SUMMARY CONTEMPT POWER IN THE MILITARY: A PROPOSAL TO AMEND ARTICLE 48, UCMJ

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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.