50(a)); United States v. Kossman, 38 M.J. 258, 260-61 & n.3 (C.M.A. 1993) (refusing to defer to the President's interpretation of Article 10 in R.C.M. 707).

251. *See supra* Part III.B.

252. *See* Parker v. Levy, 417 U.S. 733, 754 (1974) (upholding Article 134 against a vagueness challenge).

253. *See* Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 703 n.18 (1995) (discussing the application of *Chevron* in criminal cases); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469, 489 (1996) (noting that federal courts do not apply the *Chevron* rule in cases under Title 18 of the U.S.C., but presenting arguments against this position).

case of the punitive articles other than Article 134.[254] The UCMJ defines the offenses covered by those articles much more specifically. Congress thus appears to have had less of an intent to delegate.

With respect to *Manual* interpretations of non-punitive articles of the UCMJ, the lack of deference comes as somewhat of a surprise. These articles establish the workings of the military justice system. To the extent that they contain ambiguities, the Commander-in-Chief should have the authority to settle their meaning because he has responsibility for administering the military justice system. Moreover, while the military courts do not defer to the *Manual* when interpreting these provisions, they do accord "great weight" to executive interpretations found in other sources.[255] The military courts, accordingly, should rethink their position on this issue, and consider according greater deference to the *Manual*.[256]

H. The President Promulgated the *Manual* Provisions Pursuant to an Improper Delegation

Two administrative law doctrines limit Congress's ability to delegate lawmaking authority. The "non-delegation" doctrine states that Congress may not assign its legislative powers.[257] The "intelligible principle" doctrine says that, when Congress provides the executive branch with discretion in fulfilling statutory commands, it must state an intelligible principle

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254. *See supra* Part III.B.2.

255. *See, e.g.*, United States v. Margelony, 33 C.M.R. 267, 269-70 (1965) (interpreting Article 123a); United States v. Robinson, 20 C.M.R. 63 (1955) (interpretating 10 U.S.C. § 608, which prohibits officers from using enlisted members as servants).

256. *But see* Fidell, *supra* note 25, at 6055 (arguing against deference to the President on matters of trial procedures on grounds that military courts "would certainly be closer to these questions than would a civilian Chief Executive who may or may not be an attorney, and who, even if legally trained, may be much further from trial experience than the judges of the reviewing court").

257. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power"); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7-17 (1982) (discussing the history of the non-delegation doctrine).

to guide exercise of the discretion.[258] Litigants in military cases have challenged *Manual* provisions under both doctrines.

1. Leading Cases

Two years ago, the Supreme Court decided the leading military case concerning whether these doctrine apply to the *Manual*. In *Loving v. United States*, a court-martial convicted the accused, Dwight J. Loving, of murder in violation of Article 118.[259] Article 118 authorizes the death penalty for murder,[260] but does not limit the class of offenders eligible for capital punishment as the Supreme Court has required since *Furman v. Georgia*.[261]

The President, accordingly, promulgated Rule for Court-Martial 1004(c), which provides that a court-martial may sentence an accused to death for murder only if it finds the existence of one or more "aggravating factors" listed in the Rule.[262] In *Loving*, the court-martial found three of the aggravating factors listed in Rule 1004(c), and decreed that Loving should receive capital punishment.[263] Loving challenged his sentence, arguing among other things that the President's creation of the list of aggravating factors in Rule 1004(c) violated both the non-delegation doctrine and the intelligible principle doctrine.[264]

a. Non-Delegation Doctrine

Loving asserted that Congress could not authorize the President to establish the list of aggravating factors in Rule 1004(c) for two reasons. First, Loving contended that Article I, section 8, clause 14 of the Constitution gives Congress exclusive power to "make [r]ules for the [g]overnment

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258. Touby v. United States, 500 U.S. 160, 165-166 (1991) (describing intelligible principle cases); Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 669-71 (explaining the non-delegation doctrine).

259. Loving v. United States, 517 U.S. 748, 751 (1996).

260. 10 U.S.C.A. § 918 (West 1998) ("Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being . . . shall suffer death or imprisonment for life as a court-martial may direct.").

261. 408 U.S. 238 (1972).

262. MCM, *supra* note 7, R.C.M. 1004(c).

263. *See Loving*, 517 U.S. at 751.

264. *See id.* at 759-69 (non-delegation); *id.* at 771-73 (intelligible principle).

and [r]egulation of the land and naval forces."[265] The Supreme Court, however, rejected this position based on an extensive examination of the history of courts-martial in this country and England.[266] It concluded that "[u]nder Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority."[267] The President thus may formulate rules to govern military subjects not covered by statute.

Second, Loving argued that only Congress has the power to define criminal punishments.[268] The Supreme Court rejected this position based on precedent. The Court said: "We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'"[269] The Court accordingly concluded that Congress could leave implementation of the capital murder provisions in the UCMJ to the President.[270]

b. Intelligible Principle Doctrine

The Supreme Court has held that, when Congress grants the President or an executive agency discretion, it must "lay down . . . an intelligible principle to which the person . . . authorized to [act] is directed to conform."[271] Loving argued that Congress failed to satisfy this requirement when it directed the President to create Rules for Courts-Martial in the UCMJ.[272] Article 36, he contended, directed the president to make evidentiary and procedural rules, but did not specifically tell the President what principles should guide his discretion.[273]

The Supreme Court also rejected this argument in *Loving*.[274] It concluded that the intelligible principle doctrine required Congress to provide less guidance when it delegated authority to a person who already had con-

265. *See id.* at 759.
266. *See id.* at 760-68.
267. *Id.* at 767.
268. *See id.* at 768-69.
269. *Id.* at 768 (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911)).
270. *See id.* at 769.
271. J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
272. *See Loving*, 517 U.S. at 772.
273. *See id.*
274. *See id.*

siderable expertise and experience in the area, as the Commander-in-Chief has over the armed forces.[275] The Court explained: "We think . . . that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority."[276] In this case, the Court noted that Congress had authorized the death penalty, and that the President's role as Commander-in-Chief already made him responsible for superintending courts-martial.[277]

2. Analysis and Comment

In *Loving v. United States*, the Supreme Court performed a valuable service in clarifying the applicability of non-delegation doctrine and intelligible principle doctrine to resolve the issue of the constitutionality of RCM 1004(c). Before *Loving*, the Court of Military Appeals and the Court of Appeals for the Armed Forces repeatedly had faced questions about the constitutionality of Rule 1004(c).[278] Resolving Loving's arguments had great importance to the military justice system.

Although *Loving* technically concerned only Rule 1004(c), its reasoning will have a greater impact. The Court's ruling that Article I, section 8, clause 14 does not give Congress the exclusive power to make substantive rules concerning punishment for offenses will preclude nearly all challenges to *Manual* provisions under the delegation doctrine. The same conclusion holds true for claims under the intelligible principle doctrine. Articles 18, 36, and 56 all delegate authority to the President to pass rules, but none of them details the content of the Rules. *Loving* makes clear that this silence does not matter because of the President's unique relationship to the military.

Loving also provides guidance to the military courts as they attempt to develop general principles for reviewing *Manual* provisions. In *Loving*, the Supreme Court started with the assumption that ordinary administrative law doctrines–like the non-delegation doctrine and the intelligible principle doctrine–applied to the UCMJ and the *Manual*. The Court, how-

275. *See id.*
276. *Id.*
277. *See id.*
278. *See* United States v. Curtis, 32 M.J. 252, 260-67 (C.M.A.), *cert. denied* 502 U.S. 952 (1991); United States v. Loving, 41 M.J. 213, 291 (1994), *aff'd* 517 U.S. 748 (1996).

ever, considered and gave great weight to the role of the President in conducting the special business of the armed forces. Absent other guidance, the military courts should rely on these principles in handling other challenges to the *Manual*.[279]

I. The *Manual* Provision Violates the Accused's Constitutional Rights

Service members, like civilians, have constitutional rights. In some instances, the accused in courts-martial have argued that *Manual* provisions infringe these rights. The military courts have entertained these claims, but rarely have struck down any of the rules of evidence and procedure that the President has promulgated.

1. Leading Cases

In *United States v. Jacoby*, the Court of Military Appeals proclaimed that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to the members of our armed forces."[280] The military courts, accordingly, have entertained challenges to *Manual* provisions under the First, Fourth, Fifth, Sixth, and Eighth Amendments. They also have considered claims that applying new *Manual* provisions would violate the ex post facto clause.

a. First Amendment

The First Amendment protects the freedom of speech and religion and other rights.[281] In *Goldman v. Weinberger*, the Supreme Court held that, although service members enjoy the protections of the First Amendment, "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regula-

279. *See supra* Part III.A. & B.

280. United States v. Jacoby, 29 C.M.R. 244, 246-47 (1960). *See also* United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992); FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE §§ 1-52.00, 26 (1991) (noting that scholars disagree about the application of the Bill of Rights to the military). The Supreme Court has not determined the entire extent to which the Bill of Rights applies to the armed forces.

281. *See* U.S. CONST. amend. 1 ("Congress shall make now law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petitition the Government for redress of greivances.").

tions designed for civilian society."[282] Accordingly, the military courts have rejected most First Amendment challenges to *Manual* provisions.[283]

b. Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures and imposes limitations on the issuance of warrants.[284] The Court of Military Appeals has held that the oath requirement in the Fourth Amendment does not apply to the military,[285] but otherwise has said that "the Fourth Amendment applies with equal force within the military as it does in the civilian community."[286] Litigants rarely challenge *Manual* provisions under the Fourth Amendment because the Military Rules of Evidence implement most of the Amendment's protections.[287] The military courts, nevertheless, have considered some challenges to *Manual* provisions.[288]

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282. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

283. *See, e.g.*, United States v. Caver, 41 M.J. 556, 561 n.4 (N.M. Ct. Crim. App. 1994) (upholding MCM, *supra* note 7, pt. IV, ¶ 89, which specifies indecent language as a violation of article 134); United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986), *aff'd* 24 M.J. 347 (C.M.A. 1987) (summary disposition) (upholding MCM, *supra* note 7, pt. IV, ¶ 83, which specifies fraternization as a violation of Article 134).

284. *See* U.S. CONST. amend. 4.

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

Id.

285. *See* United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981).

286. United States v. Ezell, 6 M.J. 307, 315 (C.M.A. 1979). *But see* Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110, 123 (1994) (questioning whether the military courts actually have applied the Fourth Amendment).

287. *See* MCM, *supra* note 7, MIL. R. EVID. 311-317; United States v. Hester, 47 M.J. 461, 463, *cert. denied* 119 S. Ct. 125 (1998) (noting that these rules implement the Fourth Amendment).

288. *See, e.g.*, United States v. Moore, 45 M.J. 652 (A.F. Ct. Crim. App. 1997) (holding Military Rule of Evidence 313(b) satisfies the Fourth Amendment).

c. Fifth Amendment

The Fifth Amendment contains four clauses.[289] The first clause requires indictment by a grand jury, but contains an express exception for the military. In view of this exception, no cases have held that *Manual* provisions violate the indictment requirement.

The second clause of the Fifth Amendment prohibits double jeopardy. The Supreme Court has held that this provision applies to courts-martial.[290] In addition, Article 44 also prohibits trying the accused twice for the same crime.[291] The Court of Military Appeals rejected at least one challenge to a *Manual* provision on double jeopardy grounds.[292]

The third clause of the Fifth Amendment establishes the privilege against compelled self-incrimination. The Court of Military Appeals held that this provision applies to the military.[293] Article 31, however, offers even broader protection against self-incrimination.[294] Consequently, most litigants rely on Article 31 rather than the Fifth Amendment when contest-

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289. *See* U.S. CONST. amend. 5.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

290. *See* Wade v Hunter, 336 US 684, 688-89 (1949). *See also* United States v. Richardson, 44 C.M.R. 108, 111 (1971) (confirming that the Fifth Amendment applies to the military).

291. *See* 10 U.S.C.A. § 844(a) (West 1998) ("No person may, without his consent, be tried a second time for the same offense.").

292. United States v. Burroughs, 12 M.J. 380, 382 n.2 (C.M.A. 1982) (holding that MCM 1969, supra note 7, ¶ 71a does not violate double jeopardy).

293. *See* United States v. Kemp, 32 C.M.R. 89, 97 (1962) ("[P]ersons in the military service [have] the full protection against self-incrimination afforded by the Fifth Amendment to the Constitution of the United States.").

294. *See* 10 U.S.C.A. § 831(a) ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").

ing rules in the *Manual*.[295] A few cases nonetheless have considered whether *Manual* provisions violate the privilege.[296]

The third clause of the Fifth Amendment prohibits depriving any person of life or liberty without due process of the law. The Supreme Court recently reviewed a due process challenge to a *Manual* provision in *United States v. Scheffer*.[297] The military courts have considered numerous due process challenges, but usually have upheld the *Manual*.[298]

The fourth clause of the Fifth Amendment–the takings clause–requires the government to pay just compensation when it takes private property for public use. The Court of Military Appeals suggested that this

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295. *See, e.g.*, United States v. Musguire, 25 C.M.R. 329, 330 (1958) ("Article 31 is wider in scope than the Fifth Amendment.").

296. *See, e.g.*, United States v. Eggers, 11 C.M.R. 191, 194 (1953) (invalidating MCM 1951, *supra* note 7, ¶ 150(b), which permitted the court to compel handwriting samples, as violative of the Article 31(a) and the Fifth Amendment); United States v. Greer, 13 C.M.R. 132, 134 (1953) (same). The military courts in recent years have adopted a less strict view of Article 31. *See, e.g.*, United States v. Harden, 18 M.J. 81, 82 (C.M.A. 1984) (holding that Article 31 does not apply to handwriting exemplars).

297. *See* 118 S. Ct. 1261, 1264 & n.3 (1998).

298. *See, e.g.*, United States v. Perez, 45 M.J. 323, 324 (1996) (upholding R.C.M. 305 as sufficiently protecting service members against unconstitutional deprivations of liberty); United States v. Teeter, 16 M.J. 68 (C.M.A. 1983) (upholding MCM 1969, *supra* note 7, ¶ 75c(3), which addressed extenuating evidence, against a due process challenge); Font v. Seaman, 43 C.M.R. 227, 230-31 (1971) (upholding MCM 1969, *supra* note 7, ¶ 20b, concerning restraint); United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986) (upholding MCM 1969, *supra* note 7, ¶ 213g(5) against a claim that it improperly shifted the burden of proof); United States v. Wright, 48 M.J. 896, 899-901 (A.F. Ct. Crim. App. 1998) (upholding Military Rule of Evidence 413, which permits introduction of evidence of past sexual misconduct, against due process and equal protection challenges); United States v. Salvador, No. ACM 30715, 1995 WL 329444, *4 (A.F. Ct. Crim. App. May 24, 1995) (upholding R.C.M. 1113(d)(3) against a claim that it impermissibly allows additional confinement for failure to pay a fine due to indigency); United States v. Bassano, 23 M.J. 661, 663 (A.F.C.M.R. 1986) (upholding MCM, *supra* note 7, pt. IV, ¶ 37 against a claim that it impermissibly shifted the burden of proof in controlled substance prosecutions); United States v. McIver, 4 M.J. 900, 902 (N.M.C.M.R. 1978) (upholding MCM 1969, *supra* note 7, ¶ 152, which concerned suppression of evidence, against a due process challenge); United States v. Bielecki, 44 C.M.R. 774, 777 (N.M.C.M.R. 1971) (upholding MCM 1969, *supra* note 7, ¶ 67f, which allowed the convening authority to review the trial); United States v. Coleman, 41 C.M.R. 832, 835 (N.M.C.M.R. 1970) (upholding MCM 1969, *supra* note 7, ¶ 75d, which authorized introduction of an accused's record of prior nonjudicial punishment for the purpose of sentence aggravation).

clause protects service members.[299] The military courts, however, have not considered any claims that *Manual* provisions violate the clause.

d. Sixth Amendment

The Sixth Amendment protects a variety of different rights applicable to criminal trials.[300] The Amendment's initial clause contains four very specific guarantees. First, the initial clause provides a right to a speedy trial. The Court of Military Appeals decided that service members enjoy this right.[301] In addition, the accused also enjoys speedy trial protections under Articles 10 and 33 and Rule for Courts-Martial 707.[302] Because these articles and this rule provide greater protection than the Sixth

299. United State v. Paige, 7 M.J. 480, 484 & n.8 (C.M.A. 1979) (citing Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953)).

300. *See* U.S. CONST. amend. 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

301. *See* United States v. Mason, 45 C.M.R. 163, 167 (1972) ("The Sixth Amendment affords an accused the right to a speedy trial."). MCM, *supra* note 7, R.C.M. 707(d) expressly recognizes this "constitutional right to a speedy trial." Interesting, as recently as 1967, the government argued that the speedy trial guarantee of the Sixth Amendment did not apply to the military. *See* United States v. Lamphere, 37 C.M.R. 200, 202 (C.M.A. 1967) (noting government's argument that "the speedy trial clause of the Sixth Amendment to the Constitution of the United States does not apply in trials by court-martial; only the "spirit" of this constitutional provision extends to the military by way of [UCMJ articles 10 and 33]").

302. *See* 10 U.S.C.A. § 810 (West 1998) ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."); *id.* § 833 ("When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction."); MCM, *supra* note 7, R.C.M. 707 ("The accused shall be brought to trial within 120 days . . . .").

Amendment, litigants generally have not claimed that *Manual* provisions violate the constitutional speedy trial guarantee.[303]

Second, the initial clause of the Sixth Amendment requires a public trial. The Court of Military Appeals held that this right extends to service members.[304] (The accused also has a right to a public trial under Rule 806.[305]) In addition, the Court of Appeals for the Armed Forces has ruled that the Sixth Amendment entitles the accused to a public Article 32 investigative hearing.[306] Litigants have not claimed that *Manual* provisions violate these rights.

Third, the initial clause of the Sixth Amendment provides a right to a jury trial. The military courts, however, have held that this protection does not extend to courts-martial.[307] Accordingly, litigants have not challenged *Manual* provisions on this ground.

Fourth, the initial clause of the Sixth Amendment guarantees the right to trial in the place where the crime occurred. The military courts have not held that this guarantee applies to courts-martial.[308] Accordingly, no mil-

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303. *See* United States v. King, 30 M.J. 59, 62 & n.5 (C.M.A. 1990).

304. *See* United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985) ("Without question, the sixth-amendment right to a public trial is applicable to courts-martial."); United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977) ("The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States."). The Court of Military Appeals at one time took the contrary position. *See* United States v. Brown, 22 C.M.R. 41, 47 (C.M.A. 1956) (citing that older authorities indicating that the Sixth Amendment right to a public trial did not apply), *overruled in part by* United States v. Grunden, 2 M.J. 116, 120 n.3 (C.M.A. 1977).

305. *See* MCM, *supra* note 7, R.C.M. 806(a) ("Except as otherwise provided in this rule, courts-martial shall be open to the public.").

306. *See* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) ("Today we make it clear that, absent 'cause shown that outweighs the value of openness,' the military accused is likewise entitled to a public Article 32 investigative hearing." (citations omitted)).

307. *See* United States v. Guilford, 8 M.J. 598, 601 (A.C.M.R. 1979) ("The right to a trial by jury as contemplated in the Sixth Amendment does not apply to military trials of members of the armed forces in active service."); United States v. Ezell, 6 M.J. 307, 327 n.4 (C.M.A.1979) (Fletcher, C. J., concurring).

308. *See* United States v. Culp, 33 C.M.R. 411, 418 (1963) (opinion of Kilday, J) ("I know of no contention, or decision, that trial by court-martial shall be in "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," as is clearly required by the Amendment . . . .").

itary courts have invalidated *Manual* provisions for violating this provision.

The second clause of the Sixth Amendment requires the accused to "be informed of the nature and causes of the accusation."[309] The Court of Appeals for the Armed Forces has applied this provision to the service members.[310] The military courts, however, have upheld *Manual* provisions against claims that they violate this constitutional requirement.[311]

The third clause of the sixth amendment–the "confrontation clause"–guarantees the accused the right to confront witnesses. The Court of Appeals for the Armed Forces has held that this protection applies to service members in courts-martial.[312] Although the Confrontation Clause may limit introducing hearsay, the military courts have rejected challenges to the hearsay exceptions in the *Manual*.[313]

The fourth clause of the Sixth Amendment establishes the right to compulsory process for obtaining evidence. The Court of Appeals for the Armed Forces has held that service members enjoy this right in courts-martial.[314] The Military Rules of Evidence and Rules for Courts-Martial attempt to satisfy this rule. The military courts, nevertheless, have had to

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309. U.S. CONST. amend. 6. *See also* 10 U.S.C.A. § 810 (West 1998) (requiring similar notification).

310. *See* United States v. Brown, 45 M.J. 389, 395 (1996).

311. *See, e.g.*, United States v. Leslie, 2 C.M.R. 622, 624 (C.G.B.R. 1951) (upholding MCM 1951, *supra* note 7, ¶¶ 74b(2) and (3)).

312. *See* United States v. Sojfer, 47 M.J. 425, 428 (1998).

313. *See* United States v. Clark, 35 M.J. 98, 106 (C.M.A. 1992) (upholding Military Rule of Evidence 803(4)'s exception for statements made for the purpose of medical treatment); United States v. Cottrill, No. ACM 30951, 1995 WL 611299, *2 (A.F. Ct. Crim. App. Sept. 26, 1995) (same), *aff'd* 45 M.J. 485 (1997); United States v. Fling, 40 M.J. 847 (A.F.C.M.R. 1994) (upholding Military Rule of Evidence 803(2)'s exception for excited utterance); United States v. Reggio, 40 M.J. 694, 698 n.7 (N.M.C.M.R. 1994) (same); United States v. Gans, 32 M.J. 412, 417 (C.M.A. 1991) (upholding Military Rule of Evidence 803(5)'s exception for past recollection recorded of deceased witness).

For cases questioning or limiting evidence rules, *see* United States v. Groves, 23 M.J. 374 (C.M.A. 1987) (holding that Military Rule of Evidence 804(b)(4)'a exception for statements of personal or family history is limited by the confrontation clause); United States v. Cordero, 22 M.J. 216, 220 (C.M.A. 1986) (opinion of Everett, J.) (questioning whether Military Rule of Evidence 804(b)(5) imposes restrictions necessary to satisfies the confrontation clause).

314. United States v. Cabral, 47 M.J. 268, 271 (1997).

consider whether *Manual* provisions violate the constitutional guarantee.[315]

The fifth and final clause of the Sixth Amendment establishes a right to counsel. The courts have held that this right applies to general and special courts-martial, but not to summary courts-martial.[316] The accused has similar statutory protection under Article 27.[317] The military courts have considered whether particular *Manual* provisions violate the right to assistance of counsel, but usually under Article 27 rather than the Sixth Amendment.[318]

e. Eighth Amendment

The Eighth Amendment bans excessive bail requirements, excessive fines, and cruel and unusual punishment.[319] The UCMJ contains a similar provision; Article 55 provides that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter."[320] The military courts have never held that the excessive bail prohibition applies to courts-martial, and have not invalidated any *Manual* provision based upon it.[321] The Court of Appeals for the Armed Forces has considered whether sentences impose "excessive

315. *See* United States v. Scheffer, 118 S. Ct. 1261, 1265 (1998) (rejecting contention that Rule 707(a)'s ban on polygraph evidence violated the Sixth Amendment); United States v. Breeding, 44 M.J. 345, 354 (1996) (Sullivan, J., concurring) (asserting that R.C.M. 703 violates the rights of compulsory process).

316. *See* United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994); United States v. Scott, 24 M.J. 186 (C.M.A. 1987).

317. *See* 10 U.S.C.A. § 827(a)(1) (West 1998) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial.").

318. *See* United States v. Jones, 3 M.J. 677, 678 (C.G.C.M.R. 1977) (upholding MCM 1969, *supra* note 7, ¶ 6d which said that it "desirable" for the accused to have as many counsel as the government, but not required); United States v. McFadden, 42 C.M.R. 14, 16 (1970) (limiting MCM 1969, *supra* note 7, ¶ 47 so that it did not prohibit uncertified assist defense counsel).

319. *See* U.S. CONST. amend. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

320. 10 U.S.C.A. § 855. *See* United States v. Wappler, 9 C.M.R. 23, 26 (1953) (holding that § 855 provides greater protection than the Eighth Amendment).

321. *Cf.* Levy v. Resor, 37 C.M.R. 399, 409 (1967) (rejecting a claim that post-trial confinement could implicate the excessive bail prohibition).

fines" in violation of the Eighth Amendment.[322] The military courts, however, have not struck down any *Manual* provisions on this ground.

In *Loving v. United States*, the Supreme Court assumed, but did not hold, that the Eighth Amendment's prohibition on cruel and unusual punishment limited capital punishment under the UCMJ.[323] The Court, however, did not invalidate Rule for Court-Martial 1004(c), which specifies aggravating circumstances necessary for imposition of the death penalty.[324] Separately, the military courts have adopted a limiting construction for Rule 1003, which authorizes confinement to bread and water, so that it does not violate the Eighth Amendment.[325]

f. Ex Post Facto Clause

The Ex Post Facto clause[326] bars retroactively applying new criminal legislation.[327] The President from time to time has updated the *Manual* by adding new rules.[328] The military courts, accordingly, have had to consider whether retroactively applying new *Manual* provisions in some way may violate this protection.[329]

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322. United States v. Sumrall, 45 M.J. 207, 210 (1996). *See also* United States v. Lee, 43 M.J. 518, 521 (A.F. Ct. Crim. App. 1995).

323. *See* Loving v. United States, 517 U.S. 748, 755 (1996).

324. *See id.* at 755-76.

325. *See* United States v. Yatchak, 35 M.J. 379, 308 (C.M.A. 1992) (holding that R.C.M. 1003(b)(9) does not permit confinement to bread and water while attached to a ship undergoing a major overall in dock).

326. *See* U.S. CONST. art. I, § 8, cl. 4 ("No Bill of Attainder or ex post facto Law shall be passed.").

327. *See* United States v. Gorski, 47 M.J. 370, 374 (1997) (holding that application of article 58b to offenses preceding its enactment would violate the ex post facto principle). *See generally* DANIEL E. TROY, RETROACTIVE LEGISLATION 47 (1998).

328. *Cf.* United States v. Worley, 42 C.M.R. 46, 47 (1970) (holding that the President may change rules within his powers under Article 36 even if the new rules upset existing case law).

329. *See* United States v. Ramsey, 28 M.J. 370, 371 (CMA 1989) (rejecting an ex post facto challenge to the application of R.C.M. 707(c)); United States v. Hise, 42 C.M.R. 195, 197 (1970) (upholding an ex post facto challenge to the application of MCM 1969, *supra* note 7, ¶ 140a). *Cf.* United States v. Derrick, 42 C.M.R. 835, 838 (A.C.M.R. 1970) (explaining how application of new versions of the *Manual* may violate the prohibition on ex post facto laws).

2. Analysis and Comment

The foregoing cases show that the military courts review the constitutionality of *Manual* provisions, but rarely strike them down. This observation should come as little surprise. The President does not stand above the Constitution and cannot transgress its commands by executive order. At the same time, however, the President would have little desire to create unconstitutional *Manual* provisions. Promulgating rules for the military justice system that violate the basic rights of service members would create dissension and hinder the President in his role as Commander-in-Chief.

Litigants challenging *Manual* provisions, accordingly, should not rely on the Constitution alone. As noted above, in most instances, the UCMJ creates protections similar to those in the Bill of Rights. Sometimes these protections address the same subject, but extend further than the Constitution.[330] Thus, litigants may fare better arguing that *Manual* provisions conflict the UCMJ.[331]

Questions about the meaning of the various clauses of the Bill of Rights and the Ex Post Facto clause lie outside of the scope of this article. The military courts, however, admirably have looked to the Supreme Court and other federal courts for guidance. They have not attempted to create their own doctrines, but instead have sought to harmonize their conclusions with those of non-military tribunals.

V. Conclusion

Congress, the President, and the military courts all play roles with respect to the *Manual*. Congress authorized its creation. The President acted upon this authorization. Through his executive orders, he has established the Rules for Court-Martial, the Military Rules of Evidence, and the other portions of the *Manual.* The military courts then have had the duty not merely to apply the *Manual*'s rules, but also to review their legality.

The military courts have taken their responsibility to review the *Manual* seriously. Since adopting the UCMJ almost five decades ago, the courts have considered a variety of challenges, and have struck down many *Manual* provisions on numerous different grounds. Sufficient precedents

330. *See supra* Part IV.I.c.
331. *See supra* Part IV.B.

now have accumulated to permit a systematic examination of judicial review of the *Manual*.

This article has observed that challenges to *Manual* provisions tend to fall into nine categories. Litigants have argued that courts should not enforce *Manual* provisions on grounds that they are precatory, or that they are arbitrary and capricious, or that they do not adopt the best interpretation of the UCMJ. In addition, litigants have complained that *Manual* provisions conflict with federal statutes, service regulations, or other *Manual* provisions. They also have argued that the UCMJ provides no authority for the *Manual* provisions or that the Constitution does not permit Congress to delegate authority to the President. Finally, some service members have contended that *Manual* provisions violate their constitutional rights.

This article has described and analyzed each of these categories. In addition to making various minor criticisms, the article has advanced three recommendations:

First, in reviewing *Manual* provisions, courts should look to the APA and federal administrative law cases for guidance. Although these sources do not bind the courts, they often may provide persuasive guidance. Throughout this article, the author has identified comparable challenges that litigants have made when contesting federal regulations.

Second, although the military courts have both the authority and the duty to review the *Manual*, they should remember to show deference to the President. The President has responsibility for administering the military justice system under the UCMJ and by virtue of his status as Commander-in-Chief. The military courts, accordingly, must leave certain policy choices to the President, just as the federal courts defer to administrative agencies.

Third, the military courts should strive for consistency in their decisions. In the past, they may have had difficulty because no single source summarized the different types of challenges or identified the leading precedents. This article in large part has sought to remedy this deficiency by listing, describing, and analyzing the principal bases for challenging *Manual* provisions.

This article generally has supported the work of the military judges. On the whole, they carefully have considered the arguments of litigants, and have attempted to create proper rules for resolving challenges to the

Manual. No one could fault the judges of these courts for lacking independence when deciding whether the President has erred. On the contrary, they have not shied from this sensitive task. Any criticism presented seeks only to improve future decisions, and therefore the military justice system.

SUMMARY CONTEMPT POWER IN THE MILITARY: A PROPOSAL TO AMEND ARTICLE 48, UCMJ

COLONEL DAVID A. ANDERSON[1]

Get your checkbooks out. Right now! I'm not going to tolerate this thing any more.

Judge Lance Ito, moments before fining two lawyers $250.00 for arguing with each other in *The People of the State of California v. Orenthal James Simpson*.[2]

Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes.

Justice Jackson, speaking for the U.S. Supreme Court in *Sacher v. United States*[3]

I. Introduction

Accused of rape, the young Marine Corps corporal stood at attention as the President of his general court-martial began to read from the find-

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2. CHRISTOPHER A. DARDEN, IN CONTEMPT 391 (Harper Paperbacks 1997).

3. Sacher v. United States, 343 U.S. 1, 8 (1952).

ings worksheet: "Of the charge and specification thereunder, Guilty." Stunned and enraged, the corporal lifted the crimson *Manual for Courts-Martial*[4] (*Manual* or *MCM*) from his counsel's table and threw it with great force at the President. That day, the corporal's aim was as bad as his luck. The *Manual* impacted harmlessly against the members' box and came to rest on the floor of the courtroom.

Reality quickly returned to the corporal, and he sat down next to his counsel, gazing sorrowfully at the court members. He awaited the sentencing phase of his trial. What awaited the corporal, however, was his introduction to Article 48, Uniform Code of Military Justice (UCMJ),[5] the military's summary contempt power. This power, exercised without notice to the accused or the opportunity to be heard, is intended to quickly compel respect for the authority of the court. An expeditious disposition did not follow.

Once order was restored, the military judge permitted the sentencing phase of the court-martial to continue. Shortly thereafter, the court members announced a sentence that included confinement for twenty years, total forfeitures, reduction to E-1, and a dishonorable discharge. The court members were then excused from the courtroom, but the trial was not yet over.

Before adjourning the court-martial, the military judge informed the corporal that he was initiating a contempt proceeding against him. This contempt proceeding consisted of the military judge reciting for the record the facts of the corporal's earlier histrionic behavior and stating that he had directly witnessed the corporal's actions. He then asked the corporal and his counsel to rise and announced a second verdict: "I find you guilty of contempt and sentence you to be fined $100 and confined for three days." The corporal, with no *Manual* at hand, returned to his seat.

Incredibly, the contempt aspect of the trial was not over yet. Several days after the trial had ended, the military judge authenticated that portion of the record of trial involving the contempt proceedings. He forwarded the record to the convening authority, the commanding officer who had originally convened the general court-martial for rape. This officer had the power to approve or to disapprove the contempt sentence. After reviewing

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

5. 10 U.S.C. § 848 (1994). The Uniform Code of Military Justice comprises sections 801 to 946 of Title 10, United States Code.

the record, the convening authority approved the $100 fine, but disapproved the confinement. He gave no reason.

Two years later, based on a petition for extraordinary relief under the All Writs Act,[6] the U.S. Court of Appeals for the Armed Forces reviewed the corporal's contempt conviction and found it deficient on two grounds. First, the court concluded that in a trial by court members, the power of contempt under Article 48, UCMJ, was reserved to the court members. The military judge in this case had no authority to conduct the contempt proceeding. Second, the failure of the contempt proceeding to be conducted immediately after the contemptuous behavior occurred deprived the court of its authority to hold the corporal in summary contempt without a hearing. Accordingly, the finding of contempt and the sentence were reversed.

Although this story is fictional, it is a realistic application of Article 48, UCMJ, and its current procedures found in Rule for Courts-Martial (R.C.M.) 809[7]–a process that the U.S. Court of Appeals for the Armed Forces once called "an anachronism" and "obsolete."[8] While a recent amendment to the *Manual* attempted to resolve several of the procedural difficulties in applying Article 48, UCMJ,[9] the real problem lies with the statute itself, which needs extensive revision to become effective.

This article explores the shortcomings in Article 48, UCMJ, and its application, and proposes a comprehensive solution in the form of a revised statute. To arrive at this solution, the article examines the general history behind the summary contempt power and the nature of what contemptuous conduct may be punished summarily. Next, it provides an overview of state summary contempt statutes, it examines the history of Article 48, UCMJ, and its application, and it surveys the views of current military trial judges concerning their use of the summary contempt power. Finally, this article exposes the deficiencies in Article 48, UCMJ, and its application. Although acknowledging that an argument can be made for the repeal

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6. 28 U.S.C. § 1651(a) (1994).

7. MCM, *supra* note 4, R.C.M. 809.

8. United States v. Burnett, 27 M.J. 99, 107 (C.M.A. 1988). At the time of this decision, the U.S. Court of Appeals for the Armed Forces was called the U.S. Court of Military Appeals. The Court of Military Appeals was renamed the Court of Appeals for the Armed Forces on 5 October 1994. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2831 (1994).

9. *See* Exec. Order No. 13,086, 63 Fed. Reg. 30,065, 30,068, 30,088 (1998).

of the statute, this article argues instead for a complete revision and offers a proposed statutory change.

II. History of the Summary Contempt Power

In its origins in Anglo-Saxon jurisprudence, contempt encompassed any act disrespectful to the king, whether it was an insult or disobedience to a lawful order.[10] Although the contempt could occur directly to the king himself, most frequently it occurred against the courts.[11] Regarded as a crime, it "derived its criminality from the active interference with the crown or its acting official agents [the courts],"[12] and upon conviction, it was punished by imposing criminal sanctions.[13] One of the first cited cases of criminal contempt occurred in the seventeenth century and involved a criminal defendant who threw a brickbat at the presiding judge.[14] The judge immediately held the defendant in contempt and ordered his right hand cut off.[15]

The power to find contempt and impose punishment is rooted in the common law and long recognized by the United States Supreme Court.[16] Commentators, courts, and the American Bar Association (ABA) all agree that the general contempt power is inherent in the judiciary.[17] "The contempt power enables the courts to perform their functions without interfer-

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10. Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 161 (1908).

11. *Id.* at 162 ("But of course the commonest and most important of all contempts in the eye of the law is the contempt of court. Contempt of the court is contempt of the lord of the court.").

12. RONALD L. GOLDFARB, THE CONTEMPT POWER 50 (1963).

13. Gordon K. Wright et al., *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 167 (1955).

14. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.7 at 43, n.54 (2d ed. 1986) (citing Anonymous, 73 Eng. Rep. 416 (1631)).

15. *Id.*

16. *Ex parte* Terry, 128 U.S. 289 (1888); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.").

17. FELIX F. STUMPF, INHERENT POWERS OF THE COURTS 16-17 (1994); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power* (pt. 1), 65 WASH. L. REV. 477, 485-89 (1990); GOLDFARB, *supra* note 12, at 163; *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994); ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-4.1 (2d. ed. Supp. 1986) [hereinafter ABA STANDARDS].

ence, to control courtroom misbehavior and to enforce orders and compel obedience."[18] As early as 1873, the Supreme Court wrote:

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[19]

In general, contempt of court can be divided into two categories: criminal contempt and civil contempt.[20] Criminal contempt occurs when the primary purpose is to preserve the authority or dignity of the court or to punish for disobedience of its orders (that is, punitive in nature).[21] Where the primary purpose is to enforce the rights of private litigants or to coerce compliance with its orders (that is, remedial in nature), the contempt is civil.[22]

In determining the due process necessary to resolve criminal contempt, courts and commentators generally further divide contempt into direct contempt and indirect (or constructive) contempt.[23] Direct contempt occurs in the actual presence of the court while it is in session, and it is generally punishable summarily, without notice or the opportunity to be heard.[24] Examples of direct contempt include: (1) a defendant referring in open court to a judge's offer to continue the case as "protracted bullshit;"[25] (2) an attorney's "[c]ontinued argumentation in the face of a judge's contrary ruling;"[26] (3) a defendant's act of standing up, unzipping his pants, and urinating in court during the government's closing argument;[27] (4) a prospective juror's refusal to take a seat in the jury box after being ordered

18. STUMPF, *supra* note 17, at 16.

19. *Ex parte Robinson*, 86 U.S. at 510.

20. LAFAVE & SCOTT, *supra* note 14, at 43. *See also* GOLDFARB, *supra* note 12, at 46-67.

21. LAFAVE & SCOTT, *supra* note 14, at 43.

22. *Id.*

23. *See* Harris v. United States, 382 U.S. 162, 164-67 (1965); Mine Workers v. Bagwell, 512 U.S. at 821, 832-33 (1994); LAFAVE & SCOTT, *supra* note 14, at 45; GOLDFARB, *supra* note 12, at 67-77.

24. LAFAVE & SCOTT, *supra* note 14, at 45; *Ex parte* Terry, 128 U.S. 289, 313 (1888).

25. People v. Holmes, 967 P.2d 192, 193 (Colo. Ct. App. 1998).

26. Crumpacker v. Crumpacker, 516 F. Supp. 292, 298 (N.D. Ind. 1981).

27. United States v. Perry, 116 F.3d 952, 954-55 (1st Cir. 1997).

to do so by the judge;[28] (5) a defendant's act of striking the prosecutor during a sentencing hearing;[29] (6) an attorney's disobedience of a court's order regarding the permissible scope of cross-examination;[30] (7) a courtroom observer taking a photograph in court in direct defiance of a court order prohibiting such conduct;[31] and (8) a defendant directing "a contumelious single-finger gesture at the trial judge"[32] or telling a witness on the stand, "You're a god damn liar."[33]

Indirect contempt, on the other hand, occurs outside the presence of the court, and it is punishable only after notice and a hearing. The accused has the right to counsel, to present evidence, to examine witnesses, and if the offense is serious, to a jury trial.[34] Examples of indirect contempt include: (1) an attorney failing to appear in court at the time scheduled;[35] (2) an attorney advising a witness to disregard a judge's earlier instructions to remain available for later testimony;[36] (3) jurors violating a judge's sequestration order by leaving the jury quarters, visiting local taverns, and drinking and commingling with the public;[37] (4) an interested party

28. *In re* Jaye, 90 F.R.D. 351, 351-52 (E.D. Wis. 1981).

29. People v. Totten, 514 N.E.2d 959, 960 (Ill. 1987). *See also* United States v. Mirra, 220 F. Supp. 361, 361-62 (S.D.N.Y. 1963) (noting that the defendant was held in summary contempt for throwing a chair at the prosecutor); United States v. Rollerson, 449 F.2d 1000, 1001 (D.C. Cir. 1971) (noting that the defendant was held in summary contempt for throwing a water pitcher at the prosecutor).

30. *See* United States v. Lowery, 733 F.2d 441, 445 (7th Cir. 1984). *See also* United States v. Briscoe, 839 F. Supp. 36, 37-39 (D.D.C. 1992) (finding the attorney in summary contempt for repeatedly disobeying the court's "explicit and direct" orders and for ignoring the established rules of courtroom procedure); United States v. Afflerbach, 547 F.2d 522, 525 (10th Cir. 1976) (upholding the finding of summary contempt for the defendant who, contrary to the warnings of the judge, persisted in reading from the documents that he had unsuccessfully sought to have admitted into evidence).

31. State v. Clifford, 118 N.E.2d 853, 854-56 (Ohio Ct. App. 1954).

32. Mitchell v. State, 580 A.2d 196, 197 (Md. 1990).

33. Robinson v. State, 503 P.2d 582, 582-83 (Okla. Crim. App. 1972).

34. *See* LAFAVE & SCOTT, *supra* note 14, at 45; *Ex parte* Terry, 128 U.S. 289, 313 (1888). *See also Ex parte* Savin, 131 U.S. 267, 277 (1889); Cooke v. United States, 267 U.S. 517, 534-38 (1925); Bloom v. Illinois, 391 U.S. 194, 198-99 (1968).

35. *In re* Barnes, 691 N.E.2d 1225, 1227 (Ind. 1998); *In re* Purola, 596 N.E.2d 1140, 1142-44 (Ohio Ct. App. 1991); *In re* Chandler, 906 F.2d 248, 249-50 (6th Cir. 1990); United States v. Onu, 730 F.2d 253, 255-56 (5th Cir. 1984). The majority rule is that an attorney's unexcused absence is indirect contempt, but certain jurisdictions have found it to be direct contempt or a hybrid of both. *See In re* Yengo, 417 A.2d 533, 540-43 (N.J. 1980); State v. Jenkins, 950 P.2d 1338, 1346-48 (Kan. 1997); John E. Theuman, Annotation, *Attorney's Failure to Attend Court, or Tardiness, as Contempt*, 13 A.L.R. 4TH 122, §§ 9-13 (1982 & Supp. 1998).

36. United States v. Time, 21 F.3d 635, 637-38 (5th Cir. 1994). *See also* Securities and Exch. Comm'n v. Simpson, 885 F.2d 390, 392-98 (7th Cir. 1989).

attempting to influence the testimony of a potential witness[38] or the minds of potential jurors;[39] and (5) an attorney filing pleadings containing "irrelevant, untrue, and scurrilous allegations."[40]

The summary power to punish direct criminal contempt is unique in its lack of procedural due process. The court has the power to proceed as victim, prosecutor, judge, and jury, and upon its own knowledge of the facts, "punish the offender, without further proof, and without issue or trial in any form."[41] The Supreme Court has defined the word "summary" used in this context to mean "a procedure which dispenses with the formality, delay, and digression that would result from issuing process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial."[42] The court is "not bound to hear any explanation of his motives, if it was satisfied . . . that the ends of justice demanded immediate action and that no explanation could mitigate his offense, or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment."[43]

Despite this absence of due process, as early as 1888, the Supreme Court specifically upheld the summary contempt power in *Ex parte Terry.*[44] In that case, an attorney assaulted a U.S. marshal with a knife in open court in the presence of the judge, and the judge summarily found him in contempt and ordered him imprisoned for six months.[45] The Supreme Court found it well-settled that for direct contempt committed in the face of the court, the offender may, in the court's discretion, "be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred," and also without hearing the motives explained.[46]

The primary justification behind the summary contempt power is necessity. "Without it, judicial tribunals would be at the mercy of the dis-

37. People v. Rosenthal, 13 N.E.2d 814, 817-20 (Ill. App. Ct. 1938).

38. State *ex rel*. Huie v. Lewis, 80 So. 2d 685, 691-93 (Fla. 1955).

39. State v. Weinberg, 92 S.E.2d 842, 846 (S.C. 1956). *See also* United States v. Sinclair, 279 U.S. 749, 757-65 (1929) (upholding indirect contempt for the defendant for hiring private detectives to shadow the jurors).

40. *In re* Jafree, 741 F.2d 133, 135-36 (7th Cir. 1984).

41. *Ex parte* Terry, 128 U.S. 289, 309 (1888).

42. Sacher v. United States, 343 U.S. 1, 9 (1952).

43. *Ex parte Terry*, 128 U.S. at 309-10.

44. *Id*. at 297-314.

45. *Id*. at 298-300.

46. *Id*. at 309, 313.

orderly and violent."[47] It is viewed as a necessary way of preserving order in the courtroom.[48]

> The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstructions to it. It is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage.[49]

A secondary justification for the power is "as a means of eliminating the waste of administrative resources."[50] Because the judge has witnessed the contemptuous behavior, "a hearing is unnecessary and a waste of time and resources."[51] In 1925, the Supreme Court summarized the nature of the summary contempt power as follows:

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law.[52]

Of course, this "extraordinary" power is limited by the situations in which it may be employed. It may be exercised only for

> charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public.[53]

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47. *Id*. at 313.

48. *Id*. *See also* Cooke v. United States, 267 U.S. 517, 534 (1925).

49. Offutt v. United States, 348 U.S. 11, 14 (1954).

50. Ruth M. Braswell, Comment, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 177, 177-78 n.5, 182 (1982).

51. *Id*. at 178 n.5, 182.

52. *Cooke*, 267 U.S. at 534.

53. *In re* Oliver, 333 U.S. 257, 275 (1948) (quoting *Cooke*, 267 U.S. at 536).

In 1997, in *Pounders v. Watson*, the Supreme Court "confirm[ed] the power of courts to find summary contempt and impose punishment."[54] As long as summary contempt orders are confined to misconduct occurring in open court, where "the affront to the court's dignity is more widely observed," the Court ruled that "summary vindication" is permissible.[55] The Court specifically restated its long-standing holding that summary contempt is an "exception to normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses."[56]

The principles of the summary contempt power, originally established in *Ex parte Terry*, were codified by the U.S. Congress in 18 U.S.C. § 401 and Federal Rule of Criminal Procedure 42(a).[57] In 18 U.S.C. § 401, Congress authorizes U.S. courts the power to summarily punish for contempt by fine or imprisonment, at its discretion, the "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[58] Federal Rule of Criminal Procedure 42(a) then sets out the procedures for summarily disposing of contempt.[59] That rule provides that "[a] criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."[60] Furthermore, the rule requires that "[t]he order of contempt shall recite the facts and shall be signed by the judge and entered of record."[61] Any other criminal contempt must be prosecuted upon notice and an opportunity to be heard.[62] From this federal law and procedure has emerged three major issues: (1) delay of disposition, (2) authorized punishment, and (3) judicial recusal.

The Supreme Court first addressed the delay of disposition question in *Sacher v. United States*.[63] At issue was whether a trial judge was required to impose punishment immediately upon the commission of an alleged contemptuous act or whether the judge could wait until the end of trial to impose punishment without forfeiting his summary contempt

54. Pounders v. Watson, 117 S. Ct. 2359, 2361 (1997).

55. *Id*. at 2362.

56. *Id*.

57. Sacher v. United States, 343 U.S. 1, 7-8 (1952). Federal Rule of Criminal Procedure 42 was promulgated by the Supreme Court in 1944 and became effective 26 March 1946. *Id.* at 8.

58. 18 U.S.C. § 401(1) (1994).

59. FED. R. CRIM. P. 42(a).

60. *Id*.

61. *Id*.

62. *Id.* 42(b).

63. Sacher v. United States, 343 U.S. 1 (1952).

power.[64] In this case, the trial judge, who had witnessed the contemptuous behavior of counsel in court for several months, waited until the conclusion of the trial before he summarily imposed punishment on them for the contempt.[65] On appeal, counsel argued that because the trial was effectively over when the contempt was adjudicated, the trial could no longer be obstructed and summary action was unnecessary.[66] Consequently, they claimed that they could only be convicted or sentenced except after notice, time to prepare a defense, and a hearing.[67] The Court disagreed, finding that the power did not have to be exercised immediately after the event to retain its summary nature.[68] The Court justified its holding as follows:

> If the conduct of these lawyers warranted immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of trial if the circumstances permit such delay. The overriding consideration is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken in this case. To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. . . . It might also have the additional consequence of depriving defendant of his counsel unless execution of prison sentence were suspended or stayed as speedily as it had been imposed. . . . If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.[69]

The *Sacher v. United States* rule of permissible delay in summary contempt proceedings was modified, if not overruled, by the Supreme Court in *Taylor v. Hayes*.[70] In *Taylor v. Hayes*, the trial judge, like the trial judge in *Sacher v. United States*, observed the contemptuous behavior of an attorney during trial, but he waited until the end of the trial to summarily

64. *Id.* at 5-7.
65. *Id.*
66. *Id.* at 7.
67. *Id.*
68. *Id.* at 11.
69. *Id.* at 10-11.
70. Taylor v. Hayes, 418 U.S. 488 (1974).

punish him.[71] The Supreme Court overruled the punishment, finding that the trial judge could not proceed summarily after trial to punish for a contempt which occurred during trial without first giving the contemnor notice and an opportunity to be heard.[72]

The Court reasoned that "[t]he usual justification of necessity . . . is not nearly so cogent when final adjudication and sentence are postponed until after trial," and "where conviction and punishment are delayed, 'it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable (the court) to proceed with its business.'"[73] Because notice and an opportunity to be heard are basic elements of due process in American jurisprudence, the Court held that "before an attorney is finally adjudicated in [summary] contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf."[74] The Court explained that this new requirement did not necessitate a "full-scale trial," but merely the ability of a contemnor to "at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court."[75] Summary contempt thus became less summary when delayed until the end of trial.

The next issue with respect to summary contempt is the amount of punishment that a trial judge can adjudge. Under the federal contempt statute, 18 U.S.C. § 401, a person summarily punished for contempt can be sentenced to an undefined "fine or imprisonment."[76] The alternative language used in the statute has been interpreted by the Supreme Court to mean that a judge can impose either a fine or a term of imprisonment for contempt, but not both.[77] Although Congress has set no ceiling on the

71. *Id*. at 490.

72. *Id*. at 497-500. This holding did not explicitly overrule *Sacher v. United States*. The Court distinguished *Sacher v. United States*, contending that the contemnors in that case were given an opportunity to speak. The lower court decision, *United States v. Sacher*, 182 F.2d 416, 418-19 (2d Cir. 1950), indicates to the contrary–that the trial judge imposed sentence before hearing the contemnors.

73. *Taylor*, 418 U.S. at 497-98 (quoting Groppi v. Leslie, 404 U.S. 496, 502 (1972)).

74. *Id*. at 498-99.

75. *Id*. at 499.

76. 18 U.S.C. § 401 (1994).

77. *See In re* Bradley, 318 U.S. 50, 51 (1943); United States v. Versaglio, 85 F.3d 843, 945-47 (2d Cir.), *on reh'g modified*, 96 F.3d 637 (1996).

amount of fine or imprisonment that may be imposed for summary contempt,[78] as discussed below, federal case law has done so.

Criminal contempt is considered a petty offense unless the punishment makes it a serious one.[79] With respect to confinement, the dividing line between petty and serious offenses has been fixed at six months. Any offense with a sentence of more than six months is serious, with the right to a jury trial, and any offense with a sentence of six months or less is petty, without the right to a jury trial.[80] As such, criminal contempt may be tried without a jury if the confinement actually imposed does not exceed six months.[81]

For summary contempt, the Supreme Court has held that "where the necessity of circumstances warrants, a contemnor may be summarily tried for an act of contempt during trial and punished by a term of no more than six months."[82] The Court has also determined that

> the judge [does] not exhaust his power to convict and punish summarily whenever the punishment imposed for separate contemptuous acts during trial exceeds six months. . . . That the total punishment meted out during trial exceeds six months in jail or prison would not invalidate any of the convictions or sentences, for each contempt has been dealt with as a discrete and separate matter at a different point during the trial.[83]

If the judge waits until the end of trial to punish summarily a contemnor for separate acts, however, the aggregate confinement for all the acts cannot exceed six months.[84]

With respect to a fine, the Supreme Court "to date has not specified what magnitude of contempt fine may constitute a serious criminal sanction" that will trigger the right to a jury trial.[85] The Court has held that a

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78. *See* Douglas v. First Nat'l Realty Corp., 543 F.2d 894, 900 n.38 (D.C. Cir. 1976).

79. Cheff v. Schnackenberg, 384 U.S. 373, 378-80 (1966).

80. Frank v. United States, 395 U.S. 147, 149-50 (1969); Baldwin v. New York, 399 U.S. 66, 69 (1970).

81. *See* Bloom v. Illinois, 391 U.S. 194 (1968); Taylor v. Hayes, 418 U.S. 488 (1974); Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Muniz v. Hoffman, 422 U.S. 454 (1975); Mine Workers v. Bagwell, 512 U.S. 821 (1994).

82. *Codispoti*, 418 U.S. at 514.

83. *Id*. at 514-15.

84. *Id*. at 515-18.

fine of $52,000,000 imposed on a union was sufficient to trigger a jury trial,[86] but that a $10,000 fine was insufficient.[87] What fine for an individual will constitute a serious offense is unknown, but in the last Supreme Court case to consider contempt fines, the Court cited the federal definition of petty offenses as a reference authority.[88] Under current federal law, the maximum punishment allowed for a petty offense is confinement not to exceed six months or a fine not to exceed $5000.[89] The punishment for summary contempt is more than likely limited to that range.

The final issue in the area of summary contempt involves at what point a judge becomes too personally involved in a contempt matter to impose punishment. The Supreme Court has clearly stated that a judge does not lose the power to punish summarily merely because a contempt is personal to the judge:

> It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial, the court is so much the judge and the judge so much the court that the two terms are used interchangeably . . ., and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.[90]

With this principle in mind, the Court has held that "disruptive, recalcitrant and disagreeable" comments directed toward a judge, as long as they were not "an insulting attack upon the integrity of the judge carrying such potential for bias," do not mandate disqualification.[91] On the other hand, the Supreme Court has also unequivocally stated that when the issue between a judge and an offender involves "marked personal feelings that d[o] not make for an impartial and calm judicial consideration and conclu-

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85. *Mine Workers*, 512 U.S. at 837 n.5.

86. *Id*. at 837-38.

87. Muniz v. Hoffman, 422 U.S. 454, 477 (1975).

88. *Mine Workers*, 512 U.S. at 837 n.5.

89. A petty offense is defined to include a Class B misdemeanor. 18 U.S.C. § 19 (1994). The maximum confinement for a Class B misdemeanor is 6 months. *Id.* § 3559(a). The maximum fine for a Class B misdemeanor is $5000 for individuals. *Id.* § 3571(b).

90. Sacher v. United States, 343 U.S. 1, 12 (1952).

91. Ungar v. Sarafite, 376 U.S. 575, 584 (1964).

sion," then the judge should recuse himself.[92] Accordingly, if a judge is personally vilified and becomes personally entangled with the misconduct, the matter must be given a public trial before a different judge.[93]

Whether to self-recuse on a contempt matter is an issue to be decided by a judge on a case-by-case basis, without a bright-line rule.[94] Nonetheless, the Supreme Court has given judges the following guidance for making the decision:

> Th[e] rule of caution [in exercising the summary contempt power] is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency, but it is not always possible. Of course, where acts of contempt are palpably aggravated by a personal attack upon the judge, in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.[95]

In making the decision, the inquiry goes not to just actual bias, but to "whether there [is] 'such a likelihood of bias or an appearance of bias that the judge [is] unable to hold the balance between vindicating the interests of the court and the interests of the accused.'"[96]

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92. Cooke v. United States, 267 U.S. 517, 539 (1925).

93. *See* Offutt v. United States, 348 U.S. 11, 14 (1954); Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

94. *Offutt*, 348 U.S. at 15.

95. *Cooke*, 267 U.S. at 539.

96. Taylor v. Hayes, 418 U.S. 488, 501 (1974) (citing *Ungar*, 376 U.S. at 588).

III. What Constitutes Contemptuous Conduct?

In general, "contumacious conduct disruptive of judicial proceedings and damaging to the court's authority" constitutes contemptuous conduct for summary disposition.[97] This includes "disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge."[98] What it does not include, however, is "fearless, vigorous, and effective" advocacy.[99]

The most common direct criminal contempts include an attorney, litigant, juror, witness, or spectator who: (1) behaves in a disrespectful or boisterous manner in court,[100] (2) refuses to obey a lawful order of the court,[101] or (3) commits an assault or battery on someone in the courtroom.[102] While it is impossible to delineate every behavior that would constitute misconduct warranting a summary contempt order, a review of case law does provide certain limitations and standards.

In *United States v. Wilson*, the Supreme Court justified summary contempt where witnesses were granted immunity to testify but then refused to testify in court.[103] The Court held that the refusals to answer, although they were not delivered disrespectfully, clearly fell within the meaning of contemptuous conduct under Federal Rule of Criminal Procedure 42(a). "Rule 42(a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial."[104]

> The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify.[105]

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97. Pounders v. Watson, 117 S. Ct. 2359, 2363 (1997).
98. *Id*.
99. *Id*. (quoting Sacher v. United States, 343 U.S. 1, 13 (1952)).
100. *See Sacher*, 343 U.S. at 1.
101. *See* United States v. Wilson, 421 U.S. 309 (1975); *Pounders*, 117 S. Ct. at 2359.
102. *Ex parte* Terry, 128 U.S. 289 (1888).
103. *Wilson*, 421 U.S. at 309.
104. *Id*. at 314-15.
105. *Id*. at 316.

The Supreme Court discussed a variation on this theme in *Ex parte Hudgings*.[106] In this case, a witness testified that he could not remember seeing an event happen: "I would not say I have not, but I would not say that I have."[107] The trial judge, stating on the record that he believed the witness was testifying falsely, found him in contempt.[108] The Supreme Court reversed.[109] Obstruction was the key to its decision. "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest."[110]

Although the Court acknowledged that "the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt," it found no "inherent obstructive effect to false swearing."[111] The Court reasoned that if a judge had the power to summarily impose contempt on every witness thought to be testifying falsely, "it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."[112]

In *Pounders v. Watson*, the Supreme Court upheld a summary contempt finding on a lawyer who disobeyed a judge's instructions not to raise the issue of authorized punishments before the jury.[113] "The trial court's finding that [the lawyer's] comments had prejudiced the jury–together with its assessment of the flagrance of [the lawyer's] defiance–support the finding of the need for summary contempt to vindicate the court's authority."[114] In arriving at this conclusion, the Supreme Court held that nothing in its cases supported a requirement that a contemnor engage in a pattern of repeated violations before being held in summary contempt.[115] A single disobedience of a court's order, even if not delivered disrespectfully, would be sufficient to warrant summary punishment if the conduct were determined by the judge to have disrupted and frustrated an ongoing proceeding.[116] In addition, the Supreme Court specifically rejected requiring that

106. *Ex parte* Hudgings, 249 U.S. 378 (1919).
107. *Id*. at 381.
108. *Id*.
109. *Id*. at 384-85.
110. *Id*. at 383.
111. *Id*. at 382-84.
112. *Id*. at 384.
113. Pounders v. Watson, 117 S. Ct. 2359, 2363 (1997).
114. *Id*.
115. *Id*. at 2362.

the "court determine a contemnor would have repeated the misconduct but for summary punishment."[117]

In *Sacher v. United States*, the Supreme Court upheld the summary contempt convictions of several defense counsel where the misconduct consisted of breaches of decorum and disobedience of the trial judge's orders in the jury's presence.[118] "The nature of the deportment [numerous instances of contumacious speech and behavior] was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."[119] In addition, the "course of conduct long-continued in the face of warning that it was regarded by the court as contemptuous."[120]

The Court was quick, however, to defend the right of lawyers to passionately argue their cases without the fear of a contempt citation. In the Court's opinion, lawyers must be allowed to fully press their claims, "with due allowance for the heat of controversy," even if their claims appear "farfetched and untenable." [121] "But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge–his right is only respectfully to preserve his point for appeal."[122] The Court would "not equate contempt with courage or insults with independence."[123]

In *In re McConnell*, [124] the Supreme Court overturned a summary contempt conviction of an attorney who, after being told that he could not question witnesses on an inadmissible subject, argued with the judge that he had a right to ask the questions and proposed to continue to do so unless the bailiff stopped him. The bailiff never had to stop him because he did not ask any such questions again throughout the trial.[125] As in *Ex parte Hudgings* above, obstruction was the key to the Court's decision: "[B]efore the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice . . . ."[126] The Court held that

116. *Id*. at 2363.
117. *Id*.
118. Sacher v. United States, 343 U.S. 1, 5-14 (1952).
119. *Id*. at 5.
120. *Id*.
121. *Id*. at 9.
122. *Id*.
123. *Id*. at 14.
124. *In re* McConnell, 370 U.S. 230 (1962).
125. *Id*. at 235.
126. *Id*. at 234.

"[t]he arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."[127] The Court did not find obstruction.[128]

Finally, in *In re Little*, the Supreme Court overturned the summary contempt conviction of a criminal defendant, who, in defending himself at trial, stated in closing argument that the court was biased and had prejudged his case, and that he was a political prisoner.[129] The Court found that these statements did not constitute criminal contempt where there was no indication that they "were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and where the defendant was entitled to "much latitude in . . . vigorously espousing [his] cause."[130] In summarizing its holding, the Court provided this telling commentary on contempt and judges:

> Therefore, 'The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . . The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.' (citation omitted) 'Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.' (citation omitted).[131]

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127. *Id*. at 236.

128. *Id*.

129. *In re* Little, 404 U.S. 553 (1972).

130. *Id*. at 555.

131. *Id*. *See* Holt v. Virginia, 381 U.S. 131, 136 (1965) (holding that the allegations of judicial bias specified in a motion for a change of venue did not constitute contempt:

> "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations . . . of alleged bias on the [judge's] part.").

IV. State Summary Contempt Statutes

"While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the states must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted."[132] Consequently, each state permits a judge to exercise the summary contempt power, but applying that power in each state is different.[133] A wide divergence exists in state summary contempt statutes, particularly with respect to procedures, definitions, and sentences. A review of these statutes, however, reveals certain common trends that can serve as a generic model for improving the current military statute.[134]

Generally, the statutes define direct criminal contempt as disorderly, contemptuous, or insolent behavior or other misconduct committed in open court in the presence of the judge. The misconduct must interrupt, disturb, or interfere with the proceedings of the court, and all of the essential elements of the misconduct must occur in the presence of the court and

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132. Pounders v. Watson, 117 S. Ct. 2359, 2363 (1997).

133. *See infra* note 134 for additional State codes and case law. *See, e.g.*, ALA. CODE §§ 12-1-8, 12-1-9, 12-1-10, 12-1-11, 12-2-7, 12-3-11, 12-11-30, 12-12-6, 12-13-9, 12-14-31 (1998); ALA. R. CRIM. P. 33.1, 33.2, 33.5, 33.6, 70A; ALASKA STAT. §§ 09.50.010, 09.50.020, 12.80.010 (Michie 1998); ALASKA R. CIV. PROC. 90; Weaver v. Superior Court, 572 P.2d 425 (Alaska 1977); State v. Browder, 486 P.2d 925 (Alaska 1971); ARIZ. REV. STAT. ANN. § 12-864 (West 1998); ARIZ. R. CRIM. P. 33.1, 33.2, 33.4; ARK. CODE ANN. § 16-10-108 (Michie 1997); Burradell v. State, 931 S.W.2d 100 (Ark. 1996); CAL. CIV. PROC. CODE ANN. §§ 128, 177, 177.5, 178, 1209, 1211, 1218 (West 1998); McCann v. Municipal Court, 221 Cal. App. 3d 527, 270 Cal. Rptr. 640 (Cal. Ct. App. 1990); COLO. R. CIV. P. 107; CONN. GEN. STAT. ANN. § 51-33 (West 1998); CONN. SUPER. CT. R. §§ 1-14, 1-15, 1-16, 1-17, 1-20, 1-21; DEL. CODE ANN. tit. 11, §§ 1271, 1272, 4206 (1997); DEL. [SUPER. CT., C.P. CT., FAM. CT.] CRIM. R. 42; FLA. STAT. ANN. §§ 38.22, 38.23, 775.02 (West 1998); FLA. R. CRIM. P. 3.830; Butler v. State, 330 So.2d 244 (Fla. Dist. Ct. App. 1976); GA. CODE ANN. §§ 15-1-3, 15-1-4, 15-6-8 (1998); HAW. REV. STAT. ANN. §§ 706-640, 706-663, 710-1077, 801-1 (Michie 1998); IDAHO CODE §§ 7-601, 7-603, 18-113, 18-1801 (1997); IDAHO R. CRIM. P. 42; ILL. 6TH CIR. R. 8.1; People v. Collins, 373 N.E.2d 750 (Ill. App. Ct. 1978); People v. Minor, 667 N.E.2d 538 (Ill. App. Ct. 1996); County of McLean v. Kickapoo Creek, Inc., 282 N.E.2d 720 (Ill. 1972); IND. CODE ANN. §§ 34-47-1-1, 34-47-2-1, 34-47-2-2, 34-47-2-3, 34-47-2-4, 34-47-2-5 (West 1998); *In re* Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995); IOWA CODE ANN. §§ 665.2, 665.3, 665.4, 665.9, 665.10 (West 1998); KAN. STAT. ANN. §§ 20-1201, 20-1202, 20-1203, 20-1205 (1997); State v. Jenkins, 950 P.2d 1338 (Kan. 1997); State v. Shannon, 905 P.2d 649 (Kan. 1995); KY. REV. STAT. ANN. §§ 421.110, 431.060, 432.230, 432.270, 500.020 (Banks-Baldwin 1998); Gordon v. Commonwealth, 133 S.W. 206 (Ky. 1911); International Ass'n of Firefighters v. Lexington-Fayette Urban County Gov't, 555 S.W.2d 258 (Ky. 1977); Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996); LA. REV. STAT. ANN. § 13:4611 (West 1998); LA. CODE CRIM. PROC. ANN. art. 20, 21, 22, 22.1, 25 (West 1998); LA. CODE CIV. PROC. ANN. art. 221, 222, 222.1, 223, 227 (West 1998).

the court must actually observe them. Finally, immediate action is essential to preserve order in the court or to protect the authority and respect of the court.[135]

With respect to procedure, the statutes generally provide that a judge may summarily find in contempt any person who commits a direct criminal contempt in the actual presence of the court, immediately notifying the person of such finding.[136] The judge must then prepare and file a written

134. *See supra* note 133 for additional State codes and case law. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 1004, 1103, 2115-B (West 1998); ME. R. CRIM. P. 42; ME. R. CIV. P. 66; MD. CODE ANN., CTS. & JUD. PROC. § 1-202, 12-304 (1998); MD. R. ANN. 15-202, 15-203; *In re* Kinlein, 292 A.2d 749 (Md. App. 1972); MASS. R. CRIM. P. 43; MICH. COMP. LAWS ANN. §§ 600.1701, 600.1711, 600.1715 (West 1998); MINN. STAT. ANN. §§ 588.01, 588.03, 588.20, 609.02 (West 1998); State v. Tatum, 556 N.W.2d 541 (Minn. 1996); MISS. CODE ANN. § 9-1-17 (1998); MO. ANN. STAT. §§ 476.110, 476.120, 476.130 (West 1998); MO. R. CRIM. P. 36.01; MONT. CODE ANN. §§ 3-1-501, 3-1-511, 3-1-519, 3-1-523 (1997); NEB. REV. STAT. §§ 25-2121, 2122 (1997); NEV. REV. STAT. §§ 22.010, 22.030, 22.100 (1997); N.H. SUPER. CT. R. 95; N.J. STAT. ANN. § 2A:10-1, 2A:10-3, 2A:10-5, 2C:1-5 (West 1998); N.J. CT. R. 1:10-1, 2:10-4; *In re* Daniels, 570 A.2d 416 (N.J. 1990); N.M. STAT. ANN. § 34-1-2 (Michie 1998); N.M. DIST. CT. R. 5-112, 5-902; N.M. METRO. CT. R. CRIM. P. 7-111; N.M. METRO. CT. R. CIV. P. 3-110; N.Y. JUD. LAW §§ 750, 751, 752, 755 (Consol. 1998); N.Y. APP. DIV. 1ST DEP'T R. 604.2; N.Y. APP. DIV. 2D DEP'T R. 701.2; N.C. GEN. STAT. §§ 5A-11, 5A-12, 5A-13, 5A-14, 5A-16 (1997); N.D. CENT. CODE §§ 27-10-01.1, 27-10-01.2, 27-10-01.3 27-10-01.4 (1997); N.D. R. CRIM. P. 42; OHIO REV. CODE ANN. § 2705.01, 2705.02, 2901.03 (Anderson 1998); Scherer v. Scherer, 594 N.E.2d 150 (Ohio Ct. App. 1991); OKLA. STAT. tit. 21 §§ 565, 565.1, 566, 568 (1998); OKLA. DIST. CT. R. 20; OR. REV. STAT. §§ 33.015, 33.096, 33.105 (1997); 42 PA. CONS. STAT. §§ 4132, 4133, 4137, 4138, 4139 (1998); R.I. GEN. LAWS §§ 8-6-1, 8-8-5 (1997); R.I. [SUPER., DIST.] R. CRIM. P. 42; State v. Price, 672 A.2d 893 (R.I. 1996); S.C. CODE ANN. § 14-1-150, 14-1-160, 14-5-320 (Law Co-op 1998); State v. Weinberg, 92 S.E.2d 842 (S.C. 1956); State v. Buchanan, 304 S.E.2d 819 (S.C. 1983); S.D. CODIFIED LAWS §§ 16-15-2, 22-2-6, 22-6-2, 23A-38-1 (Michie 1998); TENN. CODE ANN. § 29-9-102 (1998); TENN. R. CRIM. P. 42; TEX. GOV'T CODE ANN. §§ 21.001, 21.002 (West 1998); *In re* Bell, 894 S.W.2d 119 (Tex. Spec. Ct. Rev. 1995); *Ex parte* Knable, 818 S.W.2d 811 (Tex. Crim. App. 1991); *Ex parte* Krupps, 712 S.W.2d 144 (Tex. Crim. App. 1986); UTAH CODE ANN. §§ 78-7-17, 78-7-18m 78-32-1, 78-32-3, 78-32-120 (1998); VT R. CRIM. P. 42; State v. Allen, 496 A.2d 168 (Vt. 1985); VA. CODE ANN. §§ 18.2-456, 18.2-457, 18.2-458, 18.2-459, 19.2-11 (Michie 1998); WASH. REV. CODE §§ 2.28.010, 2.28.020, 7.21.020, 7.21.020, 7.21.030m 7.21.050 (West 1998); W. VA. CODE § 61-5-26 (1998); W. VA. R. CRIM. P. 42; WIS. STAT. ANN. §§ 785.01, 785.02, 785.03, 785.04 (West 1998); WYO. R. CRIM. P. 42; Weiss v. State *ex rel*. Cardine, 455 P.2d 904 (Wyo. 1969); Skinner v. State, 838 P.2d 715 (Wyo. 1992).

135. *See, e.g.*, ALA. R. CRIM. P. 33.1.

136. *See, e.g.*, ARIZ. R. CRIM. P. 33.2.

order reciting the grounds for the finding, including a statement that the judge saw or heard the conduct constituting the contempt.[137]

Unlike the federal procedure, many state jurisdictions require that before the judge imposes punishment, he apprise the person of the specific conduct on which the contempt citation is based. The judge also gives that person the opportunity to make a brief oral statement in defense or in extenuation or mitigation, unless compelling circumstances demand otherwise.[138] In addition, several jurisdictions require that executing the punishment be stayed for a few days after the contempt citation is issued and during any appeal.[139] Several jurisdictions also specifically provide that if the judge's conduct is so integrated with the contempt such that he contributed to it or his objectivity could reasonably be questioned, then the matter must be referred to another judge, thereby precluding summary punishment.[140]

The greatest disparity among the state contempt statutes is in the maximum punishment allowed to be imposed.[141] All the jurisdictions allow a fine, imprisonment,[142] or both, but vary widely in amount.[143] Permissible fines range between fifty dollars[144] and any amount considered reasonable in view of the nature of the contempt,[145] but limited to that permitted by federal law for petty offenses ($5000).[146] The most common maximum fine is divided equally between $500 and that set by federal law, $5000.[147] Permissible imprisonment terms range from five days[148] to six months.[149]

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137. *See, e.g.*, IDAHO R. CRIM. P. 42.

138. *See* ALA. R. CRIM. P. 33.2; ARIZ. R. CRIM P. 33.2; COLO. R. CIV. P. 107; CONN. SUPER. CT. R. 1-16; FLA. R. CRIM P. 3.830; ILL. 6TH CIR. R. 8.1; IND. CODE ANN. § 34-47-2-4 (Michie 1998); KAN. STAT. ANN. § 20-1203 (1997); LA. CODE CRIM. P. Art. 22; ME. R. CRIM. P. 42; MD. R. ANN. 15-203; MASS. R. CRIM. P. 43; Malee v. District Court, 911 P.2d 831 (Mont. 1996); N.H. SUPER. CT. R. 95; N.J. CT. R. 1:10-1; N.Y. APP. DIV. 1ST DEP'T R. 604.2; N.Y. APP. DIV. 2D DEP'T R. 701.2604.2; N.C. GEN. STAT. 5A-14 (1997); OKLA. STAT. tit. 21 § 565.1 (1998); S.C. CODE ANN. § 14-1-150 (1998); WASH. REV. CODE ANN. § 7.21.050 (West 1998); WYO. R. CRIM. P. 42.

139. *See* N.J. CT. R. 1:10-1; 42 PA. CONS. STAT. § 4137 (1998).

140. *See* ARIZ. R. CRIM. P. 33.4; OKLA. DIST. CT. R. 20.

141. *Compare* OKLA. STAT. tit. 21 § 566 (1998) *with* S.D. CODIFIED LAWS § 23A-38-1 (1998).

142. Although by statute Alaska permits the imposition of a fine and imprisonment for summary contempt (ALASKA STAT. § 09.50.020 (1998)), the Alaskan Constitution has been interpreted to guarantee an accused the right to a jury trial if imprisonment is an option, thereby precluding imprisonment as a punishment for summary contempt. State v. Browder, 486 P.2d 925 (Alaska 1971).

143. *See supra* note 133, 134.

144. *See* ARK. CODE ANN. § 16-10-108 (1997); TENN. CODE ANN. § 29-9-103 (1998); VA. CODE ANN. § 18.2-457 (Michie 1998); W. VA. CODE § 61-5-26 (1997).

The most common maximum imprisonment term is rather equally split between thirty days and six months.[150]

V. The Military Summary Contempt Statute

In 1950, the military summary contempt statute was enacted as Article 48, UCMJ.[151] It has remained virtually unchanged for almost fifty years,[152] despite significant changes made to the UCMJ by the Military Justice Acts of 1968[153] and 1983.[154] Today's military contempt statute is

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145. *See, e.g.*, *In re* Steelman, 648 N.E.2d 366, 369 (Ind. Ct. App. 1995) (limiting the punishment by reasonableness); State v. Jenkins, 950 P.2d 1338, 1349 (Kan. 1997) (using the least possible power adequate to the end proposed); Scherer v. Scherer, 594 N.E.2d 150, 153 (Ohio Ct. App. 1991) (imposing a penalty reasonably commensurate with the gravity of offense).

146. *See, e.g.*, State v. Price, 672 A.2d 893, 896-898 (R.I. 1996) (giving the Rhode Island contempt statute the same interpretation as the federal contempt statute); State v. Allen, 496 A.2d 168, 173 (Vt. 1985).

147. *Compare* GA. CODE ANN. § 15-6-8 (1998); ILL. 6TH CIR. R. 8.1; LA. CODE CRIM. PROC. ANN. art. 25 (West 1998); MASS. R. CRIM. P. 43; MONT. CODE ANN. § 3-1-519 (1997); NEV. REV. STAT. § 22.010 (1997); N.C. GEN. STAT. § 5A-12 (1997); N.D. CENT. CODE § 27-10-01.4 (1997); OKLA. STAT. tit. 21 § 566 (1998); OR. REV. STAT. § 33.105 (1997); TEX. GOV'T CODE ANN. § 21.002 (West 1998), WASH. REV. CODE ANN. § 7.21.050 (West 1998), WIS. STAT. ANN. § 785.04 (West 1998) *with* states that have no statutory maximum (Colo., Ind., Kan., Ky., Mo., Neb., N.H., N.J., N.M., Ohio, R.I., S.C., Vt., Wyo.) and are limited to the punishment authorized by the federal law for petty offenses. *See supra* note 133, 134.

148. *See* CAL. CIV. PROC. CODE ANN. § 1218 (West 1998); MONT. CODE ANN. § 3-1-519 (1997).

149. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 1271, 4206 (1997); ILL. 6TH CIR. R. 8.1; LA. CODE CRIM. PROC. ANN. art. 25 (West 1998); OKLA. STAT. tit. 21 § 566 (1998); TEX. GOV'T CODE ANN. § 21.002 (West 1998); WYO. R. CRIM. P. 42.

150. *Compare* CONN. SUPER. CT. R. § 1-20; HAW. REV. STAT. ANN. § 706-640 (LEXIS 1998); ME. R. CRIM. P. 42; MICH. COMP. LAWS ANN. § 600.1715 (West 1998); MISS. CODE ANN. § 9-1-17 (1998); N.Y. JUD. LAW § 751 (Consol. 1998); N.C. GEN. STAT. § 5A-12 (1997); N.D. CENT. CODE § 27-10-01.4 (1997); OR. REV. STAT. § 33.105 (1997); 42 PA. CONS. STAT. § 4137 (1998); S.D. CODIFIED LAWS § 23A-38-1 (1998); UTAH CODE ANN. § 78-32-10 (1998); WASH. REV. CODE ANN. § 7.21.050 (West 1998); WIS. STAT. ANN. § 785.04 (West 1998) *with* ARIZ. R. CRIM. P. 33.4; DEL. CODE ANN. tit. 11, §§ 1271, 4206 (1997); Butler v. State, 330 So.2d 244 (Fla. Dist. Ct. App. 1976); IOWA CODE ANN. § 665.4 (West 1998); LA. CODE CRIM. PROC. ANN. art. 25 (West 1998); OKLA. STAT. tit. 21 § 566 (1998); County of McLean v. Kickapoo Creek, Inc., 282 N.E.2d 720 (Ill. 1972); State v. Shannon, 905 P.2d 649 (Kan. 1995); International Ass'n of Firefighters v. Lexington-Fayette Urban County Gov't; 555 S.W.2d 258 (Ky. 1977); State v. Buchanan, 304 S.E.2d 819 (S.C. 1983); TEX. GOV'T CODE ANN. § 21.002 (West 1998); WYO. R. CRIM. P. 42. *See supra* note 133, 134.

151. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107, 123.

152. *See* United States v. Burnett, 27 M.J. 99, 103-104 (C.M.A. 1988).

little different from the original statute that Congress enacted as Article 14 of the first American Articles of War on 20 September 1776.[155] Article 48, UCMJ, provides:

> A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.[156]

Unlike the statute itself, however, its implementing rules and regulations have significantly evolved since 1950, with major changes made in 1969,[157] 1984,[158] and 1998.[159] This evolution may be seen in a review of the contempt procedures set forth in the 1951 *MCM*,[160] the 1969 *MCM*,[161] the 1984 *MCM*,[162] and the 1998 *MCM*.[163]

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153. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

154. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. *Compare* 10 U.S.C. § 848 (1958) *with* current version at 10 U.S.C. § 848 (1994).

155. "No person whatever shall use menacing words, signs, or gestures, in the presence of a court-martial, then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial." GEORGE B. DAVIS, MILITARY LAW OF THE UNITED STATES 507-08 (1898); John A. McHardy, Jr., *Military Contempt Law and Procedure*, 55 MIL. L. REV. 131, 134, 137 (1972). *See* United States v. Gray, 14 M.J. 551, 552 (A.C.M.R. 1982).

156. 10 U.S.C. § 848 (1994). As originally enacted in 1950, the last sentence of the statute read: "The punishment shall not exceed confinement for 30 days or a fine of $100, or both." Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107, 123. In 1956, when Congress revised and codified the UCMJ into Title 10, U.S. Code, the last sentence was slightly modified to read: "The punishment may not exceed confinement for 30 days or a fine of $100, or both." Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 1, 53. The change was intended to be a stylistic, as opposed to a substantive, change. *See* H.R. Rep. to accompany H.R. 7049, 1956 U.S.C.C.A.N. 4613, 4620-22.

157. Exec. Order No. 11,476, 3 C.F.R. 802 (1966-1970).

158. Exec. Order No. 12,473, 3 C.F.R. 201 (1985).

159. Exec. Order No. 13,086, 63 Fed. Reg. 30,065, 30,068, 30,088 (1998).

160. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 118 (1951) [hereinafter 1951 MANUAL].

161. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 118 (1969 (Rev.)) [hereinafter 1969 (REV.) MANUAL].

162. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 809 (1984) [hereinafter 1984 MANUAL].

163. MCM, *supra* note 4, R.C.M. 809.

A. 1951 *MCM* Contempt Procedures

When the UCMJ was originally enacted in 1950, the word "court-martial" under Article 48, UCMJ, was a term of art that did not include a military judge.[164] Three types of courts-martial existed: general, special, and summary.[165] A general court-martial consisted of a law officer (legal advisor) and at least five court members. The senior member served as president. A special court-martial consisted of at least three court members, with the senior member serving as president. A summary court-martial consisted of one officer (essentially a one person judge and jury).[166]

When a court-martial punished for contempt, the court members would make the contempt finding and determine the sentence by a two-thirds vote.[167] The law officer for the general court-martial, a licensed attorney, served only to provide advice and instructions to the members, but did not have a vote on the contempt findings or sentence.[168] The one officer summary court-martial, with no required legal training, could nevertheless exercise the contempt power.[169] Thus, when the 1950 UCMJ gave "courts-martial" the power to "punish" for contempt, it gave the power to the court members and summary court-martial officer; a judge did not exist under the system.[170]

Under the 1951 *MCM* procedures, all three types of court-martial–general, special, and summary–had the power to punish for contempt.[171] Any person, civilian or military, with the exception of the law officer and members of the court, could be punished for direct contempt ("using men-

164. 10 U.S.C. § 816 (1958) (current version at 10 U.S.C. § 816 (1994)).

165. *See id. See also* 1951 MANUAL, *supra* note 160, ¶ 3.

166. *See* 10 U.S.C. § 816 (1958) (current version at 10 U.S.C. § 816 (1994)). *See also* 1951 MANUAL, *supra* note 160, ¶¶ 4b, 40a. A general court-martial has jurisdiction over every service member and offense under the UCMJ and can prescribe any punishment permitted by that Code and the President. 10 U.S.C. § 818. A special court-martial has similar jurisdiction, but its punishment authority is limited to six months confinement, a forfeiture of two-thirds pay per month for six months, and a bad conduct discharge. *Id.* § 819. A summary court-martial has jurisdiction only over enlisted service members, and its punishment authority is limited to 30 days confinement and forfeiture of two-thirds pay for one month. *Id.* § 820.

167. 1951 MANUAL, *supra* note 160, ¶ 118b.

168. *See id*. ¶¶ 4e, 39b, 118b. *See also* 10 U.S.C. § 826 (1958) (current version at 10 U.S.C. § 826 (1994)).

169. 1951 MANUAL, *supra* note 160, ¶ 118a.

170. *Id*. ¶¶ 3, 4, 118.

171. *Id*. ¶ 118a.

acing words, signs, or gestures in the presence of the court-martial or by disturbing its proceedings by any riot or disorder").[172] The regulations specifically excluded indirect or constructive contempt ("those not committed in the presence or immediate proximity of the court while it is in session") from punishment under Article 48, UCMJ.[173]

When the conduct of any person before a court-martial warranted a contempt proceeding, the court suspended the regular proceedings and advised the suspected offender of the alleged contemptuous conduct.[174] Although a prior warning was not a prerequisite to initiate a contempt proceeding, such a warning could be given if deemed advisable by the law officer of a general court-martial, the president of a special court, or a summary court officer.[175] Once the regular proceedings were suspended, however, the suspected offender was afforded an opportunity to show cause why the conduct should not be found to be contemptuous.[176] This included the right to introduce evidence and make argument.[177] Thereafter, each type of court-martial handled the issue of contempt and possible punishment in a slightly different manner.[178]

In the general court-martial, the law officer ruled preliminarily, subject to objection by any court member, as to whether the suspected offender should or should not be held in contempt.[179] In the special court-martial, the president of the court made this preliminary determination, again subject to objection by any court member.[180] The summary court-martial officer determined contempt, without a preliminary ruling, and if contempt were found, announced the punishment, if any.[181]

In the general and special courts-martial, if a preliminary ruling found that the suspected offender should not be held in contempt and no member objected to this ruling, then the matter was closed and the regular proceedings of the court-martial were resumed.[182] If any member objected to the

172. *Id*.

173. *Id.* Commentators have interpreted Article 48, UCMJ, as solely a direct contempt statute, with no power over indirect contempt. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 301-02 (2d Ed. 1920); McHardy, *supra* note 155, at 150-51. *See infra* Part VII.

174. 1951 MANUAL, *supra* note 160, ¶ 118b.

175. *Id*. ¶ 118a.

176. *Id*. ¶ 118b.

177. *Id*. app. 8b, at 522.

178. *Id*. ¶ 118b.

179. *Id*.

180. *Id*.

181. *Id*. ¶ 118b & app. 8b, at 522.

ruling, however, the court members entered into closed session, and the members decided by majority vote whether or not to sustain the ruling.[183]

If, as a result of this vote, a preliminary determination were made that the suspected offender be held in contempt, or if the same uncontested preliminary determination were made by the law officer or the president of a special court-martial, then the court entered into closed session to vote by secret written ballot on whether or not to convict.[184] In both the general and special courts-martial, a finding of guilty required concurrence of two-thirds of the members.[185] If the offender were convicted, the members remained in closed session to determine an appropriate punishment by secret written ballot, again by a two-thirds concurrence.[186] The court then reopened, and the president of the court announced the holding and the punishment adjudged, if any.[187]

Whether the members or the summary court-martial officer made the contempt ruling, the action was summary in nature.[188] No formal trial was required, and no appeal or review was authorized, with the exception of the automatic review by the convening authority, the officer who originally convened the court-martial.[189]

Before the regular trial continued, a record of the contempt proceeding had to be prepared.[190] The record either was inserted in the record of trial for later review by the convening authority in the regular course of events, or it was forwarded to the convening authority for immediate action.[191] In order for any punishment to be executed, the approval of the convening authority was required.[192] By operation of law, any period of confinement imposed by a court-martial began to run from the date that the sentence was adjudged. If confinement were included in the contempt sentence, the convening authority, upon notice of the results of the contempt

182. *Id*. ¶ 118b.

183. *Id*. A tie vote was a finding against the suspected offender. *Id.* app. 8b, at 522.

184. *Id*. ¶ 118b. In the general court-martial, prior to the court closing, the law officer would provide instructions to the members on the definition of contempt, voting procedures, and the maximum limits of punishment. *Id*. ¶ 39b.

185. *Id*. ¶ 118b.

186. *Id*.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*.

191. *Id*.

192. *Id*.

proceeding, had the authority to order the offender to undergo the confinement pending his formal review of the contempt record.[193] In all cases, the offender had to be advised in writing of the findings and punishment and also of the convening authority's action on the contempt record.[194]

B. 1969 *MCM* Contempt Procedures

By the Military Justice Act of 1968, Congress significantly amended the UCMJ and issued a new *MCM*.[195] Although the terms of Article 48, UCMJ, were not altered, this statute established an independent trial judiciary and required that a military judge preside over general and special courts-martial.[196] The law officer disappeared.[197]

The statute also permitted an accused in a general or special court-martial to request a trial by military judge alone.[198] As a result of this latter change, the "court-martial" that could punish for contempt now included the military judge.[199] Thus, when court members were present, they were the court-martial and possessed the authority to punish for contempt.[200] In a trial by military judge alone, however, the military judge was the court-martial and had the authority to punish for contempt.[201] These changes were reflected in the revised contempt procedures outlined in the new *MCM* (1969 Rev.).[202]

Under the 1969 *MCM* contempt procedures, any person, civilian or military, with the exception of the military judge and members of the court,[203] could be punished for direct contempt.[204] As before, indirect or

193. *Id*. *See* 10 U.S.C. § 857(b) (1958) (current version at 10 U.S.C. § 857(b) (1994)).

194. 1951 MANUAL, *supra* note 160, ¶ 118b.

195. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; Exec. Order No. 11,476, 3 C.F.R. 802 (1966-1970); 1969 (REV.) MANUAL, *supra* note 161.

196. *See* 10 U.S.C. § 826 (1970) (current version at 10 U.S.C. § 826 (1994)). *See also* Tate & Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23, 25. Technically, it is still possible to have a special court-martial without a military judge, but only if one cannot be detailed because of physical conditions or military exigencies. Such a court cannot adjduge a discharge. MCM, *supra* note 4, R.C.M. 201(f)(2)(B).

197. *Compare* 10 U.S.C. § 826 (1958) *with* 10 U.S.C. § 826 (1970) (current version at 10 U.S.C. § 826 (1994)).

198. 10 U.S.C. § 816 (1970) (current version at 10 U.S.C. § 816 (1994)).

199. 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b.

200. *Id*.

201. *Id*.

202. *Id*. ¶ 118.

constructive contempts were specifically excluded from being punished under Article 48, UCMJ.[205] And as before, if the conduct of any person before a court-martial warranted a contempt proceeding, the court suspended the regular proceedings, advised the suspected offender of the alleged contemptuous conduct, and afforded that individual an opportunity to show cause why the conduct should not be found to be contemptuous.[206] Although no prior warning was required to be given to the suspected offender, such a warning could be given if deemed advisable by the military judge, the president of a special court, or a summary court officer.[207]

When the military judge and the summary court-martial officer tried the case alone, they determined whether a person should be held in contempt, and if necessary, an appropriate punishment.[208] In a court-martial composed of members, however, the contempt proceedings paralleled those conducted in a court-martial with a law officer under the 1951 *MCM*, with the military judge assuming the law officer's role.[209]

In such trials, the military judge (or the president of a special court-martial without a military judge) ruled preliminarily, subject to objection by any court member, as to whether a suspected offender should be held in contempt.[210] Once the judge or president so ruled, the military judge instructed the members on the legal standards for contempt and the procedures to be followed in the event an objection were made.[211] If the preliminary ruling found that the suspected offender should not be held in contempt and no member objected to this ruling, then the matter was closed and the regular proceedings of the court-martial were resumed.[212] If any member objected to the ruling, however, the members entered into closed session and voted orally, beginning with the junior in rank, whether

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203. In 1850, the Secretary of War held that a court-martial had no power to punish its own members under Article of War 86, an article that was a forerunner of and little different from Article 48, UCMJ. Articles of War LXXXVI A, Op. OTJAG, Army, R. 5, 172 (Oct. 1863), *as digested in* Dig. Ops. JAG 1912, at 162 n.1. *See also* McHardy, *supra* note 155, at 134-37, 143; WINTHROP, *supra* note 173, at 306-07.

204. 1969 (REV.) MANUAL, *supra* note 161, ¶ 118a.

205. *Id*.

206. *Id*. ¶ 118b.

207. *Id*. ¶ 118a.

208. *Id*. ¶ 118b.

209. *Compare* 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b *with* 1951 MANUAL, *supra* note 160, ¶ 118b.

210. 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b.

211. *Id*. ¶ 118b; app. 8c, at A8-26.

212. *Id*. ¶ 118b.

to sustain the ruling.[213] A majority vote was needed to overturn the ruling; a tie vote was insufficient.[214]

If, as a result of this vote, the members preliminarily determined that the suspected offender be held in contempt, or if the military judge made the same uncontested preliminary ruling, then the court again entered into closed session for a secret written ballot vote on whether to convict.[215] Before the court entered closed session, the military judge was required to instruct the members on the definition of contempt, voting procedures, and the maximum limits of punishment.[216] Concurrence of two-thirds of the members was required for a finding of guilty.[217] If the offender were convicted, the members remained in closed session to determine an appropriate punishment by secret written ballot, again by a two-thirds concurrence.[218] The court then reopened, and the president of the court announced the holding and the punishment adjudged, if any.[219] The record and review procedures were identical to those of the 1951 *MCM*.[220]

C. 1984 *MCM* Contempt Procedures

By the Military Justice Act of 1983, several major changes were made to the UCMJ and another *MCM* was issued.[221] Although Article 48, UCMJ, was not altered, several revisions and clarifications were made to the contempt procedures in the *MCM*.[222]

Under the 1984 *MCM* contempt procedures, the most significant change involved dividing "direct" contempt into two categories, thereby dividing the methods of its disposition.[223] The first category of direct contempt ("summary disposition") concerned conduct actually seen or heard

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213. *Id*.
214. *Id.*
215. *Id*.
216. *Id*. ¶ 118b; app. 8c, at A8-26.
217. *Id*. ¶ 118b.
218. *Id*.
219. *Id*.
220. *Compare* 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b *with* 1951 MANUAL, *supra* note 160, ¶ 118b. *See supra* Part V.A.
221. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; Exec. Order No. 12,473, 3 C.F.R. 201 (1985); 1984 MANUAL, *supra* note 162.
222. 1984 MANUAL, *supra* note 162, R.C.M. 809. The format of the *MCM* changed in 1984 to a rule format, as opposed to the previous paragraph format. *Id*. app. 21, at A21-1.
223. *Id*. R.C.M. 809(a) discussion, R.C.M. 809(b).

by the court-martial.[224] The court-martial could summarily punish such conduct, without giving the suspected offender any notice or opportunity to be heard.[225] To dispose of this category of contempt, the regular court-martial proceedings were suspended.[226] The second category of contempt ("disposition upon notice and hearing") concerned conduct that the court-martial did not actually observe, but occurred in its presence or in its immediate proximity.[227] An example provided in the rule was "an unseen person [who] makes loud noises, whether inside or outside the courtroom, which impede the orderly progress of the proceedings."[228] For this second category of contempt, the suspected offender was entitled to be "brought before the court-martial and informed orally or in writing of the alleged contempt," "given a reasonable opportunity to present evidence, including calling witnesses," and "represented by counsel."[229] Punishment could be imposed in this second category only if the contempt were proved beyond a reasonable doubt.[230]

In the 1984 *MCM*, the procedures to punish for contempt depended on whether court members were present or not.[231] If contemptuous conduct occurred during a court session when the members were absent, the military judge[232] determined whether to punish for contempt, and if so, what punishment to impose.[233] If punishment were imposed in a summary disposition of contempt, the military judge was required to recite for the record those facts underlying the contempt and specifically state that the conduct was directly witnessed during a court session.[234]

If the contemptuous conduct occurred during a session when the members were present, the military judge or any court member could initiate contempt, unless the military judge determined as a matter of law that the conduct complained of by the court member did not constitute contempt.[235] Once the proceedings were initiated, the military judge

224. *Id*. R.C.M. 809(b)(1).
225. *Id*.
226. *Id*.
227. *Id*. R.C.M. 809(b)(2).
228. *Id*. R.C.M. 809(a) discussion.
229. *Id*. R.C.M. 809(b)(2).
230. *Id*.
231. *Id*. R.C.M. 809(c).
232. The term "military judge" was defined to include the summary court-martial officer or in the context of a special court-martial without a military judge, the president. *Id.* R.C.M. 103(15).
233. *Id*. R.C.M. 809(c)(1).
234. *Id*.

instructed the members on the procedures they had to follow, and the members then retired to deliberate.[236]

In closed session, the members decided by secret written ballot whether to find an alleged offender in contempt.[237] Two-thirds of the members had to concur on a finding of contempt.[238] If the proceedings were summary, only those members who directly witnessed the alleged contemptuous conduct in court could vote.[239] If the members found the offender in contempt, they again voted, without reopening the court-martial, on an appropriate sentence, again with two-thirds of the members needing to agree, and announced the results in open court.[240]

Once the military judge or members reached a contempt finding, a record of the contempt proceedings was included in the record of trial.[241] If the suspected offender were found in contempt, a separate record of the contempt proceedings was required to be prepared and forwarded for review to the officer who convened the court-martial.[242] The convening authority had the authority to approve or to disapprove all or part of the contempt sentence.[243] Written notice of the convening authority's action was provided to the person held in contempt.[244] After the convening authority acted, the contempt process was complete and not subject to any further relief or appeal.[245]

If a fine were adjudged as punishment, it did not become effective until approved by the convening authority.[246] A sentence to confinement, however, took effect immediately, unless it was deferred, suspended, or disapproved by the convening authority.[247] In addition, the military judge had the power to "delay announcing the sentence after a finding of con-

235. *Id*. R.C.M. 809(c)(2).
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id*.
240. *Id*.
241. *Id*. R.C.M. 809(d).
242. *Id*.
243. *Id*.
244. *Id*. R.C.M. 809(f).
245. *Id*. R.C.M. 809(d).
246. *Id*. R.C.M. 809(e).
247. *Id*.

tempt to permit the person involved to continue to participate in the proceedings."[248]

D. 1998 *MCM* Contempt Procedures

In 1998, although Article 48, UCMJ, remained unchanged, the President, by executive order, significantly altered the contempt procedures by vesting the contempt power solely in the military judge and eliminating the court members from the process.[249] The current procedures are set forth in R.C.M. 809.[250]

All three types of courts-martial still possess Article 48, UCMJ, contempt power.[251] In all cases, however, the military judge[252] determines whether to punish for contempt, and if so, the extent of the punishment.[253] Instead of suspending the regular proceedings to conduct a contempt proceeding, as was the historical practice, the military judge now has the discretion to decide when during the court-martial the contempt proceeding should occur (with one exception in a members trial).[254] In a members trial, the sole limitation as to when the military judge will conduct the contempt proceedings is that the proceedings must be conducted outside of the members' presence.[255] According to the accompanying analysis, the military judge's discretion with respect to timing is to "assure that the court-martial is not otherwise unnecessarily disrupted or the accused prejudiced by the contempt proceedings."[256]

The current R.C.M. 809 continues to separate "direct" contempt into two categories. Now, however, only the military judge disposes of the contempt, and handles each category differently.[257] When the military judge directly witnesses conduct constituting contempt, the conduct may be punished summarily.[258] When summary punishment is imposed, the military

248. *Id*.

249. Exec. Order No. 13,086, 63 Fed. Reg. 30,065, 30,068, 30,088 (1998); MCM, s*upra* note 4, R.C.M. 809.

250. MCM, *supra* note 4, R.C.M. 809.

251. *Id*. R.C.M. 809(a).

252. *See supra* note 232. Again, the term "military judge" is defined to include the summary court-martial officer or in the context of a special court-martial without a military judge, the president. *Id*. R.C.M. 103(15).

253. MCM, *supra*, note 4, R.C.M. 809(c).

254. *Id*.

255. *Id*.

256. *Id*. R.C.M. 809 analysis, app. 21, at A21-47.

257. *Id*. R.C.M. 809(a) discussion, 809(b), 809 (c).

judge must recite the facts for the record and certify that the conduct was directly witnessed.[259]

When the conduct is not directly witnessed by the military judge, but occurs in the presence or immediate proximity of the court-martial, the military judge must bring the suspected offender before the court-martial and provide oral or written notice of the alleged contempt.[260] The offender then has the right to be represented by counsel and the right to a reasonable opportunity to present evidence, including calling witnesses.[261] For the military judge to punish this second category of contempt, it must be proved beyond a reasonable doubt.[262] Whatever the manner of disposition, however, the record and review procedures are identical to those of the 1984 *MCM*.[263]

E. Case Law Interpreting the Statute

Few reported modern cases exist involving the military summary contempt power.[264] One of the first involved the Navy's pre-1950 version of Article 48, UCMJ.[265] In that case, a court-martial found a civilian attorney, acting as counsel for the accused, to be "in contempt of court in that he had appeared before the court under the influence of intoxicating liquor, thereby interrupting the progress of the trial without justifiable cause."[266] Although found to be in contempt, the attorney was not sentenced; rather,

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258. *Id*. R.C.M. 809(b)(1).

259. *Id*. R.C.M. 809(c).

260. *Id*. R.C.M. 809(b)(2).

261. *Id*.

262. *Id*.

263. *Compare* MCM, *supra* note 4, R.C.M. 809(d)-(f) *with* 1984 MANUAL, *supra* note 162, R.C.M. 809(d)-(f). *See supra* Part V.C.

264. *See* Max S. Ochstein, *Contempt of Court*, 16 JAG J. 25 (1962); David A. Hennessey, *Court-Martial Contempt–An Overview*, ARMY LAW., June, 1988, at 38 ("The fact that, after review by the convening authority, any finding of contempt is not subject to further review or appeal may serve to explain the paucity of appellate cases."); Holland, *Military Contempt Procedures: An Overdue Proposed Change*, ARMY LAW., Jan. 1994, at 21.

265. Contempt of Court, Op. JAG, Navy, C.M.O. 4 (29 Apr. 1933), *as digested in* Judge Advocate General, U.S. Navy, Index of Court-Martial Orders for the Year Ending December 31, 1933, 12-13.

266. *Id*. at 12.

the court-martial "ordered that he be precluded from further attendance on the court."[267]

In *United States v. Rosato,* a law officer limited the defense counsel's cross-examination of a witness to a specific issue.[268] When the defense counsel exceeded those limits, he was warned by the president of the court not to do so again or he would be subject to proceedings for contempt.[269] When the defense counsel exceeded the limits again, the president asked the law officer to initiate contempt proceedings against the defense counsel.[270] The court-martial proceedings were halted, and contempt proceedings begun.[271] After hearing argument on the matter from the defense counsel, the law officer ruled, without objection by any member of the court, not to hold him in contempt.[272] When the court-martial proceedings resumed, the defense counsel challenged the president of the court for cause.[273] After extensive *voir dire* of the president by the defense counsel, the court, in closed session with the president excluded, voted not to sustain the challenge.[274]

At issue before the appellate court was whether the president's request to hold the defense counsel in contempt prejudiced the rights of the accused.[275] The Army Board of Review held that "there is always the danger that an accused may be prejudiced when his counsel is cited for contempt," but "whether prejudice actually resulted must be decided on the basis of all the circumstances."[276] In this case, the Board found "no showing or indication in the record that the action of the president weighted the scales against the accused or that he was motivated by prejudice toward either the accused or defense counsel."[277] What the Board found instead was that the president was simply fulfilling his duty to insure compliance with the rulings of the law officer, and that none of his actions denied the

267. *Id*.
268. United States v. Rosato, 5 C.M.R. 183, 187 (A.B.R. 1952).
269. *Id*.
270. *Id*.
271. *Id*. at 188.
272. *Id*.
273. *Id*.
274. *Id*.
275. *Id*. at 189, 194.
276. *Id*. at 194. *See also* United States v. Warnock, 34 M.J. 567, 573-74 (A.C.M.R. 1991) (finding that the military judge's threat to cite the defense counsel for contempt did not prejudice the accused under the circumstances).
277. United States v. Rosato, 5 C.M.R. 183, 194 (A.B.R. 1952).

accused the aid of his defense counsel or the opportunity to develop his case.[278]

Two other cases mentioned the use of the contempt power, but did not comment on it. In *United States v. Barcomb*, a law officer found a witness in contempt for her refusal to answer questions after repeated efforts by the law officer to persuade her to testify.[279] In *United States v. McBride*, a military judge found a trial counsel "about one-hundredth of an inch from contempt" after the trial counsel ignored an earlier ruling of the judge that the accused's pretrial statements were inadmissible and asked a witness if the accused had exercised his right to remain silent or made a statement.[280]

In *United State v. DeAngelis*, a civilian defense counsel threatened the court-martial members with civil liability and was disrespectful to the law officer.[281] The following invective directed at the law officer was representative: "Have you ever tried a case? That is the most absurd question I ever heard of. You want to know why I didn't put him on the witness stand? Any first year law student would know that."[282] Although the civilian counsel was not held in contempt, the Court of Military Appeals, in reviewing other issues in the case, suggested that the summary contempt power should have been used:

> [W]e cannot ignore such deliberately contemptuous tirades . . . . Our review of the record of trial, consisting of approximately two thousand pages, impels the conclusion that the obstructive and abusive actions of counsel flouted the authority of the law [officer], made a mockery of the requirement of decorous behavior, and impeded the expeditious, orderly, and dispassionate conduct of the trial. Although counsel unquestionably has a right to press his arguments vigorously, and explore freely all avenues favorable to his client, there is a limit beyond which he may not

278. *Id*.

279. United States v. Barcomb, 6 C.M.R. 92, 93 (A.F.B.R. 1952).

280. United States v. McBride, 50 C.M.R. 126, 128 (A.F.B.R. 1975).

281. United State v. DeAngelis, 12 C.M.R. 54, 58-59 (C.M.A. 1953). This trial was conducted under the provisions of the 1949 *MCM*. A law member under the 1948 Articles of War was an appointed member of the court-martial panel who was required to be an officer of the Judge Advocate General's Department or an officer who was a licensed attorney serving as a commissioned officer on active duty. A law member ruled on interlocutory questions, and no court-martial could receive evidence or vote on the findings or sentence in the law member's absence. Act of June 24, 1948, 62 Stat. 604, 628-29, 631-32. *See* Tate & Holland, *supra* note 196, at 24.

282. *DeAngelis*, 12 C.M.R. at 59.

> go without incurring punitive action. In instances of such flagrantly contemptuous conduct, law officers should not hesitate to employ the power granted by Article 48 . . . especially when counsel has been warned against such action.[283]

In *United States v. Cole*, a civilian rape victim became upset during cross-examination into her credibility and declared, "I am not lying. He'll burn for it if it's the last thing I do."[284] After being admonished by the law officer for this outburst, she replied, "The accused ought to be burned."[285] A recess was called, during which the victim issued an "undescribed" outburst toward the accused.[286]

After the recess, the victim refused to testify further.[287] Despite repeated admonitions and warnings to her from the law officer, she refused to cooperate and made several more verbal "outbursts" before departing the courtroom.[288] The law officer, however, never exercised the summary contempt power.[289] Upon review, the Court of Military Appeals referred to the witness's "contumacious behavior," and, citing to Article 48, UCMJ, and the *DeAngelis* case, recommended that "law officers of general courts-martial not hesitate to employ the powers conferred upon them by Congress in order that military trials may proceed in a fair and orderly manner."[290] "While instances such as here depicted are fortunately rare," the court counseled, "institution of contempt proceedings should serve wholly to eliminate them."[291]

In *United States v. Snipes*, a military judge, after a brief hearing, held the defense counsel in contempt and fined him fifty dollars "for insolence and inappropriately suggesting that 'this court argued for the government' resulting in 'grossly inappropriate' behavior."[292] The facts of the case revealed that the military judge had abandoned his impartial role and suggested to the government a particularly damaging sentencing argument.[293]

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283. *Id*. at 60.
284. United States v. Cole, 31 C.M.R. 16, 17 (C.M.A. 1961).
285. *Id*.
286. *Id*.
287. *Id*. at 17-18.
288. *Id*. at 18.
289. *Id*. at 17-20.
290. *Id*. at 20.
291. *Id*.
292. United States v. Snipes, 19 M.J. 913, 916 (A.C.M.R. 1985).
293. *Id*. at 914-16.

The defense counsel objected, contending that the judge was arguing for the government: "I don't feel that's fair, I don't feel that that's your job to bring that out."[294] After reviewing the record,[295] the Army Court of Military Review concluded that "the trial defense counsel's objection to the military judge's remarks, although spirited, certainly did not warrant contempt proceedings."[296]

In *United States v. Gray*, the Army Court of Military Review considered the extent of the conduct covered by Article 48, UCMJ.[297] In this case, the accused had been convicted of threatening the prosecutor in a previous court-martial by shaking his finger at him and saying, "I'm going to get you."[298] The accused had softly spoken the language, and the military judge had not witnessed the conduct; thus, no summary contempt proceedings had been conducted.[299]

On appeal, the accused contended that he had been denied equal protection of the law because his conduct should have been punished as a contempt under Article 48, UCMJ, which carried a substantially lesser penalty than communicating a threat.[300] In rejecting this notion, the court held that Article 48, UCMJ, was not the exclusive remedy for unlawful conduct occurring during a court-martial.[301] Before arriving at this decision, however, the court discussed in dicta whether "a softly spoken threat uttered by the appellant to the trial counsel, which was not heard by any other parties to the trial, constitute[d] the type of disruptive conduct contemplated by Article 48."[302] The court was not convinced that it did.[303] In the opinion of the court, "[t]he language of the military contempt statute ha[d] always been more limited than the traditional contempt power of civilian courts" because Article 48, UCMJ, since 1776 had described the proscribed conduct solely "in terms of menacing words, signs and gestures, disorder or riot."[304] Because the court found "no menace or affront to the military

294. *Id*. at 916.

295. The record revealed that the "trial defense counsel apologized eloquently and profusely during [the contempt] hearing and explained that his comments were intended only as an objection to the military judge's remarks." *Id.* at 916 n.3.

296. *Id*. at 916.

297. United States v. Gray, 14 M.J. 551, 552 (A.C.M.R. 1982).

298. *Id*.

299. *Id*.

300. *Id*.

301. *Id*.

302. *Id*.

303. *Id*.

304. *Id*.

judge and no disruption," the conduct did not fall under the reach of Article 48, UCMJ.[305]

Two other cases, one before the *Gray* case and one after, provided other definitions of contempt under Article 48, UCMJ. In a concurring opinion in *Soriano v. Hosken*, Chief Judge Everett of the Court of Military Appeals stated that Article 48, UCMJ, "expressly empowers a court-martial to punish 'any person' for contemptuous, menacing, or disruptive conduct."[306] In *United States v. Owen*, the Court of Military Appeals commented that Article 48, UCMJ, "provides for contempt powers, but they are limited to misdeeds such as menacing words, signs or gestures, or disturbance of the proceedings."[307]

In the most recent military case to consider the summary contempt power, *United States v. Burnett*, the Court of Military Appeals closely scrutinized the meaning of Article 48, UCMJ, and its procedures.[308] In this case, a general court-martial before court members, a civilian counsel was openly critical of a military judge's ruling when he asked a witness what the witness was going to say before "the military judge would not let you finish your answer."[309] After a heated exchange between the civilian counsel and the judge, the military judge suspended the proceedings and instructed the members on the procedures for determining summary contempt.[310] The members closed to deliberate, and when they returned, they found the civilian counsel in contempt and fined him one hundred dollars.[311] The trial then continued.[312] The Court of Military Appeals conceded that it had no authority to directly review the contempt proceedings. It concluded, however, that it could properly review the possible prejudicial effect that such contempt proceedings (conducted during trial against an accused's attorney) would have on an accused's right to a fair trial.[313]

Before addressing the fair trial issue, the Court of Military Appeals considered whether the civilian counsel's behavior was within the contempt power of Article 48, UCMJ.[314] It noted that although a broad con-

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305. *Id*.
306. Soriano v. Hosken, 9 M.J. 221, 230 (C.M.A. 1980).
307. United States v. Owen, 24 M.J. 390, 395 (C.M.A. 1987).
308. United States v. Burnett, 27 M.J. 99, 100-108 (C.M.A. 1988).
309. *Id*. at 101.
310. *Id*. at 101-103.
311. *Id*. at 103.
312. *Id*.
313. *Id*. at 105.
314. *Id*. at 103-106.

struction of the contempt power "would be at odds with the history of Article 48 and its predecessors," it had in previous decisions interpreted the language of Article 48, UCMJ, in a rather "sweeping way."[315] Without retreating from those prior decisions, the court now wished to make clear that "every heated exchange between a lawyer and a military judge would [not] be punishable as a 'contempt' under Article 48."[316] With respect to this particular civilian lawyer's conduct, it doubted that the conduct was punishable under Article 48, UCMJ, "in the absence of a more specific warning by the judge prior to the events which gave rise to the contempt proceeding."[317] The court concluded that the judge's definition of contempt for the members–"[a]ny disorder or disrespect to the court committed in the presence of the court"–"allowed the court members to exceed the boundaries of the contempt power prescribed by Article 48."[318]

On the fair trial issue, when the alleged contempt is by a defense counsel and the members conduct contempt proceedings during the course of a trial, the court held that a "danger of prejudice to the accused is created."[319] Citing the Supreme Court's ruling in *Sacher v. United States*, the court asserted that "[i]f, as the Supreme Court has suggested, a substantial risk of prejudice to the defendant is created when jurors are even aware that a defense counsel has been cited by the judge for contempt, the danger of prejudice would seem to be enhanced when the 'jurors' themselves must determine during the trial whether a contempt has been committed by the attorney and what his punishment should be."[320]

The court further indicated that "a defense counsel may have difficulty in zealously advocating his client's cause before the same persons who have just found the lawyer guilty of contempt and imposed a punishment therefor."[321] Consequently, the court decided to remand the *Burnett* case to a lower court to determine if the contempt proceedings had prejudiced the accused, and if so, what remedy was appropriate.[322] In its opin-

315. *Id*. at 104-105.
316. *Id*. at 105.
317. *Id*.
318. *Id*. at 105-106.
319. *Id*. at 106.
320. *Id*. at 107.
321. *Id*.
322. *Id*. at 107-108. On remand, the Army Court of Military Review found no prejudice and affirmed the sentence. United States v. Burnett, 27 M.J. 99 (C.M.A. 1988), *aff'd on remand*, CM 444568 (A.C.M.R., 13 Apr. 1989), *aff'd* 29 M.J. 446 (C.M.A. 1989) (summary disposition).

ion, the court suggested that the *MCM* should be changed to permit military judges to conduct all contempt proceedings, to require those proceedings to take place outside the presence of the court members, and to enable military judges to delay the contempt proceedings until the end of a trial if they choose to do so.[323]

VI. Survey of Military Judges

A written questionnaire designed to gather the views of all the current active duty trial judges in the four military services was sent to eighty-four judges.[324] Of these eighty-four, the twenty-two Air Force judges were precluded from responding by an Air Force regulation, which prohibited their response to non-Department of Defense surveys.[325] Of the remaining sixty-two judges, over two-thirds (forty-two) responded. The results of the survey revealed that while no current trial judge had exercised the summary contempt power, most felt the statute should be revised. A summary of the results follows.

Only a fourth of the responding judges had ever experienced contemptuous behavior in their courtrooms. The reported misbehavior involved unruly attorneys, accuseds, witnesses, and spectators. With respect to attorneys, the contempt took the form of verbal attacks against opposing counsel and disrespectful language or demeanor directed against the military judge. In addition, it included attorneys who would object to a judge's ruling on an issue by continuing to argue after being warned and

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323. *Burnett*, 27 M.J. at 107.

324. The survey comprised four questions, and it was conducted prior to the President vesting summary contempt power solely in the military judge. Exec. Order No. 13,086, 63 Fed. Reg. 30,065, 30,068, 30,088 (1998).

The questions were: (1) Have you witnessed any contemptuous behavior in your courtroom? If so, please describe the circumstances and outcome? (2) Have you ever exercised your contempt powers under Article 48, UCMJ? If so, please describe the circumstances and punishment. (3) If you have experienced contemptuous behavior in your courtroom but elected not to use your contempt power, what alternative corrective measures, if any, did you undertake? (4) Do you believe the current contempt statute, Article 48, UCMJ, should be revised or abolished? If you feel it should be revised, how would you change it?

325. Despite this regulation, three Air Force judges responded to the survey. In deference to the regulation, the author declined to include their responses in the overall survey. It should be noted, however, that none of their responses would have changed any aspect of the outcome of the survey.

told to move on, throwing things down on counsel table, or making disrespectful gestures or statements.

With respect to accuseds, the contempt took the form of shouting or throwing things at the military judge, or verbally, or through gestures, threatening a witness. With respect to spectators, the contempt took the form of inappropriate laughter or facial expressions made during testimony, screams or expressions of disgust from the gallery after a ruling, or throwing items at counsel. With respect to witnesses, the contempt took the form of their refusal to give testimony after being ordered to do so by the judge.

None of the responding judges had ever exercised their summary contempt authority under Article 48, UCMJ. Instead, those who had experienced contemptuous behavior in their courtrooms employed alternative corrective measures. With respect to contemptuous counsel, the judges would first issue verbal admonishments–either during a recess, in chambers, or on the record, either before the court members or out of their presence. If a verbal admonishment went unheeded, they would call a recess and direct counsel to reflect on their behavior. If still unsuccessful, they would report military counsel to their superior officers and civilian counsel to their state bar authorities. In extreme cases of disrespect, they would relieve counsel from the case, and if necessary, defer the proceedings until new counsel could be appointed.

With respect to contemptuous accuseds, the judges would first issue a verbal admonishment. If this were unavailing, they would order an accused bound or gagged or both, or have an accused removed from the courtroom until his behavior improved. With respect to contemptuous spectators, the judges would verbally warn them or have them removed from the courtroom. With respect to uncooperative witnesses, the judges would admonish them or inform them that they could be prosecuted for their failure to testify. All of the judges who had experienced contemptuous behavior indicated that these alternative corrective measures were sufficient to modify behavior or resolve a disruptive situation without the need to resort to their summary contempt power.[326]

Two-thirds of the responding judges felt that Article 48, UCMJ, needed revision. No judge wanted to abolish it, five felt it needed no change, and the remaining judges had no comment. The judges casting their ballots for revision saw the need for six basic changes. First, the statute should specifically designate the military judge as the only one autho-

rized to use the summary contempt power, thereby eliminating the court-martial members from any participation in the process and making them subject to the power. Second, the contempt definition should be expanded to include a broader range of misconduct. Third, a streamlined, simple, and effective procedure for using the power should be delineated in the statute. Fourth, an immediate enforcement mechanism should be included, eliminating the convening authority as the approval authority. Fifth, the maximum allowable punishment should be increased. Recommendations were made to raise the maximum fine from $500 to $10,000, and to raise the maximum confinement to six months. And sixth, an expedited appellate procedure should be incorporated into the statute.

VII. Deficiencies of the Military Summary Contempt Power and Suggested Remedies

The foregoing discussion has identified a variety of deficiencies in the military summary contempt power. An analysis of these deficiencies, and others not previously enumerated, provides the means to suggest possible remedies.

First, the consensus opinion of active duty military trial judges and the U.S. Court of Appeals for the Armed Forces is that the military judge, and not the court members, should be the sole authority to exercise the summary contempt power.[327] A military judge is trained in the law and can immediately announce a ruling on summary contempt. Members, on the

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326. Of course, where the offenders are service members, the military judge may decide not to exercise the contempt power, but instead may "prefer a charge for a violation of a punitive Article under the UCMJ." McHardy, *supra* note 155, at 161. As noted by one commentator, "it is always open to the court to waive the right of proceeding under [Article 48, UCMJ], and prefer charges against the offender." WINTHROP, *supra* note 173, at 303. More importantly, "the limit of punishment set for contempt of court does not apply where the offense is prosecuted by the preferring of formal charges and specifications for the act which constituted the contempt." McHardy, *supra* note 155, at 142. Civilian offenders, however, are not generally subject to prosecution under the punitive articles of the UCMJ. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-23.00 (1991). As such, this alternative method of resolution only has limited applicability. In addition, as the Supreme Court has noted, "obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission [of another offense]. . . . We must give heed to all the circumstances, and of these not the least important is the relation to the court of the one charged as a contemnor. . . . What is punished is . . . the abuse of an official relation. . . . This is contempt, whatever it may be besides." Clark v. United States, 289 U.S. 1, 12 (1933).

327. *Burnett*, 27 M.J. at 106-107.

other hand, must first be instructed on the law and can only arrive at a contempt decision after a slow, deliberate, closed session of debate and voting. Members are also more subject to being prejudicially affected by contempt proceedings held during trial than would a military judge who constantly makes decisions in which inappropriate or inadmissible facts must be disregarded.[328]

The U.S. Court of Appeals for the Armed Forces has claimed that "there is no statutory impediment to providing that in all cases the military judge will be responsible for conducting contempt proceedings."[329] The President has recently amended the *MCM* to accomplish this change.[330] A more definitive fix, however, would be to amend the statute, removing the contempt power from the "court-martial," and giving it specifically to the military judge. As discussed earlier, Congress did not change Article 48, UCMJ, when it created the military judge, and presumably left the contempt power with the "court-martial."[331] Certainly, that was the view of the drafters of the 1984 *MCM* when they offered this commentary:

> The Working Group examined the possibility of vesting contempt power solely in the military judge; but Article 48 provides that "courts-martial" may punish for contempt. When members are present, the military judge is not the court-martial. *See* Article 16. When trial by military judge alone is requested and approved, the military judge is the court-martial. Under Article 39(a) the military judge may 'call the court into session without the presence of the members,' and the military judge therefore acts as the court-martial within the meaning of Article 16 and 48. Since Article 48 authorizes summary punishment for contempt committed in the presence of the court-martial (citation omitted), its purpose would be destroyed by requiring members who were not present and did not observe the behavior to decide the matter.[332]

Amending Article 48, UCMJ, to vest contempt power in the military judge would serve to eliminate any ambiguity engendered by an *MCM* change. Because the *MCM* designated the military judge as the person "responsible for ensuring that court-martial proceedings are conducted in

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328. *See generally id*. at 106-108.

329. *Id*. at 107.

330. Exec. Order No. 13,086, 63 Fed. Reg. 30,065, 30,068, 30,088 (1998); MCM, *supra* note 4, R.C.M. 809.

331. *See supra* Part V.A.-D.

a fair and orderly manner," the military judge should logically shoulder the responsibility for exercising summary contempt authority, thereby eliminating the cumbersome process required before court members.[333] Such an amendment would also serve to remove the contempt power from the summary court-martial and from the special court-martial without a military judge.

Second, under Article 48, UCMJ, "any person," whether or not subject to military law,[334] "except the military judge, members, and foreign nationals outside the territorial limits of the United States who are not sub-

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332. 1984 MANUAL, *supra* note 162, R.C.M. 809(c) analysis, app. 21, at A21-43. Remarkably, this view remains in the current R.C.M. 809 analysis, despite the change vesting summary contempt power solely in the military judge. MCM, *supra* note 4, R.C.M. 809(c) analysis, app. 21 at A21-46. A newly added analysis section to R.C.M. 809 does not explain how the change overcomes this earlier view. *Id*. at A21-47. In addition, by 10 U.S.C. § 836(a) (1994), Congress authorizes the President to prescribe the rules and procedures governing trial by courts-martial, and the President has prescribed these in the *MCM*. This statute makes it clear, however, that the President may not prescribe any rules or procedures which are "contrary to or inconsistent with [the UCMJ]"–to include Article 48. *See* Ellis v. Jacob, 26 M.J. 90, 92-93 (C.M.A. 1988).

333. MCM, *supra* note 4, R.C.M. 801(a) discussion; Hennessey, *supra* note 264, at 41.

334. The legislative history of Article 48, UCMJ, makes clear that civilians are subject to punishment under the statute: "[T]his section contemplates the right to punish for contempt civilians who may be testifying or appearing as counsel in a court-martial case. . . . When civilians come before a court-martial they must be bound by the same rules of decorum as the other people before it." *See Uniform Code of Military Justice, Hearings before a Subcomm. of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1060 (1949) [hereinafter *Uniform Code of Military Justice, Hearings*] *reprinted in* JUDGE ADVOCATE GENERAL, U.S. NAVY, INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (1950) (quoting Mr. Smart, a professional staff member explaining the meaning of Article 48, UCMJ, to the subcommittee). *See also* United States v. Hunt, 22 C.M.R. 814, 818 n.1 (A.F.B.R. 1956). One commentator explained the rationale for the civilian application as follows:

> "The enforcing of [Article 48, UCMJ] in the instance of a civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offense, but to the legal penalties of a defiance of the authority of the United States offered to its legally-constituted representative."

WINTHROP, *supra* note 173, at 306.

Civilians confined for violating Article 48, UCMJ, may be confined in military brigs. *See* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES, B.2.b (19 May 1988); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1640.9B, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL, para. 7103.2.f (2 Dec. 1996).

ject to the code" may be punished for direct contempt.[335] If, however, the summary contempt power is vested exclusively in the military judge, court members should no longer be exempt from the provisions of Article 48, UCMJ. In this regard, court members are clearly not immune from displaying contemptuous behavior in court, especially during long and contentious trials. To eliminate any possible confusion about applying Article 48, UCMJ, to court members once the military judge has exclusive contempt power, the words "any person" should be specifically defined to include the court members.

Third, the restrictive definition of contempt under Article 48, UCMJ, has caused concern both among commentators and the courts.[336] By the plain language of the statute, the proscribed conduct includes only a "menacing word, sign, or gesture," or a disturbance of a court proceeding by a "riot or disorder."[337] If this language is strictly interpreted, contemptuous conduct under the statute may be limited to conduct that is "riotous, threatening, or confrontational."[338]

In his seminal treatise on *Military Law and Precedents*, William Winthrop recognized these limits in the language.[339] Because the word, "menacing," modified the phrase "word, sign or gesture," he contended that to qualify as being contemptuous, words, signs, or gestures had to be threatening or defiant.[340] In his opinion, words, signs, or gestures, "however disrespectful, if . . . not of a minacious character, [could not], unless actually amounting to or creating a *disorder*, in the sense of the further provision of the Article, be made the occasion of summary proceedings and punishment as for a contempt–a defect certainly in the statute."[341]

In addition, because the word "disorder" is "construed as implying more than a mere irregularity, and as importing disorder so rude and pronounced as to amount to a positive intrusion upon and interruption of the

335. MCM, *supra* note 4, R.C.M. 809(a) discussion.

336. *See* WINTHROP, *supra* note 173, at 307-309; Ochstein, *supra* note 264, at 26-27; McHardy, *supra* note 155, at 147-50, 152-53; Hennessey, *supra* note 264, at 39; *see also* United States v. DeAngelis, 12 C.M.R. 54, 60 (C.M.A. 1953); United States v. Cole, 31 C.M.R. 16, 16-20 (C.M.A. 1961); Soriano v. Hosken, 9 M.J. 221, 230 (C.M.A. 1980); United States v. Gray, 14 M.J. 551, 552 (A.C.M.R. 1982); United States v. Owen, 24 M.J. 390, 395 (C.M.A. 1987); and United States v. Burnett, 27 M.J. 99, 103-106 (C.M.A. 1988).

337. 10 U.S.C. § 848 (1994).

338. Hennessey, *supra* note 264, at 39.

339. WINTHROP, *supra* note 173, at 307-309.

340. *Id*. at 307.

341. *Id*.

proceedings of the court," he believed that "acts not of a violent or disturbing character, though they might constitute contempts at common law and before civil courts, would not be *disorders* in the sense of [Article 48, UCMJ]."[342] A different military commentator framed the issue as follows: "The question therefore arises, does the statute authorize punishing as contempt, action which is disrespectful rather than menacing or conduct which is short of a riot disorder."[343]

As discussed earlier, military courts have offered differing views on the contemptuous conduct covered by Article 48, UCMJ.[344] The early cases appeared to expand the specific language of the statute.[345] The last three cases to consider the issue, however, have limited the coverage of Article 48, UCMJ, to the conduct specified in the statute.[346] In the most recent contempt case, the Court of Military Appeals reasoned that

> in drafting Article 48, Congress did not use the broader language that had been employed in the corresponding section of the Federal Criminal Code. Moreover, since under Article 48 military jurisdiction is extended to 'any person'–not merely to service members–the statutory language should not be expanded by the Court.[347]

If the language of Article 48, UCMJ, is strictly interpreted, then disrespectful language or behavior that is not menacing or that does not rise to the level of a disorder in court will not be covered by the statute. Consequently, polite insolence or disobedience that nonetheless serves to disrupt the proceedings of a court-martial may not be summarily sanctionable.

To remedy this gap in coverage, and to conform the military definition of summary contempt with the broader federal definition and the broader definition of many states, a more inclusive definition of contempt should

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342. *Id*. at 308-309.

343. Ochstein, *supra* note 264, at 26-27.

344. *See supra* Part V.E.

345. United States v. DeAngelis, 12 C.M.R. 54, 60 (C.M.A. 1953); United States v. Cole, 31 C.M.R. 16, 6-20 (C.M.A. 1961); Soriano v. Hosken, 9 M.J. 221, 230 (C.M.A. 1980).

346. United States v. Gray, 14 M.J. 551, 552 (A.C.M.R. 1982); United States v. Owen, 24 M.J. 390, 395 (C.M.A. 1987); United States v. Burnett, 27 M.J. 99, 103-106 (C.M.A. 1988).

347. *Burnett*, 27 M.J. at 104.

be written into Article 48, UCMJ. Such a definition should include contemptuous, or insolent behavior or other misconduct committed in open court, in the presence of the military judge, that interrupts, disturbs, or interferes with the proceedings of the court-martial. This redefinition would also correspond to what appears to have been the original legislative intent–to create "substantially the same rule that you have in the Federal criminal courts."[348]

Fourth, as noted earlier,[349] although Article 48, UCMJ, appears to be exclusively a direct contempt statute, R.C.M. 809 interprets it to encompass certain indirect contempt as well (contempt that disturbs its proceedings, but that the court-martial does not directly witness).[350] Under R.C.M. 809, such indirect contempt is punishable, not summarily, but only after notice to the accused and the opportunity to be heard.[351] From an historical standpoint, however, this interpretation of the scope of Article 48, UCMJ, lacks support.[352]

In both the 1949 House and Senate reports accompanying the bill to establish the UCMJ, the written commentary on Article 48, UCMJ, referred to the "direct" nature of the contempt contemplated by the statute. "It is felt essential to the proper functioning of a court that such court have direct control over the conduct of persons appearing before it."[353] In addition, during the 1949 House subcommittee hearings on the proposed UCMJ, the Assistant General Counsel for the Office of the Secretary of Defense clearly explained that the contempt covered by Article 48, UCMJ, was direct contempt–that which occurred in the court's presence.

> [Article 48, UCMJ] is designed to operate in the court's presence. If the court-martial cannot conduct its proceedings in an orderly quiet way it just cannot get to the issue, and you cannot in a contemplative manner decide what is right and what is wrong. Unless it has the power to discipline those before it you may have the most erratic kind of proceedings, and the most disturbing circus atmosphere, as you very frequently have in some

348. *Uniform Code of Military Justice, Hearings, supra* note 334, at 1060 (quoting Congressman Brooks, Chairman of the Subcommittee).

349. *See supra* note 173.

350. MCM, *supra* note 4, R.C.M. 809(a) discussion.

351. *Id*. R.C.M. 809(b)(2); 809(b) analysis, app. 21, at A21-46.

352. *See Uniform Code of Military Justice, Hearings, supra* note 334, at 1060; H.R. REP. NO. 81-491, at 25 (1949); S. REP. NO. 81-486, at 22 (1949).

353. *Id*.

> sensational civil cases. If the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable.[354]

In fact, at no place in the legislative hearings was the statute considered to encompass indirect contempt. William Winthrop espoused the same view years earlier when he wrote that the statute contemplated "direct" contempts, "as distinguished from 'constructive' contempts."[355]

Furthermore, neither the 1951 *MCM* nor the 1969 *MCM* interpreted Article 48, UCMJ, to reach indirect contempts.[356] The 1951 *MCM* provided: "The conduct described in Article 48 constitutes a direct contempt. Indirect or constructive contempts . . . are not punishable under Article 48."[357] Similarly, the 1969 *MCM* provided: "The conduct described in Article 48 constitutes a direct contempt. Neither indirect or constructive contempt . . . is punishable under Article 48."[358]

Indirect contempt was first determined to be within the meaning of Article 48, UCMJ, in the 1984 *MCM*.[359] The drafter's analysis explained the change as follows:

> By its terms, Article 48 makes punishable contemptuous behavior which, while not directly witnessed by the court-martial, disturbs its proceedings (e.g. a disturbance in the waiting room). . . . [T]his type of contempt may not be punished summarily. . . . Paragraph 118 of MCM, 1969 (Rev.) did not adequately distinguish these types of contempt. There may be technical and practical problems associated with proceeding under [notice and the opportunity to be heard] but the power to do so appears to exist under Article 48.[360]

While such a change may be arguable on the face of the statute, when the statute is considered in its historic context, the change is not justifi-

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354. *Uniform Code of Military Justice, Hearings*, *supra* note 334, at 1060 (quoting Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

355. WINTHROP, *supra* note 173, at 301-02.

356. *See* 1951 MANUAL, *supra* note 160, ¶ 118a; 1969 (REV.) MANUAL, *supra* note 161, ¶ 118a.

357. 1951 MANUAL, *supra* note 160, ¶ 118a.

358. 1969 (REV.) MANUAL, *supra* note 161, ¶ 118a.

359. 1984 MANUAL, *supra* note 162, R.C.M. 809(a) discussion, 809(b)(2), 809(b) analysis, app. 21 at A21-46.

360. *Id*. R.C.M. 809(b) analysis, app. 21, at A21-43.

able.[361] In addition, no military appellate court has ever discussed, suggested, or mentioned that a military judge or court-martial possesses the power to punish indirect contempts under Article 48, UCMJ.

In view of the legislative history of Article 48, UCMJ, and its application in the 1951 *MCM* and the 1969 *MCM*, any power to punish for indirect contempt implied by the language of the statute should be specifically removed.[362] This correction can be accomplished by defining Article 48, UCMJ, solely in terms of direct criminal contempt.[363]

Fifth, under the current contempt procedures, when conduct constituting contempt is directly witnessed by the military judge and the conduct is to be summarily punished, the contempt proceeding is not required to be contemporaneous with the alleged contempt.[364] Instead, the military judge has the discretion to decide when during the court-martial the contempt proceedings should be conducted.[365] The authority cited for this procedure is *Sacher v. United States*.[366] In addition, the military judge has the authority under the current procedures "to delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings."[367]

As discussed earlier, *Sacher* does stand for the proposition that a trial judge, "if he believes the exigencies of the trial require that he defer judgment [upon contempt] until its completion, he may do so without extinguishing his [summary contempt] power."[368] The viability of the discretionary timing and delay-in-punishment provisions, however, must

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361. *See Uniform Code of Military Justice, Hearings*, *supra* note 334, at 1060; H.R. REP. NO. 81-491 at 25 (1949); S. REP. NO. 81-486 at 22 (1949); 1951 MANUAL, *supra* note 160, ¶ 118a; 1969 (REV.) MANUAL, *supra* note 161, ¶ 118a.

362. *See supra* note 361.

363. Under the current UCMJ, the military judge lacks the specific statutory power to punish for indirect contempt. *See* United States v. Mahoney, 36 M.J. 679, 691 n.10 (A.F.C.M.R. 1992). If Congress determines that indirect criminal contempt warrants punishment under the UCMJ, a separate provision, similar to the federal rule, could be added to Article 48, UCMJ, to provide for its disposition upon notice and hearing. *See* 18 U.S.C. § 401 (1994); FED. R. CRIM. P. 42(b). Whether the military judge should be afforded this power and how it should be implemented is beyond the scope of this article.

364. MCM, *supra* note 4, R.C.M. 809(c).

365. *Id*.

366. *Id*. R.C.M. 809 analysis, app. 21 at A21-47.

367. *Id*. R.C.M. 809(e).

368. Sacher v. United States, 343 U.S. 1, 11 (1952). *See supra* Part II.

be read in terms of the impact that the Supreme Court's decision in *Taylor v. Hayes* had on *Sacher.*

As noted above, the Supreme Court in *Taylor v. Hayes* held that when disposition of a contempt is not contemporaneous with its commission, then summary disposition is improper without affording the alleged contemnor the due process protections of "reasonable notice of the specific charges and opportunity to be heard in his own behalf."[369] Because both the discretionary timing and delay-in-punishment provisions permit the military judge to delay adjudging contempt until the end of trial, but fail to require notice and opportunity to be heard, they can be considered legally insufficient.

This insufficiency should be remedied by requiring the disposition of contempt at the time of its commission. Such a remedy would support the common law principle behind summary contempt proceedings–that they are only available when necessary to preserve the order or dignity of the court, and not later in the trial when the justification of necessity has vanished.[370] This remedy would also "maximize the potential for deterring misconduct, which is the principal purpose of the sanction;" and "reduce the likelihood that the contempt sanction when imposed [later in the trial] will appear unfair."[371] To ensure that the court-martial is not otherwise unnecessarily disrupted or the accused prejudiced by the contempt proceedings, the military judge should conduct the proceedings outside the court members' presence. The judge should also be given the discretion to stay the execution of the punishment, but not its announcement, until the end of trial.

Sixth, in the discussion to R.C.M. 809, the current *MCM* advises that in some cases, "it may be appropriate to warn a person whose conduct is

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369. Taylor v. Hayes, 418 U.S. 488, 498-500 (1974). *See supra* Part II.

370. Cooke v. United States, 267 U.S. 517, 536 (1925); Offutt v. United States, 348 U.S. 11, 14 (1954).

371. ABA STANDARDS, *supra* note 17, § 6-4.3 commentary at 6-52

> When the judge announces an intention to cite participants for contempt (or worse, summarily convicts them) at the end of the trial, the judge's action may appear to be vindictive. If the announcement follows the verdict, it may even appear to have depended on the outcome. Moreover, unless a course of contemptuous conduct during the trial is broken up by separate citations for contempt, the justness and validity of cumulative sentences for separate acts of contempt may be open to doubt.

Id.

improper that persistence therein may result in removal or punishment for contempt."[372] Although a warning is not a prerequisite under the law before punishment may be imposed for summary contempt,[373] the ABA's criminal justice standards for trial judges provide that "a prior warning is desirable before punishing all but flagrant contempts."[374] The ABA's rationale is as follows:

> A warning may be effective in preventing further disorder and is therefore preferable to sanctions as a first step. It also assures both the court and the public that subsequent misconduct will be considered willfully contemptuous and deserving of punishment. Moreover, the practice of warning before imposing punishment reduces the risk that attorneys will be deterred by the fear of punishment from exercising zealous advocacy.[375]

Obviously, in cases of willful or flagrant contemptuous behavior, a warning is unnecessary, but in view of the ABA's standards, and in the interests of basic fairness, a permissive warning provision should be added to Article 48, UCMJ.

Seventh, neither Article 48, UCMJ, nor the current R.C.M. 809 procedures provide a contempt offender with the right of allocution–that is, the opportunity to defend or explain the conduct observed by the judge.[376] While the practice of allocution is "steeped in history" and "well established in English common law,"[377] due process does not require that a contemnor be given the right to respond before a summary adjudication of direct criminal contempt.[378] In some cases, "affording a defendant an opportunity to speak in explanation of his conduct may only invite additional invective."[379] Certainly, where the contemptuous conduct is unequivocal or clearly willful, "there may be little or no room for helpful explanation."[380] In many other cases, however, the allocution right serves an important purpose:

> [A] person whose inappropriate conduct was essentially reflexive, when confronted with the seriousness of what he or she had

372. MCM, *supra* note 4, R.C.M. 809(a) discussion.
373. *See Ex parte* Terry, 128 U.S. 289, 306-07 (1888).
374. ABA STANDARDS, *supra* note 17, § 6-4.2 commentary at 6-51.
375. *Id*.
376. *See* 10 U.S.C. § 848 (1994); MCM, *supra* note 4, R.C.M. 809.
377. State v. Webb, 748 P.2d 875, 877 (Kan. 1988).
378. *See Ex parte Terry*, 128 U.S. at 306-07.
379. Mitchell v. State, 580 A.2d 196, 202 (Md. 1990).
380. *Id*.

> done, may quickly become contrite and effectively communicate an appropriate apology. Indeed, the explanation offered, or the sincerity with which it is offered, may persuade the trial judge to strike the finding of contempt. If not, allocution by the alleged contemnor will at least assist the judge in fixing the appropriate sanctions.[381]

In military summary contempt practice, the allocution right has a historical basis. As early as 1898, a leading military commentator considered the allocution right to be a part of the summary contempt procedure:

> Where a contempt within the description of this Article has been committed, and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business, and *after giving the party an opportunity to be heard, in defense*, to proceed, if the explanation is insufficient, to impose a punishment, resuming thereupon the original proceedings.[382]

In addition, both the 1951 *MCM* and the 1969 *MCM* afforded the offender "an opportunity to explain his conduct."[383] Inexplicably, the 1984 *MCM* and all subsequent editions omitted the allocution right from the summary contempt procedure.[384]

Both the Supreme Court and the ABA have recommended that the right of allocution be provided to an accused contemnor in a summary contempt proceeding.[385] In *Groppi v. Leslie*, the Supreme Court noted that "reasonable notice of a charge and an opportunity to be heard in defense before punishment [for contempt] is imposed are 'basic in our system of jurisprudence.'"[386] Again in *Taylor v. Hayes*, the Supreme Court commented that "[e]ven where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to

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381. *Id*.

382. DAVIS, *supra* note 155, at 508 (emphasis added).

383. 1951 MANUAL, *supra* note 160, ¶ 118b; 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b.

384. *See* 1984 MANUAL, *supra* note 162, R.C.M. 809; MCM, *supra* note 4, R.C.M. 809. The right of allocution is not inappropriate in the military context. Before being sentenced at a court-martial, an accused is afforded this right. *Id.* R.C.M. 1001(c)(2).

385. Groppi v. Leslie, 404 U.S. 496, 502 (1972); Taylor v. Hayes, 418 U.S. 488, 498 (1974); ABA STANDARDS, *supra* note 17, § 6-4.4 commentary at 6-53.

386. *Groppi*, 404 U.S. at 502 (quoting *In re* Oliver, 333 U.S. 257, 273 (1948).

speak in his own behalf in the nature of a right of allocution.'"[387] The ABA's position is the same:

> Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required.[388]

In light of prior military practice and the recommendations of the Supreme Court and the ABA, Article 48, UCMJ, should be amended to include a right of allocution in all summary contempt cases except those involving willful or flagrant contempt. This right will merely require the military judge to give the offender a brief opportunity to speak. Not only will the allocution right allow a contemnor the chance to offer an explanation or an apology, which may affect the judge's final determination, but it will also promote the appearance of justice.[389]

Eighth, by limiting the punishment for summary contempt to thirty days confinement or a one hundred dollar fine, or both, Article 48, UCMJ, places too severe a restriction on the military judge's ability to punish a contemnor commensurate with his misconduct. This conclusion can be drawn from the survey of military judges, and it can be drawn from the higher punishment authority for summary contempt provided by many state legislatures.

As noted earlier, Congress has not set a ceiling on the penalty for summary contempt. Federal case law, however, has fixed the maximum punishment to that allowed for a petty offense–currently, confinement not to exceed six months or a fine not to exceed $5000.[390] As a matter of comity with federal judges, and to give military judges a more realistic deterrent capability, the maximum punishment provisions of Article 48, UCMJ, should be increased to the authorized federal level. In 1951, when a court-

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387. *Taylor*, 418 U.S. at 498 (quoting *Groppi*, 404 U.S. at 504). *See also* Richard B. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 57 (1978).

388. ABA STANDARDS, *supra* note 17, § 6-4.4 commentary at 6-53.

389. Mitchell v. State, 580 A.2d 196, 203 (Md. 1990).

390. *See supra* note 89.

martial panel of line officers exercised the contempt power, and when no court member was required to have legal training, limiting contempt punishment to the bare minimum was sensible. With the military judge as the sole arbiter of summary contempt, however, the need for the strict limitation vanishes.

Ninth, under the current system, punishment for summary contempt is not effective until reviewed and approved by the court-martial's convening authority.[391] In essence, the military judge only suggests a contempt punishment. The convening authority employs the actual power, and this power is not exercised when the contemptuous conduct occurs in the courtroom.[392] The convening authority acts much later, only after a written record of the in-court proceedings is prepared.[393] Thus, no immediate enforcement mechanism exists.

As previously discussed, summary adjudication of contempt loses its justification when the sanction lacks immediacy, and "[i]f a court delays punishing a direct contempt until the completion of trial, . . . due process requires that the contemnor's rights to notice and a hearing be respected."[394] In view of the delay factored into the military contempt procedure by the requirement for a convening authority's action, a plausible argument can be made that the current contempt power cannot be exercised without notice and opportunity to be heard.

To avoid this potential legal deficiency, the convening authority's role in the summary contempt process should be specifically eliminated. This revision would also make the contempt process less cumbersome, provide the necessary immediacy to the punishment, and accommodate the wishes of the surveyed judges. Moreover, as one commentator has argued, the contempt power is independent of the convening authority's role in the court-martial:

> The enforcement of [the contempt power] is not an exercise of military jurisdiction over the contemnor. He is not subjected to trial and punishment for a military offense, but rather to the legal penalties for a defiance of the authority of the United States offered to its legally constituted representative. Therefore the

391. MCM, *supra* note 4, R.C.M. 809(d).

392. *Id*.

393. *Id*.

394. Mine Workers v. Bagwell, 512 U.S. 821, 832 (1994) (citing Taylor v. Hayes, 418 U.S. 488 (1974)).

> punishment is not a sentence as a result of findings of guilty to a charge referred to the court by the convening authority. Rather it is the result of a summary proceeding arising out of the court-martial, but not out of the charge. Furthermore the punishment may well be imposed against one other than the accused.[395]

Tenth, neither Article 48, UCMJ, nor the R.C.M. 809 contempt procedures provide any person who is summarily punished for contempt with the right to appeal.[396] The absence of a right to appeal was intentional, as evidenced from this colloquy in the House hearings on the UCMJ:

> Mr. Brooks. Is there any appeal from this [Article 48]?
>
> Mr. Smart. There is none. There is a limited punishing power and there is no appeal. It is a summary citation for contempt.[397]

Accordingly, every *MCM*, from 1951 to the present, has affirmatively stated that no appeal or review of a summary contempt citation was authorized (except, of course, for automatic review by the convening authority).[398]

In 1988, the Court of Military Appeals acknowledged the "no appeal" rule in *United States v. Burnett.* The court concluded that "because only limited punishments can be imposed under Article 48" and because the *MCM* "provides expressly only for approval of contempt proceedings by the convening authority," it "has no occasion for direct review of contempt proceedings."[399]

With the proposed increase in punishment as well as the proposed removal of any review by the convening authority, basic notions of fairness would suggest that Article 48, UCMJ, be amended to include one level of

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395. McHardy, *supra* note 155, at 167. *See also* United States v. Sinigar, 20 C.M.R. 46, 53-54 (C.M.A. 1955) (finding that the summary contempt proceeding is "not treated as a trial within the federal system").

396. *See* 10 U.S.C. § 848 (1994); MCM, *supra* note 4, R.C.M. 809.

397. *Uniform Code of Military Justice, Hearings*, *supra* note 334, at 1060 (quoting Congressman Brooks, Chairman of the Subcommittee, and Mr. Smart, a professional staff member).

398. 1951 MANUAL, *supra* note 160, ¶ 118b; 1969 (REV.) MANUAL, *supra* note 161, ¶ 118b; 1984 MANUAL, *supra* note 162, R.C.M. 809(d); MCM, *supra* note 4, R.C.M. 809(d).

399. United States v. Burnett, 27 M.J. 99, 105 (C.M.A. 1988) The court did suggest in a footnote, however, that it might have authority to directly review a contempt proceeding under the All Writs Act, 28 U.S.C. § 1651(a) (1994). *Id.* at 105 n.9.

appeal to the respective service Court of Criminal Appeals. This level of review will serve four purposes. First, it will encourage the military judge to exercise the summary contempt power with caution and prudence, and discourage the arbitrary exercise of the power. Second, it will allow counsel to be aggressive advocates, without fear of unchecked, repressive action by a judge. As the Supreme Court has noted, it is important that "no lawyer is at the mercy of a single federal trial judge."[400] Third, it will promote the appearance of justice in the system. Finally, it will be consistent with the large number of states that specifically permit either an appeal or a review of a summary contempt conviction.[401]

Eleventh, no provision exists in the current system to instruct a judge when it is necessary to self-recuse from handling a contempt situation and refer the matter to another judge for disposition. As noted earlier, the Supreme Court has advised that a judge should not sit in judgment upon contempt where the matter is "entangled with the judge's personal feeling."[402] The ABA has adopted this premise in its criminal justice standards for trial judges, with the following rationale:

> Respect for the court will diminish if a judge who was personally involved in a misconduct or provoked some or all of it also adjudicates and punishes the contempt. If the judge is the target of personal attacks during trial and does not take instant action against the contempt, due process requires that the contempt be tried before another judge. Not every attack on a judge disqualifies the judge from sitting, and schemes to drive a judge out of a case for ulterior reasons should not be allowed to succeed. But even though the judge's objectivity has not been affected by the attacks, 'justice must satisfy the appearance of justice.'[403]

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400. Sacher v. United States, 343 U.S. 1, 12 (1952).

401. *See* ALA. R. CRIM. P. 33.6, 70A; CAL. CIV. PROC. CODE ANN. § 1209 (West 1998); COLO. R. CIV. P. 107; HAW. REV. STAT. ANN. § 710-1077 (Michie 1998); ILL. 6TH CIR. R. 8.1; IND. CODE ANN. § 34-47-2-5 (Michie 1998); KAN. STAT. ANN. § 20-1205 (1997); ME. R. CRIM. P. 42; ME. R. CIV. P. 66; MD. CODE. ANN., CTS. & PROC. § 12-304 (1997); MASS. R. CRIM. P. 43; MONT. CODE ANN. § 3-1-523 (1997); N.J. STAT. ANN. § 2A:10-3 (West 1998); N.J. CT. R. 1:10-1, 2:10-4; N.M. METRO. CT. R. CRIM. P. 7-111; N.M. METRO. CT. R. CIV. P. 3-110; N.Y. JUD. LAW § 752 (Consol. 1998); N.D. CENT. CODE § 27-10-01.3 (1997); 42 PA. CONS. STAT. § 4137 (1998); VA. CODE ANN. § 18.2-459 (Michie 1998); WIS. STAT. ANN. §785.03 (West 1998).

402. Offutt v. United States, 348 U.S. 11, 14 (1954).

403. ABA STANDARDS, *supra* note 17, § 6-4.5 commentary at 6-54 (quoting *Offutt*, 348 U.S. at 14).

A similar standard should be adopted in Article 48, UCMJ, for military judges. Thus, if a military judge's conduct is so integrated with the contempt that he contributes to it or is otherwise involved, or his objectivity can reasonably be questioned, Article 48, UCMJ, should provide that the matter be referred to another military judge. This guidance should be advisory, as opposed to mandatory, but it will enable the trial judge to better see and understand the parameters of the issue. "[W]e do not mean to imprison the discretion of judges within rigid mechanical rules. The nature of the problem precludes it."[404]

Finally, although Article 48, UCMJ, affords courts-martial the express power to punish summarily for contempt committed in their presence, Congress neglected to explicitly grant this power to its military appellate courts.[405] As noted by the U.S. Court of Appeals for the Armed Forces in *Court of Military Review v. Carlucci*, "[t]his is an omission in the Uniform Code to which Congress may wish to give attention."[406] To place these appellate courts on an equal footing with courts-martial and other federal courts, the summary contempt power should be extended to them as a matter of comity.

VIII. An Argument for the Repeal of the Summary Contempt Power and a Reply

The Supreme Court has recognized that the summary contempt power may be abused.[407] "Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."[408] In view of the power's potential for being abused and its lack of procedural due process, several commentators have called for its repeal.[409]

"The essence of the case against the summary contempt power is that any exercise of that power is inherently unfair to the accused, and that less

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404. *Offutt*, 348 U.S. at 15.

405. Specifically, the U.S. Court of Appeals for the Armed Forces and the service Courts of Criminal Appeals. *See* Court of Military Review v. Carlucci, 26 M.J. 328, 335 (C.M.A. 1988).

406. *Id*. at 335 n.10.

407. Pounders v. Watson, 117 S. Ct. 2359, 2362 (1977); *Ex parte* Terry, 128 U.S. 289, 309 (1888) ("It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily.").

408. Sacher v. United States, 343 U.S. 1, 12 (1952).

unjust methods are available to preserve order in the courtroom."[410] The power is considered inherently unfair because of the absence of an impartial, unbiased judge and the constitutional protections of a typical criminal trial. In the words of one commentator, "no judge should sit in a case in which he is personally involved, and . . . no criminal punishment should be meted out except upon notice and hearing."[411]

More importantly, however, the loss of these basic due process rights is considered unjustified by the rationale for the power–the need to preserve order in the courtroom.[412] Numerous other ways are available to control courtroom disorder which do not require forfeiting an individual's right to due process.[413] These include a verbal reprimand, threats to report an attorney to the state bar, removal from the courtroom, and issuing a contempt citation for later disposition at a nonsummary proceeding before another judge.[414] "In sum, the exercise of the summary contempt power is simply not necessary to preserve order in the courtroom."[415] Abolition of the power, it is argued, "would be consistent with the efficient administration of justice and would better accord with the requirements of a fair trial."[416]

This argument, however, fails on several accounts. First, federal case law has for more than a century consistently held that due process is not violated in a summary contempt proceeding where the formalities of notice and a hearing are absent.[417] Any possible judicial abuses have been severely reduced by limiting the situations in which the power can be invoked,[418] by requiring the use of the least possible power adequate to

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409. Harry H. Davis, Comment, *Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CAL. L. REV. 463 (1966); Paul V. Evans, Note, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process*, 5 DUKE B.J. 155 (1956); Richard J. Sax, Comment, *Counsel and Contempt: A Suggestion that the Summary Power be Eliminated*, 18 DUQ. L. REV. 289 (1980); Robert A. Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. REV. 34 (1976). *See also* Teresa S. Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553 (1987).

410. Sedler, *supra* note 409, at 85.

411. Sax, *supra* note 409, at 303.

412. Sedler, *supra* note 409, at 85-90.

413. *Id*. at 89.

414. *Id*. at 89-90.

415. *Id*. at 90.

416. Evans, *supra* note 409, at 160.

417. Pounders v. Watson, 117 S.Ct. 2359, 2361 (1997); *Ex parte* Terry, 128 U.S. 289, 309-10 (1888).

prevent the actual obstruction of justice,[419] and by insisting on a judge who is not personally involved.[420] Appellate review would further check against abuse.[421] Precedent alone demands that the power remain. In addition, as noted by William Winthrop in his treatise on military law, the exercise of the summary contempt power is "not [really] a trial, but a summary assertion and enforcement of executive authority."[422]

Second, courts have the inherent power to punish for contempt.[423] This power is "the primary instrument through which a court safeguards its own authority. Thus, in their very essence, contempt proceedings are sui generis."[424]

Last, the summary contempt power is, in fact, necessary to defend the dignity and authority of the court and ensure an orderly judicial process.[425] It is a key to judicial self-preservation.[426] As the Supreme Court stated in *Ex parte Terry*:

> [The fact summary contempt power may be abused] is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them, without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community.[427]

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418. *Pounders*, 117 S. Ct. at 2362; *In re* Oliver, 333 U.S. 257, 274-76 (1948).

419. *Pounders*, 117 S. Ct. at 2363; United States v. Wilson, 421 U.S. 309, 319 (1975).

420. Cooke v. United States, 267 U.S. 517, 539 (1925); Offutt v. United States, 348 U.S. 11, 14 (1954); Mayberry v. Pennsylvania, 400 U.S. 455, 466-67 (1971).

421. Sacher v. United States, 343 U.S. 1, 12-13 (1952).

422. WINTHROP, *supra* note 173, at 302.

423. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); *Ex parte* Terry, 128 U.S. 289, 302-04 (1888); *Mine Workers*, 512 U.S 821, 831 (1994).

424. United States v. Sinigar, 20 C.M.R. 46, 54 (C.M.A. 1955). *See* Court of Military Review v. Carlucci, 26 M.J. 328, 335 (C.M.A. 1988) (noting that the Court of Military Appeals and the Courts of Military Review arguably have inherent authority to punish for contempt). *But cf.* United States v. Burnett, 27 M.J. 99, 103 (C.M.A. 1988) (commenting that the inherent authority of the court-martial convened on *ad hoc* basis is more questionable than that of a tribunal existing on permanent basis); WINTHROP, *supra* note 173, at 301 (stating that courts-martial, not being courts of record, have no general inherent authority to punish for contempt).

425. Cooke v. United States, 267 U.S. at 517, 534-36 (1925); *In re* Oliver, 333 U.S. 257, 275 (1948); United States v. Wilson, 421 U.S. 309, 316 (1975); Pounders v. Watson, 117 S. Ct. 2359, 2362 (1997); *Ex parte Terry*, 128 U.S. at 307-10, 313.

426. *Ex parte Terry*, 128 U.S. at 307-10, 313.

427. *Id*. at 309.

Indeed, the mere existence of the summary contempt power undoubtedly deters misbehavior in the courtroom.[428] Its "main use" is "an *in terrorem* use–preventive, not punitive."[429] The deterrent effect would be eviscerated if the trial judge were limited to verbal reprimands or issuing a citation for contempt.[430] Clearly, this power is important: In the military trial judges' survey, none had ever used the power, but virtually all wished to keep it. In sum, "all courts-martial should be empowered to safeguard their authority, to ensure fair and orderly trials, and to protect themselves from abuse and disrespect."[431]

IX. Summary, Conclusions, and Recommendations

Based on the foregoing analysis of federal and state law and a survey of military trial judges, the military summary contempt statute and the court-martial rules that implement it need revision to reflect current trends in contempt law. The following changes are required: (1) vesting the contempt power solely in the military judge by statute, not by regulation; (2) including court members as subject to punishment under the statute; (3) broadening the contempt definition; (4) removing the power to punish for indirect contempt; (5) requiring the immediate disposition of contemptuous conduct; (6) adding a permissive warning provision; (7) including an allocution right; (8) increasing the maximum permissible punishment; (9) eliminating the convening authority from any part in the process; (10) adding a right to appeal; (11) providing guidance on when a contemptuous incident should be referred to another judge; and (12) authorizing the military appellate courts the power to exercise the summary contempt power. A proposed statutory change to implement these revisions is provided at the Appendix.[432]

In commenting on the summary contempt power, the Chief Justice of the Supreme Court provided these sage words of advice to trial judges in *Cooke v. United States*:

> The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court, is most impor-

428. Sedler, *supra* note 409, at 91.

429. Walter Nelles, Note, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956, 963 (1936).

430. Sedler, *supra* note 409, at 91.

431. Ochstein, *supra* note 264, at 28.

> tant and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions.[433]

A revised Article 48, UCMJ, will strike the necessary balance between giving trial participants limited freedoms without causing them to become overly fearful of a judicial backlash if they become emotional or aggressive. It should remain a seldom-used, sword of Damocles–available as a necessary threat to keep the participants focused on the professionalism expected during judicial proceedings. Judges should use this power only when all other methods of judicial control have failed. Summary criminal contempt is "not a power lightly to be exercised," but it is "a necessary and legitimate part of a court's arsenal of weapons to prevent obstruction, violent or otherwise, of its proceedings."[434]

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432. A statutory change, as opposed to a change to the *MCM*, is necessary to modernize the summary contempt power because regulatory changes cannot be made in contravention of the current statute. *See* 10 U.S.C. § 836(a) (1994). The proposed statute is tailored as narrowly and explicitly as possible to eliminate the need for interpretation by regulators and courts and to provide clear guidance for practitioners. In addition, it is written to conform with the federal civilian standard, because a departure from the civilian norm requires justification, and no such justification has been found. *See* 10 U.S.C. § 836(a); United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979) ("When a party urges that a different rule obtains in the military than in the civilian sector, the burden is upon that party to show the need for such a variation."); Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

433. Cooke v. United States, 267 U.S. 517, 539 (1925).

434. United States v. Wilson, 421 U.S. 309, 321 (1975).

Appendix

Proposed Revision to Article 48, UCMJ

A BILL

To amend Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), to revise the military summary contempt power

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Summary Contempt Power Reform Act."

SECTION 2. SUMMARY CONTEMPT POWER FOR THE MILITARY JUSTICE SYSTEM.

(a) Chapter 47 of Title 10 United States Code, is amended by deleting the current section 848 (article 48) and replacing it with the following new section:

§ 848. Art. 48. Summary Criminal Contempt.

(a) A military judge may summarily punish any person, to include court members, who commits a direct criminal contempt during the conduct of a general or special court-martial.

(b) Direct criminal contempt means any disorderly, contemptuous, or insolent behavior or other misconduct committed in open court, in the presence of the military judge, that interrupts, disturbs, or interferes with the proceedings of the court-martial, where all of the essential elements of the misconduct occur during the court-martial and are actually observed by the military judge, and where immediate action is essential to preserve order in the court-martial or to protect the authority and dignity of the court-martial.

(c) Procedure. (1) Summary punishment for direct criminal contempt shall be imposed by the military judge immediately after the contemptuous conduct has occurred or after a delay no longer than necessary to prevent

further disruption or delay of the court-martial. A prior warning is desirable before punishing all but flagrant contempts. (2) Except in cases of flagrant contemptuous conduct, before imposing any punishment, the military judge should give the offender notice of the charges and at least a summary opportunity to present evidence or argument relevant to guilt or punishment. (3) The imposition of summary punishment normally should take place outside of the presence of the court members.

(d) If punishment is awarded, the military judge shall issue, in a reasonable time thereafter, a signed order that directly or by incorporation of the record: (1) recites the facts and specifies the conduct constituting the contempt; (2) certifies that the conduct constituting contempt occurred in the presence of the military judge in open court and was seen or heard by that judge; and (3) contains the punishment imposed. The order of contempt shall be entered into the record of the court-martial.

(e) The punishment may not exceed confinement for 6 months or a fine of $5000.

(f) Any person sentenced under this article may appeal therefrom within five working days to the Court of Criminal Appeals. If such appeal is taken, the military judge will be notified by the appellant and the contempt order shall forthwith be transmitted by the sentencing military judge to the clerk of the Court of Criminal Appeals. The Court of Criminal Appeals may in its discretion hear the appeal upon the contempt order and review the decision *de novo*.

(g) Where the interests of orderly courtroom procedure and substantial justice require, execution of the punishment may be stayed at the discretion of the military judge until the end of trial, and if an appeal is taken, during the pendency of the appeal.

(h) The military judge who finds a person in contempt may at any time remit or reduce a fine, or terminate or reduce the confinement, imposed as punishment for contempt if warranted by the conduct of the offender and the ends of justice.

(i) The convening authority will have no role in reviewing or altering a military judge's summary contempt order.

(j) If the military judge's conduct was so integrated with the contempt that he or she contributed to it or was otherwise involved or his or her objectiv-

ity can reasonably be questioned, the matter should be referred to another military judge."

(b) Chapter 47 of Title 10 United States Code, is amended by adding the following new section:

§ 848a. Art. 48a. Appellate Summary Criminal Contempt.

(a) An appellate judge from the Court of Criminal Appeals or the U.S. Court of Appeals for the Armed Forces may summarily punish any person who commits a direct criminal contempt during the conduct of court.

(b) Direct criminal contempt means any disorderly, contemptuous, or insolent behavior or other misconduct committed in open court, in the presence of an appellate judge, that interrupts, disturbs, or interferes with the proceedings of the court, where all of the essential elements of the misconduct occur during the court and are actually observed by the judge, and where immediate action is essential to preserve order in the court or to protect the authority and dignity of the court.

(c) The procedures to implement this section will be established by the court rules.

(d) The punishment awarded may not exceed confinement for 6 months or a fine of $5,000.

(e) A finding of contempt under this section and the imposition of punishment is subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28.

(c) *Conforming Amendment*–Chapter 47 of Title 10 United States Code, is amended by adding the following new paragraph to section 866 (article 66):

(i) A Court of Criminal Appeals may in its discretion hear the appeal of a contempt order issued under section 848 of this title (article 48) and review the decision *de novo*.

(d) *Technical Amendment* -- The table of sections at the beginning of subchapter IX of Chapter 47 of Title 10, United States Code, is amended

by inserting after the item relating to section 848 (article 48) the following new item:

§ 848a. Art. 48a. Appellate Summary Criminal Contempt.

SECTION 3. EFFECTIVE DATE.

This Act shall apply to contempt proceedings pending on or commenced on or after the date of the enactment of this Act.

THE TWENTY-THIRD EDWARD H. YOUNG LECTURE IN LEGAL EDUCATION: LEGAL EDUCATION AND PROFESSIONALISM IN PARALLEL UNIVERSES[1]

W. FRANK NEWTON[2]

I. Introduction

Professionalism is composed of two essential elements: valid theoretical principles and effective application of those principles in the prac-

1. This article is an edited transcript of a lecture delivered on 29 March 1999 by Mr. W. Frank Newton to members of the staff and faculty, distinguished guests, and officers attending the 47th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The lecture is named in honor of Colonel Edward H. (Ham) Young, who served two tours as the Commandant of The Judge Advocate General's School. He was the first Commandant of the School when it was established in Washington, D.C., in 1942. He presided over the School for two years and oversaw its expansion and transfer to the University of Michigan. He returned as Commandant when the School was reactivated at Fort Myer in 1950. His distinguished military career began when he received his commission in 1918 from West Point and served with the American Expeditionary Force and the Army of Occupation in Europe after World War I. His impressive legal career in the Army also included assignments as an Assistant Professor of Law at the United States Military Academy, the China Theatre Judge Advocate and legal advisor to the Far East United Nations War Crimes Commission, the Chief of War Crimes Branch in the Office of The Judge Advocate General. Colonel Young ended his career in the Army in 1954 while serving as Staff Judge Advocate, Headquarters, Second Army.

2. Dean and Professor of Law, 1985. B.A., Baylor University, 1965; J.D., 1967; LL.M., New York University, 1969; LL.M., Columbia University, 1978. Admitted to practice in Texas. Dean Newton entered private practice with the Stubbeman McRae Sealy Laughlin and Browder law firm of Midland, Texas, where he engaged in civil defense work, commercial litigation, and a major oil concession interest in Ecuador. Dean Newton left private practice to enter the Judge Advocate General's Corps of the United States Navy. Initially he served as defense counsel in general and special courts-martial. He also served as special prosecutor for major felony cases. After an assignment to the international affairs office of the Judge Advocate General in Washington, he was selected to serve on the staff of the Secretary of the Navy as a member of the Presidential Task Force on Law of the Sea. Dean Newton returned to Texas to join the faculty at the Baylor School of Law. In addition to teaching, he was an advisor on a project designed to revise the Constitution of the State of Texas. He also served the State Bar of Texas as Chair of the Standing Committee on Legal Services to the Poor in Civil Matters. Dean Newton has been appointed by the Supreme Court of Texas as Chair of the Texas Equal Access to Justice Foundation. He also serves as Trustee of the Texas Center for Legal Ethics and Professionalism and is active as a member of the American Law Institute.

I thank James Ranspot and Jeffrey Waller for research assistance and particularly Derek Hampton, now serving as Lieutenant (junior grade) in the Navy JAG, for research and editorial assistance.

tice of law.[3] The Colonel Edward H. "Ham" Young Lecture at The Judge Advocate General's School provides a prime opportunity for us to exhume the theoretical principles of professional conduct by asking how effectively we apply those principles in practice. Our respective systems of legal education play essential roles in both areas.

Presentations in law school settings often focus on validity issues, an arena that is as interesting as it is elusive. The professional principles that we pursue are composed of myriad elements including moral ideals expressed in philosophy and in the rules of conduct for lawyers. Many philosophies feature components that examine the depth and weight of moral paragons. Other philosophies are remembered as a single formula, such as Kant's postulate–"Act only on that maxim by which you can at the same time will that it should become a universal law."[4] Kant's "universal law" considers the aspects of an individual's freedom to act and principles of "right" and "correct" actions that coexist with the freedom to act.[5]

Today's complex philosophical counterparts to Kant are rooted either in Plato and Aristotle's position on the control of truth and reason[6] or in Hume and St. Augustine's concept involving the control of will and love.[7] Many of us inherited a preference directed toward Plato and Aristotle through the influence of John Stuart Mill. In 1971, John Rawls offered a current version of this line of philosophy in his classic book, *A Theory of Justice*.[8] These very Western and American philosophical views provide the framework for the American Bar Association's (ABA) 1969 Code[9] and the 1983 Model Rules.[10] The Model Rules are the basis of many current state-adopted rules applicable to practicing lawyers today.[11] Most recently, the American Law Institute has developed *The Law Governing*

3. *See, e.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953); C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

4. IMMANUEL KANT, FUNDAMENTALS OF METAPHYSICS CUSTOMS (1795).

5. *See* IMMANUEL KANT, THE SCIENCE OF RIGHT 3 (1790).

6. *See* Deborah Rhode, *Why the ABA Bothers*, 59 TEX. L. REV. 689 (1981).

7. *See generally* CAN A GOOD CHRISTIAN BE A GOOD LAWYER? (Thomas E. Baker & Timothy W. Floyd eds., 1998).

8. *See* JOHN RAWLS, TOWARD A THEORY OF SOCIAL JUSTICE (1971). *See also* T. M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) (encompassing a newer version of Rawl's work).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

10. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

11. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 40 (1986).

Lawyers.[12] These codes, or rules of conduct for lawyers, represent our commitment to the effective application of principles in practice.

Today we will focus on professional principles in practice. Our discussion will be primed by review of several experiences I enjoyed during my brief tenure in the Navy JAG. These experiences, which are loosely historical, are designed to take advantage of what philosophers George Lakoff and Mark Johnson call "Philosophy in the Flesh."[13] They persuasively argue that metaphors–word pictures–are powerful philosophical teaching and learning tools. As Aristotle proclaimed, "[T]he greatest thing by far is to be a master of metaphor[s]."[14] If the metaphor is the medium, then the goal is to open a constructive dialogue between the parallel universes of military and civilian legal education and practice. We should expect to both reaffirm and enrich our respective professionalism. Certainly, that is the experience of the civilian bar in drawing on the strength of the military bar.[15] This review will highlight several significant advances that should provide us both a platform and an impetus for further development. Let us turn to the first word picture to frame our dialogue examining these parallel universes.

II. Decommissioning the Admiral's Barge

My first duty station in the Navy Judge Advocate General's Corps was the Naval Air Station at Corpus Christi, Texas. At that time, the concept of a law center comprised of thirty defense counsel and fifteen prosecutors, who were to try special and general court-martials for a several state command, was being tested. When I arrived, the process was well under way and everyone seemed to know everyone else. Except for the judges and a lone executive position, every lawyer at the law center was a Navy lieutenant. I assume that is why no one bothered to use Lieutenant–we just used last names. As I was struggling during my first week to learn

12. RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS (1998).

13. *See* Edward Rothstein, *Giving the Truth a Hand: We Construct the World, the Authors Believe, in the Image of Our Own Bodies*, N.Y. TIMES BOOK REV., Feb. 21, 1999, at 25.

14. ARISTOTLE, POETICS § 22 (McKeon trans., 1941).

15. Major General Walter Huffman, The Judge Advocate General of the Army, is currently serving a three-year term as Director of the State Bar of Texas. During this term of service General Huffman has used expertise born of the experience of serving as "managing partner" of the world's largest and most far-flung law firm to advance the cause of members of the bar who live and practice outside the borders of the state.

names, Charlton came running through our offices yelling in a singsong voice, "Tilden's going to decommission the Admiral's Barge . . . Tilden's going to decommission the Admiral's Barge." *En masse*, my colleagues, drawn from all parts of the United States, poured down the stairs from our second floor offices and spilled out into the parking lot.

It was four-thirty on a Friday afternoon in April. Corpus Christi was at its best. The bright sun hung in the clear sky, and a light breeze danced through the mild afternoon air. It was sixty-six degrees and the humidity was relatively low. We all looked so good–all forty-five of us in our formal khaki uniforms–as we left thirty minutes early. There were no trials in progress–a real rarity–and our lone executive, Commander Lake, was in his office practicing discretion. We piled into the nearest cars–three or four to a vehicle–and roared out of the parking lot. I had the distinct sensation that every eye on the base and every alert brain was aware that the young Turk lawyers were playing hooky. Beyond that, I was confused. If we were going to watch the decommissioning of the Admiral's Barge, why were we heading away from the bay and toward the back gate?

In just a matter of minutes, we had exited through the back gate of the base and pulled into the mulched seashell parking lot of a low windowless concrete-block building. A sign on the flat roof, painted on plywood and supported by a simple, weathered two-by-four frame, read "Battery Ann's." As we had spilled out of our office into the cars, so we spilled out of the cars into "Battery Ann's." It was just plain dark inside for anyone leaving the bright April Texas sun. I just followed along and found myself in a roughly formed line heading toward a bar on the far wall. Halfway there the line parted where it met a short woman dressed in Levi jeans, square boots, and a tee-shirt that said "Battery Ann's." Her face suggested how the bar may have been named, although along one wall was a rack of car batteries that suggested an alternative possibility. I quickly fished out a dollar bill, following the lead of those ahead of me, handed it to Battery Ann, and followed the line that turned to the left. I discovered I had voted for two Lone Star long necks instead of two Pearl long necks. A double row of these two local brews, cold and sweating, had been lined up on the bar. Every lawyer, after giving Battery Ann the dollar due, had grabbed a beer in each fist and returned to the sun-soaked, mulched white-seashell parking lot.

Outside, we surrounded a car I had not previously noticed–a rusted, black and white 1955 Buick two-door convertible. On each front-fender, just above the three chrome portholes, appeared "Admiral's Barge" in cur-

sive chrome. "This is Tilden's drunk car," explained the lawyer next to me. "He drives it slowly through on-base housing and by the BOQ with "Louie Louie" blaring from oversized speakers. Lawyers can catch up on foot, scramble up the broad trunk, and jump into the car. It always goes to "Battery Ann's" and everyone ties one on." Just as I was digesting this information, Tilden emerged from the front door of "Battery Ann's" onto the seashell parking lot. He had a beer in each fist. The assembled group yelled "Tilden!" He raised the long neck in his left-hand high overhead. In turn, we raised our left-hand beers and took a drink. Tilden drained his bottle. Then, Tilden raised his right-hand beer. We raised our right-hand beers and took a drink. Tilden drained his other bottle.

Tilden then walked directly toward the middle of the hood of the rusted, black and white 1955 Buick convertible. On one side of Tilden was Johnson, who had played down lineman at Tulane, and on the other side was King, who had played down lineman at Notre Dame. Tilden, five feet, eight inches tall and maybe 140 pounds in lead-lined shoes, was hoisted onto the hood of the Buick by Johnson and King. As the assembled crowd roared their approval, Tilden pulled out a forty-five revolver and shot through the hood into the engine block. The roar of the revolver temporarily silenced us. Nevertheless, we were quick to cheer as Tilden turned on his heels, jumped down, and motioned for us to follow him back into Battery Ann's.

It seemed that the night before, the engine on the fifteen-year-old Buick had completely seized up and the car was a total loss. Perhaps the car sacrificed itself, or perhaps it was Tilden's habit of adding beer instead of oil to the crankcase that caused the Buick's demise. Tilden's decommissioning of the Admiral's Barge became an instant legend at NAS Corpus Christi Law Center. At every opportunity, the story was retold, which is a good thing because Tilden did not remember what happened. Tilden was an alcoholic.

This is a lecture on legal education and professionalism and, therefore, you are fully justified in wondering what is alcoholism, and what does it have to do with legal education and professionalism.

A. What is Alcoholism?[16]

Alcoholism is a "secret sickness" that could affect anyone at any and in every level of society.[17] "By definition," a former addict explained, "the addict is a person who is living secretly. The treatment is to help an alcoholic come out of that secret life to a place where he can deal with shame and guilt and anger and suffering and remorse and be open with other people."[18] This "secret" is often found in lawyers, physicians, airline pilots, and professors; individuals who are all considered by society as providing the highest role models. Individuals in these role model positions are "pedestal professionals."[19] Winos on skid row and crack addicts in jail are a world removed from "pedestal professionals." Certainly, lawyers, in or out of military service, are not less vulnerable than others to substance abuse. Indeed, there are several indications that "pedestal professionals" may experience substance abuse more frequently than members of the general public.[20]

Substance abusing or addicted "pedestal professionals" are often top students.[21] Frequently they are efficient, hardworking, high achievers who are admired by clients and colleagues alike. One active recovering alcoholic I know was a model law review member while addicted.[22] A drive to succeed may be part of the underlying "addiction" to perfection, which can generate a need to be exceptionally productive. This need to produce often manifests itself in other-directed goals and values including money, power, prestige, and rank. The desire for these goals can exert tremendous pressure on a person. When fear, exhaustion, and failure close in, and there are not enough hours in the day, then drugs and alcoholism can be a friend to someone in need. That need is often for temporary relief from the pressures and goals involving the desire to produce.

Chemical psycho-stimulates produce temporary relief. "[B]ut slowly, insidiously they change from a help to a hindrance." Recovering alcoholics in Alcoholics Anonymous have a saying: "First the man takes a drink;

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16. This section draws information from ROBERT HOLMAN COOMBS, DRUG-IMPAIRED PROFESSIONALS (1997).

17. *See id.* at 4 (citing Videotape: A Secret Sickness: Just How Secret Is It? (Texas Young Lawyers Association 1990)).

18. *See id.* at 3.

19. *Id.*

20. *See id.* at 48.

21. *See id.*

22. *See* Speech by Mike Crowley to the Texas Tech School of Law, August 21, 1998.

then the drink takes a drink; then the drink takes a man."[23] All addicts eventually lose control. That loss of control is characterized by behavior that leads inexorably to professional, financial, familial, and personal ruin. The risk of ruin often extends beyond the alcoholic.

In every case, clients and professional colleagues are also at risk. Paradoxically, professional colleagues often help conceal addiction, although they are also at risk. This is true because we do not want to concede that lawyers, particularly lawyers we know, are drunks and addicts. Too often it is just easier to "cover up" any problems.

> The addicted professional fears the loss of a practice, and even more devastating, the loss of a license to practice; the office staff fears reprisal and termination of employment; the family fears discovery by the community; the spouse fears loss of income and disintegration of the family; peers face loss of respect for the profession; professional licensing boards fear that harm will come to the public and embarrassment to the professional society; close friends fear that friendships will be terminated. So everyone tip toes around the problem, maintaining a conspiracy of silence.[24]

If a lawyer with a problem is a member of a firm, the firm may terminate the lawyer, or if that is problematic, simply cover up the problem fearing the loss of insurance, higher premiums, or other problems. This type of approach or attitude does nothing to correct the problem and may only compound the final cost. In many cases, the addiction of a lawyer is initially facilitated by the elitist attitude common among professionals. Lawyers often believe they are too smart and well educated to become addicted. All this adds up to a false sense of security and invincibility. But the facts belie any sense of professional immunity.

The North Carolina Bar Association conducted a study and found that almost seventeen percent of new North Carolina attorneys consumed three to five alcoholic drinks a day.[25] In a random ten-percent sample, the State of Washington discovered that one-third of its attorneys suffered from depression, problem drinking, or cocaine abuse.[26] It is estimated that at

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23. COOMBS, *supra* note 16, at 5.

24. *Id.* at 8 (citing S. William Oberg, *There are 18,000 Dentists Who Need Our Special Attention* (Part I), 56 J. AM. C. DENTISTS 4 (1989)).

25. *See* NORTH CAROLINA BAR ASSOCIATION, *Report of the Quality of Life Task Force and Recommendations* 33 (1991).

least one in seven lawyers in California has a "serious substance abuse problem."[27] In fact, this problem appears to start as early as law school. The ABA reported that thirteen percent of law school graduates show signs of drug or alcohol dependency.[28] Law students show significantly higher usage rates for alcohol when compared with college and high school graduates of a similar age.[29]

> The drug problem in America is much more pervasive than is commonly recognized. As a nation we usually target the most visible addicts–those in our inner cities who use illicit drugs. Fanned by uniformed political rhetoric, we prosecute and imprison them. Rarely do we notice or publicize professionals and other white-collar drug abusers who have much easier access to controlled substances. Our national understanding about the nature of chemical dependency and those who succumb to it is faulty.[30]

B. What Does Alcoholism Have to do With Professionalism?

Alcoholism directly affects professionalism in two distinct ways. First, alcoholism causes us to confront a moral obligation owed to others. Second, alcoholism requires us to act to support effective programs to protect clients. Either of these independent bases would be enough to encourage a response; together they present us with an inescapable professional obligation.

Moral obligations are formally described in theology and philosophy. For most of us, the lesson of the Good Samaritan comes readily to mind as a theological expression of this moral obligation.[31] John Rawls coined a popular current philosophical expression. His "veil of ignorance" analysis invites us to consider the proper action in a situation without knowing which role we will ultimately be assigned.[32] Either way, these theological

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26. *See* G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyer*, 13 INT'L J.L. & PSYCHIATRY 233 (1990).

27. *See* COOMBS, *supra* note 16, at 33.

28. *See id*. (citing J. H. Robbins & Tim F. Branaman, *The Personality of Addiction*, TEXAS BAR J., Mar. 1992, at 266).

29. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools* (1993).

30. COOMBS, *supra* note 16, at 35.

31. *See Luke* 10:25-37.

and moral concepts play against a central reality of our profession: lawyers spend a lot of time at work with other lawyers. Aside from family and close, personal friends, lawyers are the people who matter most to lawyers. We must, therefore, accept moral responsibility for our alcoholic colleagues or forswear professional moral responsibility altogether.[33]

Moreover, there exists a professional obligation independent of any moral base.[34] Our professional obligation is to police our profession effectively to assure client protection.[35] Most disciplinary actions brought against lawyers involve either client neglect or conversion of client funds.[36] In many of these cases, perhaps fifty to seventy percent, substance abuse is the reason for client neglect or conversion of client funds. Client neglect usually results from devotion of too much time and energy to the abuse of substances.[37] Conversion of client funds occurs in order to support drug abuse.[38] Drug abuse, including prominently alcoholism, is a major lawyer discipline problem.

Initially, alcoholism among lawyers was treated as a matter of "moral turpitude."[39] Dr. Benjamin Rush, founder of the American Psychiatric Association, argued in the early nineteenth century that alcoholism was a disease.[40] It was not until 1945, however, that the American Medical Association formally accepted alcoholism as a disease.[41]

Since then, the disease model has become the dominant rationale for treating chemical dependencies and has been officially endorsed by the World Heath Organization, the American Psychiatric Association, the National Association of Social Workers, the American Public Health Association, the National Council on Alcoholism, and the American Soci-

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32. *See* JOHN RAWLS, TOWARD A THEORY OF SOCIAL JUSTICE (1971).

33. *See generally* CAN A GOOD CHRISTIAN BE A GOOD LAWYER? (Thomas E. Baker & Timothy W. Floyd eds., 1998)

34. *See* THE LAWYER AS A PROFESSIONAL (Timothy W. Floyd & W. Frank Newton eds., 1991).

35. *See, e.g.*, POUND, *supra* note 3; WARREN, *supra* note 3.

36. *See* Stephanie B. Goldberg, *Drawing the Line: When is an Ex-Coke Addict Fit to Practice Law?*, 76 A.B.A. J. 48, 51 (Feb. 1990).

37. *See* Elaine Johnson, *From the Alcohol, Drug Abuse, and Health Administration*, J. AM. MED. ASS. (1992).

38. *See, e.g.*, *In re* Adams, 737 S.W.2d 714 (Mo. 1987) (en banc).

39. *See, e.g.*, State v. Edmundson, 204 P. 619 (Or. 1922).

40. *See Drug and Alcohol Addiction as a Disease*, *in* COMPREHENSIVE HANDBOOK OF DRUG AND ALCOHOL ADDICTION (Norman S. Willard ed., 1991).

41. *See* Coombs, *supra* note 16, at 174.

ety for Addiction Medicine. The disease model defines substance abusers as people who are ill or unhealthy, not because they have an underlying mental disorder, but because they have the disease of chemical dependency, which manifests itself in an irreversible loss of control over alcohol and other psychoactive substances. The disease may go into remission, but because there is no known cure, complete abstinence is the treatment goal. The disease is progressive and, without abstinence, often fatal.[42] Great progress has occurred since the American Medical Association recognized alcoholism as a disease in 1945. Today, alcoholism is accepted as a disease and programs to help arrest its progress, as well as to provide for rehabilitation and restitution, exist alongside and cooperate with the formal discipline process.[43]

The ABA has been active in providing responses to this disease that afflicts so many American lawyers. In 1990, the ABA promulgated a *Model Law Firm/Legal Department Personnel Impairment Policy.*[44] This work was the first product of the Commission on Lawyer Assistance Programs (COLAP) established by the Board of Governors of the ABA in 1988. The mission of COLAP includes all of the following: educating the legal profession concerning alcoholism and other forms of chemical dependency; assisting and supporting bar associations and lawyer assistants in developing and maintaining methods of providing effective solutions for recovery; maintaining a national clearinghouse on lawyer assistance programs and case law relating to addiction; and providing a national network of lawyer assistance program leaders and staff as a resource to each other and attorneys in need of assistance through a directory and national workshops on lawyer addiction.[45]

Many materials on chemical abuse have been produced by COLAP following its mission. In 1991, it produced *Guiding Principles for a Lawyer Assistance Program*.[46] In 1995, COLAP produced a *Model Lawyer Assistance Program*.[47] In 1998, COLAP produced a *Model Recovery*

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42. *Id.* at 175.

43. *See, e.g.*, *In re* Robert Kunz, 524 N.E.2d 544, 549 (Ill. 1989). *See also* Raymond P. O'Keefe, *The Cocaine Addicted Lawyer and the Disciplinary System,* 5 ST. THOMAS L. REV. 217 (1992); Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY L.J. 1263 (1993).

44. *See* MISCONDUCT & DISCIPLINE: DISCIPLINARY PROCESS, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 101 (Sept. 25, 1991).

45. *See id*.

46. *See* ABA COMMISSION ON IMPAIRED ATTORNEYS REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, GUIDING PRINCIPLES FOR A LAWYER ASSISTANCE PROGRAM (1991).

Monitoring Guide.[48] Additionally, there are now annual national workshops for lawyer assistance programs.[49] The Association of American Law Schools (AALS), the professional organization of American Law Schools, has similarly focused on alcoholism and substance abuse. In May of 1993, a *Report of the Special Committee on Problems of Substance Abuse in the Law School* was completed and submitted to the Executive Committee of AALS.[50] This report was adopted the same year.[51]

All of this national activity was built on work previously performed at the state level. This is natural because, in the United States, the states are the entities that license lawyers to practice. Additionally, bar admissions and lawyer discipline are governed at the state level. Review of the Texas program, which I am familiar with and know is a premier program, will serve to provide pertinent illustrative detail. Beginning in the mid 1980s, the State Bar of Texas sought statutory authorization to create a lawyer assistance program. In 1989, pursuant to Chapter 467 of the Texas Health and Safety Code, the State Bar of Texas established the Texas Lawyer's Assistance Program (TLAP).[52]

The TLAP is funded and staffed by the State Bar of Texas under a statutory grant that authorizes the identification of lawyers who are substance abusers, and also authorizes peer intervention, counseling, and rehabilitation. In addition to substance abuse, the statute covers personal difficulties adversely affecting a lawyer's practice such as physical or mental illness, or emotional distress.[53] The TLAP is governed by a committee made up of about thirty lawyers from around Texas. These lawyers are appointed to staggered terms by the State Bar President. Day-to-day management of TLAP is in the charge of a full-time director who is supported by a full-time assistant director. Both director and assistant director are lawyers.[54] These two positions are of great importance, but the heart of the

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47. *See* ABA COMMISSION ON IMPAIRED ATTORNEYS, AMERICAN BAR ASSOCIATION MODEL LAWYER ASSISTANCE PROGRAM: REPORT TO THE HOUSE OF DELAGATES (1995).

48. *See id.*

49. *See* Feature, *Center Update*, 7 NO. 2 PROF. LAW. 26 (1996).

50. *See* Association of American Law Schools, Special Committee, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35 (1994).

51. *See id.*

52. *See* TEX. HEALTH & SAFETY CODE ANN. § 467 (1989).

53. *See id.*

54. TEXAS LAWYERS' ASSISTANCE PROGRAM, VOLUNTEER HANDBOOK 1-2 (1997) [hereinafter HANDBOOK].

TLAP is the statewide network of over 400 volunteers committed to helping an estimated ten to fifteen thousand lawyers who need help.[55]

> TLAP not only helps to save the lives and practices of impaired attorneys, it also contributes to the protection of the public, the continued improvement in the integrity and reputation of the legal profession, and, because assistance to an impaired lawyer often prevents future ethical violations, the reduction of disciplinary actions against impaired attorneys.[56]

Today the TLAP receives about 300 calls each month or about 3600 calls a year. About ten percent of those calls result in cases of individual lawyer referrals to substance abuse programs.

The Army approach to alcohol and drug abuse prevention and control is quite different from my personal experience at NAS Corpus Christi. Your current Alcohol and Drug Abuse Prevention and Control Program[57] recognizes the tension between two polices: rehabilitation of soldiers and military readiness.[58] This policy accepts alcoholism as a disease and adopts rehabilitation as a goal. This is commendable both on moral grounds and as a way of protecting the substantial investment that every soldier represents. Of course, the overarching policy is that of military readiness. Rehabilitation of an individual soldier cannot be pursued if military readiness must be sacrificed. Individual need must yield to collective need.

Because alcoholism is such a real problem, and because of the special tension between rehabilitation and readiness, one would expect that the Army would dedicate considerable resources to this problem. And this is the case. Your curriculum here at The Judge Advocate General's School is firm testament to that end.

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55. There are 87,102 lawyers licensed in Texas, 64,145 of which are in good standing. *See* Telephonic Interview with Representative of Membership Department, State Bar of Texas (Mar. 5, 1999).

56. HANDBOOK, *supra* note 54, 1-1.

57. *See* DEP'T OF THE ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, at 1 (C2, 1995).

58. *See* Lieutenant Colonel Karl M. Goetzke, MILITARY PERSONNEL LAW, 148TH JUDGE ADVOCATE OFFICER BASIC COURSE, ALCOHOL AND DRUG PREVENTION AND CONTROL PROGRAM, ch. O (1998).

Does this mean that each of us, in our parallel universe, has slain the dragon? May we declare victory and march on?

Certainly vast improvements have been made. Of course, each of you must support and employ these improved procedures and approaches in the discharge of your individual careers. Eternal vigilance is certainly the price of any victories won against alcoholism. I suspect we can, and certainly we should strive to, improve on current approaches. Our experience in Texas is that having lawyers talk to lawyers is a critical aspect of our program. Within one hour a recovering alcoholic is present or on the telephone with a lawyer in need. And the recovering alcoholic is not only knowledgeable but successful, a critical element in breaking through the wall of secrecy and stigma. Perhaps this could be employed in The Judge Advocate General's Corps. How helpful might it be for a captain to hear within an hour from a colonel who is a recovering alcoholic, and a successful career officer?

III. Forget the Constitution! This is a Navy Administrative Discharge Proceeding!

It was my first big case as a Navy JAG lawyer. Thirty-eight defendants had been charged with marijuana possession and use. Additionally, one defendant was charged with possession with intent to distribute. A frog-strangling rain was falling, and I was driving a motor-pool Chevy heading toward NAS Kingsville from Corpus Christi. I was excited! So even before driving to the Naval Air Station, I drove to the "Country Club." It was a location I knew as a result of reading the Naval Investigative Service report: a rented three-bedroom, one-bath house in Kingsville, Texas. The glass panes in the windows had been painted black on the inside. A central hall was the repository of the Turkish hashish tub. Holes had been drilled at the baseboard level to allow the tubes that protruded from the hashish tub to pass to each "pleasure area." The dining room, living room, and each of the three bedrooms was a "pleasure area." Each was independently outfitted with a sound system. There was a rock and roll room, a jazz room, a country and western room, a blues room, and a "mood" music room. Each venue was served by a tube-fed mouth piece which would allow club members to "draw the weed."

Alas, the Kingsville Country Club, with its professionally lettered sign reading "Music Appreciation Classes–Call 794-9943," had been raided, and thirty-eight "members" were arrested. As luck would have it,

the President of the Music Appreciation Club, Warrant Officer Wayne Bose Clarkson, was also present. I was the lawyer for the members and the president of this "country club."

My first meeting with my clients was memorable. I was ushered into an enclosed exercise area at Kingsville Brig. Mass confusion would be a conservative description of the situation–borderline riot is a more accurate portrait. Some of my clients were angry at each other. Some of my clients were irate at me. All of my clients were furious with the brig officers. In-turn the brig officers were clearly frightened and anxious to deliver my charges to me. These men were seething with anger. They had never been in trouble before. Many of the defendants were married and had been held incommunicado. The brig facility was very overcrowded and there was simply no way to interview my new clients. I decided to take this problem to the command.

Naval Air Station Kingsville was then commanded by a Navy captain who refused to receive me. I decided to stay in the waiting room until he would agree to see me. There were two receptionists sitting at their desks doing nothing so I approached one of them, introduced myself, and explained that I needed help in producing a formal request for relief on behalf of my clients. She received my request with some trepidation. In fact, she said she needed to ask the captain about my request. She called the captain and I could hear his response both from the receiver and through the wall–a rather firm "No!" I decided a handwritten request would do.

I was in the process of composing the request when the base legal officer, Marine Major James Settler, entered the room. He introduced himself and explained that the base commander was "hard" on drugs and that he was particularly upset by the fact that so many of the arrested sailors were aircraft mechanics. Apparently the base commander believed that drug-impaired aircraft mechanics were responsible for a recent rash of aircraft accidents–a development which presented a direct and real threat to the commander's career. I explained my problems and Major Settler assured me he would immediately try to work something out with the base commander. He entered the commander's office and I waited.

After an hour, with Major Settler still in the commander's office, two members of the shore patrol entered the office, silently approached me and stood on either side of my chair. At this point the receptionist I had earlier spoken to burst into tears, got up from her desk and ran out of the room.

This dramatic development distracted me, and I did not notice that Major Settler had left the commander's office and entered the reception area. Major Settler was not nearly as friendly or as easy going as he had been earlier. Major Settler informed me that the shore patrol would escort me off the base. They did.

It was the middle of the afternoon when I got back to my office in Corpus Christi. Major Settler had called and asked that I contact him. I called and he told me all of my clients were being transferred to the brig in Corpus and that I should arrange to visit my clients there. Major Settler planned to be in Corpus Christi the next day to file formal general court-martial charges against my clients. He was true to his word. He also dropped off, in my office, copies of the individual confessions of each of my clients. I decided to open a file for each client, and I asked my secretary to prepare the folders. Almost immediately, she came back to inform me that there were two copies of one confession and, therefore, only thirty-eight confessions instead of thirty-nine.

The Naval Investigative Service office was in the same building as my office. I often went there to get reports so I volunteered to go and get the missing confession. I knew the receptionist and she was familiar with the Kingsville "Country Club" case. She brought me a thick file and asked me to select the documents I wanted to have copied. Attached to the outside of the file by paper clip was a letter, which I then began to read. I found its contents most interesting.

The letter was from the head of the investigative office to the base commander in Kingsville. It proudly recited the fact that although the thirty-nine suspects had originally refused to confess, once they were told that failure to speak constituted perjury and that perjury was more serious than first time marijuana possession, they had all confessed. Judge Dan Flynn, our general court-martial judge, found the letter as interesting as I did. The confessions were thrown out. This displeased the Kingsville base commander. He granted immunity to the thirty-eight club members and then subpoenaed them to testify against Warrant Officer Clarkson. Not surprisingly, now that my former clients were government witnesses with immunity, they readily confessed recreational use of marijuana, but could offer no direct proof, as opposed to the rumors and hearsay they had recounted in their confessions, of any illegal possession, use, or distribution of marijuana by Warrant Officer Clarkson. He was acquitted.

This greatly displeased the Kingsville base commander. Immediately after the acquittal, the commander initiated an administrative discharge proceeding of Warrant Officer Clarkson using as evidence the "confession" which Judge Flynn had previously determined inadmissable in court. This displeased me and I sought to enjoin the use of the "confessions." This displeased Major Settler who was beginning to see possible career implications for himself. Major Settler arranged a meeting with the base commander in Kingsville. I was met at the gate and escorted to the commander's office by shore patrol officers.

The commander stood behind his desk and opened the conversation by saying that he appreciated the role I played as defense counsel, but since Warrant Officer Clarkson had been acquitted in court, "didn't I think an administrative discharge proceeding was proper given the need to protect our Navy flyers?" I replied that as long as he was seeking an undesirable discharge I thought the same constitutional hurdles that were applicable at the trial were on point. To which he replied, "Dammit Lieutenant, forget the Constitution! This is a Navy administrative discharge proceeding!"

A. Supervision Within Organizations of Lawyers–The Problem

Title C of Topic 5 of the Restatement of the Law Governing Lawyers is entitled "Supervision Within Organization of Lawyers." This general topic is in turn divided into two sections: one entitled, "Duty of Supervision of Lawyer"; and the second entitled, "Duty of Lawyer Subject to Supervision." Law firm practice and practice in The Judge Advocate General's Corps are addressed by these sections.

While the Restatement of the Law Governing Lawyers contains the most recent treatment of the special professional problems raised by subordinate and supervising lawyer situations, this area has a history that is directly informed by command concepts in the military. As World War II drew to a close, attention focused on the rules of war and affixing responsibility for violating these rules. The *Yamashita* war crimes trial was the most controversial, and for purposes of the development of subordinate and supervisory lawyer responsibilities, the most important case.

Yamashita and the Concept of Command/Supervisory Responsibility—A recent article reviewing the Yamashita case begins by proclaiming that "General Tomoyriki Yamashita was a man at the wrong place at the wrong time."[59] As World War II drew to a close, General Yamashita was

appointed to take command in the Philippines. This was an area where an Allied attack was likely.[60] General Yamashita's predecessor did little to help in the transition of command, and about all the General had time to do, in the mere eleven days which elapsed before the American invasion, was to put together a staff, learn the situation, and make basic defensive plans.[61]

In less than a month after General Yamashita's surrender, he was charged with having "unlawfully disregarded and failed to discharge his duty as commander to control operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."[62] Credible evidence existed that General Yamashita personally ordered or authorized at least two thousand summary executions.[63] A careful and conservative reading of the Supreme Court's consideration of the case against General Yamashita indicates merely that a commander has a duty to protect prisoners and civilians.[64] Many observers saw, however, the *Yamashita* case as precedent for absolute command responsibility as to war crimes.[65] It is now quite evident that *Yamashita* was the extreme case in establishing a commander's criminal responsibility for the actions of subordinates.

Two years after the Supreme Court issued its *Yamashita* decision, and no doubt mindful of Justice Murphy's concern that Yamashita was a scapegoat considering that the Americans had done everything possible to defeat all communications and thereby destroy Yamashita's command and control,[66] two cases at the Nuremberg Military Tribunals adopted a more limited liability standard for commanders.[67] The *Hostage Case* adopted a "should have known" standard, and the *High Command* case concurred.[68] This standard was to be applied later in situations arising during the Viet Nam conflict.

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59. *See* Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

60. *See id*.

61. *See id*.

62. *Id.* at 295

63. *See* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

64. *See In re* Yamashita, 327 U.S. 1, 15-17 (1946).

65. *See* RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 123, 127 (1982).

66. *See Yamashita*, 327 U.S. at 34-35 (Murphy, J., dissenting).

67. *See* Landrum, *supra* note 59, at 298.

68. *See id*. at 298-99.

In the trial of Captain Earnest Medina, the immediate supervisor of Lieutenant William Calley who, with his troops, was responsible for the 1969 My Lai massacre in Vietnam, the "should have known" standard from the *High Command* case was applied.[69] Protocol I to the 1949 Geneva conventions, agreed to in 1977, contained the High Command formulation in its Article 86.[70] Current problems in the former Yugoslavia, including indictments of Radovan Karadizic and Ratko Mladic, leaders of the Bosnian Serbs, will again invoke Protocol I.[71]

Under Article 86, liability exists if superiors "knew, or had information which should have enabled them to conclude in the circumstances at the time" that subordinates were committing crimes.[72] In addition, there is a responsibility to prevent and to suppress crimes once they are discovered.[73] Indeed, direct attention is given the suppression approach by the United Nations, which adopted a statute fixing liability upon a commander if the commander "knew or had reason to know" of commission of crimes by subordinates and "failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators of the crimes."[74] It is clear that military command situations have served as the historical model for the rule of responsibility of superiors for subordinates based on a knew or should have known standard.

B. Supervision Within Organizations of Lawyers–The Answer

Adopting a uniform set of conduct standards was not one of the first undertakings of the ABA after its 1878 organization. Not until 1908 did the ABA propose a common statement of professional principles.[75] The 1908 canons, largely copied from the 1887 Code of Ethics of the Alabama

69. *See* Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 971-72 n.111 (1998); W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 118 (1995).

70. *See* Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 86, 1125 U.N.T.S. 3 [hereinafter Protocol I].

71. *See* Fenrick, *supra* note 69, at 103.

72. Protocol I, *supra* note 70, at 3.

73. *See id*.

74. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808, U.N. Security Council, at 704, U.N. Doc. 5/25 (1993).

75. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 34 (1986); J. GOULDEN, THE BENCHWARMERS 60-61 (1974).

State Bar Association, were characterized primarily by their narrowness and lack of vision.[76] These canons focused almost exclusively on practice in the courtroom. As Professor Wolfram points out, "The canons assume that all lawyers are sufficiently homogenous to conform to common standards, an assumption that was probably unfounded in 1908 and certainly proved false as members of an increasingly stratified bar confronted a variety of contrasting practice settings in an increasingly industrialized and urbanized world."[77] One area not addressed in these canons, aimed as they were at honorable solutions between individuals, was that of subordinate and supervising lawyers.

This deficiency, along with many others, led then-ABA president Lewis F. Powell, Jr., to appoint a committee to study the canons and prepare suggested amendments.[78] Edward L. Wright, a practitioner, chaired the committee, which later came to bear his name. A new format and approach were taken and the 1969 Code was the result.[79] Within five years, every state had adopted the code or had changed its own local rules in light of the code.[80] The rapidity of adoption could not mask, however, the fact that the 1969 Code confronted a number of difficult legal issues, many of which were not satisfactorily resolved.

Even as the code was being adopted, it came under vigorous attack. Major criticisms came from several different and conflicting positions. First, criticism came from a reform-minded group convinced the code should have been more clear and responsive to modern practice. Second, criticism came from a group convinced that the code failed to provide relevant and helpful guidance to practitioners, and particularly sole practitioners.[81] Additionally, serious threats of antitrust attacks were raised. These criticisms and external pressures caused the ABA leadership to decide to take additional action.

In 1977, the ABA leadership appointed a commission to study the code. The Chair of the Commission was Robert J. Kutak, a practitioner from Omaha, Nebraska. In August of 1993, after Mr. Kutak had died, the ABA adopted the Model Rules.[82] The Model Rules are the most ambitious

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76. *See* WOLFRAM, *supra* note 75, at 54 & n.21.
77. *Id*. at 54-55.
78. Lewis F. Powell, Jr. later became a Justice of the United States Supreme Court.
79. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).
80. *See* WOLFRAM, *supra* note 75, at 56-57.
81. *See id*. at 60.
82. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983).

and controversial attempt to set forth a comprehensive set of principles governing the conduct of attorneys.

A major innovation of the Model Rules are Rules 5.1 through 5.3 which address hierarchical authority.[83] Specifically, the Model Rules provide that a partner in a law firm "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct."[84] In addition, any lawyer having direct supervisory authority "shall make reasonable effort to ensure that the other lawyer conforms to the rules of professional conduct."[85]

Beyond the requirement for reasonable firm plans and direct partner-associate supervision, a lawyer may not order another to act in violation of the rules, ratify conduct in violation of the rules, or fail to avoid or mitigate consequences of rules violations when such consequences were subject to reasonable remedial measures. Finally, lawyers have similar obligations to associated non-lawyers, namely adoption of reasonable measures, effective direct supervision, prohibition of ordering or ratifying conduct, and the obligation to take reasonable measures to avoid or mitigate consequences of a rule violation. The basic command-responsibility principle born in the aftermath of World War II now applies to the more complex structures of modern legal practice.

Two distinct elements must be satisfied by a lawyer with supervisory authority: first, development and adoption of measures designed to ensure that associates and employees follow rules; and second, effective application of those rules. Consider a lawyer with a large staff. If the lawyer does not have a plan to instruct each staff member, including each new staff member, in a timely fashion, the lawyer has committed a violation.

In the most rudimentary case, a lawyer might simply assume that non-lawyers do not need to know about the Rules. That assumption, coupled with inaction, constitutes a violation of the obligation to develop and adopt a plan.[86] Apart from the influence of the state bar and the model rules, there is another influence that often helps to persuade lawyers to institute such plans. Lawyers in private practice are increasingly driven by their

83. *See generally id*. at Rule 5.1-5.3 (discussing the responsibility of supervising and subordinate lawyer in relation to each other and in relation to non-lawyer assistants).

84. *Id*. at Rule 5.1(a).

85. *Id*. at Rule 5.1(b).

86. *See In re* Galbasimi, 786 P.2d 971 (Ariz. 1990).

insurance carriers to adopt and monitor plans for associates and employees alike. Fortunately, lawyers are not charged with this responsibility without being offered commensurate means of support and help. Very helpful information is available through bar organizations and law reviews and peer review is now being accepted more readily. Nonetheless, it is clear that this is an area where much more progress is necessary in civilian practice.[87]

By contrast, the program of instruction for lawyers in the Army is both comprehensive and an organic part of professional education and practice. First comes the professional responsibility component of the officer basic course.[88] This course covers the Army's regulatory standards (adopted from the ABA Model Rules), the lawyer-client relationship, the lawyer as an advocate, obligations to third parties, duties of subordinates and supervisors, and professional responsibility complaints. Advanced professional responsibility courses are offered by the nonresident instruction branch of the JAG School,[89] an elective course in Professional Responsibility is offered in the legal assistance course, and Ethics Counselors Workshops have been held.[90]

This rich course offering, coupled with regular review of professional performances by lawyers and their staffs in practice, help insure that measures are developed, adopted, and implemented to ensure that junior officers and staff working in the military justice system follow the rules. While military readiness poses special problems in the case of rehabilitating alcoholic lawyers, by contrast the Army's hierarchical structure clearly facilitates supervision within its organization of lawyers, unlike what happens most of the time in civilian practice.[91]

While failure to develop and to adopt a proper plan for subordinates is in itself a violation, it does not automatically cause harm to clients. Too

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87. *See* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271 (1996); Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329 (1995).

88. *See, e.g.*, Major Norman F. J. Allen III & Major Maurice A. Lescault, Jr., 148TH OFFICER BASIC COURSE, PROFESSIONAL RESPONSIBILITY (1999).

89. *See* UNITED STATES ARMY, JUDGE ADVOCATE GENERAL'S SCHOOL, CRIMINAL LAW DEPARTMENT, SUBCOURSE JA 160, ADVANCED PROFESSIONAL RESPONSIBILITY (1996).

90. *See* Faculty, The Judge Advocate General's School, *First Ethics Counselor CLE Workshop*, ARMY LAW., Sept. 1994, at 46.

91. *See* Angela Ward, *Raymark Files Swan Song Fraud Suit Against Baron & Budd*, 14 TEX. LAWYER 5 (1998).

often, however, this violation does result in harm. For example, let us assume that a lawyer has no plan for proper supervision of a non-lawyer. It is predictable that an enterprising employee might claim to be a lawyer, represent clients, and be in a position to embezzle client funds.[92] Alternatively, assume that a new non-lawyer assigned to legal assistance decides that no cause of action exists in a client's situation, then fails to allow a visit with a legal assistance counsel and a statute of limitations thereafter bars the action.[93] We all know that violations of the Rules do not automatically create liability for malpractice, and that quite different malpractice issues control in the case of a military lawyer. Nonetheless, the underlying principles of professionalism apply in both our parallel universes.

We commonly think of authority in the military context as top-down. This is the order of discussion in the Model Rules and the Law Governing Lawyers. The provisions of the rule on the duty of supervision contained in the Law Governing Lawyers, and its accompanying comments and reporter's notes, extends for eleven pages. By contrast, provisions of the rule on the duty of lawyers subject to supervision, with comments and reporter's notes, occupy only four pages. There are two parts to the rule covering the duty of supervised lawyers: first, a supervised lawyer is independent of supervision for purposes of the Rules; and second, in a case where a reasonable argument can be made both ways, a subordinate may yield to a supervisor.

This formulation is as simple as it is unsatisfying. No one would argue the logic and correctness of the part of the rule that makes the supervised attorney independently responsible for following the rules. The supervised attorney must obey the rules in the face of an order to the contrary by a superior.[94] This is a rule that grew out of the application of rules of war to junior officers in the Nuremberg Trials. Beyond the obvious, an attempt is made, in the Law Governing Lawyers, to identify a "safe haven" for subordinates. But, the "safe haven" comment to the rule is professional babble. It provides:

> In some instances . . . professional requirements may be unclear because a reasonable view of the facts or the lawyer code is subject to conflicting interpretations, or the matter may involve an

92. *See In re* Bonanno, 617 N.Y.S.2d 584 (N.Y. App. Div. 1994).

93. *See* Anderson v. Hall, 755 F. Supp. 1, 5 (D.D.C. 1991).

94. *See* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 293-94 (1994).

> exercise of professional discretion. When supervising and supervised lawyers disagree over such a matter, the supervisory lawyer may make either of two decisions. First, . . . the supervisory lawyer may reasonably decide that, given the strength of support for the supervised lawyer's position in light of the probable risk and magnitude of harm to a client or third person, the view of the supervised lawyer may be followed. Alternatively, the supervising lawyer may decide to direct, and is empowered to direct . . . that the course of action preferred by the supervisory lawyer be followed.[95]

While it is important to make it clear that a supervised lawyer is independently responsible, suggesting that a supervised lawyer might politely request that a supervisor think about the arguments raised before then trumping them is both banal and misleading. Surely as the twentieth century ends, no one seriously doubts professionals may disagree on the meaning or application of professional rules of discipline. Indeed, such discourses routinely take place over the entire subject of the law between judges and lawyers. Thus, the proclaimed "safe haven" is quite trite.

The larger deficiency of the comment in Section 13 of the Law Governing Lawyers is that it strongly suggests that there is no other, or better, way of dealing with a conflict between a supervising and a supervised attorney. This is simply not the case. One need look no further than the comment to Rule 5.1 of the Army Rules of Professional Conduct for Lawyers to find the proper model for an answer.[96] The comment provides:

> Supervisory lawyers must be careful to avoid conflicts of interest in providing advice to subordinate lawyers. For example, the chief of administrative law in an office may be the supervisory lawyer for both administrative law lawyers and legal assistance lawyers. Both subordinate lawyers may seek advice concerning an appeal to an adverse action handled by the administrative law lawyer and now being challenged by the client of the legal assistance lawyer. In such a situation, the supervisory lawyer should not advise the subordinate lawyers; depending on the circumstances, the supervisory lawyer may advise one subordinate lawyer and refer the other subordinate lawyer to another supervisory

95. RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS, ch. 13 (Final Draft 1998).

96. *See* DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 5.1 cmt. (1992).

> lawyer in the office, or the supervisory lawyer may refer both subordinate lawyers to separate supervisory lawyers in the office.[97]

What this comment teaches us is that we must: (1) anticipate the problem before it occurs; and (2) resolve the problem structurally. Thus, good practice dictates that conflicts between supervising and subordinate lawyers should be resolved by a third lawyer who enjoys status at least equal to the supervisor. In this setting, the views of the subordinate lawyer will receive a fair hearing. Moreover, the subordinate lawyer, who must ultimately yield, will at least experience a brand of procedural due process–the right to be heard by a "neutral" third party.

I am informed that command influence teachings, including those specifically raised in the supervisory/subordinate lawyer setting, champion the use of a neutral third party in resolution of such a conflict. Section 13 of the Law Governing Lawyers, and Rule 5.2 of the Army Rules of Professional Conduct, should be formally amended to acknowledge this good practice model. Once this is done, a supervising lawyer would be required, under section 12 of the Law Governing Lawyers and under Rule 5.1 of the Army Rules of Professional Conduct, to arrange for a neutral third party hearing. Clearly, this is the logical extension of the existing command influence concepts developed primarily by military law in the wake of the *Yamashita* case and the Nuremberg trials.

IV. Conclusion

Practice of law in the Army is not the same as private practice, but Army lawyers are still lawyers. We are all lawyers, even though we live in parallel universes. It is altogether fitting and proper that we explore, examine and enrich these parallel universes through this 23rd Colonel Edward H. "Ham" Young Lecture. He was an early colossus with a foot solidly in each universe, first directing specialized legal education for military lawyers at the University of Michigan, and then here on the grounds of the University of Virginia. Surely, Colonel Young would applaud the substantial work done in helping educate lawyers about alcoholism, because it is the single most important contributor to disciplinary action nationwide. And just as surely he would ask, are we doing all we can? Should there be a JAG alcohol hotline?

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97. *Id.*

Similarly, Colonel Young would be proud of the major contribution made by military law to the concepts, rules, and practices for supervision within organizations of lawyers. This problem, with roots in the unhappy and harsh realities of World War II, has grown to flower in subsequent decisions that inform our current model rules both in civilian and military practice. And the hierarchical Army organization sets a standard that must guide our civilian practice.

Each of us should learn from our shared profession even as we experience the differences that define our professional lives. I leave a richer lawyer because of the interchange with Major General Huffman, Major General Murray, Colonel Fulton, Colonel Taylor, Colonel St. Amand and the many faculty members here at the JAG School who sent me material and shared their time generously. I end the only way I can, by saying thank you.

DERELICTION OF DUTY:

LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM[1]

REVIEWED BY MAJOR ROBERT K. FRICKE[2]

"*Vietnam was not forced on the United States by a tidal wave of Cold War ideology. It slunk in on cat's feet.*"[3]

I. Introduction

In his book, *Dereliction of Duty,* H. R. McMaster vigorously argues that neither the American entry into the war in Vietnam, nor the manner in which it was conducted was inevitable.[4] Instead, he reasons that the escalation of U.S. military intervention "grew out of a complicated chain of events and a complex web of decisions that slowly transformed the conflict in Vietnam into an American war."[5]

After his own experiences in the Persian Gulf War as the commander of an armored cavalry troop, McMaster wondered *how* and *why* Vietnam had become an American war. As the full title of the book suggests, the author answers these two questions by focusing primarily on the personalities of, and the interactions between, Lyndon Johnson, Robert McNamara, and the Joint Chiefs of Staff.

Ultimately, McMaster argues that American policy on Vietnam was arrived at by default–there was no strategic vision or planning. It was instead, the by-product of the dynamic that existed between these individuals, the advice they gave or failed to give, and the conflicts that Vietnam posed to Lyndon Johnson's primary goals of reelection in 1964 and the

1. H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM (2d ed., HarperPerrennial 1998) (1997).

2. United States Marine Corps. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. MCMASTER, *supra* note 1, at 323.

4. Id.

5. Id.

passing of his "Great Society" legislation during his second term. McMaster supports his thesis through extensive research that relies primarily on personal papers, oral histories, and tape-recorded interviews of the people named in the book's title and others who worked closely with them.

McMaster's thorough analysis of the personalities of these essential figures, their selfish goals, and the policy-making structure in which they operated helps to answer *how* we fought in Vietnam. *Dereliction of Duty* is not nearly as probative as he would have us believe in answering *why* we fought there. To use his metaphor, while Vietnam may have "slunk in on cat's feet,"[6] the feet of this "cat" were the feet of a wild, hungry tiger that had escaped from its cage long before the Johnson administration. This "cat" remained on the prowl until it was returned to its cage during the Reagan administration.

Sprinkled throughout *Dereliction of Duty* are isolated references to the events of the Cold War. Among some of the crises and Cold War doctrine mentioned within the book are Truman's "Domino Theory;" Korea; the Bay of Pigs; the Cuban missile crisis; the Laotian crisis; the Congo from 1961-1963; confrontation with the Kremlin over a divided Berlin; Kruschev's support for communist insurgents fighting wars of national liberation in the countries of the developing world; and Kennedy's inaugural speech where he exhorted America's youth to "pay any price" and "bear any burden" to extend the virtues of their country to the rest of the world. Johnson, McNamara, and the Joint Chiefs of Staff lived through these events as adults.

McMaster's sparse treatment of these events helps to lessen their impact on *his* theory of the *why* of Vietnam. He uses these events not to explain a Cold War mentality that led to Vietnam, but rather to explain the relationships that were formed based on the advice given during these crises. He argues that it is the nature of these advisory relationships that ultimately led to the Americanization of Vietnam.

It is his attempt to use the interaction of these personalities to explain the *why* of Vietnam that causes McMaster's work to fall short. He offhandedly discounts, and all but ignores, the cumulative affect these Cold War events had on the "inevitability theory" of *why* Vietnam. In fact, McMaster waits until a footnote in his epilogue to acknowledge the argument of a large majority who believe the war in Vietnam was inevitable due to this

6. *Id.*

"Cold War mentality."[7] McMaster's view of this theory is that the Cold War crises, particularly those that occurred during the Kennedy years, shaped advisory relationships that carried over into the Johnson administration.

McMaster, however, betrays his *why* theory early on in his book. "November 1963 marked a turning point in the Vietnam War. The U.S. role in fomenting a change in the South Vietnamese government *saddled* the United States with responsibility for its successor."[8] By his own words then, the author acknowledges the "inevitability theory" of Vietnam that he builds a case against throughout the remainder of his book.

Perhaps the best evidence of the Cold War theory of the inevitability of American involvement in Vietnam is provided unwittingly by McMaster. He uses the Dominican Republic crisis to illustrate Johnson's political "gimmick" to overcome opposition to his Vietnam policy. More telling is the introduction of 20,000 troops to prevent a Communist takeover that would result in another "Cuba" in the Caribbean. "Although he was aware that the intervention would expose him to charges of gunboat diplomacy, Johnson thought that the public and congressional criticism would be 'nothing compared to what I'd be called if the Dominican Republic went down the drain.'"[9] The Dominican Republic crisis was not "bequeathed" from Kennedy. It best illustrates the cultural milieu of our nation at the time, and our unthinking, knee-jerk reaction to the potential spread of Communism. The battle between the "Free World" and "Communism" is the correct answer to the *why* of Vietnam.

McMaster's analysis is brilliant, however, in explaining the *how* of Vietnam. Johnson, McNamara, and the Joint Chiefs of Staff each get their chance in the McMaster spotlight. He illuminates throughout the book the improper functioning of staffs, the very deep consequences that are paid in failing to exercise moral courage to voice one's true beliefs, and how those bent on political gain can distort the policy making process to achieve their own selfish goals.

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7. *Id.* at 323.
8. *Id.* at 41 (emphasis added).
9. *Id.* at 282.

II. Lyndon Johnson

Lyndon Johnson's dereliction in the *how* of American involvement in Vietnam was primarily fourfold. First, he accepted and ratified a method of doing business that limited the source of advice and displaced the role of the Joint Chiefs of Staff on military issues. Second, his insecurity in having "inherited" the presidency caused him to crave consensus. As such, he was so obsessed with validating himself in the 1964 election that he neglected to develop a coherent policy on Vietnam. Third, after the election, his focus became his legacy. Passage of his "Great Society" legislation was the mechanism by which he would achieve it, again, to the exclusion of a coherent policy on Vietnam.[10] Fourth, he was willing to lie for political purposes, and did so when it served his need.

McMaster uses the Kennedy administration as the backdrop for the flawed policy–making process that Lyndon Johnson adopted when confronted with issues on Vietnam. Kennedy had dismantled the National Security Council apparatus in favor of "task forces" and "inner clubs" of most trusted advisors to weigh the advantages and disadvantages of proposed policy actions. McMaster makes a compelling argument that an assassin's bullet thrust Johnson into a job he was not yet ready to assume,[11] and that Kennedy's flawed method of doing business carried over into Johnson's administration.[12]

McMaster's use of the word "bequeathed"[13] is correct. While Kennedy certainly felt free to change his predecessor's method of doing business to a leadership/management style that Kennedy was more comfortable with, his assassination did not afford Johnson that luxury–at least not initially. Continuity and status quo were the guiding principles after Johnson initially assumed his duties as President. At some point, however,

10. *Id.* at 317 ("Thirty years later McNamara admitted that the Great Society had dominated the president's desire to conceal the cost and scale of American intervention in Vietnam.").

11. *Id.* at 50 ("He later told a biographer that he felt as if he was "illegitimate, a naked man with no presidential covering, a pretender to the throne, an illegal usurper.").

12. *Id.* at 41 ("John Kennedy bequeathed to Lyndon Johnson an advisory system that limited real influence to his inner circle and treated others, particularly the Joint Chiefs of Staff, more like a source of potential opposition than of useful advice.").

13. *Id.* at 41.

Johnson adopted the policy-making apparatus that he inherited from Kennedy, and it reflected his own leadership style.

McMaster provides no evidence that Johnson was ever privy to Kennedy's "task forces" and "inner clubs."[14] For all the reader knows, Johnson the vice-president was busy attending state funerals, as had been the experience of most vice-presidents until the very recent modern era. If anything, Johnson's exclusion from these groups as a vice-president arguably should have made him more resentful of such groups as President. At some point, presumably after the mandate he received in the 1964 election, Johnson could have refused this "inheritance." Instead, he made it his own.

III. Robert McNamara

Robert McNamara's dereliction in relation to the *how* of American involvement in Vietnam was threefold. First, he believed that geopolitical and technological changes of the last fifteen years had rendered advice based on military experience irrelevant and, in fact, dangerous.[15] Second, and related to the first point, he overused the "success" of the Cuban missile crisis, and the policy of "graduated pressure" as the model for a solution to the Vietnam situation. Third, instead of assuming the role of "honest broker," he tried to live up to the label given to him by Johnson as a "can do fellow." He would make Johnson's wishes come true.

McMaster paints McNamara, through the comments of uniformed military personnel, as a statistician who believed that statistics and the Harvard business-school solution would be the answer to all problems.[16] Yet it was the uniformed services' parochialism that alienated McNamara and prompted him to centralize power in the Office of the Secretary of Defense. In light of "Goldwater-Nichols" and the emphasis on "jointness" in our services today, McNamara seemed visionary in this regard.

McMaster's criticism of McNamara is misplaced as to his perceived over-reliance on the Cuban missile crisis as a model for the graduated use of force. McNamara had concluded that the principal lesson of the Cuban

14. *Id.* at 26. For example, membership of the Executive Committee (EXCOM) of the National Security Council during the Cuban missile crisis did not include Vice-president Johnson.

15. *Id.* at 328.

16. *Id.* at 20.

missile crisis was that graduated pressure provided a "firebreak between conventional conflict and that situation of low probability but highly adverse consequences" that could lead to nuclear war.[17] This "success" (with the caveat of the under-the-table negotiation of the removal of Jupiter missiles brokered between Robert Kennedy and Anatoli Dobrynin) is a concrete example of a real life, military "lesson learned." These "lessons" are what our uniformed military is so anxious to collect, catalogue, and apply as guiding principles to ensure the success of future operations. It is easy for the author to criticize applying this "lesson learned" to Vietnam based upon its subsequent failure. The proper question is whether it was reasonable at the time to apply this lesson. Given the "Cold War" mentality that existed at the time and that the author chooses to minimize, criticism of McNamara on this point is unjustified.

McMaster asserts that the collective lack of military experience among McNamara and his "whiz kids" caused them to "fail to consider that Hanoi's commitment to revolutionary war made losses that seemed unconscionable to American white-collar professionals of little consequence to Ho's government."[18] McMaster properly charges McNamara with trying to do the enemy's thinking for him and validates the advice of the uniformed services based upon the war gaming results of the Joint Chiefs of Staff. In the same vein, however, McMaster seems unwilling to give any credence to McNamara's concern over possible Russian or Chinese involvement based upon the United States' recent experience in Korea.

McMaster's greatest criticism of McNamara is the "can do" label that was placed on him by Johnson, and McNamara's zealous efforts to live up to it.

> McNamara knew that Johnson wanted advisors who would tell him what he wanted to hear, who would find solutions even if there were none to be found. Bearers of bad new or those who expressed views that ran counter to his priorities would hold little sway. McNamara could sense the president's desires and determined to do all that he could to fulfill them. He would become Lyndon Johnson's "oracle" for Vietnam.[19]

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17. *Id.* at 73.
18. *Id.* at 163.
19. *Id.* at 61.

McNamara and others had witnessed Johnson's exclusion of Vice President Humphrey from future deliberations on Vietnam after he had offered advice that questioned the direction of Johnson's policy. It was this blind loyalty and personal desire to hold sway over the President that was the most destructive.

When Johnson "wanted to conceal from the American public and Congress the costs of deepening American involvement in Vietnam, McNamara's can-do attitude and talent for manipulating numbers and people would prove indispensable."[20] This point goes a long way toward answering the *how* of Vietnam.

IV. The Joint Chiefs of Staff

The dereliction of the Joint Chiefs of Staff in relation to the *how* of American involvement in Vietnam is *Dereliction of Duty*'s greatest revelation. McMaster unmasks the service parochialism that virtually paralyzed the Joint Chiefs of Staff in carrying out their role as principal military advisor to the President. In sum, because of their inability to put their rivalries and own self-interests aside, they were relegated to the role of technicians for planners in the Office of the Secretary of Defense, rather than as strategic planners in their own rite.

Dereliction of Duty is full of concrete examples of how each service elevated its own interest at the expense of the common good. McMaster makes a very strong case for the proposition that the Joint Chiefs determined their own fate and shared in the complicity for *how* we fought in Vietnam, principally due to their own inaction.

McMaster tempers this argument slightly with some sympathy for their plight by listing the unique restraints that encumbered them as military professionals. McMaster reminds the reader of the Truman-MacArthur controversy during the Korean War and the dangers of overstepping the bounds of civilian control. He also points out that the professional code of the military officer prevents political activity.

In the same breath, McMaster posits that action that could have undermined the administration's credibility and derailed its Vietnam policy could not have been taken lightly. This is an excellent point. Where a

20. *Id.* at 54.

civilian advisor might "leak to the press"[21] that he opposed a policy course in an effort to derail it, the leadership trait of loyalty is most certainly burned into the psyche of the military officer by the time he attains flag rank. The true mark of a military professional is the ability to execute lawful orders that you do not agree with personally without blaming the "old man." The same traits that make military officers "professionals" also serve to inhibit their role and influence in a political setting.

V. Vitality for Today

The reader need look no farther than the present presidential administration to find many of McMaster's observations relevant today. The political use of the military can still occur. Johnson's use of the "Gulf of Tonkin" incident and his desire for action "in time for the seven o'clock news" might be an interesting case study for analyzing President Clinton's decision to use retaliatory missile strikes against Sudan and Afghanistan during the Monica Lewinsky grand jury testimony.[22]

McMaster makes a telling reference to General Westmoreland's complaint to General Wheeler, Chairman of the Joint Chiefs of Staff, about Washington's control of the Vietnam air campaign. General Westmoreland relayed that "experience indicated that the more remote the authority which directs how a mission is to be accomplished, the more we are vulnerable to mishaps resulting from such things as incomplete briefings and preparation, loss of tactical flexibility and lack of tactical coordination."[23] These appear to be prophetic words in light of the criticism of President Clinton and then Secretary of Defense Les Aspin for their role in the massacre of U.S. Army rangers in Somalia.[24]

Dereliction of Duty is highly recommended reading for any young military staff officer and should be mandatory reading for general officers. Senior military leaders must be prepared to deal with the tension between the restraint on political activity of the military officer and his concomitant duty in a democratic society to propose military solutions that take into

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21. Howell Raines, *Reagan Defends Policies to Curb New Disclosures*, N.Y. TIMES, Dec. 10, 1983, at B1.

22. Russell Watson & John Barry, *Our Target Was Terror*, NEWSWEEK, Aug. 31, 1998, at 24.

23. MCMASTER, *supra* note 1, at 233.

24. Steven A. Holmes, *The Somalia Mission: Clinton Defends Aspin on Action Regarding Request for U.S. Tanks*, N.Y. TIMES, Oct. 9, 1993, at sec. 1-7.

account political viability. Senior military leaders must also be able to properly balance their loyalty to their service branch with the welfare of the nation. Future officers who aspire to such positions owe their country no less.

Those senior level policy advisors whose uniform consists of a civilian coat and tie should also read it. The lack of prior military experience in the staff of the present presidential administration, and the likelihood that the trend will continue in the future based upon military downsizing, makes the "lessons learned" in *Dereliction of Duty* even more relevant today.

MOVING MOUNTAINS:

LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR[1]

REVIEWED BY MAJOR MICHAEL G. SEIDEL[2]

I. Introduction

"Running logistics for the Gulf War has been compared to transporting the entire population of Alaska, along with their personal belongings, to the other side of the world, on short notice."[3] Between August 1990 and August 1991, the logisticians of the U.S. Armed Forces in Southwest Asia served over "122 million meals, pumped 1.3 billion gallons of fuel, and drove nearly 52 million miles."[4] This can be compared to "feeding all the residents of Wyoming and Vermont three meals a day for forty days;" supplying "the [twelve]-month fuel consumption of the District of Columbia, Montana, and North Dakota combined;" and making "more than 100 round trips to the moon."[5]

Lieutenant General (Retired) William G. Pagonis and his 22d Support Command (SUPCOM) completed these unprecedented logistical feats. In response to Iraq's invasion of Kuwait on 2 August 1990, the United States rapidly deployed forces to Saudi Arabia. This short-notice deployment created an immense logistical task. How do the Armed Forces move over 560,000 soldiers and their equipment to a remote side of the globe, sustain them in the field indefinitely, and then reverse the process?

This incredible challenge fell on General Pagonis, a career Army logistician with a unique style of leadership and management. Under his leadership, the 22d SUPCOM met the challenge with resounding success.

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1. LIEUTENANT GENERAL WILLIAM G. PAGONIS (U.S ARMY, RETIRED) & JEFFERY L. CRUIKSHANK, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 1 (1992).

2. United States Army. Written while assigned as a student, 47th Judge Advocate Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. PAGONIS, *supra* note 1, at 1.

4. *Id.*

5. *Id.*

General Pagonis' logistical success enabled the quick, decisive U.S. victory against Iraq.

In *Moving Mountains*, General Pagonis, with Jeffery L. Cruikshank, presents lessons learned in leadership and logistics from his Gulf War experience. He uses his logistical success as a platform to present lessons in three areas: (1) lessons that leaders, military or civilian, can learn from his leadership style; (2) lessons the Army can apply to its doctrine; and (3) lessons private industry can learn from the military. This review examines the first area. General Pagonis devotes nearly two-thirds of *Moving Mountains* to the leadership theme of this area and presents various lessons to consider.

Unfortunately, General Pagonis fails to provide a cogent formula for leadership success. In his attempt to validate his leadership style as a model, he sends mixed messages to the reader. General Pagonis presents his leadership lessons in two sections: his life-long memoirs and a textual leadership outline. In his memoirs, he sends mixed messages by presenting lessons with conflicting leadership values. He highlights positive leadership values in some lessons and then contradicts them with lessons that convey negative or questionable values. Next, in his leadership outline, General Pagonis sends mixed messages through the conflicting application and superficial treatment of his lessons. First, this review provides a synopsis of *Moving Mountains*. Second, it focuses on the mixed messages presented in his memoirs. Last, this book review explores the mixed messages within the text of his leadership outline.

II. Synopsis

General Pagonis effectively piques the reader's interest at the beginning of *Moving Mountains* by immediately describing the Gulf War. He astounds the reader with the sheer size and complexity of the Gulf War logistical effort and describes how the three main phases of the logistics operation–deployment, combat, and redeployment–were planned and executed. By the end of the first chapter, the reader anticipates that General Pagonis will explain how he achieved these monumental tasks.

General Pagonis takes a detour, however, by presenting his memoirs. Instead of meeting the reader's expectation of how he achieved these great logistical feats, he spends the next 140 pages telling his life story, in the context of what he has learned about leadership and logistics management.

General Pagonis begins his memoirs by telling of his days delivering newspapers as a boy in Pennsylvania and continues through to his management of the Gulf War redeployment phase nearly forty-five years later. General Pagonis justifies this detour by explaining that to understand his leadership style, the reader must know the source. Throughout the vivid narrative of his life, Army career, and Gulf War experience, General Pagonis orients the reader to his essential lessons in leadership as he learned them.

General Pagonis then transitions from the narrative to the descriptive and expositive with a text-like leadership outline entitled the "Building Blocks of Leadership."[6] He organizes leadership into eight broad functions and presents leadership lessons under each function as steps to success. After making brief tangential observations, General Pagonis distills the lengthy leadership outline into seven essential lessons.

II. Memoirs

At the outset of this section, the reader expects that General Pagonis will weave the lessons of leadership from his life experiences. General Pagonis uses the term "lessons" loosely, and in this section, "lessons" equates to common values or leadership traits. General Pagonis effectively highlights several lessons. Most lessons seem positive and reinforce the expectation he initially creates. Some lessons, however, seem negative or questionable and send a mixed message to the reader about what is truly important.

Before General Pagonis begins to narrate his life and career, he represents that his life experiences contain valuable "lessons" for potential leaders to learn. After the reader learns about his fantastic Gulf War accomplishments in the preceding chapter, he states: "I'm convinced that all of my experience before the Gulf War added up to a unique and highly specialized sort of training; and *it was only this training* that allowed me to accomplish a series of very complex logistical tasks in Saudi Arabia."[7] Here, General Pagonis introduces an underlying premise–that his leadership style is a model for success. At this point, the reader is already impressed with his Gulf War accomplishments. This, combined with General Pagonis' emphasis on the value that only this training can bring, cre-

6. *Id.* at 59.
7. *Id.* at 17 (emphasis added).

ates a powerful expectation. The reader expects General Pagonis to set forth the keys to successful leadership through his memoirs.

Throughout his memoirs, General Pagonis effectively uses his life experiences to illustrate many lessons he learned in leadership. While the lessons he illustrates tend to be anecdotal, he brings them to life by weaving them into an interesting narrative. Overall, the narrative holds the reader's attention and foreshadows many leadership concepts he presents in his leadership outline.

Through the lessons presented in the narrative, the reader identifies common leadership values or traits. This is especially true for the military reader, who is generally familiar with core leadership "values" and "norms."[8] Most of these lessons are positive and comport with the expectation that they are keys to success. Two examples of these positive leadership lessons are "getting your hands dirty,"[9] and "not being overcome by events."[10]

General Pagonis presents the first lesson from his experience working in his father's restaurant and hotel as a teenager. He describes how he started out performing menial tasks such as busboy or dishwasher, and how he moved up the ranks over the years to management positions. Through his rise in the business, however, his father assigned him regular stints of latrine duty. General Pagonis sums up this experience with the lesson that "you have to be involved in every aspect of an organization . . . if you're really going to understand how it works,"[11] or as his father put it, "never forget how to get your hands dirty!"[12]

From this illustrative experience, the reader can identify common traits such as "duty" and "setting the example." General Pagonis shows that "duty" goes beyond the confines of the office and that an effective leader must "set the example" by not being afraid to perform subordinate

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8. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, MILITARY LEADERSHIP (31 July 1990). The Army's basic manual on leadership contains values and norms military leaders should follow.

9. PAGONIS, *supra* note 1, at 20.

10. *Id.* at 39.

11. *Id.* at 20.

12. *Id.*

tasks. This lesson comports with General Pagonis' premise that his style, developed through his life experiences, is a model of success to follow.

General Pagonis provides another positive lesson from one of his Vietnam experiences. Serving as a commander of an Army riverboat company, he describes an incident where one of the barges behind him in a riverboat convoy came under fire and became stuck. Pagonis made an immediate decision to turn the convoy around and go into the line of fire to rescue the stranded barge. He presents the lesson that "the good military leader will dominate the events around him,"[13] by describing how his soldiers followed him during this incident, trusted him, and "did not panic under fire."[14]

This vignette also conveys a positive leadership message. The reader can identify leadership values such as "competence," "courage," and "selfless service." General Pagonis demonstrates that an effective leader is one who acts decisively and puts the needs of his subordinates above his own. Again, this lesson comports with General Pagonis' premise.

Unfortunately, General Pagonis uses his life experiences to present lessons that seem negative, objectionable, and raise doubt. At the very least, these lessons are confusing, and the reader is left wondering how they fit into his model for success. These lessons not only deflate General Pagonis' credibility as a source, they undermine his leadership style as a template for success. Two examples of these negative lessons are "bending the law can lead to good things,"[15] and "not pulling [your] weight" in garrison.[16]

General Pagonis makes no reservation about ignoring rules to reach goals or to attain a desired outcome. In fact, he elevates what he describes as "bending the law" to a "lesson,"[17] thereby giving this negative lesson equal status with the positive lessons already discussed. He illustrates this lesson with two separate life experiences. First, he describes how he got the profitable paper route he sought as an adolescent by disregarding the established rules and hierarcy. After controversy ensued, he eventually got

13. *Id*. at 39 *quoted in* WILLIAM A. COHEN, THE ART OF THE LEADER 165 (1990).
14. *Id.* at 39.
15. *Id.* at 22.
16. *Id.* at 45.
17. *Id.* at 22.

the route he wanted because the paperboy supervisor liked his aggressiveness.

Another vivid example is the prisoner of war issue he confronted in the Gulf War. General Pagonis details how he refused to provide cigarettes to Iraqi prisoners of war–even after he was made aware of Geneva Convention requirements. He staunchly opposed this requirement because "this was a foolish way to spend the scarce time of my soldiers, not to mention the taxpayers' money."[18] General Pagonis finally capitulates to the requirement only after a military lawyer threatened to put his chief contracting officer in jail.

This lesson of "bending the rules" to meet other objectives sends a mixed message. The reader is left wondering how this comports with conventional leadership norms. Is General Pagonis saying that a successful leader is one who ignores rules to reach a specific goal or to conserve resources? If so, what rules can be ignored, or which goals justify bending or breaking the rules? At the very least, General Pagonis should have explained the parameters of this lesson. Nevertheless, as written, this lesson conflicts with the more positive lessons cited above, undermines his premise that his leadership style should be emulated, and damages his credibility as an authoritative source in leadership theory.

The same is true of the "pulling your own weight"[19] lesson he presents. During his second tour of duty in Vietnam, he describes how he successfully completes his own branch transfer by not volunteering key information. Then Major Pagonis was a transportation officer with a key staff function at division level, but he had a deep, personal desire to be in the field where the "real" war was being fought. When the division commander asked for volunteers to fill executive officer vacancies in some infantry battalions, Pagonis immediately raised his hand to get one of the positions. Of course, the commander assumed Pagonis was an infantry officer, and Pagonis, knowing he would not get the position if his true branch was known, did not disclose that fact (Pagonis was wearing General Staff branch insignia which did not reveal that he was a transportation

18. *Id.* at 10.
19. *Id.* at 45.

officer). General Pagonis justified this with his gut feeling that "[he] couldn't stand not pulling [his own] weight"[20] behind the lines in garrison.

Here, General Pagonis sends another mixed message about leadership. In this "lesson," he put his personal desire to be where the action was above his less glamorous, but no less important, duty on the division staff. This vignette smacks of selfishness and noncommitment; it contradicts the positive leadership norms of "duty" and "selfless service" presented in earlier lessons. These conflicting norms not only destroy General Pagonis' premise, they cause the reader to question the value of the positive lessons presented earlier.

III. Leadership Outline

After his memoirs, General Pagonis presents his "building blocks" of leadership. In this section, the term "lessons" is synonymous with "techniques" or actual practices he has used. The outline itself provides some substance for prospective leaders, but suffers in two respects. First, in his introduction of the outline, General Pagonis sends a mixed message about how the reader should apply these "building blocks." Second, he leaves the reader craving details with the superficial treatment of suggested techniques.

The reader is immediately confronted with the problem of applying the "building blocks of leadership." Before he presents the text of his leadership outline, General Pagonis sends a confusing message of application. First, he boldly proclaims the value of his particular leadership style. His leadership style "made it possible to solve our formidable logistical challenges," it "became the property of hundreds of people,"[21] and "it allowed other people to lead" successfully.[22] In sum, General Pagonis claims that his logistical success in the Gulf War validated his leadership style. In effect, the reader anticipates that the outline will contain the "must do" list that will hold the fundamental keys to leadership.

Just before the outline itself, however, General Pagonis contradicts this "must do" impression with a disclaimer. He tells the reader that he will present his techniques "as orders: do this, do that."[23] But the "last such

20. *Id.*
21. *Id.* at 159-160.
22. *Id.*

order . . . will be for the reader to ignore any advice that doesn't make sense for a specific context, or for them personally."[24] This is confusing. On one hand, he emphasizes the importance of using these techniques–that they were a key to victory and were emulated by others. On the other hand, he minimizes their usefulness by telling the reader to disregard those techniques that do not work for them personally. As a result, the reader wonders if there are any absolutes. Are there some techniques that every leader must apply to be successful?

The second problem in this section is the superficial treatment of suggested techniques. Overall, the outline contains useful substance for the reader to consider, but some techniques lack detail. Under eight broad leadership functions he describes as "ends," he presents various "means" of accomplishing these ends. The means are his techniques or his "to do" list. For example, under the broad leadership "end" of "present yourself," he lists "means" such as "learn to listen, learn to communicate, and MBWA" (management by walking around).[25]

Despite the mixed message, many of these leadership techniques provide excellent "food for thought" and force readers to consider whether the technique might work in their own organizations. Two techniques that stand out are his "stand-up"[26] briefings and his "3x5 card"[27] problem-solving system. General Pagonis provides a wealth of detail about these unique leadership tools. He explains his rationale for using the techniques, explains how they work, describes how he used them in the Gulf War setting, and defends their value as leadership tools.

Conversely, General Pagonis presents some of his leadership techniques in a superficial fashion. These techniques are anecdotal suggestions without any meaningful discussion to support them. Due to the lack of detail, the reader cannot consider the value of the suggested technique to his own organization. One such instance is his "to do" entitled "augment yourself"[28] under the broad functional heading of "know yourself."[29] General Pagonis defines this leadership "to do" as personal evaluation. He explains that a good leader engages in introspection but his discussion goes

23. *Id.* at 161.
24. *Id.*
25. *Id.* at 163-166.
26. *Id.* at 185.
27. *Id.* at 189.
28. *Id.* at 162.
29. *Id.* at 161.

no further. This creates questions on how to apply the technique. When should it be done? Is there a particular way? How did he use it successfully in the Gulf War? Once again, General Pagonis leaves the reader wondering what is truly important and how to apply it–another mixed message.

IV. Conclusion

In the Gulf War "we off-loaded 33,100 containers, which, if laid end to end, would have stretched 188 miles."[30] No one can discount the immense challenge General Pagonis faced in the Gulf War and the unprecedented results he achieved. In *Moving Mountains*, however, General Pagonis fails to convince this reviewer that his leadership style is a formula to be duplicated. He proclaims the inherent value of his leadership style and then undermines it with mixed messages of conflicting norms, confusing application, and superficial explanation. General Pagonis deserves credit for illustrating key values and presenting alternative management techniques, but he leaves the reader with too many questions about who a leader is and what a leader must do.

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30. *Id.* at 6.

BREAKING THE PHALANX:

A NEW DESIGN FOR LANDPOWER IN THE 21ST CENTURY[1]

REVIEWED BY MAJOR JAMES R. AGAR, II[2]

Few soldiers could accomplish the feats of Colonel Douglas Macgregor. During the Persian Gulf War, he directed a battle against Iraq's elite Republican Guard with only ten tanks and thirteen Bradley fighting vehicles at his disposal. After just twenty-three minutes, the Battle of 73 Easting was over with Iraqi losses of nearly seventy armored vehicles. Macgregor's troop suffered no casualties. Two years later at the U.S. Army's National Training Center at Fort Irwin, California, Macgregor again proved indomitable. "In a series of five battles, most units typically lose four, draw one; Macgregor won three, lost one, drew one–still the best showing since the Persian Gulf War."[3]

Colonel Macgregor then turned his attention to perhaps the most daunting task of his career: the reformation of the U.S. Army. In *Breaking the Phalanx*,[4] Macgregor advocates a smaller, more concentrated, and lethal Army. He takes the title of his book from ancient military history when the Roman Legions first engaged the Macedonian Phalanx around 200 BC. While the Romans were outnumbered, their smaller and more agile Legions were able to flank the Macedonians and "break" the Phalanx. They defeated the Macedonians, not with an army that was superior in numbers, but superior in organization.[5] Macgregor believes the fate suffered by the once impregnable Macedonian Phalanx may be a prologue for today's Army.

Macgregor sees land armies as the primary means for achieving and maintaining strategic global dominance. Using historical examples of every conflict from this century, he outlines how America habitually

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1. DOUGLAS A. MACGREGOR, BREAKING THE PHALANX: A NEW DESIGN FOR LANDPOWER IN THE 21ST CENTURY (1997).

2. United States Army. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Richard J. Newman, *Renegades Finish Last*, U.S. NEWS & WORLD REP., July 28, 1997, at 35.

4. MACGREGOR, *supra* note 1, at 285.

5. *Id*. at 1-2.

neglects its defense needs, particularly the Army. It is this weakness, he argues, that then entices our enemies to strike. While the Air Force and Navy play significant roles in the game of strategic dominance, none of the major conflicts in this century were ended until the United States committed the Army to battle.[6] Meanwhile, American ground forces in Europe and the Korean peninsula have successfully deterred communist aggression for fifty years.

But America's lynchpin of strategic dominance may have seen its zenith. Macgregor identifies two problems with today's Army: first, it is much smaller than anytime since 1948;[7] and second, it's organized the same way it was during World War II.

Throughout the book, Macgregor appeals to the reader to resist further reductions in the troop strength or budget of the Army, even to the point of cannibalizing the budgets of the sister services. The wisdom of this is debatable, but Macgregor believes he has a plan to take the same numbers of soldiers in today's Army and organize them into a more effective fighting force.

According to Macgregor, the issue is one of information. Today's Army fights with far more information than it did decades ago. Commanders now possess a wealth of information from a variety of sources: satellites, computer networks, radar, and unmanned aerial reconnaissance. Weapons systems can reach from one continent to the next. Brigades of troops can deploy in hours instead of weeks or months. All this creates a situation where commanders receive a plethora of information in a compressed battlespace where the deep, close, and rear battles become one. Complicating matters, commanders also face a compressed decision/analysis timeframe in which they must act.[8] In short, more is happening to today's Army in an expanded arena with too much information and much less time to decide what to do.

Macgregor argues that the organization of today's Army is too inflexible and sluggish for such an environment. He holds up the incredibly successful Microsoft Corporation as a model of how the Army might consider changing its organization. He points to Microsoft's "flattened organization,"[9] which reduces the amount of intermediate management. He also

6. *Id*. at 11-21.
7. *Id*. at 15.
8. *Id*. at 50.

embraces the minimal top-down coordination used by the computer software pioneer. These modifications allowed Microsoft to be more agile than its traditionally organized corporate competitors and react swiftly to changes in the market, because it could use and disseminate information quickly through the organization. Today's Army was conceived in the heyday of the industrial age when attrition warfare was the sole means to defeat the enemy. But in the information age this no longer holds true. Our current organization of the Army cannot fully exploit the advantage conferred on it by the wealth of information technology.

In contrast, smaller "all arms" units can be far more lethal than their bigger counterparts, according to Macgregor. They can deploy faster, need fewer command and control elements, can disperse over a wide area to make them less attractive targets, maneuver swiftly and (if armed with the right information) attack their opponent's weak spots without engaging in a head-to-head fight. This agility is crucial to success with today's maneuver warfare because it enables the commander to manipulate the battle to a time and place of his choosing. Like Microsoft, the Army which can better control and manage information on the battlefield will dominate its opponents. Therefore, information and organization become the combat multipliers of the twenty-first century.

Macgregor envisions a radically different Army to exploit the changes in maneuver warfare. For starters, he would do away with all ten of the Army's divisions and replace them with twenty-six much smaller "groups."[10] The groups resemble a regimental or brigade combat team, but are organized according to task and assigned to a joint task force (JTF) command, which would support and control the groups under its command.[11] Corps headquarters and their support elements would become JTF commands in the process. This structure eliminates the intermediate division command and staff, thus "flattening" the organization. The groups can be assigned to individual JTF commands on an "as needed" basis as each mission dictates.

Macgregor's critical thinking does not stop there. He decries the continual pursuit of "magic bullet" technologies, which sap precious defense funds and leave us with nothing but a false sense of security. He cites the

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9. *Id*. at 34.

10. A modern combat division has approximately 16,000 soldiers. The "groups" proposed by the author would contain about 4000-5000 troops each. *Id.* at 81.

11. *Id*. at 74-85.

expensive B-1 and B-2 bombers as examples, pointing out that neither have ever flown a combat mission. He is also highly critical of the number of aircraft carriers and their relatively high maintenance costs.[12] Macgregor uses these examples to point out the relatively low cost of maintaining a potent ground force. He reinforces this reasoning with charts showing the Army receiving only eight percent of the Department of Defense (DOD) budget for the top twenty weapons programs. Clearly, Macgregor believes the Army is the stepchild of the DOD when it comes to money.

The budgets and the current force structure are not the Army's only troubles, however. Macgregor attacks the Army's current system of managing and promoting officers as being too conformist and stifling both creativity and initiative. Perhaps Colonel Macgregor's experience at being passed-over for brigade command at least three times (a necessary step for promotion to brigadier general) colors his arguments in this area.

Macgregor also foresees big changes in doctrine and training for all the armed forces. He deftly points out that the services seldom conduct joint training on a large scale. He recognizes that the services have located their doctrine centers away from one another and rarely see substantial coordination. He strongly encourages joint operations as the blueprint for future success.

Colonel Macgregor writes with a sharp pen and a great intellect, yet he is no ordinary Army officer. Besides his accomplishments on the battlefield, he has a Ph.D. in International Relations from the University of Virginia.[13] His sources and endnotes indicate tremendous research on this project and a grasp of matters far greater than just the Army force structure. Macgregor sprinkles the text with the ramifications for U.S. foreign policy if we should fail to make critical changes in the years ahead. While he sees where the Army and the rest of the DOD may go, Colonel Macgregor plots a tenuous course to get us there.

Macgregor claims the transition to the group-JTF force structure will not cost taxpayers anything. Yet, he can cite no empirical studies to support this assumption, nor has any reliable government agency (such as the

12. A modern carrier group costs $10 billion annually to run. A combat division costs $1 billion annually to operate. *Id*. at 208.

13. MACGREGOR, *supra* note 1, at 285

Congressional Budget Office or the General Accounting Office) verified his figures.

Macgregor also fails to account for the logistical and personnel implications of his model for change. By eliminating the division hierarchy, he dispenses with the forward and main support battalion that provide logistical support for the brigades (or in Macgregor's case, the "groups"). Yet he provides no surrogate to support his newly formed groups. Instead he relies on a fragile, "just-in-time" logistics system–courtesy of the corps Support Command (now part of the JTF)–which may leave U.S. forces without adequate supplies at the wrong time. He makes no mention of the assignment of the special staff relative to his new "groups," leaving open the question of where the division Staff Judge Advocate's office will go and what the role of the trial counsel will be. His proposals to eliminate dependent-accompanied overseas tours and rotate entire groups overseas for twelve months at a time would save DOD plenty of money, but the cost in morale cannot be measured. It is doubtful many married persons would remain in the Army if they knew they faced every other year apart for twenty years.

Despite all the brilliance with which Colonel Macgregor assembles his thesis, the reader cannot help noticing a tone of bitterness or envy in his writing. He seems bitter that he was not picked up for brigade command (a fact not disclosed by him in the book).[14] He envies the way the Air Force and the Navy get far more defense-dollars than their Army counterparts. He is bitter that the Army has cut back one third of its strength to ten divisions and may be cutting even more. While diplomatic and politic in his critique of the Air Force and Navy, he clearly holds both in low regard.

Indeed, this bitterness clouds Macgregor's objectivity on more than one occasion. Early in the book, he discusses the critical need for close air support (CAS) from the Air Force and how it is a fundamental key to success on the modern battlefield. A few chapters later he suggests the Air Force cannot be relied upon to provide CAS, despite the history he has laid out to the contrary. It is odd to read his criticism of the sister services on one page and his emphasis on joint operations in yet another part of the book.

The greatest shortcoming of *Breaking the Phalanx* is that it defines a new force structure without identifying the threat that force structure will

14. Newman, *supra* note 3, at 35.

face. Macgregor describes a second version of the Persian Gulf War in which his "groups" would fight, but he cannot articulate any failure by the U.S. Army in the last half century which merits a wholesale change in the force structure. He poses no other hypothetical battles in which his force might prove superior to the current force structure. Macgregor may be attempting to fix something that isn't broken. Today's Army faces a myriad of different missions. Smart, capable leaders like Colonel Macgregor have learned to successfully modify and adapt our current force structure to most operations and threats faced by the Army. It is not a perfect organization, but Macgregor does not identify any tragic flaws which justify such dramatic change. Nor does he give the reader a more modern historical precedent than the Macedonian Phalanx.

The reformation of the force faces huge obstacles too. Closer integration of the sister services will likely encounter great resistance from all branches. Budgets may be the next battlegrounds for the four services. Even Macgregor acknowledges that the additional "jointness" required under his plan may not be possible and that his model requires additional study.[15]

Breaking the Phalanx is a remarkable book that every serious student of warfighting should read. Colonel Macgregor courageously challenges some of the most deeply held assumptions in the military and boldly proposes innovative and well thought out changes for the status quo. His book will stimulate a lot of ideas and controversy on how we can make this a better Army. In *Breaking the Phalanx*, Colonel Macgregor may not have all the answers, but he certainly asks the right questions.

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15. MACGREGOR, *supra* note 1, at 96.