JUDICIAL REVIEW OF THE *MANUAL FOR COURTS-MARTIAL*

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I. Introduction

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

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

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

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

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

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

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

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 The 1969 *Manual* superseded the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter MCM 1951].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

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

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

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

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

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

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

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

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

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

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

20. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Authority, Challenges, and Judicial Review

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

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

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

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

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

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

B. How Challenges to the *Manual* Arise

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

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

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

Id.

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

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

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

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

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

33. *See id.*

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

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

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

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34. *See id.*

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

Id.

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

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

Id.

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

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

C. Law Governing Challenges to *Manual* Provisions

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

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

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

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

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

Id.

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

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

44. *See id.*

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

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

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

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

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

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

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

5 U.S.C.A. § 706(2) (West 1998).

47. *See infra* Part IV.

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

III. General Principles for Judicial Review

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Reliance on General Principles of Administrative Law

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

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

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

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

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

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

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

B. Deference to the President

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

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57. *See, e.g.*, Bangor Hydro-Elec. Co. v. Federal Energy Regulatory Comm'n, 78 F.3d 659, 663-64 (D.C. Cir. 1996); Military Toxics Project v. Environmental Protection Agency, 146 F.3d 948, 955 (D.C. Cir. 1998).

58. *See* Loving v. United States, 517 U.S. 748, 768-73 (1996).

59. In support of its ruling on the non-delegation doctrine, the Supreme Court cited: United States v. Grimaud, 220 U.S. 506 (1911); Touby v. United States, 500 U.S. 160 (1991); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614 (1946); and other decisions. *See Loving*, 517 U.S. at 768. In addressing the intelligible principle doctrine, the Supreme Court cited: A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and other cases. *See Loving*, 517 U.S. at 771.

60. *See* Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984). The *Chevron* doctrine requires the federal courts to defer to an administrative agency when the agency adopts a reasonable interpretation of a statute that the agency administers. *See id.* at 843.

The federal courts generally uphold regulations passed by agencies, as well as their interpreting of statutes.[61]

In an influential article, Justice Antonin Scalia identified three arguments for judicial deference to administrative agencies.[62] First, the separation of powers principle generally requires courts to cede questions of policy to the other branches of government.[63] Second, Congress expressly or implicitly may direct and often has directed courts to defer to agencies.[64] Third, agencies have greater substantive expertise in many areas than the courts.[65]

These reasons for deferring to administrative regulations, as the following discussion will show, also apply to the executive orders issued by the President. Indeed, in the case of executive orders to the military, they may produce an even stronger argument for deference.[66] Courts, therefore, should hesitate before invalidating *Manual* provisions.

1. Separation of Powers

Some commentators have argued that courts should defer to administrative agencies because of the separation of powers principle. They have reasoned that the executive branch, rather than the judiciary, should settle questions of policy when statutes do not make them clear. Judges, therefore, should not substitute their judgment for those of the executive officers controlling the agencies.

This separation of powers concern is heightened in the case of executive orders. Overruling an agency encroaches on the President's policy-making authority, but only indirectly. The President has only limited control over the regulations issued by administrative agencies. He usually has

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61. *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 703 (1992); Thomas W. Merrill, *Deference to Executive Precedent*, 101 YALE L.J. 969, 1017 (1992). For discussion of the special rules concerning deference in the context of criminal law, *see infra* Part IV.G.2.

62. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

63. *Id.* at 515-16.

64. *Id.* at 516-17.

65. *Id.* at 514.

66. *See* Robinson O. Everett, *Some Comments on the Role of Discretion in Military Justice*, 37 LAW & CONTEMP. PROBS. 173, 176-184 (1972) (discussing generally the President's discretion over the content of the rules governing courts-martial).

the power to hire and to fire the head of the agency,[67] but generally cannot direct its day-to-day operations. For this reason, regulations promulgated by an agency–although they emanate from the executive branch of government–may not fully reflect the President's views or policy choices.

The same caveat holds less true for executive orders. The President has complete control over the content of executive orders because he alone signs them. Executive orders, therefore, necessarily embody policy choices that the President personally has made or approved. Therefore, when a court invalidates an executive order, it directly challenges the President's decisions. Respect for the head of the executive branch, for this reason, requires that courts take this step only with justification.[68] Although they may strike down Military Rules of Evidence and Rules of Courts-Martial Procedure for a variety of reasons (described in Part IV), they should defer to the President's lawful policy choices.

2. Delegation of Policy-Making Authority

All legislation contains some gaps or open issues. Accordingly, when Congress requires an agency to administer a statute, commentators have argued that courts should infer that Congress implicitly has delegated to the agency the authority to make policy choices.[69] Courts must recognize

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67. *See* Myers v. United States, 272 U.S. 52 (1926) (President may discharge executive officers). *But see* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Congress may limit the power of the President to discharge a member of an independent agency who exercises quasi-legislative power).

68. One author would disagree somewhat with this argument. Eugene R. Fidell asserts:

> [I]t is error to leave the impression that the role of the President is more than perfunctory in the adoption of *Manual* provisions. True, a presidential signature appears, and the President's attorneys may have a part in the review process, but the undeniable fact is that the essential work in this regard is performed by the Joint Service Committee on Military Justice.

Fidell, *supra* note 25, at 6055. Nevertheless, while the President may delegate the work of putting together the *Manual* as he delegates most work, by statute he retains ultimate responsibility for its content.

69. *See* Scalia, *supra* note 62, at 516 (finding this rationale most persuasive). Some courts have accepted this reasoning. *See, e.g.*, Process Gas Consumers Group v. United States Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc), *cert. denied* 461 U.S. 905 (1983); Constance v. Secretary of Health & Human Serv., 672 F.2d 990, 995 (1st Cir. 1982).

and uphold this implicit delegation, just as they would follow any other express or implied command in a statute.

The same reasoning applies to the executive orders that establish the UCMJ, only with more force. The UCMJ assigns to the President the task of creating rules, and therefore naturally invests some discretion in him.[70] That is not all. The Constitution also designates the President as the Commander-in-Chief.[71] In this role, he has broad discretion in military matters.[72] Courts, therefore, again should not upset his decisions lightly.

3. Expertise

As administrative agencies have expertise in the areas that they regulate, the President and his advisers have special knowledge about the needs and concerns of the military. This expertise extends not only to strategic and operational matters, but also to matters of discipline. Military necessity requires that the President have discretion to employ his expertise. As Professor William F. Fratcher explained nearly forty years ago:

> Good order, morale, and discipline in the armed forces are necessary to victory in war; their absence ensure defeat. The President, as Commander-in-Chief, is primarily responsible for the maintenance of order, morale and discipline in the armed forces and the system of military justice is one of the principal means of maintaining them. It is essential to national safety that the President have sufficient power to make the system of military justice work effectively under the conditions which actually exist in the forces . . . .[73]

Professor Fratcher added that, in recognition of these principals, it "is to be hoped that" the military courts "will exercise greater judicial restraint

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70. *See, e.g.*, Douglas Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277-78 (1988); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308-12 (1986).

71. U.S. CONST. art. II, § 2, cl. 1.

72. *See* Loving v. United States, 517 U.S. 748, 772-73 (1996); Reid v. Covert, 354 U.S. 1, 38 (1957).

73. *See* Fratcher, *supra* note 25, at 868.

in the exercise of its power to determine that regulations of the President are invalid."[74]

C. Consistency

In reviewing *Manual* provisions, the courts also should strive to act consistently and to explain any apparent inconsistencies in their decisions. Yet, they have not always treated the same types of challenges in a similar manner. For example, in two cases, defendants sought to have *Manual* provisions invalidated on grounds that they conflicted with Army regulations. In one decision, the Court of Military Appeals ruled that *Manual* provisions preempt service regulations when they conflict.[75] In the other case, however, the Court of Military Appeals struck down the *Manual* provision and upheld the regulation.[76] The court made no effort to reconcile these cases, leaving future litigants, and the lower courts with ambiguous guidance.

The military courts appear to have rendered most of their conflicting decisions inadvertently. The way to avoid problems of inconsistency, in this author's view, lies in enabling the military courts to recognize that they regularly perform judicial review of the *Manual*, and that challenges to rules of evidence and procedure tend to fall into a small set of discernible categories. Once the military courts see the similarities among the cases, they can harmonize their decisions. The following part of this article seeks to aid them in this endeavor.

IV. Grounds for Invalidating *Manual* Provisions

In preparing this article, the author has attempted to conduct an exhaustive survey of the challenges to the *Manual* since the UCMJ was enacted in 1950. This research has revealed that litigants have asked the military courts to invalidate *Manual* provisions on nine principal grounds. The courts have accepted these challenges in many instances, but rejected them in others. The following discussion addresses each of these nine

74. *Id.* at 860.

75. *See* United States v. Kelson, 3 M.J. 139, 140 (C.M.A. 1977) (invalidating rule promulgated by the Secretary of the Army as inconsistent with the *Manual*).

76. *See* United States v. Johnson, 22 C.M.R. 278, 283 (1957) (striking down *Manual* provision as inconsistent with Army regulation).

grounds, summarizing the leading cases, and then presenting the author's own comments and analysis.

A. The *Manual* Provision is Merely Precatory

Litigants in many cases have asked the military courts not to follow *Manual* provisions or passages in the supplementary materials on grounds that the President did not intend them to have a binding effect. In these cases, the litigants have characterized the disputed language as "precatory," meaning that it only provides guidance and does not have the force of law.[77] The courts have accepted this challenge in a number of instances.

1. Leading Cases

The cases indicate that two factors determine whether the military courts will characterize a *Manual* provision as precatory and thus feel free not to follow it. The first factor is the provision's location within the *Manual*. The second is the wording of the provision.

The published volume containing the *Manual*, includes two very important supplementary materials: the "discussion" accompanying the Rules for Courts-Martial and Military Rules of Evidence, and the "analyses" of these Rules and the Punitive Articles.[78] Military courts frequently cite and follow these supplementary materials, and judge advocates constantly rely on them for guidance. Nonetheless, the courts have characterized everything appearing in these supplementary materials as precatory, and often have refused to follow what they say.[79]

Actual *Manual* provisions–the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles–have received different treatment. Unlike the discussion and analysis, the courts have assumed that the President generally intended these provisions to be binding unless other-

77. *See* BLACK'S LAW DICTIONARY 1176 (6th ed. 1990) (defining "precatory" to mean "conveying or embodying a recommendation or advice or the expression or a wish, but not a positive command or direction").

78. *See* MCM, *supra* note 7, pmbl. discussion (describing these supplementary materials).

wise indicated. The military courts, accordingly, have followed them except when their language reveals that they merely provide guidance.

Most of the *Manual* provisions that courts have characterized as precatory have contained the word "should." This auxiliary verb often creates an ambiguity. If a rule says that someone "should" take a particular action, does the rule mandate that action, or only recommend it? This question unfortunately has no universal answer.

The characterization of "should" as permissive or mandatory depends on context.[80] In some cases, courts have held that rules containing the word "should" are precatory.[81] In other cases, they have found them to be binding.[82] In still other cases, the courts have raised the issue without deciding it.[83] To present a persuasive argument, litigants must be prepared

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79. For cases refusing to following the discussion, *see, e.g.*, United States v. Fisher, 37 M.J. 812, 818 (N.M.C.M.R. 1993) (refusing to follow discussion of R.C.M. 305(h)), *affirmed* 40 M.J. 293 (C.M.A. 1994); United States v. Robertson, 27 M.J. 741, 743 n.1 (A.C.M.R. 1988) (refusing to follow discussion of R.C.M. 1003(3)). For cases refusing to follow the analysis, *see, e.g.*, United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993) (analysis not followed), *cert. denied* 510 U.S. 1192 (1994); United States v. Marrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994) (refusing to follow statement in analysis indicating that R.C.M. 405(g)(1)(A) created a per se rule), *aff'd* 43 M.J. 35 (1995). *See also* United States v. Mance, 26 M.J. 244, 252 (C.M.A.), *cert. denied* 488 U.S. 942 (1988) (stating that the analysis is not binding); United States v. White, 39 M.J. 796 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Ferguson, 40 M.J. 823, 827 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Perillo, 6 M.J. 678, 679 n.2 (A.C.M.R. 1978) (appendix 8 to the *Manual* does not have the force of law).

80. *See* United States v. Voorhees, 16 C.M.R 83, 101 (C.M.A. 1954) (holding that while the word "should" is "normally construed as permissive," context may indicate that it has a "mandatory" meaning). *Cf.* United States v. Merritt, 1 C.M.R. 56, 61 (1951) ("[W]hile the word 'shall' is generally construed to mean imperative and mandatory, it may be interpreted to be permissive and directory.").

81. *See, e.g.*, United States v. Howard, 17 C.M.R. 186, 194 (1954) (holding that MCM 1951, *supra* note 7, ¶ 150b was precatory when it stated "the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him"); United States v. Hartley, 14 M.J. 890, 898 (N.M.C.M.R. 1982) (holding that MCM 1969, *supra* note 7, at A6-A4 was precatory when it stated: "A person on active duty belonging to a reserve component . . . should be described as such . . . .").

82. *See, e.g.*, United States v. Lalla, 17 M.J. 622, 625 (N.M.C.M.R. 1983) (holding that MCM 1969, *supra* note 7, ¶ 76b(1) was not precatory when it stated: "If an additional punishment is authorized because of the provisions of 127c, Section B, . . . the military judge . . . should advise the court of the basis of the increased permissible punishment."); United States v. Warner, 25 M.J. 64, 67 (C.M.A. 1987) (rejecting the argument that R.C.M. 1107(d)(2) was precatory when it stated: "When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial . . . unless requested by the accused.").

to compare these numerous precedents to the particular provision that they are challenging as precatory.

Although most cases in which courts have found *Manual* provisions precatory have involved rules employing the word "should," some have not. For example, in *United States v. Jeffress*,[84] the Court of Military Appeals concluded that it did not have a duty to follow a portion of the punitive articles that explained the elements of kidnapping. Although the punitive articles generally have a binding effect, the court characterized this particular explanation as non-binding "discussion."[85]

Another example of a challenge to a rule that did not use the word "should" appears in *United States v. Solnick*.[86] In that case, the government argued against enforcing Rule for Courts-Martial 1107, which directs the convening authority to act on a sentence unless "it is impracticable."[87] The government contended that the court should not enforce the provision or its impracticability requirement on grounds they "are essentially 'housekeeping' rules 'serving no purpose other than to provide guidance to commanders through the post-trial process and assist them in taking action on results of courts-martial . . . .'"[88] Although the court ultimately rejected the argument, it seriously considered the government's position.[89]

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83. *See, e.g.*, United States v. Francis, 15 M.J. 424, 428 (C.M.A. 1983) (questioning whether MCM 1969, *supra* note 7, ¶ 33h was mandatory or precatory in stating that all known charges "should" be tried at a single trial); United States v. Hoxsey, 17 M.J. 964, 965 (A.F.C.M.R. 1984) (suggesting that MCM 1969, *supra* note 7, ¶ 168 might be precatory when it stated that "[i]n general it is considered objectionable to hold one accountable under [art. 89] for what was said or done by him in a purely private conversation").

84. 28 M.J. 409 (C.M.A. 1989).

85. *See id.* (upholding UCMJ art. 92(c)(2) (West 1998)). For a similar case, *see* United States v. Turner, 42 M.J. 689, 691 (Army Ct. Crim. App. 1995). In *Turner*, the court upheld the definition of "dangerous weapon" in UCMJ art. 54c(4)(a)(ii), but did not appear to feel bound by the *Manual* provision. Instead, it simply agreed that the definition was logical. *See id.* The dissent described the definition in the *Manual* as "a nonbinding comment on the law." *Id.* at 694 (Mogridge, J., dissenting).

86. 39 M.J. 930 (N.M.C.M.R. 1994).

87. MCM, *supra* note 7, R.C.M. 1107.

88. *See Solnick*, 39 M.J. at 933.

89. *See id.* For another precatory language challenge not involving the word "should," *see* United States v. Latimer, 30 M.J. 554, 562 (A.C.M.R. 1990) (suggesting that R.C.M. 911 was precatory in stating that "[w]hen the trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn").

2. Analysis and Comment

At first glance, some observers might think that the military courts improperly are failing to defer to the President when they refuse to follow the discussion or analysis printed along with the *Manual*.[90] In reality, however, they are not. The President played no role in preparing these supplementary materials, and he did not promulgate them by executive order; on the contrary, these materials represent only the beliefs of staff personnel who worked on the *Manual*.[91] The courts, therefore, do not violate the principle of deference to the President when they disagree with them.

The discussion accompanying the preamble explains the development and role of these supplementary sources as follows:

> The Department of Defense, in conjunction with the Department of Transportation, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Courts of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules.[92]

The analysis of the Rules for Courts-Martial confirms this view of both the discussion and analysis:

> The Discussion is intended by the drafters to serve as a treatise. . . . The Discussion itself, however, does not have the force of law. . . .
>
> The Analysis sets forth the nonbinding views of the drafters, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. . . . [I]t is important to remember that the analysis solely represents the views of staff personnel who worked on the project, and does not

90. *See supra* Part III.B. (arguing that courts should defer to the President).
91. *See* MCM, *supra* note 7, pmbl.
92. *Id.*

> necessarily reflect the view of the President in approving it, or of the officials who formally recommended approval to the President.[93]

The military courts also correctly have presumed that they generally must follow actual *Manual* provisions, unless their language suggests otherwise. Rule for Courts-Martial 101 declares: "These rules govern the procedures and punishments in all courts-martial . . . ."[94] Military Rule of Evidence 101 similarly states that the rules of evidence "are applicable in courts-martial, including summary courts-martial . . . ."[95] These provisions reveal that the President generally intended actual *Manual* provisions to have the force of law, absent some other indication.

In deciding future cases, however, courts should take care not to dismiss the supplementary materials as irrelevant. Despite their precatory status, the courts should not simply ignore them. On the contrary, they generally should follow the "discussion" and "analysis" for three reasons.

First, the staff who prepared the supplementary material had significant expertise in the field of military law.[96] They drafted many of the rules in the *Manual*, and they attempted to explain the rules as thoroughly as they could. In cases of doubt, courts generally should assume that the drafters understand the implications of their statements, and follow their nonbinding guidance.

Second, judge advocates by necessity often must rely on the supplementary materials although they know (or should know) that they are not binding. In the field, trial and defense counsel often must give quick advice without having the opportunity to conduct extensive research. Naturally, they first turn to the *Manual* and the material printed with it.[97] Con-

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93. *Id.* at A21-3.
94. *Id.* R.C.M. 101.
95. *Id.* MIL. R.EVID. 101.
96. *See id.* pmbl. & A21-1.
97. *See* United States v. Smith, 32 C.M.R. 105, 119 (1962).

> It must be remembered that in many instances facilities of legal research are not readily available, so it is wholly understandable–perhaps even desirable–that the *Manual*, a handy compendium on military justice, include statements concerning substantive principles of law.

Id.

sequently, even if courts have no duty to follow precatory parts of the *Manual*, disregarding them may have negative practical consequences.

Third, following the precatory language would accord with the long-standing judicial practice of deferring to an agency's interpretation of the statutes that it enforces.[98] This doctrine strictly does not apply to the armed forces, but there is no pressing need for the military courts to have a different policy. Although the frequency of job rotations prevents many judge advocates from becoming truly expert in any one legal subject, the officers who prepared the "analysis" and "discussion" had long-term experience in military criminal law.[99] They thus resembled the staff of administrative agencies in terms of expertise.

With respect to actual *Manual* provisions, the courts have done well in trying to determine what the President intended. When the President promulgates rules containing words like "should," he may or may not want courts to enforce them. Indeed, the President could aid the courts significantly by eliminating the word "should" from future versions of the *Manual*.[100]

B. The *Manual* Provision Conflicts with the UCMJ

Outside of the military context, the APA permits courts to invalidate administrative rules and regulations that are "not in accordance with law."[101] This provision insures that legislation takes precedence over administratively promulgated materials. Under the APA, courts regularly strike down federal regulations that conflict with federal statutes.[102] Although the APA does not apply to the *Manual*, the military courts occa-

98. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 627-31 (1996).

99. *See, e.g.*, MCM, *supra* note 7, at A22-1 (indicating that then-Major Fredric Lederer prepared the initial draft of the analysis of the Military Rules of Evidence). *See also id.* at A21-1 through A21-2 (describing the other officers who worked on the extensive revisions to the *Manual* in 1984).

100. *See* OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REP., HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 61-62 (Ira B. Forester ed., 1995) (recommending use of the word "shall"); REED DICKERSON, LEGISLATIVE DRAFTING 125-29 (1954) (listing words that drafters should avoid in creating legal rules).

101. 5 U.S.C.A. § 706(2)(A) (West 1998).

sionally have invalidated *Manual* provisions on the ground that they conflict with the UCMJ.[103]

1. Leading Cases

The Court of Military Appeals began to invalidate *Manual* provisions that conflicted with the UCMJ shortly after the code went into effect. In *United States v. Wappler*,[104] the court refused to uphold a *Manual* provision that indicated a court-martial could confine to bread and water a person not attached to or embarked on a vessel.[105] The court found this provision to conflict with Article 55's prohibition on cruel or unusual punishments.[106] The court subsequently invalidated a number of other provisions in the 1951 *Manual* because the provisions conflicted with Article 27's requirement of certified counsel,[107] Article 31's prohibition on self-incrimination,[108] Article 37's rules on unlawful command influence,[109]

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102. *See, e.g.*, Abington Memorial Hosp. v. Heckler, 750 F.2d 242 (3d Cir. 1984) (invalidating a Medicare regulation under section 706(2)(A) on grounds that it conflicted with federal statutes).

103. *See* Fidell, *supra* note 25, at 6050-51 (discussing this type of challenge).

104. 9 C.M.R. 23 (1953). Professor Fratcher identifies *Wappler* as the first case in which the Military Court of Appeals held a *Manual* provision invalid. *See* Fratcher, *supra* note 25, at 870. *But see* Fidell, *supra* note 25, at 6051 n.17 (qualifying this assertion).

105. MCM 1951, *supra* note 7, ¶ 127b.

106. 10 U.S.C.A. § 855 (West 1998). Noting that Article 55 affords greater protection than the Eighth Amendment, the court held that the statute prohibits confinement to bread and water except as authorized in Article 15. *See Wappler*, 9 C.M.R. at 26. Because Article 15 authorized confinement to bread and water only for persons attached to or embarked on vessels, *see* 10 U.S.C.A. § 15(b)(2)(A), the *Manual* provision violated Article 55. *See id.*

107. United States v. Drain, 16 C.M.R. 220 (1954) (invalidating MCM 1951, *supra* note 7, ¶ 117a, which said that officers taking depositions need not be certified counsel, as contrary to article 27(a)).

108. *See* United States v. Rosato, 11 C.M.R. 143, 145 (1953) (invalidating MCM 1951, *supra* note 7, ¶ 150, which said that a person can be required to make a handwriting sample, as contrary to Article 31); United States v. Eggers, 11 C.M.R. 191, 194 (1953) (same); United States v. Greer, 13 C.M.R. 132, 134 (1953) (invalidating a statement in MCM 1951, *supra* note 7, ¶ 150(b) indicating that courts may compel an accused to utter words for the purpose of voice identification as contrary to Article 31); United States v. Kelley, 23 C.M.R. 48, 52 (1957) (apparently invalidating an unspecified *Manual* provision on admission of exculpatory statements as contrary to Article 31); United States v. Price, 23 C.M.R. 54, 56 (1957) (invalidating MCM 1951, *supra* note 7, ¶ 140(a), which said that evidence of a false statement was admissible even if no preliminary warning had been given, as contrary to Article 31); United States v. Haynes, 27 C.M.R. 60, 64 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 140a, which said that evidence found by means of inadmissible confession was itself admissible, as contrary to Article 31).

Article 51's rules on voting by the panel,[110] Article 66's rules on appeal,[111] Article 72's rules regarding suspension of sentences,[112] Article 83's rules on fraudulent enlistments,[113] Article 85's rules on desertion,[114] and Article 92's rules on disobeying orders.[115]

The conflicts that these cases addressed arose mostly because of a fundamental problem with the 1951 *Manual*. That version of the *Manual* strived to serve two competing functions. It sought to act not only as a list of rules but also as a handy treatise to aid judge advocates. The treatise-like aspects of the *Manual* simply went too far in many instances.[116]

A substantial revision of the *Manual* occurred in 1969.[117] Although this revision made the *Manual* more compatible with the UCMJ, the Court of Military Appeals continued to strike down its provisions.

In particular, it invalidated paragraphs as inconsistent with Article 38's rules with respect to representation of defense counsel,[118] Article 39's

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109. *See* United States v. Littrice, 13 C.M.R. 43, 50 (1958) (limiting the use of MCM 1951, *supra* note 7, ¶ 38, which denounces theft as a crime of moral turpitude, so as not to violate Article 37 on unlawful command influence).

110. *See* United States v. Jones, 22 C.M.R. 73 (1956) (invalidating a statement in MCM 1951, *supra* note 7, ¶ 8a's "guide to trial procedure," which said that the law officer may excused a challenged person, as contrary to Articles 41 and 51); United States v. Johnpier, 30 C.M.R. 90, 94 (1961) (invalidating a provision in MCM 1951, *supra* note 7, ¶ 55 that specified a procedure for suspending trial in order to obtain the views of the convening authority).

111. *See* United States v. Varnadore, 26 C.M.R. 251, 256 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 127b, which limited confinement to six months in the absence of a punitive discharge, as contrary to Articles 66).

112. *See* United States v. Cecil, 27 C.M.R. 445, 446 (1959) (invalidating MCM 1951, *supra* note 7, ¶ 88e(2)(b), which allowed the convening authority to suspend a sentence without giving the accused probationary status as contrary to Article 72).

113. *See* United States v. Jenkins, 22 C.M.R. 51 (1956) (invalidating MCM 1951, *supra* note 7, ¶162's definition of enlistment to include "induction" as contrary to Article 83).

114. *See* United States v. Cothern, 23 C.M.R. 382 (1957) (invalidating MCM 1951, *supra* note 7, ¶ 164a's inference of an intent to remain absent as contrary to Article 85).

115. *See* United States v. Curtin, 26 C.M.R. 207, 211-12 (1958) (invalidating MCM 1951, *supra* note 7, ¶ 171b, which authorized conviction upon a finding of "constructive" knowledge, as contrary to Article 92(2)'s requirement of actual knowledge).

116. *See* Robert Emmet Quinn, *Courts-Martial Practice: A View from the Top*, 22 HASTINGS L.J. 201, 206 (1971) (explaining that many provisions of the *Manual* were struck down "because the *Manual* was both deficient and inefficient in effectuation of its purpose" and that the *Manual*'s "principal fault was that it tried to be an encyclopedia of military law, rather than a rule book of practice.").

117. *See supra* note 7.

provisions about what may take place at court sessions,[119] and Article 54's rules with respect to records of trial.[120]

The 1984 revision, which gave the *Manual* its present format, largely succeeded in eliminating existing conflicts. It did not, however, eliminate them all. For example, in *United States v. Davis*,[121] the Court of Military Appeals struck down a Rule for Court-Martial purporting to limit matters that the accused could submit to the convening authority when seeking clemency. In others instances, the courts have suggested that *Manual* provisions might conflict with the UCMJ, but ultimately have avoided making that determination.[122]

Ironically, despite the large number of cases in which the military courts have struck down *Manual* provisions since the inception of the UCMJ, they actually have hesitated to find conflicts. In a series of cases, the courts have interpreted *Manual* provisions to avoid conflicts even when their interpretations do not comport with the most natural reading of their text. The courts' practice in these cases resembles the familiar "rule of avoidance" that requires courts to interpret statutes in ways such that they do not violate the Constitution.[123]

An early example of interpreting the *Manual* to avoid conflicts comes from the 1952 case of *United States v. Clark*.[124] A provision in the *Manual*

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118. *See* United States v. McFadden, 42 C.M.R 14, 15-16 (1970) (invalidating a provision in MCM 1969, *supra* note 7, ¶ 47 that limited participation of uncertified assistant counsel as contrary to Article 38(e)).

119. United States v. McIver, 4 M.J. 900, 903-04 (N.M.C.M.R. 1978) (invalidating a provision in MCM 1969, *supra* note 7, ¶ 152 that prevented judges from ruling on motions to suppress evidence during a pre-arraignment session as contrary to Article 39).

120. *See* United States v. Douglas, 1 M.J. 354, 355 (C.M.A. 1976) (invalidating portions of MCM 1969, *supra* note 7, ¶ 145b, which relaxed the rule on admission of non-verbatim transcripts, as conflicting with Article 54).

121. 33 M.J. 13, 15 (C.M.A. 1991) (invalidating R.C.M. 1105 as conflicting with Article 60(b)(1)).

122. *See, e.g.*, United States v. Francis, 25 M.J. 614, 618-19 (C.G.C.M.R. 1987) (discussing possible conflict between Military Rule of Evidence 103(a) and Article 66).

123. *See, e.g.*, Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); Presser v. Illinois, 116 U.S. 252, 269 (1886). *See generally* Adrian Vermeule, *Savings Constructions*, 85 GEO. L.J. 1945 (1997). Outside of military law, no doctrine says that courts must interpret regulations to avoid conflicts with statutes.

Instead, the Supreme Court has made clear that federal courts must invalidate regulations that conflict with statutes. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In some cases, the courts do interpret ambiguous regulations to avoid conflicts with statutes. *See* Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 994 (10th Cir. 1996). The military courts, however, seem to have gone farther, and have extended this practice to *Manual* provision that do appear ambiguous.

specified that the law officer "may advise" a court-martial of lesser included offenses.[125] The Court of Military Appeals interpreted this provision to mean "*must* advise" the court, because a contrary interpretation would conflict with Article 51.[126] Subsequent cases have continued this effort to avoid conflicts even when it requires the court to adopt an unnatural or strained reading of a *Manual* provision.[127]

2. Analysis and Comment

The Constitution grants Congress the power "[t]o make [r]ules for the [g]overnment and [r]egulation of the land and naval forces."[128] Congress effectively would lack that power if the President could use executive orders to contradict legislation. The military courts have acted properly in allowing parties to challenge *Manual* provisions that conflict with the UCMJ.[129] The courts similarly might invalidate *Manual* provisions that conflict with federal legislation other than the UCMJ.

Statutory support for the courts' practice of striking down *Manual* provisions that conflict with the UCMJ comes from Article 36.[130] Article 36 specifies that the President may prescribe rules of procedure and evidence for courts-martial.[131] The article, however, insists that the rules prescribed "shall not be contrary to or inconsistent with this code."[132] Courts thus have an implicit statutory basis for striking down procedural and evidentiary provisions in the *Manual* if they conflict with the UCMJ.

The military courts, however, do not stand on as firm ground when they interpret *Manual* provisions to avoid conflicts with statutes.

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124. 2 C.M.R. 107 (1952).

125. MCM 1951, *supra* note 7, ¶ 73c.

126. *See Clark*, 2 C.M.R. at 109-110.

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

128. U.S. CONST. art. I, § 8, cl. 14.

129. Other commentators also agree that statutory provisions take precedence over the *Manual*. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL X (2d ed. 1986) (stating that *Manual* provisions must fall if they conflict with a statute); EDWARD M. BRYNE, MILITARY LAW 12 (3d ed. 1981) (stating that *Manual* provisions must fall if they conflict with a statute); Fratcher, *supra* note 25, at 866 (discussing in depth the question of when presidential orders and congressional statutes take precedence over each other).

130. 10 U.S.C.A. § 836 (West 1998).

131. *See id.*

132. *Id.*

Although courts traditionally have interpreted federal statutes in ways to avoid constitutional questions, they generally have not sought to avoid conflicts between regulations and statutes.[133] Courts avoid striking down statutes because Congress passes laws only after great effort and because legislation generally reflects democratic choices. The same concern has less force in the area of administrative law. The President, unilaterally, issues the *Manual* by executive order. If its provisions conflict with the acts of Congress, they should fall. Invalidating *Manual* provisions does not create a substantial problem because the President easily can replace the stricken portions with new provisions that do not conflict with the statute. The military courts, accordingly, should reconsider their practice of adopting unnatural or strained interpretations of the *Manual* to prevent conflicts from arising with the UCMJ.[134]

C. The *Manual* Provision Conflicts with Another *Manual* Provision.

The *Manual* contains hundreds of pages of rules. Not surprisingly, a few of these rules have come into conflict with each other. In these situations, the military courts have to decide what to apply and what to ignore.

1. Leading Cases

The Court of Military Appeals recognized early that one *Manual* provision might clash with another. In a frequently cited passage, the court suggested that such a conflict might require the military courts to choose not to enforce one of the two provisions.[135] Subsequent lower-court cases have announced two rules for determining which *Manual* provision should prevail.

First, in *United States v. Morlan*, the Army Board of Review ruled that when a specific provision in the *Manual* conflicts with a general provision, the "specific terminology controls and imparts meaning to [the]

133. *See supra* note 123.

134. This conclusion applies only to cases where courts adopt interpretations that are contrary to the ordinary meaning of *Manual* provisions. In cases of ambiguity, the courts may decide that an interpretation that avoids a conflict is best because the President most likely intended to comport with the statute.

135. *See* United States v. Villasenor, 19 C.M.R. 129, 133 (1955) ("[W]here a [*Manual*] provision does not lie outside the scope of the authority of the President, offend against the Uniform Code, conflict with another well-recognized principle of military law, or *clash with other Manual provisions*, we are duty bound to accord it full weight." (emphasis added)).

general terminology."[136] Applying this rule, the Board of Review decided that a court-martial had improperly sentenced a warrant officer to a bad-conduct discharge.[137] Although paragraph 127c of the 1951 *Manual* said generally that a "bad conduct discharge may be given in any case where a dishonorable discharge is given," paragraph 126d said more specifically that "separation from the service of a warrant officer by sentence of court-martial is effected by dishonorable discharge."[138]

Second, in *United States v. Valente*, the Coast Guard Board of Review held that when *Manual* provisions clash, "the pertinent paragraphs should be read together and, if possible, the conflict resolved in accord with the overall intent of the *Manual*."[139] The Board used this standard in a case in which a court-martial had sentenced an accused to a bad-conduct discharge and confinement at hard labor for one year, but the convening authority conditionally had remitted the bad-conduct discharge.[140] In reviewing the legality of the convening authority's action, the Board had to consider three conflicting provisions in the 1951 *Manual.*[141]

Paragraph 88e(2)(b) appeared to authorize what the convening authority had done by stating that the convening authority "may suspend the execution of a punitive discharge."[142] Paragraph 88c, however, said that the convening authority could remit part of a sentence only if a court-martial could have imposed the remaining punishment.[143] A court-martial could not have imposed a sentence of confinement at hard labor for one year without a punitive discharge because paragraph 127b barred a court-martial from ordering confinement at hard labor for more then six months absent a punitive discharge.[144]

Although the Board of Review did not fully explain its reasoning, it concluded that the *Manual* prohibited the sentence.[145] The Board ruled that the overall intent of the *Manual* was to prohibit confinement with hard

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136. United States v. Morlan, 24 C.M.R. 390, 392 (A.B.R. 1957). *See also* United States v. Dowty, 46 M.J. 845, 848 n.10 (N.M. Ct. Crim. App. 1997) (stating this same canon of construction), *aff'd* 48 M.J. 102 (1998).

137. *See Morlan*, 24 C.M.R. at 392.

138. *See id.* (quoting MCM 1951, *supra* note 7, ¶¶ 126d, 127).

139. United States v. Valente, 6 C.M.R. 476 (C.G.B.R. 1952).

140. *See id.* at 476.

141. *See id.*

142. MCM 1951, *supra* note 7, ¶ 88(e)(2)(b).

143. *See id.* ¶ 88c.

144. *See id.* ¶ 127b.

145. *See Valente*, 6 C.M.R. at 476.

labor for more than six months without a punitive discharge.[146] It, therefore, remitted the portion of the accused's confinement in excess of six months, while retaining the conditionally remitted bad-conduct discharge.[147] Few other cases have identified conflicts within the *Manual*.[148]

2. Analysis and Comment

The two rules in *Valente* and *Morlan* for resolving conflicts between *Manual* provisions comport with the first two of the general principles for judicial review discussed above.[149] The court in *Valente* adopted a general canon of construction that both military and nonmilitary courts have applied in the context of conflicting laws.[150] The court in *Morlan*, moreover, afforded respect to the President by striving foremost to determine the overall intent of the *Manual* when reconciling disagreeing provisions.

On the other hand, the two decisions appear slightly inconsistent. In particular, the Coast Guard Board of Review might have reached a different result in *Valente* if it had considered the cannon that the Army Board of Review applied in *Morlan*. The Coast Guard Board of Review might have seen paragraph 88e(2) as the most specific provision, and thus held that it trumped paragraphs 127b and 88c. If the Board had reached this conclusion, it would have upheld the convening authority's action.

To reduce inconsistency, the military courts might prioritize their rules for addressing conflicts within the *Manual*. For example, they could decide first to apply the canon in *Morlan*, determining whether one *Manual* provision is more specific than another. Usually, they will have little difficulty with this issue. If, however, the *Morlan* canon does not resolve the case, the courts then could pursue the *Valente* case's inquiry into the more difficult issue of the "general intent" of the *Manual*. Although this

146. *See id.*

147. *See id.*

148. *Cf.* United States v. McCray, 15 M.J. 1086, 1089 (A.C.M.R. 1983) (rejecting argument that Military Rule of Evidence 609 conflicts with Military Rule of Evidence 403); *but see* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 526 (1989) (holding that Federal Rule of Evidence 609 trumps Federal Rule of Evidence 403).

149. *See supra* Part III.A., B.

150. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) (stating that *Manual* provisions must fall if they conflict with a statute); United States v. Dowty, 46 M.J. 845, 848 n.10 (N.M. Ct. Crim. App. 1997) (stating that *Manual* provisions must fall if they conflict with a statute), *aff'd* 48 M.J. 102 (1998).

example shows one possible way to prioritize, the courts probably should wait until they review more cases before deciding the best order for applying rules that address internal *Manual* conflicts. Although prioritizing will not eliminate all inconsistency in decisions, it should alleviate the problem.

D. The *Manual* Provision Conflicts with a Regulation

A great deal of administrative law outside of the *Manual* affects service members. The secretaries of the Departments of Defense and Transportation have statutory authority to pass a variety of regulations that affect the Armed Forces.[151] The secretaries of the Army, Navy, and Air Force, moreover, have authority under both statutes and the *Manual* to pass rules and regulations.[152] In addition, the judge advocate generals of the various services and the Court of Appeals of the Armed Forces also have power under the *Manual* to prescribe rules.[153]

Sometimes the *Manual* may conflict with other regulations. In these instances, the military courts have had to determine whether the *Manual* or the regulations should prevail. This question, unfortunately, has no easy or universal answer.

1. Leading Cases

In *United States v. Kelson*, the Court of Military Appeals upheld a *Manual* provision that clashed with an Army regulation.[154] In that case, the accused had moved to dismiss a specification as multiplicious.[155] The military trial judge refused to entertain the motion because the accused had not put it in writing before the Article 39(a) session as *Army Regulation 27-10* then required.[156] The Court of Military Appeals reversed, concluding

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151. *See, e.g.*, 10 U.S.C.A. § 580(e)(6) (West 1998) (delegation to the Secretaries of Defense and Transportation).

152. *See, e.g.*, *id.* § 2102(b)(3) (statutory delegation of the authority to the service secretaries); MCM, *supra* note 7, R.C.M. 106 (*Manual* delegation of authority to service secretaries). The Secretary of Transportation sometimes acts with respect to the Coast Guard in a capacity equivalent to the service secretaries. *See* 10 U.S.C.A. § 101(a)(9)(D) (defining "secretary concerned" to include the service secretaries and Secretary of Transportation).

153. *See, e.g.*, MCM, *supra* note 7, R.C.M. 109(a) (delegation to the Judge Advocate Generals), R.C.M. 1204(a) (delegation to the Court of Appeals for the Armed Forces).

154. United States v. Kelson, 3 M.J. 139 (C.M.A. 1977). *See* Fidell, *supra* note 25, at 6050 (discussing the *Kelson* decision).

155. *See Kelson*, 3 M.J. at 139-40.

that the regulation conflicted with paragraph 66b of the 1969 *Manual*,[157] which said that failure to assert a motion to dismiss in a timely manner did not waive the accused's rights.[158] Similarly, in *Keaton v. Marsh*, the Army Court of Criminal Appeals invalidated a provision of *Army Regulation 27-10* that conflicted with Rule for Courts-Martial 305(l).[159]

In another case, however, the Court of Military Appeals refused to follow a *Manual* provision that conflicted with a regulation. In *United States v. Johnson*, a soldier accused of desertion defended his absence on grounds that he had possessed a valid pass.[160] Relying on paragraph 164a of the 1951 *Manual*, the government argued that the accused had abandoned his pass by his conduct, and thus was absent without authority.[161] The court sided with the accused. Examining the Army regulation governing passes, the court concluded that a soldier had no power to alter or abandon his pass.[162] It thus rejected the *Manual*'s statement that a soldier could abandon a pass.[163] One dissenting judge would have upheld the *Manual*.[164]

2. Analysis and Comment

It is tempting to think that the *Manual* always should prevail over other rules and regulations because the *Manual* emanates from a higher authority. After all, the President issues the *Manual*, while subordinate secretaries and officers issue all other rules regulations. At least one military judge appears to have adopted this hierarchical theory, stating: "When a regulation promulgated by one of the Armed Forces directly conflicts with a *Manual* provision implemented by Executive Order, the conflicting provisions of that regulation are invalid."[165]

The relationship of the *Manual* to other regulations, however, requires a more sophisticated analysis. In particular, in cases of conflict,

156. *See id.*

157. *See id.* at 141; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (8 Aug. 1994) [hereinafter AR 27-10].

158. *See Kelson*, 3 M.J. at 141.

159. *See* Keaton v. Marsh, 43 M.J. 757, 760 (Army Ct. Crim. App. 1996) (holding that *Army Regulation 27-10* conflicted with R.C.M. 395(l) in purporting to authorize reconfinement in the absence of new evidence or misconduct).

160. United States v. Johnson, 22 C.M.R. 278, 282 (1957).

161. *See id.* at 282.

162. *See id.* at 283 (citing *Army Regulation 630-10*).

163. *See id.*

164. *See id.* at 286 (Latimer, J., dissenting).

whether the *Manual* or regulation should prevail depends on the authority for the *Manual* provision and the authority for the regulation. As the following discussion will explain, *Manual* provisions generally should prevail over regulations promulgated by executive officers pursuant to authority delegated by the President. Whether the *Manual* should prevail over regulations promulgated by executive branch officers pursuant to statutory delegations depends on the relationship of the statutes to the UCMJ. Regulations, nevertheless, always should prevail over the precatory portions of the *Manual.*

a. Regulations Passed by Executive Branch Officers under Authority Delegated by the President

The President has delegated some of his authority under the UCMJ to subordinates. In various provisions in the *Manual*, he has instructed the service secretaries and the judge advocate generals to pass rules and regulations.[166] When a conflict arises between the *Manual* and these rules and regulations, the *Manual* should prevail. Courts should presume that the President did not grant subordinates authority to negate the *Manual* provisions that he has issued by executive order.

The *Kelson* and *Keaton* cases provide excellent examples. The Secretary of the Army passed *Army Regulation 27-10* under authority granted by the President in the *Manual*.[167] Accordingly, when portions of the regulation conflict with the *Manual*, the regulation must fall. The President would not have delegated authority to the Secretary of the Army to prescribe rules for implementing the *Manual* that contradict the *Manual*.

b. Regulations Passed by Executive Branch Officers Pursuant to Statutory Authority

The Secretaries of Defense and Transportation and the various service secretaries prescribe some regulations pursuant to authority conferred

165. United States v. Schmenk, 11 M.J. 803, 808-09 (A.F.C.M.R. 1981) (Miller, J., dissenting) (asserting, while addressing an issue the majority did not reach, that an Air Force Regulation creating a privilege for a records in a drug abuse program violated Military Rule of Evidence 501).

166. *See* 10 U.S.C.A. § 940 (West 1998) (authorizing this delegation from the President); *supra* notes 151-52 (providing examples of delegations).

167. *See* AR 27-10, *supra* note 157, para. 1.1.

directly by statute, instead of delegated by the President. In these instances, no simple rule can determine whether the regulations or the *Manual* should prevail in cases in conflict. Instead, courts must determine what Congress intended. They must compare the UCMJ to the other statutes in question. They must ask whether Congress would have wanted regulations passed by the President under the UCMJ to prevail or vice versa.

Under this standard, the Court of Military Appeals probably reached the correct result in *Johnson*. Although the Court did not use this reasoning, the court could have determined that Congress did not intend the UCMJ to serve as the primary law on the validity of soldiers' passes. Passes, in general, have nothing to do with military justice. Accordingly, the court properly could have decided that the Army regulation on passes (issued pursuant to another statute) should take precedence over a *Manual* provision.

c. Supplementary Materials

While regulations may or may not trump *Manual* provisions, they always should prevail over the supplementary materials in the *Manual.* The President, as noted above, did not promulgate the "discussion" or "analyses" accompanying the *Manual*, and the courts properly have characterized them as merely precatory.[168] Accordingly, this supplementary material must fall to regulations that do have the force of law.

E. The President Lacked Authority to Promulgate the *Manual* Provision

The APA allows courts to strike down federal regulations promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[169] Outside of the military context, litigants frequently invoke this provision to challenge administrative law. They argue that Congress never delegated authority to an agency to make the rules or regulations, and therefore seek to have them invalidated.[170] Although the

168. *See supra* Part IV.A.

169. 5 U.S.C.A. § 706(2)(C) (West 1998).

170. *See, e.g.*, MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 233 (1994) (holding that the FCC did not have authority to promulgate a regulation eliminating a rate filing requirement).

APA does not apply to executive orders, litigants often challenge *Manual* provisions on essentially the same grounds.[171]

1. Leading Cases

An early example of the argument that the President lacked authority to promulgate a *Manual* provision appears in *United States ex. rel. Flannery v. Commanding General, Second Service Command*.[172] In that case, the President declared in a pre-UCMJ version of the *Manual* that discharges obtained by fraud could be canceled.[173] A federal district court invalidated the provision on the grounds that the President lacked authority to promulgate it.[174] The Articles of War, according to the court, "authorize[d] the President not to declare substantive law but only to prescribe rules of procedure."[175]

The military courts more recently have invalidated a variety of *Manual* provisions on grounds that the President exceeded his authority under the UCMJ. Many of the cases have involved idiosyncratic issues.[176] Two principles of general application, however, have emerged with respect to the President's authority.

First, the cases have indicated that the President does not have power to redefine the elements of punitive articles and thus change substantive criminal law.[177] For example, in *United States v. Johnson*, the accused was charged with conspiracy in violation of Article 81.[178] In reviewing the case, the Navy-Marine Corps Court of Military Review decided that it did not have to follow Part IV, paragraph 5c(1), which stated a rule for conspir-

171. *See* Fidell, *supra* note 25, at 6050-54 (discussing what falls within the scope of article 36).

172. 69 F. Supp. 661 (S.D.N.Y. 1946).

173. *See id.* at 663.

174. *See id.*

175. *Id.*

176. *See, e.g.*, United States v. Simpson, 27 C.M.R. 303, 305 (1959) (invalidating MCM 1951, *supra* note 7, ¶ 126e which called for automatic reduction in grade following conviction of certain offenses); United States v. Rapolla, 34 M.J. 1268 (A.F.C.M.R. 1992) (invalidating MCM, *supra* note 7, pt. IV, ¶ 46c(1)(b), which stated that larceny by wrongful withholding may arise "whether the person withholding the property acquired it lawfully or unlawfully" on grounds that the president lacked authority to define substantive crimes); United States v. Douglas, 1 M.J. 354 (C.M.A. 1976) (invalidating MCM 1969, *supra* note 7, ¶ 145b, which relaxed the rules on admission of non-verbatim transcripts on grounds that it exceeded the authority granted in article 36).

ators who join on-going conspiracies.[179] The court explained that "[w]hether an accused may be held criminally liable for the overt act alleged is a substantive issue. Therefore, we are not bound to follow the statement set forth in paragraph 5(c) . . . ."[180]

Second, the courts have held that the President cannot use his power to specify offenses under Article 134 (the general punitive article),[181] to reach conduct covered by the more specific articles. For example, in *United States v. McCormick*, the accused assaulted a twelve-year-old boy.[182] The United States charged him with violation of Article 134, instead of Article 128, which prohibits assaults. The court ruled that the Article 134 charge was improper, stating: "Congress has acted fully with

177. *See* United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (ignoring the definition of "distribute" in MCM, *supra* note 7, ¶ 37c(3), and stating that the "meaning and effect of this additional phrase need not be determined because in areas of substantive criminal law, the President has no authority to prescribe binding rules"); United States v. Everett, 41 M.J. 847, 852 (A.F.C.M.R. 1994) (stating that the President does not have authority to establish substantive rules of criminal law, but may establish a sentencing hierarchy); United States v. Sullivan, 36 M.J. 574, 577 & n.3 (A.C.M.R. 1992), *overruled by* United States v. Turner, 42 M.J. 689 (Army Ct. Crim. App. 1995) (invalidating the last sentence of MCM, *supra* note, pt. IV, ¶ 54c(4)(a)(ii), which states that a dangerous weapon does not include an unloaded pistol on grounds that President's authority is limited to matters of procedure and evidence and "does not include the power to exclude form the definition of 'dangerous weapon' those unloaded pistols used as firearms"). *See also* United States v. Jones, 19 C.M.R. 961, 968 n.12 (A.C.M.R. 1955) (expressing doubt that the President as commander in chief has authority to prescribe "substantive rules"); United States v. Perry, 22 M.J. 669, 670 n.2 (A.C.M.R. 1986) (expressing doubt that the President as commander in chief has authority to prescribe "substantive rules" in connection with MCM 1969, *supra* note 7, ¶ 199a's discussion of the elements of the crime of rape).

178. 25 M.J. 878, 884 (N.M.C.M.R. 1988).

179. *See id.*

180. *See id.*

181. *See* 10 U.S.C.A. § 934 (West 1998).

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id.

182. United States v. McCormick, 30 C.M.R. 26 (1960).

respect to this offense by passage of . . . Article 128. Hence, the statute is pre-emptive of the general article."[183]

Despite these contrary cases, most claims that the President lacked authority to pass *Manual* provisions fail. The principal reason for the lack of success is that the UCMJ grants the President broad authority. Article 36, as noted above, authorizes the President to create procedural and evidentiary rules.[184] Articles 18 and 56 further authorize the President to set the limits on punishments for violating the punitive articles of the UCMJ.[185] Nearly everything in the *Manual* falls within one of these categories.[186]

A good example of this principle appears in *Loving v. United States*.[187] In that case, the accused challenged the procedures by which he

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183. *Id.*

184. *See* 10 U.S.C.A. § 836(a).

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

Id.

See generally United States v. Smith, 32 C.M.R. 105, 114 (1962) (discussing the history of Article 36 and its predecessors under the Articles of War).

185. *See* 10 U.S.C.A. § 818 ("[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."); *id.* § 856(a) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.").

186. *See, e.g.*, United States v. Newcomb, 5 M.J. 4, 7 (C.M.A. 1978) (Cook, J., concurring) ("When Congress defines military crimes and provides for their prosecution by courts-martial, but does not particularize all procedures necessary to achieve its purpose, the President, or his subordinates in the military departments, must formulate rules"); United States v. Lucas, 1 C.M.R. 19, 21 (1951) (upholding MCM 1951, *supra* note 7, ¶ 73(b), which required the law officer to give the charge where a guilty plea has been entered, even though the Code does not impose such a requirement); United States v. Morlan, 24 C.M.R. 390, 394 (A.B.R. 1957) (upholding 1951 MCM, *supra* note 7, ¶ 126d which precluded warrant officers from receiving bad conduct discharges, as not in excess of the President's powers under Article 56).

187. 517 U.S. 748 (1996).

received the death penalty.[188] He argued in part that the President lacked statutory authority to promulgate a rule specifying the aggravating circumstances justifying capital punishment.[189] The Supreme Court rejected this argument, finding authority for the rule in Articles 18, 36, and 56.[190]

Challenges to the President's authority also fail because, even in the absence of statutory authority, the President may have inherent power as Commander-in-Chief to issue orders that affect courts-martial. In *Swaim v. United States*, a former Judge Advocate General of the Army sued the United States for his pay after a court-martial suspended him.[191] He argued, among other things, that the President had convened the court-martial without statutory authority.[192] The Court, however, held that "it is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial" even though the Articles of War did not grant such power.[193]

The Court in *Swaim* did not indicate what limits, if any, exist on the President's power to act with respect to courts-martial absent statutory authority. This issue remains unresolved. In *Reid v. Covert*, a plurality of the Supreme Court subsequently stated: "[I]t has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of the military courts in time of peace, or in time of war."[194]

A more recent recognition of the President's inherent authority appears in *United States v. Ezell*.[195] Paragraph 152 of the 1969 *Manual* gave commanding officers authority to issue search warrants.[196] The

188. *See id.* at 769-771.

189. *See id.*

190. *Id.* at 770. Two years later in *United States v. Scheffer*, Justice Stevens asserted in dissent that the President lacked power to under Article 36 to promulgate Military Rule of Evidence 707 banning admission of polygraph evidence. *See* United States v. Scheffer, 118 S. Ct. 1261, 1271 (1998) (Stevens, J., dissenting).

191. Swaim v. United States, 165 U.S. 553, 499 (1897). The court-martial convicted Brigadier General Swaim of conduct unbecoming an officer and a gentlemen in connection with a questionable business transaction. *See* Major General Thomas H. Green, *History of The Judge Advocate General's Department*, ARMY LAW., June 1975, at 13, 17.

192. *Swaim*, 165 U.S. at 555-56. The Articles of War allowed the President to convene a court-martial in situations in which the ordinary convening authority was disqualified because he was the accuser or prosecutor. *See id.* In *Swaim*, the ordinary convening authority–General Sheridan–could have convened the court-martial. *See id.* at 556.

193. *See id.* at 558.

defendant argued that no provision of the UCMJ authorized this paragraph, because it dealt with neither court-martial procedures nor evidence.[197] The Court of Military Appeals stated:

> While there may be doubt that paragraph 152 of the *Manual for Courts-Martial* represents a proper exercise of the President's Article 36 powers, we shall consider the lawfulness of paragraph 152 as an exercise of the powers conferred upon the President by Article II of the Constitution of the United States as Commander-in-Chief of the Armed Forces.[198]

The court, therefore, upheld the rule as properly promulgated.[199] Other cases have expressed similar views about the President's inherent power.[200]

2. Analysis and Comment

The military courts have properly recognized that the President has broad power to pass procedural and sentencing rules. Articles 18, 36, and 56, by their express terms, confer this authority. Nearly everything in the present version of the *Manual* falls within these categories: Part II includes the Military Rules of Evidence, Part III contains the Rules for

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194. Reid v. Covert, 354 U.S. 1, 38 (1957). The Court saw difficulties with allowing the President to make substantive rules. The Court said:

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Id. at 38-39. For further discussion of the President's powers as Commander-in-Chief, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also* Loving v. United States, 517 U.S. 748, 767 (1996) (holding that Congress does not have exclusive power to create rules for the military justice system).

195. 6 M.J. 307 (C.M.A. 1979).

196. *See* MCM 1969, *supra* note 7, ¶ 152.

197. *See Ezell*, 6 M.J. at 316.

198. *Id.* at 317-18.

199. *See id.* Congress subsequently amended Article 36 to cover "[p]retrial" procedures expressly. *See* 10 U.S.C.A. § 836 (West 1998).

200. *See, e.g.*, United States v. Woods, 21 M.J. 856, 871 (A.C.M.R. 1986) (assuming that the President has inherent authority to abate sentences).

Courts-Martial, Part IV specifies the sentences for the punitive articles, and Part V describes non-judicial punishment. For this reason, it should come as little surprise if courts can reject most claims that the President lacked authority to promulgate a *Manual* provision. Although these articles may not allow the President to make substantive criminal law or redefine the elements of crimes, he rarely has attempted to do that.

The scope of the President's power to create rules without UCMJ authority remains contested. Most scholars believe that the President, as Commander-in-Chief, has very broad power to make rules governing military justice. Professor Frederick B. Wiener, for example, has asserted that the President did not need UCMJ authority to promulgate the *Manual*. He has stated:

> [Articles 36 and 56] do not involve any delegation by Congress; to the contrary, they constitute recognition that the President is Commander-in-Chief of the armed forces through direct and explicit constitutional grant. . . . [T]he President would have power to prescribe much of what is now in the manual even without the present express authorizations in the code . . . .[201]

Professors Edward S. Corwin, William F. Fratcher, and Clinton Rossiter have expressed the same view.[202]

Not everyone agrees, however, that the President has authority to pass rules beyond what the UCMJ authorizes. Professor Ziegel W. Neff, for

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201. Wiener, *supra* note 25, at 361.

202. *See* EDWARD S. CORWIN, THE PRESIDENT, OFFICE AND POWERS 316 (3d ed. 1948) ("Also, in the absence of conflicting legislation [the President] has powers of his own" to promulgate rules and regulations for the internal government of the land and naval forces."); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 109 (1951) (stating that *Swain* stands for the proposition that "the exercise of discretion by the President as the fountainhead of military justice is not to be questioned in courts of the United States"); Fratcher, *supra* note 25, at 862-63.

> [U]nless restricted by express statute, the President has power, under the Constitution alone, without statutory authorization, to issue regulations defining offenses within the armed forces, prescribing the punishments for them, constituting tribunals to try for such offenses, and fixing the mode of procedure and methods of review of the proceedings of such tribunals.

Id.

example, has written a thoughtful essay expressing the contrary view.[203] He asserts that the Framers of the Constitution never intended for the President to have plenary power over military justice,[204] that Presidents have not exercised such power,[205] and that such power runs contrary to the intent of Congress in enacting the UCMJ.[206]

Were it not for the Supreme Court's decision in *Swaim*, Professor Neff's argument might "carry the day." The Constitution grants Congress the power to regulate the land and naval forces.[207] Congress exercised this power in the UCMJ. By specifying in Articles 18, 36, and 56 the kinds of military justice rules that the President can promulgate, ordinary statutory analysis would suggest that Congress preempted any inherent presidential power to issue other rules. The *Swaim* decision, however, rejected the idea of preemption, and held that the President had authority beyond that conferred by Congress. Accordingly, until the Supreme Court limits or overrules *Swaim*, the military courts must consider the possibility that the President has power to pass rules in excess of what the UCMJ expressly grants.

F. The *Manual* Provision is Arbitrary or Capricious

Litigants occasionally have challenged *Manual* provisions for being arbitrary or capricious. Their claims resemble those of litigants contesting federal regulations on the same grounds under the APA.[208] The cases considering this type of challenge fall into two categories. Some decisions suggest that the arbitrariness or capriciousness of a *Manual* provision does not matter. Others, however, indicate that the courts will not enforce arbitrary or capricious *Manual* provisions.

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203. *See* Ziegel W. Neff, *Presidential Power to Regulate Military Justice*, 30 JUDGE ADVOCATE J. 6 (1960).

204. *See id.* at 6-11.

205. *See id.* at 12.

206. *See id.* at 12-13.

207. *See* U.S. CONST. art. I, § 8, cl. 14.

208. *See* 5 U.S.C.A. § 706 (West 1998) (authorizing courts to set aside regulations that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

1. Leading Cases

The Court of Military Appeals upheld an admittedly arbitrary rule in *United States v. Lucas.*[209] In that case, although the accused had pleaded guilty to an offense stemming from an unexcused absence, he sought reversal of his conviction.[210] He argued that the law officer had not instructed the court-martial about the burden of proof as required by paragraph 73(b) of the 1951 *Manual*.[211] This instruction would have served little purpose given the accused's guilty plea. The Court of Military Appeals, however, reversed the conviction.[212] It explained: "While we may be unable to ascertain any virtue in the [*Manual*'s] requirement, we cannot ignore the plain language used."[213] Other decisions have shown a similar reluctance to review *Manual* provisions for arbitrariness or capriciousness.[214]

The Supreme Court, however, considered the substance of a *Manual* provision in *United States v. Scheffer.*[215] In that case, the accused asked the Supreme Court to strike down Military Rule of Evidence 707(a) on grounds that it arbitrarily banned polygraph evidence.[216] Citing non-military precedents, the Court declared that an evidence rule cannot arbitrarily "infringe[] upon a weighty interest of the accused."[217] Ultimately, however, the Court upheld the rule.[218] It explained that the government has a legitimate interest in excluding unreliable evidence and that "there is simply no consensus that polygraph evidence is reliable."[219] Other decisions

209. 1 C.M.R. 19, 22 (1951).

210. *See id.* at 21-22.

211. *See id.* at 22.

212. *See id.* at 25.

213. *Id.* at 22.

214. *See, e.g.*, United States v. Kunak, 17 C.M.R. 346, 355 (1954) (upholding the 1951 *Manual* provisions on insanity); United States v. Smith, 32 C.M.R. 105, 119-120 (1962) (upholding MCM 1951, *supra* note 7, ¶ 140a, which prohibited convictions based on uncorroborated confessions but resting the "decision on the ground that regulations within a properly delegated legislative authority have the force of law" rather than the wisdom of the rule); United States v. Timmerman, 28 M.J. 531, 535 (A.F.C.M.R. 1987) (upholding R.C.M. 1102(d), which limited proceedings in revisions, even though the court said that the rule produced a result that was "most unfortunate, and a situation we are not sure was intended, or for that matter even considered when the present *Manual* was being drafted.").

215. 118 S. Ct. 1261 (1998).

216. *See* at 1265.

217. *See id.*

218. *See id.* at 1264.

219. *Id.*

similarly have reviewed *Manual* provisions for arbitrariness or capriciousness.[220]

2. Analysis and Comment

The general principles for judicial review of the *Manual*, which were discussed in Part III above, provide conflicting guidance on the issue whether military courts should invalidate arbitrary or capricious *Manual* provisions. On one hand, the idea that administrative law rules found in the APA and elsewhere should guide the military court support this type of review. On the other hand, the principle of deference to the President suggests that the military courts should hesitate to second-guess the wisdom or merit of *Manual* provisions.[221]

The following rule might reconcile these competing ideas and eliminate the apparent inconsistencies in the cases described above: Military courts may review *Manual* provisions for arbitrariness or capriciousness, but only if they prejudice "a weighty interest" of the accused. This rule affords deference to the President, except where the deference might run afoul of the Fifth Amendment's requirement of Due Process. Although the rule may not square with all military justice precedents, it does accord with the leading cases described above. In *Lucas*, the Court refused to second-guess a *Manual* provision that imposed a burden only on the government. In *Scheffer*, by contrast, the Court reviewed the substance of a rule that prejudiced the accused.

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220. *See, e.g.*, United States v. Ettleson, 13 M.J. 348, 360 (C.M.A. 1982) (holding that the table of maximum punishment in MCM 1969, *supra* note 7, was not "arbitrary and capricious" in characterizing cocaine as a "habit-forming narcotic drug"); United States v. Prescott, 6 C.M.R. 122, 124-25 (1952) (upholding MCM 1951, *supra* note 7, ¶ 127, which required increased sentences for prior offenders, as not being "an unreasonable or arbitrary exercise of executive power" because the provision was "not new or foreign to the customs and traditions of the several military departments"); United States v. Firth, 37 C.M.R. 596, 600 (A.B.R. 1966) (upholding MCM 1951, *supra* note 7, ¶ 126k, which limited confinement at hard labor to three months, on grounds that it "is not arbitrary or capricious, but is based on reasonable considerations and is in keeping with established precedent and the administrative needs of the Armed Forces").

221. *See supra* Part II.B.

G. The *Manual* Provision Interprets an Ambiguous Portion of the UCMJ and a Better Interpretation is Possible

Like other complex statutes, the UCMJ contains some ambiguities. The *Manual* interprets many of these ambiguities, but litigants often ask the military courts to ignore the *Manual* interpretations. They argue that, whenever the UCMJ contains an ambiguity, the court has the power to adopt its own interpretation.

1. Leading Cases

The leading cases reveal three trends. First, the courts generally have not deferred to the *Manual*'s interpretation of the punitive articles other than Article 134.[222] Second, they have deferred to the *Manual*'s interpretation of Article 134.[223] Third, they have not deferred to the President's views about the meaning of the non-punitive articles in UCMJ.[224] The following discussion describes these categories of cases.

a. Punitive Articles Other than Article 134

When interpreting ambiguous portions of the punitive articles of the UCMJ, the courts have concluded that they do not have an absolute duty to follow the *Manual*. For example, in *United States v. Mance*,[225] a court-martial convicted the accused of wrongful use of marijuana in violation of Article 112a based on urinalysis results.[226] On appeal, the accused argued that the government had not shown that he had the requisite knowledge to sustain the conviction.[227] This argument presented difficulty because Article 112a did not make clear the state of knowledge required of the accused.[228]

In Part IV of the *Manual*, the President had interpreted Article 112a's requirement of wrongfulness to imply that lack of knowledge of the true nature of a substance constituted an affirmative defense.[229] The Court of Military Appeals, however, stated in *Mance* that it did not have to follow

222. *See* 10 U.S.C.A. §§ 877-933 (West 1998).
223. *See id.* § 934.
224. *See id.* §§ 801-870, 935-36.
225. 26 M.J. 244 (C.M.A.).
226. *See id.* at 246.
227. *See id.* at 248-51.
228. *See id.* at 249.
229. *See* MCM, *supra* note 7, pt. IV, ¶¶ 37(c)(2) & (5).

the interpretation of the Manual. The court explained: "Of course, while the views of . . . the President in promulgating [the *Manual*] are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses–at least, those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code."[230]

Although courts have concluded that they do not have a duty to follow the President's interpretation of ambiguous portions of the punitive articles, they do not automatically reject them. Sometimes courts accept the President's interpretations,[231] and sometimes they do not.[232] The outcome simply depends on whether the courts think that the President has adopted the best reading of the ambiguous language. Only in a few cases have the courts expressed conscious deference to the *Manual*'s interpretation of the punitive articles other than Article 134.[233]

b. Article 134

Courts have treated the *Manual*'s interpretation of Article 134 differently. Article 134 authorizes courts-martial to try any person subject to their jurisdiction for "all disorders and neglects to the prejudice of the good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."[234] The President has included in Part IV of the *Manual* a non-exclusive list of fifty-three different specifications of disorders and conduct that he believes would fall within the open-ended language of Article 134.[235]

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230. *Mance*, 26 M.J. at 252.

231. *See, e.g.*, United States v. Turner, 42 M.J. 689, 690 (Army Ct. Crim. App. 1995) (following MCM, *supra* note 7, pt. IV, ¶ 54c(4)(a)(ii)'s interpretation of when an unloaded pistol is a "dangerous weapon" for the purposes of Article 128).

232. *See, e.g.*, United States v. Jenkins, 22 C.M.R. 51, 52 (1956) (refusing to follow MCM 1951, *supra* note 7, ¶ 162, which interpreted "enlistment" to include induction, as an unreasonable interpretation of article 83); United States v. Rushlow, 10 C.M.R. 139, 142 (1953) (refusing to follow MCM 1951, *supra* note 7, ¶ 164a, which said that a contingent purpose to return may be considered as intent to remain away permanently for the purpose of Article 85).

233. *See, e.g.*, United States v. Margelony, 33 C.M.R. 267, 269-70 (1963) (stating that the *Manual*'s interpretation of article 123a is entitled to great weight).

234. 10 U.S.C.A. § 934 (West 1998).

235. *See* MCM, *supra* note 7, pt. IV, ¶ 61-113.

These include everything from fraternization[236] and gambling[237] to involuntary manslaughter[238] and kidnapping.[239]

The courts generally have deferred to the President's specifications when reviewing Article 134 cases. For example, in *United States v. Caver*,[240] a court-martial convicted the accused of violating the *Manual*'s specification of "indecent language" under Article 134 when he called a soldier a derogatory name.[241] The accused challenged the specification and argued that his words did not violate Article 134.[242] Rejecting this argument, the Navy-Marine Corps Court of Criminal Appeals stated:

> Great deference is accorded the determinations of Congress and the President relating to the rights of servicemembers. . . . Accordingly, we are of the view that as long as language uttered by a servicemember is "indecent," as defined by the President in the *Manual for Court-Martial*, and is "to the prejudice of good order and discipline in the armed forces" or "of a nature to bring discredit upon the armed forces," as proscribed by Congress in Article 134, it may be the basis for disciplinary action under the Code . . . .[243]

Other cases interpreting Article 134 have shown similar deference to the President's specifications,[244] although at least one decision has not.[245]

c. Other UCMJ Articles

Courts have shown less deference to the President's interpretation of the non-punitive articles of the UCMJ. For example, in *United States v. Ware*, the Court of Military Appeals rejected the President's interpretation

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236. *See id.* ¶ 83.
237. *See id.* ¶ 84.
238. *See id.* ¶ 85.
239. *See id.* ¶ 92.
240. 41 M.J. 556 (N.M. Ct. Crim. App.. 1994).
241. *See* MCM, *supra* note 7, pt. IV, ¶ 89.
242. *See Caver*, 41 M.J. at 561 n.4.
243. *Id.*
244. *See, e.g.*, United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986) (following specification of fraternization under Article 134), *aff'd* 24 M.J. 347 (C.M.A. 1987) (summary disposition); United States v. Love, 15 C.M.R. 260, 262 (1954) (following MCM 1951, *supra* note 7, ¶ 209, which defined the term "structure" to include a "tent" for the purposes of the unlawful entry specification in Article 134).
245. *See* United States v. Asfeld, 30 M.J. 917, 927 (A.C.M.R. 1990) (refusing to defer to the *Manual* specification of obstructing justice).

of Article 62.[246] Article 62 says that the convening authority may send a ruling back to the court-martial for reconsideration.[247] The 1969 *Manual* interpreted Article 62 to imply that the military judge, upon reconsideration, had to "accede" to the convening authority's views.[248] The court rejected this interpretation, concluding that "reconsider" does not mean "accede."[249] Other cases also have rejected the *Manual*'s interpretation of non-punitive UCMJ articles.[250]

2. Analysis and Comment

The general principle that the military courts should defer to the President supports the cases that have followed the *Manual*'s interpretation of Article 134.[251] Article 134 contains such broad language that its enforcement inevitably raises policy questions. The courts have respected the separation of powers by not undertaking to answer these questions themselves. Instead, they have deferred to the President who, as Commander-in-Chief, has expertise in the area of military justice. Congress presumably intended this approach; the open-ended language of Article 134 exhibits a need for narrowing by the President.[252]

Despite the general principle of deference, some arguments may support the position that the courts do not have to follow the President's interpretation of the punitive articles other than Article 134. The federal courts generally do not defer to the Department of Justice when it advances interpretations of the United States Criminal Code.[253] Moreover, an inference that Congress intended the military courts to defer seems less likely in the

246. United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

247. *See* 10 U.S.C.A. § 862 (West 1998).

248. *See* MCM 1969, *supra* note 7, ¶ 67f.

249. *See* 1 M.J. at 285.

250. *See, e.g.*, Ellis v. Jacob, 26 M.J. 90, 93 (C.M.A. 1988) (invalidating Military Rule of Evidence 916(k)(1) as an improper interpretation of article 50(a)); United States v. Kossman, 38 M.J. 258, 260-61 & n.3 (C.M.A. 1993) (refusing to defer to the President's interpretation of Article 10 in R.C.M. 707).

251. *See supra* Part III.B.

252. *See* Parker v. Levy, 417 U.S. 733, 754 (1974) (upholding Article 134 against a vagueness challenge).

253. *See* Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 703 n.18 (1995) (discussing the application of *Chevron* in criminal cases); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469, 489 (1996) (noting that federal courts do not apply the *Chevron* rule in cases under Title 18 of the U.S.C., but presenting arguments against this position).

case of the punitive articles other than Article 134.[254] The UCMJ defines the offenses covered by those articles much more specifically. Congress thus appears to have had less of an intent to delegate.

With respect to *Manual* interpretations of non-punitive articles of the UCMJ, the lack of deference comes as somewhat of a surprise. These articles establish the workings of the military justice system. To the extent that they contain ambiguities, the Commander-in-Chief should have the authority to settle their meaning because he has responsibility for administering the military justice system. Moreover, while the military courts do not defer to the *Manual* when interpreting these provisions, they do accord "great weight" to executive interpretations found in other sources.[255] The military courts, accordingly, should rethink their position on this issue, and consider according greater deference to the *Manual*.[256]

H. The President Promulgated the *Manual* Provisions Pursuant to an Improper Delegation

Two administrative law doctrines limit Congress's ability to delegate lawmaking authority. The "non-delegation" doctrine states that Congress may not assign its legislative powers.[257] The "intelligible principle" doctrine says that, when Congress provides the executive branch with discretion in fulfilling statutory commands, it must state an intelligible principle

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254. *See supra* Part III.B.2.

255. *See, e.g.*, United States v. Margelony, 33 C.M.R. 267, 269-70 (1965) (interpreting Article 123a); United States v. Robinson, 20 C.M.R. 63 (1955) (interpretating 10 U.S.C. § 608, which prohibits officers from using enlisted members as servants).

256. *But see* Fidell, *supra* note 25, at 6055 (arguing against deference to the President on matters of trial procedures on grounds that military courts "would certainly be closer to these questions than would a civilian Chief Executive who may or may not be an attorney, and who, even if legally trained, may be much further from trial experience than the judges of the reviewing court").

257. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power"); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7-17 (1982) (discussing the history of the non-delegation doctrine).

to guide exercise of the discretion.[258] Litigants in military cases have challenged *Manual* provisions under both doctrines.

1. Leading Cases

Two years ago, the Supreme Court decided the leading military case concerning whether these doctrine apply to the *Manual*. In *Loving v. United States*, a court-martial convicted the accused, Dwight J. Loving, of murder in violation of Article 118.[259] Article 118 authorizes the death penalty for murder,[260] but does not limit the class of offenders eligible for capital punishment as the Supreme Court has required since *Furman v. Georgia*.[261]

The President, accordingly, promulgated Rule for Court-Martial 1004(c), which provides that a court-martial may sentence an accused to death for murder only if it finds the existence of one or more "aggravating factors" listed in the Rule.[262] In *Loving*, the court-martial found three of the aggravating factors listed in Rule 1004(c), and decreed that Loving should receive capital punishment.[263] Loving challenged his sentence, arguing among other things that the President's creation of the list of aggravating factors in Rule 1004(c) violated both the non-delegation doctrine and the intelligible principle doctrine.[264]

a. Non-Delegation Doctrine

Loving asserted that Congress could not authorize the President to establish the list of aggravating factors in Rule 1004(c) for two reasons. First, Loving contended that Article I, section 8, clause 14 of the Constitution gives Congress exclusive power to "make [r]ules for the [g]overnment

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258. Touby v. United States, 500 U.S. 160, 165-166 (1991) (describing intelligible principle cases); Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 669-71 (explaining the non-delegation doctrine).

259. Loving v. United States, 517 U.S. 748, 751 (1996).

260. 10 U.S.C.A. § 918 (West 1998) ("Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being . . . shall suffer death or imprisonment for life as a court-martial may direct.").

261. 408 U.S. 238 (1972).

262. MCM, *supra* note 7, R.C.M. 1004(c).

263. *See Loving*, 517 U.S. at 751.

264. *See id.* at 759-69 (non-delegation); *id.* at 771-73 (intelligible principle).

and [r]egulation of the land and naval forces."[265] The Supreme Court, however, rejected this position based on an extensive examination of the history of courts-martial in this country and England.[266] It concluded that "[u]nder Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority."[267] The President thus may formulate rules to govern military subjects not covered by statute.

Second, Loving argued that only Congress has the power to define criminal punishments.[268] The Supreme Court rejected this position based on precedent. The Court said: "We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'"[269] The Court accordingly concluded that Congress could leave implementation of the capital murder provisions in the UCMJ to the President.[270]

b. Intelligible Principle Doctrine

The Supreme Court has held that, when Congress grants the President or an executive agency discretion, it must "lay down . . . an intelligible principle to which the person . . . authorized to [act] is directed to conform."[271] Loving argued that Congress failed to satisfy this requirement when it directed the President to create Rules for Courts-Martial in the UCMJ.[272] Article 36, he contended, directed the president to make evidentiary and procedural rules, but did not specifically tell the President what principles should guide his discretion.[273]

The Supreme Court also rejected this argument in *Loving*.[274] It concluded that the intelligible principle doctrine required Congress to provide less guidance when it delegated authority to a person who already had con-

265. *See id.* at 759.
266. *See id.* at 760-68.
267. *Id.* at 767.
268. *See id.* at 768-69.
269. *Id.* at 768 (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911)).
270. *See id.* at 769.
271. J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
272. *See Loving*, 517 U.S. at 772.
273. *See id.*
274. *See id.*

siderable expertise and experience in the area, as the Commander-in-Chief has over the armed forces.[275] The Court explained: "We think . . . that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority."[276] In this case, the Court noted that Congress had authorized the death penalty, and that the President's role as Commander-in-Chief already made him responsible for superintending courts-martial.[277]

2. Analysis and Comment

In *Loving v. United States*, the Supreme Court performed a valuable service in clarifying the applicability of non-delegation doctrine and intelligible principle doctrine to resolve the issue of the constitutionality of RCM 1004(c). Before *Loving*, the Court of Military Appeals and the Court of Appeals for the Armed Forces repeatedly had faced questions about the constitutionality of Rule 1004(c).[278] Resolving Loving's arguments had great importance to the military justice system.

Although *Loving* technically concerned only Rule 1004(c), its reasoning will have a greater impact. The Court's ruling that Article I, section 8, clause 14 does not give Congress the exclusive power to make substantive rules concerning punishment for offenses will preclude nearly all challenges to *Manual* provisions under the delegation doctrine. The same conclusion holds true for claims under the intelligible principle doctrine. Articles 18, 36, and 56 all delegate authority to the President to pass rules, but none of them details the content of the Rules. *Loving* makes clear that this silence does not matter because of the President's unique relationship to the military.

Loving also provides guidance to the military courts as they attempt to develop general principles for reviewing *Manual* provisions. In *Loving*, the Supreme Court started with the assumption that ordinary administrative law doctrines–like the non-delegation doctrine and the intelligible principle doctrine–applied to the UCMJ and the *Manual*. The Court, how-

275. *See id.*
276. *Id.*
277. *See id.*
278. *See* United States v. Curtis, 32 M.J. 252, 260-67 (C.M.A.), *cert. denied* 502 U.S. 952 (1991); United States v. Loving, 41 M.J. 213, 291 (1994), *aff'd* 517 U.S. 748 (1996).

ever, considered and gave great weight to the role of the President in conducting the special business of the armed forces. Absent other guidance, the military courts should rely on these principles in handling other challenges to the *Manual*.[279]

I. The *Manual* Provision Violates the Accused's Constitutional Rights

Service members, like civilians, have constitutional rights. In some instances, the accused in courts-martial have argued that *Manual* provisions infringe these rights. The military courts have entertained these claims, but rarely have struck down any of the rules of evidence and procedure that the President has promulgated.

1. Leading Cases

In *United States v. Jacoby*, the Court of Military Appeals proclaimed that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to the members of our armed forces."[280] The military courts, accordingly, have entertained challenges to *Manual* provisions under the First, Fourth, Fifth, Sixth, and Eighth Amendments. They also have considered claims that applying new *Manual* provisions would violate the ex post facto clause.

a. First Amendment

The First Amendment protects the freedom of speech and religion and other rights.[281] In *Goldman v. Weinberger*, the Supreme Court held that, although service members enjoy the protections of the First Amendment, "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regula-

279. *See supra* Part III.A. & B.

280. United States v. Jacoby, 29 C.M.R. 244, 246-47 (1960). *See also* United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992); FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE §§ 1-52.00, 26 (1991) (noting that scholars disagree about the application of the Bill of Rights to the military). The Supreme Court has not determined the entire extent to which the Bill of Rights applies to the armed forces.

281. *See* U.S. CONST. amend. 1 ("Congress shall make now law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petitition the Government for redress of greivances.").

tions designed for civilian society."[282] Accordingly, the military courts have rejected most First Amendment challenges to *Manual* provisions.[283]

b. Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures and imposes limitations on the issuance of warrants.[284] The Court of Military Appeals has held that the oath requirement in the Fourth Amendment does not apply to the military,[285] but otherwise has said that "the Fourth Amendment applies with equal force within the military as it does in the civilian community."[286] Litigants rarely challenge *Manual* provisions under the Fourth Amendment because the Military Rules of Evidence implement most of the Amendment's protections.[287] The military courts, nevertheless, have considered some challenges to *Manual* provisions.[288]

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282. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

283. *See, e.g.*, United States v. Caver, 41 M.J. 556, 561 n.4 (N.M. Ct. Crim. App. 1994) (upholding MCM, *supra* note 7, pt. IV, ¶ 89, which specifies indecent language as a violation of article 134); United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986), *aff'd* 24 M.J. 347 (C.M.A. 1987) (summary disposition) (upholding MCM, *supra* note 7, pt. IV, ¶ 83, which specifies fraternization as a violation of Article 134).

284. *See* U.S. CONST. amend. 4.

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

Id.

285. *See* United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981).

286. United States v. Ezell, 6 M.J. 307, 315 (C.M.A. 1979). *But see* Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110, 123 (1994) (questioning whether the military courts actually have applied the Fourth Amendment).

287. *See* MCM, *supra* note 7, MIL. R. EVID. 311-317; United States v. Hester, 47 M.J. 461, 463, *cert. denied* 119 S. Ct. 125 (1998) (noting that these rules implement the Fourth Amendment).

288. *See, e.g.*, United States v. Moore, 45 M.J. 652 (A.F. Ct. Crim. App. 1997) (holding Military Rule of Evidence 313(b) satisfies the Fourth Amendment).

c. Fifth Amendment

The Fifth Amendment contains four clauses.[289] The first clause requires indictment by a grand jury, but contains an express exception for the military. In view of this exception, no cases have held that *Manual* provisions violate the indictment requirement.

The second clause of the Fifth Amendment prohibits double jeopardy. The Supreme Court has held that this provision applies to courts-martial.[290] In addition, Article 44 also prohibits trying the accused twice for the same crime.[291] The Court of Military Appeals rejected at least one challenge to a *Manual* provision on double jeopardy grounds.[292]

The third clause of the Fifth Amendment establishes the privilege against compelled self-incrimination. The Court of Military Appeals held that this provision applies to the military.[293] Article 31, however, offers even broader protection against self-incrimination.[294] Consequently, most litigants rely on Article 31 rather than the Fifth Amendment when contest-

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289. *See* U.S. CONST. amend. 5.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

290. *See* Wade v Hunter, 336 US 684, 688-89 (1949). *See also* United States v. Richardson, 44 C.M.R. 108, 111 (1971) (confirming that the Fifth Amendment applies to the military).

291. *See* 10 U.S.C.A. § 844(a) (West 1998) ("No person may, without his consent, be tried a second time for the same offense.").

292. United States v. Burroughs, 12 M.J. 380, 382 n.2 (C.M.A. 1982) (holding that MCM 1969, supra note 7, ¶ 71a does not violate double jeopardy).

293. *See* United States v. Kemp, 32 C.M.R. 89, 97 (1962) ("[P]ersons in the military service [have] the full protection against self-incrimination afforded by the Fifth Amendment to the Constitution of the United States.").

294. *See* 10 U.S.C.A. § 831(a) ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").

ing rules in the *Manual*.[295] A few cases nonetheless have considered whether *Manual* provisions violate the privilege.[296]

The third clause of the Fifth Amendment prohibits depriving any person of life or liberty without due process of the law. The Supreme Court recently reviewed a due process challenge to a *Manual* provision in *United States v. Scheffer*.[297] The military courts have considered numerous due process challenges, but usually have upheld the *Manual*.[298]

The fourth clause of the Fifth Amendment–the takings clause–requires the government to pay just compensation when it takes private property for public use. The Court of Military Appeals suggested that this

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295. *See, e.g.*, United States v. Musguire, 25 C.M.R. 329, 330 (1958) ("Article 31 is wider in scope than the Fifth Amendment.").

296. *See, e.g.*, United States v. Eggers, 11 C.M.R. 191, 194 (1953) (invalidating MCM 1951, *supra* note 7, ¶ 150(b), which permitted the court to compel handwriting samples, as violative of the Article 31(a) and the Fifth Amendment); United States v. Greer, 13 C.M.R. 132, 134 (1953) (same). The military courts in recent years have adopted a less strict view of Article 31. *See, e.g.*, United States v. Harden, 18 M.J. 81, 82 (C.M.A. 1984) (holding that Article 31 does not apply to handwriting exemplars).

297. *See* 118 S. Ct. 1261, 1264 & n.3 (1998).

298. *See, e.g.*, United States v. Perez, 45 M.J. 323, 324 (1996) (upholding R.C.M. 305 as sufficiently protecting service members against unconstitutional deprivations of liberty); United States v. Teeter, 16 M.J. 68 (C.M.A. 1983) (upholding MCM 1969, *supra* note 7, ¶ 75c(3), which addressed extenuating evidence, against a due process challenge); Font v. Seaman, 43 C.M.R. 227, 230-31 (1971) (upholding MCM 1969, *supra* note 7, ¶ 20b, concerning restraint); United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986) (upholding MCM 1969, *supra* note 7, ¶ 213g(5) against a claim that it improperly shifted the burden of proof); United States v. Wright, 48 M.J. 896, 899-901 (A.F. Ct. Crim. App. 1998) (upholding Military Rule of Evidence 413, which permits introduction of evidence of past sexual misconduct, against due process and equal protection challenges); United States v. Salvador, No. ACM 30715, 1995 WL 329444, *4 (A.F. Ct. Crim. App. May 24, 1995) (upholding R.C.M. 1113(d)(3) against a claim that it impermissibly allows additional confinement for failure to pay a fine due to indigency); United States v. Bassano, 23 M.J. 661, 663 (A.F.C.M.R. 1986) (upholding MCM, *supra* note 7, pt. IV, ¶ 37 against a claim that it impermissibly shifted the burden of proof in controlled substance prosecutions); United States v. McIver, 4 M.J. 900, 902 (N.M.C.M.R. 1978) (upholding MCM 1969, *supra* note 7, ¶ 152, which concerned suppression of evidence, against a due process challenge); United States v. Bielecki, 44 C.M.R. 774, 777 (N.M.C.M.R. 1971) (upholding MCM 1969, *supra* note 7, ¶ 67f, which allowed the convening authority to review the trial); United States v. Coleman, 41 C.M.R. 832, 835 (N.M.C.M.R. 1970) (upholding MCM 1969, *supra* note 7, ¶ 75d, which authorized introduction of an accused's record of prior nonjudicial punishment for the purpose of sentence aggravation).

clause protects service members.[299] The military courts, however, have not considered any claims that *Manual* provisions violate the clause.

d. Sixth Amendment

The Sixth Amendment protects a variety of different rights applicable to criminal trials.[300] The Amendment's initial clause contains four very specific guarantees. First, the initial clause provides a right to a speedy trial. The Court of Military Appeals decided that service members enjoy this right.[301] In addition, the accused also enjoys speedy trial protections under Articles 10 and 33 and Rule for Courts-Martial 707.[302] Because these articles and this rule provide greater protection than the Sixth

299. United State v. Paige, 7 M.J. 480, 484 & n.8 (C.M.A. 1979) (citing Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953)).

300. *See* U.S. CONST. amend. 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

301. *See* United States v. Mason, 45 C.M.R. 163, 167 (1972) ("The Sixth Amendment affords an accused the right to a speedy trial."). MCM, *supra* note 7, R.C.M. 707(d) expressly recognizes this "constitutional right to a speedy trial." Interesting, as recently as 1967, the government argued that the speedy trial guarantee of the Sixth Amendment did not apply to the military. *See* United States v. Lamphere, 37 C.M.R. 200, 202 (C.M.A. 1967) (noting government's argument that "the speedy trial clause of the Sixth Amendment to the Constitution of the United States does not apply in trials by court-martial; only the "spirit" of this constitutional provision extends to the military by way of [UCMJ articles 10 and 33]").

302. *See* 10 U.S.C.A. § 810 (West 1998) ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."); *id.* § 833 ("When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction."); MCM, *supra* note 7, R.C.M. 707 ("The accused shall be brought to trial within 120 days . . . .").

Amendment, litigants generally have not claimed that *Manual* provisions violate the constitutional speedy trial guarantee.[303]

Second, the initial clause of the Sixth Amendment requires a public trial. The Court of Military Appeals held that this right extends to service members.[304] (The accused also has a right to a public trial under Rule 806.[305]) In addition, the Court of Appeals for the Armed Forces has ruled that the Sixth Amendment entitles the accused to a public Article 32 investigative hearing.[306] Litigants have not claimed that *Manual* provisions violate these rights.

Third, the initial clause of the Sixth Amendment provides a right to a jury trial. The military courts, however, have held that this protection does not extend to courts-martial.[307] Accordingly, litigants have not challenged *Manual* provisions on this ground.

Fourth, the initial clause of the Sixth Amendment guarantees the right to trial in the place where the crime occurred. The military courts have not held that this guarantee applies to courts-martial.[308] Accordingly, no mil-

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303. *See* United States v. King, 30 M.J. 59, 62 & n.5 (C.M.A. 1990).

304. *See* United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985) ("Without question, the sixth-amendment right to a public trial is applicable to courts-martial."); United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977) ("The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States."). The Court of Military Appeals at one time took the contrary position. *See* United States v. Brown, 22 C.M.R. 41, 47 (C.M.A. 1956) (citing that older authorities indicating that the Sixth Amendment right to a public trial did not apply), *overruled in part by* United States v. Grunden, 2 M.J. 116, 120 n.3 (C.M.A. 1977).

305. *See* MCM, *supra* note 7, R.C.M. 806(a) ("Except as otherwise provided in this rule, courts-martial shall be open to the public.").

306. *See* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) ("Today we make it clear that, absent 'cause shown that outweighs the value of openness,' the military accused is likewise entitled to a public Article 32 investigative hearing." (citations omitted)).

307. *See* United States v. Guilford, 8 M.J. 598, 601 (A.C.M.R. 1979) ("The right to a trial by jury as contemplated in the Sixth Amendment does not apply to military trials of members of the armed forces in active service."); United States v. Ezell, 6 M.J. 307, 327 n.4 (C.M.A.1979) (Fletcher, C. J., concurring).

308. *See* United States v. Culp, 33 C.M.R. 411, 418 (1963) (opinion of Kilday, J) ("I know of no contention, or decision, that trial by court-martial shall be in "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," as is clearly required by the Amendment . . . .").

itary courts have invalidated *Manual* provisions for violating this provision.

The second clause of the Sixth Amendment requires the accused to "be informed of the nature and causes of the accusation."[309] The Court of Appeals for the Armed Forces has applied this provision to the service members.[310] The military courts, however, have upheld *Manual* provisions against claims that they violate this constitutional requirement.[311]

The third clause of the sixth amendment–the "confrontation clause"–guarantees the accused the right to confront witnesses. The Court of Appeals for the Armed Forces has held that this protection applies to service members in courts-martial.[312] Although the Confrontation Clause may limit introducing hearsay, the military courts have rejected challenges to the hearsay exceptions in the *Manual*.[313]

The fourth clause of the Sixth Amendment establishes the right to compulsory process for obtaining evidence. The Court of Appeals for the Armed Forces has held that service members enjoy this right in courts-martial.[314] The Military Rules of Evidence and Rules for Courts-Martial attempt to satisfy this rule. The military courts, nevertheless, have had to

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309. U.S. CONST. amend. 6. *See also* 10 U.S.C.A. § 810 (West 1998) (requiring similar notification).

310. *See* United States v. Brown, 45 M.J. 389, 395 (1996).

311. *See, e.g.*, United States v. Leslie, 2 C.M.R. 622, 624 (C.G.B.R. 1951) (upholding MCM 1951, *supra* note 7, ¶¶ 74b(2) and (3)).

312. *See* United States v. Sojfer, 47 M.J. 425, 428 (1998).

313. *See* United States v. Clark, 35 M.J. 98, 106 (C.M.A. 1992) (upholding Military Rule of Evidence 803(4)'s exception for statements made for the purpose of medical treatment); United States v. Cottrill, No. ACM 30951, 1995 WL 611299, *2 (A.F. Ct. Crim. App. Sept. 26, 1995) (same), *aff'd* 45 M.J. 485 (1997); United States v. Fling, 40 M.J. 847 (A.F.C.M.R. 1994) (upholding Military Rule of Evidence 803(2)'s exception for excited utterance); United States v. Reggio, 40 M.J. 694, 698 n.7 (N.M.C.M.R. 1994) (same); United States v. Gans, 32 M.J. 412, 417 (C.M.A. 1991) (upholding Military Rule of Evidence 803(5)'s exception for past recollection recorded of deceased witness).

For cases questioning or limiting evidence rules, *see* United States v. Groves, 23 M.J. 374 (C.M.A. 1987) (holding that Military Rule of Evidence 804(b)(4)'a exception for statements of personal or family history is limited by the confrontation clause); United States v. Cordero, 22 M.J. 216, 220 (C.M.A. 1986) (opinion of Everett, J.) (questioning whether Military Rule of Evidence 804(b)(5) imposes restrictions necessary to satisfies the confrontation clause).

314. United States v. Cabral, 47 M.J. 268, 271 (1997).

consider whether *Manual* provisions violate the constitutional guarantee.[315]

The fifth and final clause of the Sixth Amendment establishes a right to counsel. The courts have held that this right applies to general and special courts-martial, but not to summary courts-martial.[316] The accused has similar statutory protection under Article 27.[317] The military courts have considered whether particular *Manual* provisions violate the right to assistance of counsel, but usually under Article 27 rather than the Sixth Amendment.[318]

e. Eighth Amendment

The Eighth Amendment bans excessive bail requirements, excessive fines, and cruel and unusual punishment.[319] The UCMJ contains a similar provision; Article 55 provides that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter."[320] The military courts have never held that the excessive bail prohibition applies to courts-martial, and have not invalidated any *Manual* provision based upon it.[321] The Court of Appeals for the Armed Forces has considered whether sentences impose "excessive

315. *See* United States v. Scheffer, 118 S. Ct. 1261, 1265 (1998) (rejecting contention that Rule 707(a)'s ban on polygraph evidence violated the Sixth Amendment); United States v. Breeding, 44 M.J. 345, 354 (1996) (Sullivan, J., concurring) (asserting that R.C.M. 703 violates the rights of compulsory process).

316. *See* United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994); United States v. Scott, 24 M.J. 186 (C.M.A. 1987).

317. *See* 10 U.S.C.A. § 827(a)(1) (West 1998) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial.").

318. *See* United States v. Jones, 3 M.J. 677, 678 (C.G.C.M.R. 1977) (upholding MCM 1969, *supra* note 7, ¶ 6d which said that it "desirable" for the accused to have as many counsel as the government, but not required); United States v. McFadden, 42 C.M.R. 14, 16 (1970) (limiting MCM 1969, *supra* note 7, ¶ 47 so that it did not prohibit uncertified assist defense counsel).

319. *See* U.S. CONST. amend. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

320. 10 U.S.C.A. § 855. *See* United States v. Wappler, 9 C.M.R. 23, 26 (1953) (holding that § 855 provides greater protection than the Eighth Amendment).

321. *Cf.* Levy v. Resor, 37 C.M.R. 399, 409 (1967) (rejecting a claim that post-trial confinement could implicate the excessive bail prohibition).

fines" in violation of the Eighth Amendment.[322] The military courts, however, have not struck down any *Manual* provisions on this ground.

In *Loving v. United States*, the Supreme Court assumed, but did not hold, that the Eighth Amendment's prohibition on cruel and unusual punishment limited capital punishment under the UCMJ.[323] The Court, however, did not invalidate Rule for Court-Martial 1004(c), which specifies aggravating circumstances necessary for imposition of the death penalty.[324] Separately, the military courts have adopted a limiting construction for Rule 1003, which authorizes confinement to bread and water, so that it does not violate the Eighth Amendment.[325]

f. Ex Post Facto Clause

The Ex Post Facto clause[326] bars retroactively applying new criminal legislation.[327] The President from time to time has updated the *Manual* by adding new rules.[328] The military courts, accordingly, have had to consider whether retroactively applying new *Manual* provisions in some way may violate this protection.[329]

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322. United States v. Sumrall, 45 M.J. 207, 210 (1996). *See also* United States v. Lee, 43 M.J. 518, 521 (A.F. Ct. Crim. App. 1995).

323. *See* Loving v. United States, 517 U.S. 748, 755 (1996).

324. *See id.* at 755-76.

325. *See* United States v. Yatchak, 35 M.J. 379, 308 (C.M.A. 1992) (holding that R.C.M. 1003(b)(9) does not permit confinement to bread and water while attached to a ship undergoing a major overall in dock).

326. *See* U.S. CONST. art. I, § 8, cl. 4 ("No Bill of Attainder or ex post facto Law shall be passed.").

327. *See* United States v. Gorski, 47 M.J. 370, 374 (1997) (holding that application of article 58b to offenses preceding its enactment would violate the ex post facto principle). *See generally* DANIEL E. TROY, RETROACTIVE LEGISLATION 47 (1998).

328. *Cf.* United States v. Worley, 42 C.M.R. 46, 47 (1970) (holding that the President may change rules within his powers under Article 36 even if the new rules upset existing case law).

329. *See* United States v. Ramsey, 28 M.J. 370, 371 (CMA 1989) (rejecting an ex post facto challenge to the application of R.C.M. 707(c)); United States v. Hise, 42 C.M.R. 195, 197 (1970) (upholding an ex post facto challenge to the application of MCM 1969, *supra* note 7, ¶ 140a). *Cf.* United States v. Derrick, 42 C.M.R. 835, 838 (A.C.M.R. 1970) (explaining how application of new versions of the *Manual* may violate the prohibition on ex post facto laws).

2. Analysis and Comment

The foregoing cases show that the military courts review the constitutionality of *Manual* provisions, but rarely strike them down. This observation should come as little surprise. The President does not stand above the Constitution and cannot transgress its commands by executive order. At the same time, however, the President would have little desire to create unconstitutional *Manual* provisions. Promulgating rules for the military justice system that violate the basic rights of service members would create dissension and hinder the President in his role as Commander-in-Chief.

Litigants challenging *Manual* provisions, accordingly, should not rely on the Constitution alone. As noted above, in most instances, the UCMJ creates protections similar to those in the Bill of Rights. Sometimes these protections address the same subject, but extend further than the Constitution.[330] Thus, litigants may fare better arguing that *Manual* provisions conflict the UCMJ.[331]

Questions about the meaning of the various clauses of the Bill of Rights and the Ex Post Facto clause lie outside of the scope of this article. The military courts, however, admirably have looked to the Supreme Court and other federal courts for guidance. They have not attempted to create their own doctrines, but instead have sought to harmonize their conclusions with those of non-military tribunals.

V. Conclusion

Congress, the President, and the military courts all play roles with respect to the *Manual*. Congress authorized its creation. The President acted upon this authorization. Through his executive orders, he has established the Rules for Court-Martial, the Military Rules of Evidence, and the other portions of the *Manual.* The military courts then have had the duty not merely to apply the *Manual*'s rules, but also to review their legality.

The military courts have taken their responsibility to review the *Manual* seriously. Since adopting the UCMJ almost five decades ago, the courts have considered a variety of challenges, and have struck down many *Manual* provisions on numerous different grounds. Sufficient precedents

330. *See supra* Part IV.I.c.
331. *See supra* Part IV.B.

now have accumulated to permit a systematic examination of judicial review of the *Manual*.

This article has observed that challenges to *Manual* provisions tend to fall into nine categories. Litigants have argued that courts should not enforce *Manual* provisions on grounds that they are precatory, or that they are arbitrary and capricious, or that they do not adopt the best interpretation of the UCMJ. In addition, litigants have complained that *Manual* provisions conflict with federal statutes, service regulations, or other *Manual* provisions. They also have argued that the UCMJ provides no authority for the *Manual* provisions or that the Constitution does not permit Congress to delegate authority to the President. Finally, some service members have contended that *Manual* provisions violate their constitutional rights.

This article has described and analyzed each of these categories. In addition to making various minor criticisms, the article has advanced three recommendations:

First, in reviewing *Manual* provisions, courts should look to the APA and federal administrative law cases for guidance. Although these sources do not bind the courts, they often may provide persuasive guidance. Throughout this article, the author has identified comparable challenges that litigants have made when contesting federal regulations.

Second, although the military courts have both the authority and the duty to review the *Manual*, they should remember to show deference to the President. The President has responsibility for administering the military justice system under the UCMJ and by virtue of his status as Commander-in-Chief. The military courts, accordingly, must leave certain policy choices to the President, just as the federal courts defer to administrative agencies.

Third, the military courts should strive for consistency in their decisions. In the past, they may have had difficulty because no single source summarized the different types of challenges or identified the leading precedents. This article in large part has sought to remedy this deficiency by listing, describing, and analyzing the principal bases for challenging *Manual* provisions.

This article generally has supported the work of the military judges. On the whole, they carefully have considered the arguments of litigants, and have attempted to create proper rules for resolving challenges to the

Manual. No one could fault the judges of these courts for lacking independence when deciding whether the President has erred. On the contrary, they have not shied from this sensitive task. Any criticism presented seeks only to improve future decisions, and therefore the military justice system.