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MILITARY LAW REVIEW

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RULE OF EVIDENCE 702: THE SUPREME COURT PROVIDES A FRAMEWORK FOR RELIABILITY DETERMINATIONS

MAJOR VICTOR HANSEN[1]

I. Introduction

In March of this year,[2] the Supreme Court clarified one of the most nagging issues that remained unanswered after their landmark opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] Using uncharacteristically clear, understandable language, the Court held that the trial judge's gatekeeping responsibility in evaluating the reliability of expert testimony applies not only to testimony based on scientific knowledge as *Daubert* held, but also to testimony based on technical and other specialized knowledge.[4] The Court also clarified that the trial judge can use the factors announced in *Daubert* as well as other appropriate factors to evaluate the

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2. Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999). This case will be published in the United States reporter at 526 U.S. 137; however, the final published version has not been released. This article will cite to the Supreme Court reporter for all references to *Kumho Tire v. Carmichael*.

3. 509 U.S. 579 (1993). In *Daubert* the Supreme Court held that general acceptance was not the exclusive test to determine the reliability of scientific expert testimony. The Court set out four factors that trial courts could use to evaluate the reliability of this evidence. The Court limited its opinion to scientific expert testimony. *Id.* n.8.

4. *Kumho Tire*, 119 S. Ct. at 1171.

reliability of scientific and nonscientific expert testimony.[5] Finally, the Court's opinion reiterated the considerable leeway and broad latitude that the trial judge must have to determine the reliability of expert evidence.[6]

In an age of increasing reliance on expert evidence in courts-martial, *Kumho Tire* has important implications for practitioners and judges. Read in connection with *Daubert* and *General Electric v. Joiner*,[7] *Kumho Tire* completes an expert trilogy and sets the course for the admissibility of expert evidence for years to come. There are several points practitioners must take away from this trilogy. First, the four reliability factors announced in *Daubert* are not an exclusive list. Second, other reliability factors can and should be considered in the appropriate case. Third, the role of the advocate and trial judge in demonstrating and evaluating the reliability of expert testimony is more important than ever before. Finally, military judges will enjoy broad discretion in deciding on the reliability and admissibility of expert testimony.

The purpose of this article is to explore the *Kumho Tire* decision and the implications that this trilogy of cases will have on the admissibility of nonscientific expert testimony. The article first discusses the historical development of methods used to evaluate the reliability of expert testimony. The article next comments on the impact that the federal and military rules of evidence have had on the reliability determination. This section also addresses the impact of *Daubert* and unresolved questions after *Daubert*. After discussing *Daubert* and the associated problems, the article analyzes *Joiner* and *Kumho Tire* and explains how the Supreme Court resolved these problems. The article concludes by discussing how these cases will impact the admissibility of expert testimony in the future. Specifically, this section provides advice to practitioners and judges on how to litigate the reliability of nonscientific expert testimony under the Supreme Court's framework.

II. Historical Background

A. Expert Framework

The long established practice at common law was to give expert witnesses a special status,[8] unlike the nonexpert, whose testimony was con-

5. *Id.*
6. *Id.*
7. 522 U.S. 136 (1997).

fined to personal observations. The expert witness, however, testified primarily in the form of an opinion. Further, the expert was not limited to opinions based on personal observation. Rather, the expert could base his opinion on interviews, case reviews, and other methods.[9]

Courts have required expert testimony to be both relevant and reliable.[10] The test for relevance focused on the helpfulness of the opinion to the fact finder. The critical question was whether expert testimony would assist the fact finder in understanding a relevant issue at trial.[11] If so, an expert with special experience, training, or knowledge on a subject could provide an opinion to assist the fact finder.[12]

Even if the expert's opinion would be helpful to the fact finders, the opinion must also be reliable.[13] The expert had to base his opinion on methods and practices that produce trustworthy results. If the methods or practices used to develop the opinion were unreliable, the fact finder would have little confidence in the opinion, and ultimately the opinion would not be helpful.

B. The *Frye* Test

The most difficult task for trial courts has always been to determine the reliability of an expert's opinion. This is particularly true when the expert is offered to testify about a new or novel theory or principal. Judges evaluating the admissibility of this evidence must decide when the principal or theory crosses over from experimental and unreliable to demonstrable and reliable.[14] A federal circuit court faced this issue several years ago in *Frye v. United States.*[15]

The defendant, James Frye, was convicted of second-degree murder.[16] At his trial, Frye sought to introduce evidence of a novel test known

8. EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1403, at 399 (2nd ed. 1993).
9. *Id*. at 408.
10. *Id*. at 135.
11. FED. R. EVID. 702.
12. *Id.*
13. Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 589 (1993).
14. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
15. *Id*.
16. *Id*.

as the systolic blood pressure deception test, an early version of the lie detector test. Frye's expert offered to testify that increases in a person's systolic blood pressure are brought about by automatic nervous impulses. One such nervous impulse is caused by conscious deception. According to the expert, concealing a crime, accompanied by fear of detection, raises a person's systolic blood pressure at the exact time when the person attempts to deceive the questioner.[17] The expert claimed that he could measure the rise in a person's blood pressure during questioning and determine if the person was being truthful.[18]

Before trial, the expert tested Frye using the systolic blood pressure test and the expert was willing to testify about the result of the testing.[19] In the alternative, Frye's counsel offered to have Frye tested in the presence of the jury. The trial judge rejected both requests.[20] The District of Columbia Circuit Court affirmed the trial judge's decision and in the process announced the now-famous test for determining the reliability of novel expert evidence.

The court recognized that the line between experimental research and reliable data could be difficult to draw. Nevertheless, the court inferred that only the latter should be admitted as expert evidence at trial.[21] To separate the experimental from the reliable, the court held that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[22] In this case the court said that the systolic blood pressure deception test has not yet gained such standing.[23]

For the next seventy years this "general acceptance" requirement became the litmus test for determining the reliability of expert testimony in most federal, state, and military courts.[24] Unless the theory or method

17. *Id.*

18. *Id.*

19. *Id.* While the opinion does not state what the results of the test were, it is unlikely that *Frye* would seek to admit this evidence unless it was exculpatory.

20. *Id.*

21. *Id.* "Inferred" is used because the court specifically hold that only reliable deductions should be admitted at trial. Rather, the court said that courts will only admit expert testimony deduced from well-recognized scientific principles. *Id.*

22. *Id.*

23. *Id.*

24. 1 PAUL C. GIANELLI ET AL., SCIENTIFIC EVIDENCE 9 (2nd ed. 1993).

used to develop the evidence offered at trial enjoyed widespread acceptance in the appropriate community, it was unreliable and inadmissible.

In the context of a primitive polygraph machine, the holding in *Frye* is fairly straightforward and uncontroversial. This case would have been surprising only if the Court of Appeals had remanded the case and ordered the trial judge to allow James Frye to be hooked up to the systolic blood pressure detector and questioned in front of the jury. The next seventy years, however, were not as kind to the *Frye* decision in other contexts.

The general acceptance test required a two step analysis. First, the court had to identify the area or field from which the evidence developed. Next, the court had to determine if members in that field generally accept the principle.[25] At first blush, this two-step approach seems fairly straightforward. As the next seventy years of case law illustrated, however, the test had a number of problems.

Because many scientific techniques did not fall into a single area or field, courts had difficulty knowing where to look for expertise. A 1968 California case dealing with voice print analysis illustrates the point. In *People v. King*,[26] the defendant was convicted of one charge of arson for his involvement in the Watts riots in Los Angeles in August 1965.[27] The basis of the prosecution's case was a documentary film made by CBS news on the Watts riots. In the documentary, an unidentifiable young black man made several incriminating statements about his role in the riot. A few weeks after CBS aired the documentary, Edward King was arrested on a narcotics charge.[28] During a search incident to the arrest, the police found a business card of the CBS camera man who filmed the documentary, a paper containing the name of the associate producer of the film, and a watch and a ring identified in the film.[29]

Suspecting a connection, the police surreptitiously taped an interview with King at the police station. At trial, the prosecution did not seek to admit this tape. Instead, the government introduced segments of the CBS interview as well as the expert opinion of a Mr. Kersta, who testified that the voice on the CBS interview and the voice on the police station inter-

25. *Id*. at 14.
26. 266 Ca. App. 2d. 437 (1968).
27. *Id.* at 440.
28. *Id*.
29. *Id*.

view tape were from the same person. Admissibility of this voice print evidence was a case of first impression for the California court.

Mr. Kersta was an early developer of voice print methodology and a machine that could record a person's "voice print." Mr. Kersta asserted that a person's voiceprint is as unique as his fingerprint. Using the method he developed, he claimed he could identify a person's voice with a 99.65% degree of accuracy.[30] The trial court admitted this evidence over defense objection and in spite of several defense experts who testified that Mr. Kersta's methods were untested, unreliable, and amounted to parlor tricks.[31]

The California Court of Appeals reversed the trial judge's decision and held that it was an abuse of discretion to admit this evidence. The court noted that while Mr. Kersta was trained in electronics and physics, communication by speech does not fall within one category of science. Rather, it involves an understanding of anatomy, physiology, physics, psychology, and linguistics.[32] The court held that because other scientific disciplines that have a role in analyzing the characteristics of someone's voice were not part of Mr. Kersta's methodology, the results were unreliable.[33] This case illustrates the difficulty courts often faced in trying to identify what field or fields of science to look to when determining general acceptance.

The second prong of the *Frye* test was equally problematic. Even if a relevant field of science could be identified, a court had to determine at what point a theory or method becomes generally accepted. This was not an easy determination, and courts since *Frye* have struggled with exactly what it means for a technique to be generally accepted. Some courts have held that a technique is generally accepted if a substantial section of the scientific community concerned have accepted it.[34] Other courts ruled that general acceptance means widespread or prevalent, though not universal acceptance.[35] Cases that followed *Frye* have offered little guidance on what the term general acceptance really means. The result was a confusing standard that was difficult to apply to the facts of a particular case.

Even assuming the court can identify what it means for a theory to be generally accepted; how does a party show general acceptance? This proof

30. *Id.* at 451.
31. *Id*. at 489.
32. *Id*. at 456.
33. *Id*. at 458.
34. United States v. Williams, 443 F. Supp. 269, 273 (S.D.N.Y. 1977).
35. United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972).

would come via expert testimony, most often the very expert whose testimony was at issue. Indeed, this was a common practice after *Frye*.[36] The problem here is one of bias: the expert who developed the procedure or theory is the one who will also provide the testimony as to whether the process or theory was reliable.

Because of this bias problem, courts established additional requirements. Some courts held that the testimony of only one expert would not be enough to represent the views of an entire scientific community.[37] These courts required at least two witnesses to testify about general acceptance. Other courts held that only an impartial expert could testify about the general acceptance of a theory.[38] Still other courts relied on scientific publications and prior judicial decisions to determine whether the theory enjoyed widespread acceptance.[39]

Aside from these problems, the most powerful criticism was the impact *Frye* had on the day-to-day admissibility of reliable evidence. The general acceptance requirement test was strict. This meant that relevant and reliable scientific evidence was kept out of the courtroom simply because it was new and had not gained general acceptance. The legal system lagged behind scientific advances.[40] The case of *Coppolino v. State*[41] is an excellent example.

The defendant in *Coppolino*, Carl Coppolino was charged with murdering his wife. The government theorized that Mr. Coppolino, an anesthesiologist, had injected his wife Carmela with a lethal dose of succinylcholine chloride.

At the time of the victim's death, most experts thought that succinycholine chloride was undetectable in a person's body after death. Carmela's death was initially ruled a suicide. Four months after her death, however, her body was exhumed and the medical examiner, Dr. Helpern,

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36. GIANELLI ET AL., *supra* note 24, at 18-19.

37. Commonwealth v. Topa, 369 A.2d 1277, 1282 (Pa. 1977); *See* People v. Kelly, 549 P.2d 1240, 1248-49 (Cal. 1976).

38. *See* State *ex rel*. Collins v. Superior Court, 644 P.2d 1266, 1285 (Ariz. 1982); People v. Tobey, 257 N.W.2d 537, 539 (Mich. 1977).

39. *See* Commonwealth v. Lykus, 327 N.E.2d 671, 675-76 (Mass. 1975); United States v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970).

40. Edward J. Imwinkelried, *A New Era in the Evolution of Scientific Evidence*, 23 WM. & MARY L. REV. 261 (1981).

41. 223 So. 2d 68 (Fla. 1968).

performed an autopsy. At the conclusion of his autopsy, Dr. Helpern was unable to determine the cause of death. However, he did find a needle injection tract in the left buttocks of the deceased.[42]

Dr. Helpern sent some tissue samples to a Dr. Umberger for a chemical analysis. Dr. Umberger performed several tests on the tissue samples. He employed some procedures that were new and had never been used. As a result of his testing, Dr. Umberger determined that the cause of death was an overdose of succinylcholine chloride. Both Dr. Helpern and Dr. Umberger testified at trial as to the cause of death.

The defense objected at trial and on appeal. At the time, Florida courts used the *Frye* test to evaluate the reliability of scientific testimony. The defense presented evidence that most experts in the field believed it was impossible to detect succinylcholine chloride in the body after death. The government witnesses conceded that some of the procedures used by Dr. Umberger were new, but maintained that they were reliable. In spite of the novel nature of this evidence, the trial judge admitted this evidence.

The Florida Court of Appeals affirmed. The court held that the trial judge had carefully evaluated the issue and had not abused his discretion in admitting this evidence.[43] The concurring opinion of Judge Mann stated the issue clearly. He said, "Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent. The expert witnesses were examined and cross-examined at great length and the jury could either believe or doubt the prosecution's testimony as it chose."[44]

This case demonstrated the major weakness of the *Frye* test. The simple fact is that even novel scientific tests or procedures can generate reliable evidence. It is not in the interest of justice to postpone the admissibility of this evidence pending widespread adoption by the scientific community.

Another criticism of *Frye* that remained even after the test's demise was that courts applied the test selectively.[45] This was largely a problem of distinguishing scientific evidence from other types of expert testimony.

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42. *Id.* at 69.
43. *Id.*
44. *Id.* at 75 (Mann, J., concurring).
45. GIANELLI ET AL., *supra* note 24, at 20-21.

Because *Frye* arguably applied only to scientific evidence, courts had to decide if the expert evidence was scientific.[46] This proved to be a difficult task. This issue will be discussed more fully in Section IV of the article. Many of these criticisms of the *Frye* test became apparent over time as more scientific evidence was introduced into the courtroom.[47]

C. Federal Rules of Evidence

At the very time practitioners pushed for the introduction of more scientific evidence in the courtroom, another important development took place. In 1975, Congress adopted the Federal Rules of Evidence (FRE). For the first time in the federal system, evidentiary issues would be decided by specific rules rather than just by general common law principles. Not only did these rules have a major impact in the federal system, they also impacted on state courts and military courts.

Soon after the federal rules were implemented, other systems adopted their own evidentiary rules modeled after the federal rules. In 1980, the military adopted the Military Rules of Evidence (MRE).[48] In many respects, these rules directly model the federal rules.

Adopting the federal and military rules of evidence accomplished a number of important objectives. First, a uniform set of rules allowed for predictability in the courtroom.[49] Before adopting the federal rules, common law principles governed the admissibility of evidence in federal courts. The difficulty with this system was obvious. Practitioners had a difficult time even knowing what principles a judge may apply to a particular issue. Also, because the common law provided the primary source of law, judges could easily ignore the principles or apply them in a way that the practitioners had not anticipated.[50] Codifying a set of rules common to all courts removed this uncertainty.

The codification of the federal and military rules also ensured a greater degree of uniformity. Because all judges would now be applying

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46. This distinction between scientific and nonscientific expert evidence will be discussed in greater detail later in this article.

47. Imwinkelried, *supra* note 40, at 263-64.

48. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22, at A22-1 [hereinafter MCM].

49. 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 4 (1998).

50. *Id*. at 5.

the same rules, their rulings on the admissibility and inadmissibility of evidence would be more uniform.[51]

A third objective of the rules relevant to the discussion in this article is that more evidence would come before the fact finder.[52] Many of the common law rules in place before Congress adopted the federal rules were archaic and had little relevance to the modern courtroom.[53] The federal and military rules did away with many of these notions and the language of the rules either explicitly or implicitly opened the door for more evidence.[54]

Nowhere was this more apparent than in the language of FRE 702 relating to expert testimony. Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the finder of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion or otherwise.[55]

Military Rule of Evidence 702 is identical. The language of Rule 702 opened up the admissibility of expert testimony in a number of ways.

First, the rule does not place any limitations on the subject matter that an expert can testify about. The rule allows expert testimony not only on

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51. *Id*. at 4. One can debate whether this goal of uniformity has really been achieved. Any experienced trial advocate can cite numerous instances where evidence deemed admissible by one judge has been deemed inadmissible under the very same circumstances by another judge. The rules are in large part responsible for this remaining disparity because they still grant a great deal of discretion to the trial judge. An example is Rule 403 which says relevant evidence can be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or unreasonable delay. The very language of the rule calls for an ad hoc judgment, and no two judges are likely to reach the same conclusion.

52. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 474 (4th ed. 1997).

53. A good example of this is the voucher rule used in many jurisdictions. This rule required the party proffering the witness to vouch for their credibility and prevented them from impeaching their own witness. *See* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE 82 (3rd ed. 1984).

54. The best example is the language of MRE 401 which defines relevant evidence as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 48, MIL. R. EVID. 401.

55. FED. R. EVID. 702.

scientific and technical knowledge, but on other specialized knowledge as well. The drafters recognized that "specialized knowledge" was a broad term, and there was no attempt in the rule or the analysis to narrow or define its meaning.[56] The term "specialized knowledge" potentially covers an innumerable range of topics and issues.[57] The rule recognizes that fact finders may benefit from expert testimony on a wide variety of topics.

Rather than limit the subject matter that an expert could testify about, the rule requires that the expert testimony assist the fact finder to understand the evidence or determine a fact in issue. Here again, this language does not place an onerous burden on the party seeking to admit the expert's testimony. If the evidence will be helpful to the fact finder and not superfluous or confusing, it is a proper subject for expert testimony.[58] This is simply a question of logical and legal relevance. Courts applying this requirement have focused on whether the fact finder can resolve the disputed issues simply by applying their own common sense.[59] If not, expert testimony may be helpful and admissible.

The federal and military rules also liberalized the admissibility of expert testimony by recognizing that a witness's expertise can come from any number of sources other than formal education. Expert witnesses can include not only physicians and scientists, but may also include farmers, mechanics, bankers, and others.[60] Provided the witness has the requisite training, experience, knowledge, education, or skill, he can be qualified as an expert.

The final aspect of expert testimony that the federal and military rules liberalized is the form of the expert's testimony. Prior to the adoption of the rules, experts were often limited to opinion testimony based on hypothetical situations proffered by counsel. This practice stemmed from a belief that if experts commented directly on the facts of the case, they

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56. *Id.*

57. Federal and military courts have admitted expert testimony on a number of subjects to include: United States v. Anderson, 851 F.2d 384 (D.C. Cir. 1988) (allowing expert testimony on how pimps operate); United States v. Alexander, 849 F.2d 1293 (5th Cir. 1987) (allowing expert testimony on the measurement of head dimensions held admissible); United States v. Cruz, 797 F.2d 90 (2nd Cir. 1986) (allowing a government agent to testify about the use of food stamps in narcotics sales); United States v. Rackley, 724 F.2d 450 (8th Cir. 1984) (allowing a demonstration on performance of drug sniffing dog).

58. FED. R. EVID. 702.

59. *Id.*

60. *Id.*

would invade the province of the jury. The hypothetical situations typically mirrored the facts of the case at issue; once the expert rendered an opinion on the hypothetical, the fact finder had to make the link to the facts of the case.

Rule 702 abolished this requirement. The rule does not limit experts to opinion testimony. They can also explain the principles relevant to the facts of the case and let the fact finder apply the principles to the facts before them.[61] Likewise, the expert can also opine about a hypothetical situation and then suggest to the fact finder what inferences should be drawn to the facts of the case.[62]

The changes established by Rule 702 had the potential to revolutionize the admissibility and use of expert testimony. The clear message from the new rule was that more expert testimony should come before the fact finder. Courts and commentators alike recognized that Rule 702 should result in greater admissibility of expert testimony.[63]

D. Conflict Between *Frye* and 702

Rule 702's loosening of restrictions on the admissibility of expert testimony corresponded with a significant increase in the number of cases using expert evidence and expert testimony.[64] One prominent commentator attributed the increase in the use of scientific evidence in criminal cases to opinions by the Warren Court. As the Court developed strong exclusionary rules, prosecutors were forced to abandon traditional methods of proof. In their place, prosecutors and police turned to more sophisticated forensic techniques to gather evidence and establish criminal liability.[65] Many of these forensic techniques involved novel scientific theories, and more and more courts were forced to grapple with issues of admissibility.

For their part, the criminal defense bar resurrected the *Frye* test as a means of keeping this novel evidence out of the courtroom. The defense bar was largely successful in their efforts. Throughout the 1970s and early 1980s, federal, state, and military courts routinely invoked *Frye* as their rationale for keeping novel expert testimony and scientific evidence out of

61. *Id.*
62. *Id.*
63. SALTZBURG ET AL., *supra* note 52, at 837.
64. Imwinkelried, *supra* note 40, at 262-63.
65. *Id.*

the courtroom.[66] The defense bar's success precipitated the many criticisms of the *Frye* test mentioned above.

One criticism, however, warrants further comment. The *Frye* test is inconsistent with both the language and the purpose of Rule 702. As discussed above, the primary restriction on expert testimony under Rule 702 is that the testimony or evidence assists the fact finder. Nothing in the language of the rule requires that the evidence enjoy widespread acceptance before it is admissible. Likewise, no general acceptance requirement is mentioned in the advisory committee notes. In fact, the *Frye* test is not mentioned whatsoever. Further, the restrictive nature of the *Frye* test is inconsistent with one of the primary purposes of the rules.

The restrictive nature of the *Frye* test simply does not square with the language or the purpose of the federal rules. In the early 1980s, this became one of the primary arguments for abolishing the *Frye* test. In jurisdictions that had a version of the federal rules, courts began to adopt this rationale. Many of these courts abandoned *Frye* in favor of the more liberal admissibility standards of Rule 702.

In 1987, the military abandoned the *Frye* test. In *United States v. Gipson*,[67] the then Court of Military Appeals (CMA)[68] held that *Frye* had been superceded by the federal and military rules of evidence and that it was no longer an independent standard of admissibility.[69] Ironically *Gipson*, like *Frye*, involved the admissibility of polygraph evidence. In *Gipson*, the accused was charged with distribution of LSD on three separate occasions. In his defense, the accused sought to admit an exculpatory polygraph that he had secured at his own expense. According to the accused, this polygraph examination indicated that he had been truthful when he denied committing the charged offenses.[70] The trial judge ruled that because this evidence was not generally accepted in the scientific community, it was

66. *Id.*

67. 24 M.J. 246 (C.M.A. 1987).

68. 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 Miltiary 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.

69. *Gipson*, 24 M.J. at 251.

70. *Id.* at 247.

unreliable and inadmissible. The trial judge prohibited the defense from even laying a foundation for the admissibility of this evidence.[71]

On appeal, the CMA noted that there was a great deal of controversy surrounding the reliability of polygraph evidence. The court said that for expert testimony such as polygraph evidence to assist the fact finder under MRE 702, it must be both relevant and reliable. According to the CMA, these requirements are implicit in the rule itself.[72]

The court then turned to the question of how best to determine the reliability of expert testimony. The court recognized that there was a split among state and federal courts as to whether *Frye* was the appropriate test for admissibility.[73] The CMA noted that MRE 702 is a comprehensive scheme for the processing of expert testimony. It also said that this scheme makes no mention of *Frye*.[74] According to the court, the adoption of the federal and military rules superseded the *Frye* test.[75]

The CMA's holding in *Gipson* preceded the Supreme Court's opinion in *Daubert* by six years. *Gipson* was a foreshadowing of things to come. By the early 1990s judges, practitioners, scientists, and commentators alike recognized that *Frye* had outlived it usefulness. It was simply too restrictive of a test, keeping reliable evidence from the fact finder.

III. *Daubert v. Merrell Dow Pharmaceuticals, Inc*.

A. The Opinion

In 1993, the Supreme Court finally addressed the question of whether the *Frye* test survived FRE 702. In the context of a product liability suit, the Court said that *Frye* was no longer the controlling test to determine the reliability of expert evidence. Like the military court six years earlier, the Supreme Court held that expert testimony must be relevant and reliable. On the question of reliability, the Court held that *Frye* was not the appropriate test.[76] The plaintiffs in *Daubert*, Jason Daubert and Eric Schuller, were born with serious birth defects. Their mothers took a medication called Bendectin during pregnancy to combat nausea. Daubert and

71. *Id.*
72. *Id.*
73. *Id.* at 251.
74. *Id.*
75. *Id.*
76. 509 U.S. 579 (1993).

Schuller sued Dow Chemical alleging that Bendectin, manufactured by Dow, caused the birth defects.[77]

To prove causation, the plaintiffs sought to introduce the testimony of eight well-credentialed experts. The experts would opine that Bendectin caused birth defects despite thirty published studies that concluded that Bendectin did not cause birth defects. The plaintiff's experts based their opinion on novel scientific theories.[78]

First, they found a link between Bendectin and birth defects in test tube and live animal studies. Second, the chemical structure of Bendectin was similar to other substances known to cause birth defects in humans. Finally, the experts conducted a reanalysis of previously published human statistical studies. Based on the information they developed, the experts were willing to testify to a causal link.[79]

The trial court rejected this testimony and granted summary judgment for the defendants. The court said that the methods employed by the plaintiffs' experts were not sufficiently established in the relevant scientific community. The evidence was unreliable and inadmissible under *Frye*.[80]

The Ninth Circuit Court of Appeals affirmed the trial court's ruling.[81] Like the trial court, the court of appeals applied *Frye* to test the reliability of the plaintiff's expert testimony. The court found that the reanalysis method used by the experts had not been published or subjected to peer review.[82] According to the Ninth Circuit, this method was against the massive weight of the evidence and not generally accepted.[83] Finally, the court noted that the plaintiff's evidence was developed solely for use in litigation.[84]

The Supreme Court granted *certiorari* and reversed the lower courts' decisions.[85] In *Daubert*, the Court did not decide whether the trial judge correctly determined the reliability of the plaintiff's expert testimony

77. *Id.* at 582.
78. *Id*. at 583.
79. *Id.*
80. *Id*.
81. Daubert v. Merrell Dow Pharmaceuticals, 951 F.2d 1128 (9th Cir. 1991).
82. *Id*. at 1130-31.
83. *Id*.
84. *Id.*
85. 506 U.S. 914 (1992).

under *Frye*. The Court instead used this case to decide if *Frye* was still the controlling test to evaluate the reliability of expert evidence.[86] The Court held that *Frye* and general acceptance was no longer the sole basis for evaluating reliability.

The Court noted that over the years courts and legal scholars have hotly debated the usefulness and the proper application of the *Frye* test. Among the numerous criticisms against *Frye*, the Court found the most persuasive to be the plaintiffs' argument that the federal rules superceded *Frye*.[87] Like the CMA six years earlier, the Supreme Court viewed FRE 702 as a comprehensive mechanism for evaluating the admissibility of expert evidence. The Court held that there is no indication that FRE 702 or the Federal Rules of Evidence as a whole were intended to incorporate a general acceptance standard.[88] The Court also said that the rigid general acceptance requirement was inconsistent with the thrust of the federal rules, which is to relax traditional barriers on opinion testimony.[89] The Court then reasoned that since the federal rules made no mention of *Frye* and there was no incorporation of *Frye* anywhere in the rules, *Frye* did not survive the implementation of the federal rules.[90]

B. Competing Concerns

The Court held that the federal rules placed some restrictions on the admissibility of expert evidence. Again, using the same language that the CMA used in *Gibson*, the Supreme Court held that the federal rules required scientific evidence to be both relevant and reliable.[91] According to the Court, the reliability requirement comes from the term "scientific knowledge" found in Rule 702. The court reasoned that for an assertion to qualify as "scientific knowledge," it must be supported by appropriate validation and must be based on good grounds.[92] In the Court's view, the very term used in the rules established a standard of evidentiary reliability. The Supreme Court also found the relevancy requirement from the language of Rule 702. Here the Court focused on Rule 702's requirement that the expert testimony assist the trier of fact to understand the evidence or to

86. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 581 (1993).
87. *Id.* at 587.
88. *Id.* at 588.
89. *Id.*
90. *Id.*
91. *Id.* at 589.
92. *Id.* at 590.

determine a fact at issue.[93] The Court said this requirement goes primarily to the relevance of the evidence.[94]

Simply stating that Rule 702 placed relevance and reliability requirements on expert scientific evidence did not completely resolve the issue. Assuming that *Frye* is no longer the test for evaluating the reliability of expert testimony, what should judges use in its place? The Court faced competing concerns. On the one hand, the Court found the *Frye* standard too restrictive and unworkable. On the other hand, the Court had to ensure that trial judges have the necessary tools to prevent "junk science" from entering the courtroom.[95]

In *Daubert*, the Supreme Court tried to provide some guidance for trial judges to keep "junk science" out of the courtroom. The Court began by clearly stating that it was the trial judge's responsibility to determine the reliability of scientific evidence. The Court counseled trial judges to conduct a hearing under FRE 104[96] to make a preliminary determination that the scientific evidence is relevant and reliable.[97] The Court then listed four

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93. *Id*. at 591.

94. *Id*.

95. The fear of "junk science" entering the courtroom was a legitimate concern when the Court decided *Daubert* and it continues to be a concern today. Ironically, at the very time Congress and the courts moved to relax the rules of admissibility, the proficiency of American crime laboratories came into question. Imwinkelried, *supra* note 40, at 269. One study in the 1970s demonstrated the very real possibility of error in the forensic analysis conducted by police laboratories. In 1974 the Law Enforcement Assistance Program sponsored a study to test the proficiency of crime labs in the United States. Some 240 laboratories participated in the study. The testing committee sent the participating labs samples of blood, hair, firearms, drugs, glass, paint and other forensic evidence for analysis. The testing committee knew the findings that a competent scientific analysis would yield. The results showed that the laboratories misidentified the samples in a large percentage of cases. With some samples, the misidentification rate was well over 50%. Imwinkelried, *supra* note 40, at 267-69. As recently as three years ago, similar allegations surfaced about the Federal Bureau of Investigation laboratory, the most prestigious criminal laboratory in the United States.

96. Federal Rule of Evidence 104(a) states:

> Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

Military Rule of Evidence 104(a) is substantially the same. *See* MCM, *supra* note 48, MIL. R. EVID. 104(a).

nonexclusive factors that the trial judge should consider when evaluating the reliability of expert scientific evidence.

First, the trial judge should determine whether the theory or technique can be (and has been) tested.[98] Second, the trial judge should consider whether the theory or technique has been subjected to peer review and publication.[99] Third, the trial judge should consider the known or potential rate of error of the theory or technique.[100] Finally, the Court recognized that *Frye* still has some value by holding that the trial judge should also consider whether the theory or technique enjoys general acceptance in the relevant scientific community.[101]

The *Daubert* opinion was significant for several reasons. The Court clearly established that when there is a conflict or uncertainty between the common law rules and the federal rules of evidence, the federal rules control. The Court also definitively held that the *Frye* test was no longer the single controlling factor courts should use to evaluate the reliability of scientific expert evidence. Finally, the Court emphasized the important role trial judges must play in allowing reliable evidence to be presented to the fact finder, while keeping "junk science" out of the courtroom. On this last point, the Court provided guidance to trial judges about factors they should use to evaluate the reliability of evidence developed from the scientific method.

C. Unanswered Questions

While *Daubert* was unquestionably the most important Supreme Court ruling on expert evidence to date, the opinion was not without problems. *Daubert* did not answer all of the questions surrounding Rule 702, and arguably raised more questions than it answered. The opinion also squarely placed a burden on trial judges that many judges were unwilling or unprepared to accept. By establishing the trial judge as the gatekeeper and rejecting *Frye*, the Court prohibited trial judges from merely relying on the opinions of others to determine the reliability of scientific evidence. The Court told judges that they must preliminarily assess whether the reasoning or methodology underlying the expert testimony is scientifically

97. *Daubert*, 509 U.S. at 592.
98. *Id.* at 593.
99. *Id.*
100. *Id.* at 594.
101. *Id.*

valid and can be applied to the facts of the case.[102] This assessment is a much more detailed review than most trial courts had done under *Frye*.[103]

The opinion, however, avoided a glaring problem. Courtrooms are not the best forums for evaluating the scientific validity of a theory or methodology, particularly if the method or theory involves novel ideas. Other than the four factors that the Court provided, the opinion left trial judges on their own. *Daubert* is unclear about how much weight each factor should be given and whether trial courts can consider other factors not expressly listed by the Court.

A second question spawned by the *Daubert* opinion was where the judge should focus the reliability inquiry. According to the Court in *Daubert*, the focus must be solely on principles and methodology, not on the conclusions they generate.[104] The opinion did not discuss the reliability of the expert's conclusions. Should the trial judge care if the expert's conclusions were reliable? Or, does the inquiry stop once the court determines that the methods employed by the expert were reliable, regardless of the conclusions the expert reached? Can a judge even draw a distinction between an expert's methods and conclusions?[105]

The Supreme Court clarified this portion of the *Daubert* opinion four years later in *Joiner v. General Electric*.[106] The Court ruled that the trial judge did not abuse his discretion when he evaluated the reliability of the expert's conclusions.[107] In *Joiner*, the plaintiff, an electrician, was occasionally exposed to polychlorinated biphenyls (PCBs) in electrical transformers manufactured by the defendant, General Electric.

In 1991, the plaintiff was diagnosed with small cell lung cancer. He sued General Electric, alleging that the cancer was caused by his exposure to PCBs.[108] To support his claim, the plaintiff sought to introduce testimony and evidence from experts who would opine that the plaintiff's exposure to PCBs promoted his cancer. The expert's opinions were based in large part on studies he conducted on laboratory animals.[109] The

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102. *Id*. at 592-93.

103. Bert Black et al., *Science and the Law in the Wake of Daubert*, 72 TEX. L. REV. 715, 721 (1994).

104. *Daubert*, 509 U.S. at 595.

105. Kennard Neal, *Life after Joiner*, GA. B.J., May 1998, at 34.

106. 522 U.S. 136 (1997).

107. *Id.* at 145-46.

108. *Id*. at 140-41.

defense claimed that the expert's opinions were unreliable and inadmissible because the studies were conducted on laboratory animals in conditions that were much different than the plaintiff's exposure. The defense also contended that no study existed that linked exposure to PCBs and cancer in humans. The trial judge agreed with the defense and granted summary judgment.[110]

On appeal, the Eleventh Circuit reversed. The court first evaluated the judge's decision to exclude this evidence, by using a "particularly stringent standard of review," rather than the traditional abuse of discretion standard. The Eleventh Circuit said that this heightened standard was appropriate when a trial judge excludes evidence because FRE 702 displays a preference for the admissibility of evidence. Under this particularly stringent standard of review, the court of appeals said the trial court erred in excluding this testimony.[111]

The Supreme Court granted *certiorari* and reversed.[112] The Court first rejected the Eleventh Circuit's particularly stringent standard of review. A unanimous court held that the proper standard of review, even for expert scientific evidence excluded by the judge, was abuse of discretion.[113]

The Court then addressed the issue unanswered in *Daubert* of whether the trial judge was limited to reviewing the reliability of an expert's methodology, or whether the judge could look at the expert's conclusions as well. The Court recognized the difficulty, and sometimes the impossibility, of separating an expert's methodology from his conclusions. The Court said conclusions and methodology are not entirely distinct from one another.[114] The Court also noted that there is nothing in the Federal Rules of Evidence or the *Daubert* opinion that requires the trial court to admit expert opinion testimony simply because the expert claims that his conclusions are supported by the existing data.[115] A trial court may find that the gap between the data and the expert's conclusions is simply too

109. *Id*. at 144-45.
110. *Id*.
111. *Id*. at 140-41.
112. *Id.*
113. *Id.*
114. *Id*. at 145-46.
115. *Id.*

great to be reliable. The appellate courts should reverse such a finding only for an abuse of discretion.[116]

Joiner answered two important questions left open by *Daubert*. First, the Court in *Joiner* reaffirmed that abuse of discretion is the proper standard to review a trial court's decision to admit or exclude expert evidence. Second, the Court said that it might be appropriate for the trial court to evaluate the reliability of both an expert's methodology and the expert's conclusions and opinions. In spite of this clarification, one very significant question from the *Daubert* opinion remained unanswered. What expert testimony and evidence does *Daubert* apply to?

In a footnote to the *Daubert* opinion, the Court expressly stated that its discussion was limited to the "scientific context" because that was the nature of the evidence in the case.[117] The expert evidence in *Daubert* involved evidence derived from laboratory research and epidemiological studies.[118] The four factors the Court introduced in *Daubert* to evaluate the reliability of expert testimony are the very questions that a scientist uses to decide if a proposition has been verified.[119]

Federal Rule of Evidence 702 and MRE 702, however, do not limit expert evidence to opinions developed just from scientific knowledge. The rule states that "scientific, technical, or other specialized knowledge" is admissible if it will assist the fact finder. What impact should *Daubert* have on expert evidence not developed using the scientific method? Does *Daubert* have any application? Should trial judges try to apply the four factors announced in *Daubert* to other types of expert testimony even though there is not a direct correlation? Should trial judges look to factors other than the ones the Court suggested in *Daubert* to evaluate the reliability of the nonscientific expert's testimony? Should trial courts even be concerned about the reliability of nonscientific experts? Finally, how can a court determine what types of evidence were developed using the Newtonian scientific method and which were not? All of these questions remained unanswered after *Daubert*.

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116. *Id.*

117. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, n.8 (1993).

118. This is evidence developed using the scientific method. The scientific method is Newtonian experimental science, the process of developing and testing hypothesis. Edward J. Imwinkelried, *Scientific Evidence After the Death of Frye Statistics, Data, and Levels of Proof*, 15 CARDOZO L. REV. 2271, 2277 (1994).

119. *Id*.

IV. *Daubert* and Nonscientific Evidence

A. Is it Science?

These unresolved issues are not mere esoteric points for commentators to debate in academia. The answers to these questions have a significant impact on any case where the reliability of nonscientific or quasi-scientific expert evidence is litigated. With scientific evidence, pre-trial motions relating to reliability can often be outcome determinative.[120] Similarly, if the judge believes that the *Daubert* factors do not apply to nonscientific testimony, that decision may lead to the testimony of a key witness, which may be outcome determinative.

To begin with, courts after *Daubert* had to answer the fundamental question of whether the evidence or testimony was developed using the scientific method. There is no easy answer to this question. At one end of the spectrum, for example, there is DNA evidence. It is clear that this type of evidence was created using the scientific method and fits well within the Court's definition of scientific knowledge. At the other end of the spectrum is something like astrology. Information developed by astrologists is far removed from the scientific method. Between these two extremes, however, there is a large gray area. A few examples illustrate how courts have struggled in this quasi-scientific no-mans land.

One example deals with expert testimony in child abuse cases. In *United States v. Bighead*,[121] the defendant was charged with two counts of sexual abuse with a minor. The victim claimed that the defendant had been abusing her from the time she was about eleven until she was seventeen. The victim, however, did not report the abuse to an adult until shortly before her eighteenth birthday.[122]

After the victim was cross-examined by the defense counsel about her delayed reporting, the government introduced as a rebuttal witness an expert in child sexual abuse.[123] The thrust of the expert's testimony was that it is not unusual for child victims to delay reporting and that such delays are consistent with incidents of abuse.[124] On appeal, the defense

120. Neal, *supra* note 105, at 34.
121. 128 F.3d 1329 (9th Cir. 1997).
122. *Id.* at 1330.
123. *Id*.
124. *Id*.

argued that the expert's testimony was improperly admitted because it did not satisfy the four factors of reliability set out in *Daubert*.[125]

The Ninth Circuit rejected the defense argument. The appellate court held that the expert's testimony was not scientific evidence. The court said that her testimony was developed from her own personal observations of numerous abuse victims. Because the evidence was not scientific, the *Daubert* factors did not apply, and the evidence was properly admitted.[126]

The dissenting judge, Judge Noonan, disagreed with the majority's characterization of this evidence. Judge Noonan first said that the majority read *Daubert* too narrowly and that the reliability analysis applied to all types of expert testimony.[127] Judge Noonan also argued that this testimony is novel scientific evidence because the expert used a particular method to interpret allegations of abuse, and she was not simply reciting her personal observations. According to Judge Noonan, this was scientific evidence that the trial court should have subjected to a *Daubert* analysis.[128]

A second example involves accident reconstruction testimony. In *Robinson v. Missouri Pacific Railroad*,[129] the plaintiff sued Missouri Pacific Railroad for the wrongful death of his family members. The plaintiff's wife and child were killed when a train at a railroad crossing struck their car.[130]

The plaintiff claimed that the crossing gate was not working and the victims were unaware of the train's approach. The defendants claimed that the crossing gate functioned properly. They alleged that the victim tried to drive around the crossing gate and that her car was struck in the process.[131]

To prove their case and rebut the defense theory, the plaintiff introduced testimony from an accident reconstruction expert. The expert created a video of the accident. The video showed that the location of the car after the accident was consistent with the plaintiff's version of the events and inconsistent with the defense claims.[132] On appeal, the defense argued

125. *Id*.
126. *Id*.
127. *Id*. at 1335 (Noonan, J., dissenting).
128. *Id*. at 1336 (Noonan, J., dissenting).
129. 16 F.3d 1083 (10th Cir. 1994).
130. *Id.* at 1084.
131. *Id*. at 1085.
132. *Id*. at 1086-87.

that the trial judge erred in admitting this video as unduly prejudicial.[133] In dicta, the court said it believed that the video did involve scientific evidence because it was based on the science of physics. Therefore, the principles of *Daubert* applied.[134]

Expert testimony about eyewitness identification is another example of the confusion over what fits the definition of scientific knowledge. Two different federal circuit courts have split on this issue. In *United States v. Smith*,[135] an Eleventh Circuit case, the accused was convicted of bank robbery. At trial, the defense sought to introduce the testimony of an expert in eyewitness identification to explain the various factors that affected the reliability of an eyewitness' identification.[136] The trial judge excluded the evidence and the Eleventh Circuit affirmed. In the opinion, the court noted that this evidence involved scientific knowledge.[137] The court, however, agreed with the trial judge that the expert opinion would not assist the fact finder.[138]

Under similar facts, the Ninth Circuit Court of Appeals reached the opposite result. In *United States v. Rincon*,[139] the accused was also charged with bank robbery and sought to introduce testimony from an expert in eyewitness identification.[140] In contrast with the Eleventh Circuit, the court in *Rincon* held that there was no evidence on the record to indicate that this type of evidence related to a scientific subject.[141]

These cases illustrate some of the glaring problems that remained after *Daubert*. Because the Supreme Court limited its opinion to evidence developed from the scientific method, courts were now faced with the challenge of deciding what evidence involved scientific knowledge and what evidence did not. These cases also show that *Daubert* did not resolve one of the main criticisms of the old *Frye* test. As discussed above, many commentators criticized *Frye* because judges applied the test selectively. Only if the evidence involved novel scientific testimony would courts

133. *Id*. at 1087.
134. *Id*. at 1089.
135. 122 F.3d. 1355 (11th Cir. 1997).
136. *Id.* at 1358.
137. *Id*.
138. *Id.*
139. 28 F.3d 921 (9th Cir. 1994).
140. *Id.* at 923.
141. *Id*. at 924-25.

apply the *Frye* test. This selectivity problem remained because the Court limited the holding in *Daubert* to scientific evidence.

B. Does *Daubert* Apply?

Closely related to the issue of whether the evidence is scientific or nonscientific, is the question of whether *Daubert* should be used to evaluate the reliability of nonscientific expert testimony. This issue has proven to be the most contentious and confusing issue for federal and military courts after *Daubert*. The Supreme Court was vague on this point.

On the one hand the Court limited its opinion to evidence developed using the scientific method.[142] On the other hand, the opinion recognized that Rule 702 is not limited to scientific evidence and the rule "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify."[143] This lack of clarity has fostered most of the confusion for courts following *Daubert*.

There are some persuasive arguments as to why a *Daubert* reliability analysis should apply to all types of expert testimony. One argument comes from the language of the rule and the Court's opinion in *Daubert*. In *Daubert*, the Court read the reliability requirement into the rule by looking at the terms "scientific" and "knowledge." The Court reasoned that the rule's use of these terms created a requirement that the information be based on "good grounds."[144]

"Knowledge," however, does not only apply to the term "scientific." The rule says "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact . . . ."[145] Under the rule, "knowledge" applies to technical and other specialized evidence as well. Applying the Court's rationale in *Daubert*, it would stand to reason that the rule is concerned that all types of expert testimony are based on "good grounds."

Another argument for applying *Daubert* to nonscientific expert evidence is evidentiary policy. In *Daubert*, the Court stressed the role of the trial judge as the gatekeeper to ensure that "all scientific testimony or evidence admitted is not only relevant, but reliable."[146] There is no reason

142. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, n.8 (1993).
143. *Id.* at 589.
144. *Id.* at 590.
145. FED. R. EVID. 702.

that courts should be any less concerned about the reliability of nonscientific expert evidence and testimony. In fact, one advantage that scientific evidence has over other types of expert testimony is that the scientific method allows for checking and double checking by others. Nonscientific expert evidence often lacks even that level of basic assurance and quality control. Without these basic controls, there is an even grater risk that unreliable evidence will get to the fact finders.[147]

If courts do not apply some *Daubert* type of reliability analysis, the consequence is that nonscientific evidence comes in largely unguarded. At most, courts will do a cursory analysis to see that the witness qualifies as an expert and the evidence will be helpful.[148] Courts will rarely go beyond that to look at the reliability of the witness's methods. From both a statutory and a policy perspective, there is no reason why the judge's gate-keeping responsibilities under Rule 702 should not apply to nonscientific expert evidence. In spite of this rationale, there are counter arguments as to why *Daubert* should not apply to nonscientific evidence.

The first argument is based on the language of the opinion itself and the Court's specific limitation of the opinion to evidence developed using the scientific method. The majority opinion expressly limited its holding to evidence developed using the scientific method and the four evaluative criteria that the Court discussed were all in the context of scientific evidence.

A stronger argument why *Daubert* should not apply to nonscientific evidence is a pragmatic one. The *Daubert* factors were created to help evaluate the reliability of scientific evidence.[149] These factors do not generally fit well in evaluating the reliability of nonscientific evidence. Take for example the testimony of a military police officer called to testify in a vehicular homicide case. The officer has investigated numerous vehicle accidents and is willing to testify that, in his expert opinion, the accused ran a stop sign causing the accident. This opinion is based on his view of the accident scene and his interviews of the eyewitnesses to the incident.

Under 702, this witness may be qualified as an expert because of his experience and training.[150] Accident scene investigation also involves

146. *Daubert*, 509 U.S. at 589.
147. Imwinkelried, *supra* note 118, at 2282.
148. *Id.* at 2281.
149. *Daubert*, 509 U.S. at 593-95.
150. FED. R. EVID. 702.

specialized knowledge. The problem is that the *Daubert* factors do not provide much help in evaluating the reliability of his testimony. It is unlikely that his opinions or methods have been published or subjected to peer review. Likewise, the error rate as to the accuracy of his opinion is probably unknown and unknowable. His theories and methods may be testable to some extent but it would be impossible to recreate the exact conditions of the accident to verify his conclusions. Finally, he may be able to show that his method of investigation enjoys widespread acceptance if he can show that he followed established procedures. Short of that, however, even widespread acceptance would be difficult to demonstrate.

This example illustrates the problem with the *Daubert* factors and nonscientific and quasi-scientific testimony. Of the four factors announced in *Daubert*, the only one that easily applies is the old *Frye* test of general acceptance. This difficulty of fitting the square peg of *Daubert* into the round hole of nonscientific and quasi-scientific testimony has caused great confusion among the federal circuits and the military courts, and it has led to inconsistent and poorly reasoned opinions.

Because of this confusion, the federal circuits have been strongly divided on the applicability of the *Daubert* factors and whether the trial judge should perform a gate-keeping function for other than scientific expert testimony. The following are just a few of the many examples of this split of opinion.

In *Berry v. City of Detroit*,[151] the Sixth Circuit applied the *Daubert* factors to evaluate the reliability of a proffered expert in police policies and practices. In that case the plaintiff sued the City of Detroit for the death of her son who was shot by a Detroit police officer. The plaintiff claimed that the city failed to properly train its officers. This indifference to the rights of its citizens was the proximate cause of her son's death.[152]

To support her claim, the plaintiff introduced the expert testimony of a Mr. Postill. Mr. Postill testified that in his opinion the police department's lack of proper training and discipline constituted a pattern of deliberate indifference.[153] The trial judge admitted this testimony over defense objection. The defense appealed and claimed that Mr. Postill's opinion tes-

151. 25 F.3d 1342 (6th Cir. 1994).
152. *Id.* at 1343.
153. *Id*. at 1353.

timony was inadmissible because it was unreliable. The Sixth Circuit Court of Appeals agreed and reversed.

The court began its review by noting that Mr. Postill's expert qualifications were very suspect. He had spent very little time as an actual policeman. It appeared that he awarded himself most of the other qualifications.[154] Next, the court turned to a method for evaluating the reliability of Mr. Postill's testimony. The court said that while *Daubert* dealt only with scientific evidence, evidentiary problems are "exacerbated when courts must deal with the even more elusive concept of nonscientific expert testimony."[155] Based on the court's reading of *Daubert*, they held that the judge's gate-keeping responsibility applies to all types of expert testimony.[156] Applying the *Daubert* factors of publication/peer review and general acceptance, as well as a detailed review of Mr. Postill's methodology, the court held that his testimony was unreliable and should not have been admitted.[157]

While the Sixth Circuit found the *Daubert* factors applicable to nonscientific experts, other circuits reached the opposite conclusion. In *United States v. Plunk*,[158] the Ninth Circuit concluded that the *Daubert* factors do not apply to nonscientific expert testimony. In *Plunk*, the defendant was convicted of conspiracy to distribute cocaine. As part of their case, the government introduced taped conversations between Plunk and his coconspirators about plans to ship drugs from Los Angeles and Houston to the East Coast.[159]

During these phone conversations, Plunk and the other conspirators spoke in a type of code. To help the jury understand this code, the government introduced the expert testimony of Detective Jerry Speziale of the New York City Police Department to testify as an expert witness in the analysis of codes, words, and references used by narcotics traffickers.[160] The defense argued that the expert's testimony was inadmissible because

154. *Id.* at 1349.
155. *Id.*
156. *Id.* at 1351.
157. *Id.* at 1351-54.
158. 153 F.3d 1011 (9th Cir. 1998).
159. *Id.* at 1015.
160. *Id.* at 1016.

it lacked the requisite scientific basis and did not meet the *Daubert* standards of admissibility.[161]

The court of appeals rejected that argument. The court held that the expert's testimony constituted specialized knowledge and the *Daubert* standards for admission did not apply.[162] Instead the court turned to what they termed a more "traditional Rule 702 analysis."[163] Under this analysis the court avoided looking at the expert's methodology. Instead, the court asked first if this is an area where expert testimony would assist the fact finder, and second, whether the expert possesses the requisite qualifications.[164] Provided these criteria are met, which they were in this case, the trial judge did not abuse his discretion in admitting this evidence.

The military cases dealing with nonscientific expert testimony since *Daubert* have also been inconsistent. In the area of handwriting and questioned document analysis, the Army court adopted an approach consistent with the Ninth Circuit. In *United States v. Ruth*,[165] the accused was convicted of attempted larceny and conspiracy for his role in a scheme to forge the financial documents of other soldiers.[166] An important part of the government's case was the expert testimony of Special Agent Horton. Agent Horton was a questioned document examiner and he opined that there were strong indications that the accused forged the financial documents. On appeal, the defense claimed the military judge erred by not conducting a thorough inquiry into the reliability of handwriting analysis. Specifically, the defense said the military judge failed by not applying the *Daubert* factors to this evidence.[167]

The Army court rejected that argument. The court held that *Daubert* was never intended to apply to any knowledge other than scientific knowledge.[168] According to the court, handwriting analysis is best treated as technical or other specialized knowledge.[169] Instead of using the *Daubert* factors to evaluate the admissibility of this evidence, the Army court, like the Ninth Circuit, asked two questions. First, would the evidence assist the

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161. *Id.* at 1017.
162. *Id.*
163. *Id.*
164. *Id. See* Compton v. Subaru of America, 82 F.3d 1513 (10th Cir. 1996).
165. 42 M.J. 730 (Army Ct. Crim. App. 1995), *aff'd* 46 M.J. 1 (1998).
166. *Id.* at 731.
167. *Id.*
168. *Id.* at 732.
169. *Id.*

trier of fact? Second, is the witness qualified to render an expert opinion? In this case, the court said the answer to both these questions was yes, and the military judge did not abuse his discretion by admitting this evidence.[170]

In other areas, however, the Court of Appeals for the Armed Forces (CAAF) has held that the *Daubert* factors do apply to nonscientific expert testimony. In *United States v. Griffin*,[171] the accused was charged with, among other things, false official statements and indecent liberties. He confessed to Air Force investigators about taking indecent liberties with his daughter. The defense claimed that this confession was coerced. To support its claim, the defense sought to introduce the testimony of Dr. Rex Frank, a psychologist.[172]

Dr. Frank was prepared to testify that, based on his studies, the accused's confession was consistent with a coerced complaint-type confession.[173] The military judge excluded this testimony. The judge held that Dr. Frank's testimony did not have the necessary reliability to be of assistance to the fact finders.[174] On appeal, the CAAF acknowledged that this type of expert testimony was nonscientific evidence. Contrary to the Army court's holding in *Ruth*, the court went on to say that it applies the *Daubert* analysis not just to scientific knowledge, but to specialized and other knowledge as well.[175]

In spite of this clear statement, the court did not apply the *Daubert* factors in the opinion. Instead, the court held that, while Dr. Frank's testimony was potentially relevant, the evidence Dr. Frank used to reach his conclusions was unreliable.[176] The court noted that Dr. Frank relied on the accused's version of what happened at the interrogation. This version was inconsistent with the investigator's testimony and the military judge found the accused's version unreliable. The CAAF held that, based on this find-

170. *Id.* at 732-33.
171. 50 M.J. 278 (1999).
172. *Id.* at 281.
173. *Id.* at 282.
174. *Id.* at 283.
175. *Id.* at 284.
176. *Id.*

ing, the military judge did not abuse his discretion in excluding this evidence.[177]

The CAAF's opinion in *Griffin* muddied the water. Even though the court said the *Daubert* analysis applies, the CAAF made no specific mention of what *Daubert* factors it considered and how those factors impacted on the reliability of this evidence. Both *Ruth* and *Griffin* show that the military courts, like their federal counterparts, are not in agreement on whether or how the *Daubert* analysis should apply to nonscientific expert evidence.

Resolving this question is important. Trial judges need to know exactly what their responsibility is under Rule 702. Expert evidence is an increasing part of nearly every trial. Judges and practitioners are faced with admissibility questions routinely and there should be some uniform guidance to which trial courts can look. Unfortunately, the federal and military appellate courts have been anything but a model of clarity.

C. Other Attempts to Resolve the Confusion

The confusion within the military and federal courts on this issue has provided fertile ground for commentators to offer suggestions. Over the six years since *Daubert* was decided, there have been numerous articles written on how courts should evaluate the reliability of nonscientific expert evidence. Commentators, like the courts, have not reached any degree of consensus. The list of proposals runs the full gambit of doing nothing to excluding all evidence that does not fit neatly within the four factors set out in *Daubert*.

At one end of the spectrum, some commentators have suggested that the trial judge should not be concerned with the reliability of nonscientific expert evidence since *Daubert* was only concerned with "junk science."[178] The logic of this argument, however, fails close scrutiny. As noted above, there is no reason that courts should be any less concerned about the reliability of nonscientific expert evidence than they are with excluding junk science. While scientific expert evidence my be independently scrutinized using the scientific method, nonscientific expert evidence may lack the

177. *Id.* at 284-85.

178. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE, rule 702 comm. n. 126-127 [hereinafter PROPOSED RULES].

same opportunity for independent quality control. If courts do not apply some type of reliability analysis, nonscientific expert evidence will come in largely unguarded.

Others have suggested that the best reliability test for nonscientific testimony is the *Frye* test.[179] This seems to be the one *Daubert* factor that courts can easily apply to nonscientific experts. Before an expert on false confessions or handwriting analysis or any other nonscientific field can testify, the proponent must demonstrate that the subject matter enjoys general acceptance. The value of adopting *Frye* for nonscientific expert evidence is that the trial judge has something to turn to when evaluating the reliability of this evidence. This alternative is certainly better than the approach of not using any criteria to evaluate the expert's reliability. It also ensures that this expert evidence will not come in unguarded.

Unfortunately, the drawbacks outweigh the benefits. There is no reason to believe that the problems associated with *Frye* and scientific evidence will not also plague *Frye*'s application to nonscientific expert evidence. For example, the same danger that reliable evidence may be excluded simply because it is not generally accepted exists with handwriting analysis as it does with DNA evidence. More importantly, applying *Frye* is inconsistent with the language of Rule 702. As the Court said in *Daubert*, nothing in the rule establishes general acceptance as an absolute prerequisite to admissibility.[180]

Another possibility is the simple two-pronged test the Army court used in *Ruth*. First, the court asks if this is the type of subject where expert testimony would help the fact finder. Second, the court asks if the expert is qualified to provide an opinion.[181]

The problem with this test is that it does not go far enough. It assumes that if the information would assist the fact finder and the expert is qualified, the evidence must be reliable. This assumption is not always true. The witness's training and the helpfulness of the information do not equate to reliability. It is not hard to imagine a scenario where a witness with years of experience working with car tires for example, is willing to testify about the cause of a particular tire's failure. The problem is that the witness reached his conclusions without fully examining the tire or considering the past history and use of the tire.[182] If the trial judge only focuses on

179. Imwinkelried, *supra* note 118, at 2286.

180. Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 589 (1993).

the helpfulness of the testimony and the qualifications of the witness, he may not fully explore the problems with the methodology. The two-pronged test then does not go far enough and can miss the key reliability question by assuming too much from the witness's training.

If one end of the spectrum of possible approaches is to not evaluate the reliability of nonscientific expert evidence, the other end is to slavishly apply the four *Daubert* factors even though there is not a good fit. Some commentators have suggested this approach,[183] and the Sixth Circuit used it in *Berry*. This approach, however, excludes too much nonscientific expert evidence that may be reliable. Many types of nonscientific evidence will not even fit within the *Daubert* scheme. Trial courts that use this method may exclude evidence not because it is unreliable, but because it does not fit within the *Daubert* framework.

One commentator has suggested a more promising approach to this problem. Professor Imwinkelried suggests that courts evaluate the reliability of nonscientific expert evidence using quantitative and qualitative restrictions.[184] Quantitative restrictions focus on the number of experiences the expert has had which support the opinion. Recall the example of the expert on car tires. Suppose the expert testifies that the tire failure was the result of a defect in manufacturing. If the expert cannot cite any other

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181. The then Court of Military Appeals first used this two pronged test in *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986). In *Mustafa*, the court held that a blood spatter expert was qualified to testify under MRE 702 because the information would assist the fact finder, and the witness had professional training on the patterns of blood splatter. *Id.* at 166. Other military cases including *United States v. Ruth*, 42 M.J. 730 (Army Ct. Crim. App. 1995) have adopted a similar analysis. *See generally* United State v. Harris, 46 M.J. 221 (1997) (holding that the military judge did not abuse his discretion by permitting a state trooper to opine as an accident reconstruction expert because the trooper had training and experience beyond the ken of the average court member); United States v. Cruz, 797 F.2d 90 (2nd Cir. 1986) (allowing a government agent to testify about the use of food stamps in narcotics sales). In *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), the court of military review set out a methodology for evaluating the admissibility of expert testimony. The court listed six factors that the military judge should consider; qualifications of the expert, subject matter of the testimony, basis of the expert testimony, relevance of the testimony, reliability of the testimony, and probative value of the testimony. Military cases after *Hauser* that have evaluated the admissibility of nonscientific expert evidence have tended to focus on just the first two prongs.

182. As will be seen, this is the scenario in the *Kumho Tire* case.

183. Imwinkelreid, *supra* note 118, at 2284.

184. *Id.* at 2290.

experiences where manufacturing defects caused this type of failure, his opinion is really nothing more than unsupported speculation.[185]

Quantitative restrictions also focus on the scope of the expert's opinion. For example, assume the tire expert can cite to ten other instances he has seen where the cause of tire failure appears to be the same as the case at issue, and in those cases the cause of the failure was a manufacturing defect. The expert then limits his in-court testimony by saying that a manufacturing error may have caused the tire failure. Because the expert limited his testimony, his past ten experiences may give him a sufficient basis. On the other hand, if the expert testified that manufacturing error was the only possible cause for the failure, his past ten experiences would likely not have been sufficient to support his conclusions.

Along with these quantitative restrictions, Professor Imwinkelried suggests that courts look to the similarity of the expert's past experiences, or, in other words, qualitative restrictions.[186] The tire expert, for example, has examined over one hundred tires to determine the cause of tire failure. There is little doubt that he has a sufficient raw number of experiences to support his conclusion. The tire at issue in this case, however, is from a farm tractor. The expert's past experiences have all been with automobile tires. In this example, the trial judge would be justified in excluding the expert's testimony because his experience is too dissimilar to the case at issue and is, therefore, unreliable.[187]

This qualitative/quantitative method has value. It forces the trial judge to look beyond the expert's stated qualifications. The judge cannot merely assume that the testimony or evidence must be reliable merely because the expert has training in the area. There is still a risk under this approach that the trial judge will focus too much on the expert's qualifications and not enough on the methods that the expert employed.

It is clear from the discussion above that commentators have been no more successful than courts in trying to resolve the issue of how to evaluate the reliability of nonscientific expert evidence. The six years since *Daubert* can best be characterized as a state of confusion. There is a split of authority over what is classified as scientific or nonscientific testimony. There is also the contentious and confusing question about whether *Daub-*

185. *Id.* at 2290-91.
186. *Id.* at 2292-93.
187. *Id.* at 2293.

ert should even apply to nonscientific expert evidence. Finally, if the *Daubert* factors do not apply, there is disagreement over what other factors the trial judge could or should use to evaluate the reliability of this evidence. It is an understatement to say that this area was ripe for Supreme Court or statutory clarification.

V. *Kumho Tire v. Carmichael*

A. Proposed Amendments

Prior to the Supreme Court decision in *Kumho Tire*, the Advisory Committee on Evidence Rules proposed changes to Rule 702. Under the current proposed change, Rule 702 would read as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *provided that (1) the testimony is sufficiently based on reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case*.[188]

This change would codify the Supreme Court's holding in *Daubert*. The drafters intended the rule to do two other things as well. By not listing the four specific *Daubert* factors, the rule would reinforce the notion that the four factors are not an exclusive list. Also, because the proposed amendment does not distinguish between scientific and other forms of expert testimony, the rule requires the trial judge to perform the gate-keeping function on all types of expert evidence.[189] Public comment on the proposed amendments closed on 1 February 1999.

B. *Kumho Tire*

Just over a month later, on 23 March 1999, the Supreme Court issued its opinion in *Kumho Tire v. Carmichael*,[190] answering most of the ques-

188. PROPOSED RULES, *supra* note 177, proposed rule 702.
189. *Id.* at 127.

tions that had nagged the federal and military courts for the past six years. On 6 July 1993, the right rear tire of a minivan driven by the plaintiff, Patrick Carmichael, blew out. The minivan crashed, one passenger was killed, and several others were injured. Following the accident, Carmichael sued the tire maker, Kumho Tire, alleging that the tire failed because of a design or manufacturing defect.[191]

The plaintiffs based much of their case on the testimony of Dennis Carlson, Jr. Mr. Carlson worked for a litigation-consulting firm that performs tire failure analysis. Mr. Carlson had a bachelor's and master's degree in mechanical engineering. Before becoming a litigation consultant, Carlson worked for several years at Michelin Tire Company. At Michelin, he designed truck tires, which are notably different than passenger car tires. Mr. Carlson had not worked in tire failure analysis at Michelin.[192] Mr. Carlson was prepared to testify that, in his opinion, the cause of the tire failure was a manufacturing or design defect.[193]

There was little dispute about some of the background history of the tire. Mr. Carlson acknowledged that the tire was manufactured in 1988 and had traveled many miles since that date. At the time of the blowout, the tread depth ranged from zero to 3/32 of an inch. The tire tread also had at least two previous punctures that had been inadequately repaired.[194] In spite of this history, Carlson opined that a manufacturing or design defect caused the blowout. According to Carlson, separation of the tire tread from the inner carcass caused the blowout. The issues that were hotly disputed were the cause of the separation, and the method used by Carlson to reach his conclusions.[195] Carlson claimed that separation of the tread from the inner carcass was caused by either a manufacturing/design defect or under inflation of the tire. According to Carlson, under-inflation can be detected by looking at four physical symptoms of the tire. If at least two of those four symptoms were not present, Carlson would conclude that a manufacturing or design defect caused the separation.[196]

In this case, Carlson adopted the opinion of a colleague as to the cause of the separation before he personally examined the tire.[197] He eventually

190. Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).
191. *Id.* at 1171.
192. Brief for Petitioner at 4-5, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).
193. *Kumho Tire*, 119 S. Ct. at 1171.
194. *Id*. at 1172.
195. *Id.*
196. *Id.*

conducted a physical examination of the tire an hour before he was deposed.[198] Even though Carlson found some evidence of each of the four symptoms that could indicate under-inflation, as well as inadequately filled puncture holes that might have caused separation, he did not change his initial opinion that a manufacturing or design defect caused the separation.[199] Carlson testified that, in his opinion, none of the symptoms were significant, and that a manufacturing or design defect was the cause of the blowout.[200]

At trial, the defense argued that Mr. Carlson's testimony should be excluded because his methodology for determining the cause of tire separation failed the Rule 702 reliability requirement. The district court judge applied a *Daubert*-type reliability analysis to Carlson's testimony even though it was arguably "technical" rather than "scientific" evidence. Applying the *Daubert* factors, the district court excluded the evidence as unreliable.[201]

The plaintiffs asked the judge to reconsider his decision because he was too inflexible in applying *Daubert*. The district judge granted the motion for reconsideration. He agreed that the four factors were merely illustrative and that other factors could be used to determine reliability. The judge, however, affirmed his earlier decision. Even in light of other factors, the judge held that Carlson's methodology lacked sufficient indications of reliability.[202]

The plaintiffs appealed the judge's order to the Eleventh Circuit.[203] The Eleventh Circuit held that the judge's decision to apply a *Daubert*-type analysis was legal error because the evidence was nonscientific and *Daubert* only applied to scientific evidence.[204]

C. The Opinion

The Supreme Court granted *certiorari*[205] to resolve the uncertainty among the lower courts. In its opinion, the Supreme Court addressed two

197. Brief for Petitioner at 5-6, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).
198. *Id.* at 6.
199. *Kumho Tire*, 119 S. Ct. at 1172-73.
200. *Id*. at 1173.
201. *Id.*
202. *Id.*
203. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997).
204. *Id.* at 1436.
205. 118 S. Ct. 2339 (1998).

key issues. First, does the trial judge's gate-keeping obligation under Rule 702 apply to all types of expert testimony?[206] Second, can the trial judge use the *Daubert* factors to evaluate the reliability of nonscientific expert testimony?[207] The Court answered yes to both questions.

On the first issue, the Court accepted the arguments discussed above that the language of the rule, evidentiary policy, and the difficulty of distinguishing between "scientific" and "technical" or "other" specialized knowledge all require the judge to serve as a gatekeeper for all types of expert evidence.[208] The Court found that the language of Rule 702 makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. In fact, the word knowledge modifies all three terms, not just "scientific." The rule, therefore, creates a reliability standard for all types of expert testimony, regardless of the form.[209]

The Court also held that evidentiary policy supports this gate-keeping requirement for all expert evidence. Because the rules grant all types of experts greater testimonial latitude than other witnesses, their testimony must be reliable.[210] Here the court acknowledged that there is a risk that nonscientific "junk" evidence can come before the fact finder as well.[211] The rules should not, therefore, be limited to preventing "junk science."

The Court also acknowledged the difficult, if not impossible, task many courts were struggling with to distinguish scientific from nonscientific evidence.[212] In many cases, the Court noted that there is no clear line that divides one from the other. The Court held that the administration of evidentiary rules should not depend on making these difficult distinctions.[213]

The more difficult and contentious issue was whether a trial judge could or should use the *Daubert* factors in performing the gate-keeping function required by the rules for nonscientific expert evidence. The Court framed the issue as follows: "whether a trial judge determining the admissibility of an engineering expert's testimony may consider several more specific factors that *Daubert* said might bear on a judge's gate-keeping determination."[214] The Court held: "Emphasizing the word 'may' in the

206. *Kumho Tire*, 119 S. Ct. at 1174.
207. *Id.* at 1175.
208. *Id.* at 1174.
209. *Id.*
210. *Id*.
211. *Id.*
212. *Id.*
213. *Id.*

question, we answer that question yes."[215] The Court then proceeded to make clear what was very confusing after *Daubert*.

First, the Court recognized that there are many different kinds of experts and many kinds of expertise. To account for these differences, the Rule 702 reliability inquiry must be flexible.[216] According to the Court, *Daubert* made clear that the factors they listed do not constitute a definitive list. If that point was not clear in *Daubert*, the Court went to great lengths to make the point in *Kumho Tire*. Specifically, the Court said they could not rule in or rule out for all cases and for all time the applicability of the *Daubert* factors.[217]

After acknowledging that the *Daubert* factors are not "holy writ," the Court determined whether the judge abused his discretion in applying them to a nonscientific expert like Mr. Carlson. The Court said that some of *Daubert*'s questions can help evaluate the reliability of even experience-based testimony.[218] By way of example, the Court noted that error rate and general acceptance were certainly two criteria that worked well in analyzing Mr. Carlson's testimony.[219] According to the Court, the key is to make sure the expert, regardless of his training, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.[220]

The last aspect of the opinion emphasized the discretion of the trial judge. In deciding whether to apply the *Daubert* factors to a particular type of evidence, what *Daubert* factors to apply, and whether to apply factors not listed in *Daubert*, the court stated that the trial judge must have considerable leeway and broad latitude.[221] The trial judge's decision should be evaluated on an abuse of discretion standard. The short concurrence written by Justice Scalia further clarified this point. He stated that the abuse of discretion standard is not discretion to perform the reliability determina-

214. *Id*. at 1175.
215. *Id.* at 1176.
216. *Id*. at 1175.
217. *Id.*
218. *Id*. at 1176.
219. *Id.*
220. *Id.*
221. *Id.*

tion inadequately. "Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky."[222]

The Court's opinion in *Kumho Tire* was a victory of common sense over formalistic application of evidence rules. The Court recognized the futility of trying to create an inflexible template or formula that can be used for all cases and all types of evidence. Instead, the Court noted that because the type of expert testimony varies widely, the trial judge must have a number of tools available to evaluate the reliability of the evidence. Provided the judge uses factors designed to separate unreliable evidence from reliable evidence, the appellate courts should not second-guess that decision.

VI. Impact of *Kumho Tire*

Because the military rules are patterned after the federal rules, *Kumho Tire* is an important case for military practitioners, and other practitioners in jurisdictions that have followed *Daubert*. Practitioners will feel the greatest impact in the area of nonscientific expert testimony.[223] First, *Kumho Tire* means that trial judges should consider a number of facts and factors in evaluating the reliability of nonscientific experts. On a closely related point, there will be a greater need for pre-trial motions and motions in limine to evaluate the admissibility of this testimony. Advocates will also have greater responsibility and greater freedom to provide the factors that the trial judge can use to evaluate the reliability of nonscientific expert evidence. Trial judges will also have greater freedom to rule on the admissibility or inadmissibility of nonscientific experts. Finally, *Kumho Tire* may have the effect of actually precluding nonscientific evidence that courts had heretofore routinely admitted.

A. Facts and Factors

As discussed above, trial courts often took a hands-off approach in evaluating the reliability of nonscientific experts. If the expert appeared to have the requisite qualifications and the testimony would be helpful, courts admitted it. This was the approach the CMA ratified in *Mustafa*.[224] To make an adequate reliability determination, courts must use a more sophis-

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222. *Id.* at 1179 (Scalia, J., concurring).

223. Hugh B. Kaplan (quoting Prof. Paul C. Giannelli), *Evidence Speakers Offer Guidance in Combating Bad Science, Misuse of Expert Testimony*, 13 THE CRIM. PRAC. REP. 219 (June 16, 1999).

224. United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986).

ticated method than merely looking at the expert's qualifications. The *Mustafa* test simply does not go far enough and does not take into consideration that even though the expert may be qualified and the information may be helpful, it may not be reliable. Indeed, after *Kumho Tire*, counsel may have a strong argument that a trial judge has abused his discretion if the reliability decision focused on only these two prongs without considering other relevant factors.

Judges are now faced with a difficult task. The *Daubert* decision provided a baseline by which judges could evaluate the reliability of scientific evidence, namely the proper application of the scientific method. While many judges found themselves woefully unprepared to engage in any sort of critique of the scientific method, at least there were some factors they could use. In contrast, *Kumho Tire* leaves judges with the open ended responsibility of not only evaluating the reliability of nonscientific evidence, but of fashioning a standard out of whole cloth that they could apply.

What should a trial judge look to and how should the court decide questions of reliability? As a starting point, the trial judge should look to the *Daubert* factors that may assist in the reliability analysis. The Court in *Kumho Tire* held that trial judges can consider one or more of the *Daubert* factors when doing so will help determine the evidence's reliability.[225] One factor that should apply to nonscientific experts is general acceptance in the relevant community. However, this should not be the end of the analysis. Other *Daubert* factors that fit the analysis should also be considered. In fact, Justice Scalia in his concurrence said that a failure to consider *Daubert* factors that would aid in the analysis in a particular case might be an abuse of discretion.[226]

Other than the *Daubert* factors that may apply, what else can the trial judge use? One point that the Court made clear is that the inquiry should be very fact specific. In the second part of their opinion, the Court illustrated the type of factual analysis that they expect from the trial courts. The court looked at the proffered expert testimony in this case and found that the trial judge did not abuse his discretion in finding it unreliable. Specifically the court looked at the expert's qualifications,[227] the imprecision of his method of inspecting the tire,[228] the subjectiveness of his mode of anal-

225. *Kumho Tire*, 119 S. Ct. at 1176.
226. *Id.* at 1179 (Scalia, J., concurring).
227. *Id*. at 1176-77.
228. *Id*. at 1177.

ysis,[229] the short amount of time the expert spent examining the tire,[230] the fact that the expert reached a preliminary conclusion before he inspected the tire,[231] his failure to adequately explain other possible causes for the tire failure,[232] and the fact that none of the *Daubert* factors favored admissibility. Based on this evidence, the Court concluded that the trial judge did not abuse his discretion. The Court also rejected the plaintiff's claim that the expert's work in the field for several years was a sufficient indication that his methods were reliable.[233]

Several commentators believe that this factual analysis was the most important aspect of the opinion.[234] In this part of the opinion, the Court took pains to provide practical guidance to trial judges on how to conduct a reliability analysis. Without taking this extra step, the opinion would have been little help. Practitioners and trial judges are well advised to study carefully this part of the opinion. It provides a good example of how fact specific the reliability analysis should be.

Along with *Daubert* factors and specific case facts that impact the expert's reliability, another area where practitioners and trial judges should focus is available empirical data. Some commentators suggest that one impact of *Kumho* will be the elimination of the "craft approach" to nonscientific experts in favor of more quantifiable empirical data.[235] If empirical data will become more important to the reliability analysis, trial judges should consider the method suggested by Professor Imwinkelreid, which was discussed earlier.[236] Courts should look at both the qualitative and quantitative aspects of the expert's methodology. Specifically, ask how many times has the expert employed this methodology under similar circumstances and how many times the expert has reached similar conclusions. If the expert cannot cite to many or any instances where their

229. *Id*.

230. *Id.*

231. *Id*. at 1178.

232. *Id.*

233. *Id.*

234. Hugh B. Kaplan, *Daubert Applies to All Experts, Not Just "Scientific" Ones, High Court Holds*, 13 THE CRIM. PRAC. REP. 132 (Apr. 7, 1999).

235. Hugh B. Kaplan (quoting Mr. Bert Black), *Evidence Speakers Offer Guidance in Combating Bad Science, Misuse of Expert Testimony*, 13 THE CRIM. PRAC. REP. 219 (June 16, 1999).

236. *See supra* note 145 and accompanying text.

methodology has reached similar results, it may be a strong indication that the method is unreliable.

There are several other common sense factors that court's can consider in evaluating the nonscientific expert's reliability. Many of these factors are discussed in the drafter's comments to the proposed changes to FRE 702. These factors include: whether the expert proposed to testify about matters growing directly out of research independent of litigation,[237] whether the expert unjustifiably extrapolated from an accepted premise,[238] whether the expert accounted for alternative explanations,[239] whether the expert employed the same degree of care he would in his regular professional work outside of the litigation,[240] and whether the field of expertise is known to reach reliable results.[241]

The clear message from *Kumho Tire* is that looking at the nonscientific expert's qualifications is not a sufficient gage of reliability. Courts in the future must consider the applicable *Daubert* factors, including in most cases general acceptance, the specific facts of the case that impact the expert's reliability, qualitative and quantitative restrictions and other empirical information, and other common sense factors that affect the reliability of the testimony.

B. Increased Pre-Trial Litigation

There will be a greater need for pre-trial litigation to resolve these issues. In the past, trial judges focusing only on the witness's qualifications and helpfulness of the testimony could make reliability determinations in short order. This is no longer the case.

Kumho Tire requires a much more expansive factual inquiry as the Court itself demonstrated. This inquiry is not something that can be done in a brief hearing or Article 39(a)[242] session while the members wait in the deliberation room. Likewise, because the trial judge's decision on the admissibility of this evidence is likely to have a significant impact on each

237. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

238. General Electric v. Joiner, 118 S. Ct. 512, 519 (1997).

239. Claar v. Burlington N. R.R., 29 F.3d 499 (10th Cir. 1994).

240. Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997).

241. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988).

242. MCM, *supra* note 48, art. 39(a).

party's litigation strategy, this is a question that should be resolved well before the formal presentation of evidence.

Trial judges must decide a host of issues in these pre-trial hearings. Professor Imwinkelreid suggests five possible outcomes to a properly conducted pre-trial inquiry. First, the proponent fails to produce any evidence that the expert's hypothesis can be empirically validated. Second, the proponent fails to produce sufficient evidence that the expert's hypothesis can be empirically validated. Third, the proponent barely sustains the burden by submitting enough evidence to show that the expert's hypothesis has been tested by sound methodology. Fourth, the proponent produces sufficient evidence, the opposing party presents contrary evidence, but the contrary evidence is not so powerful that it would be irrational for the trier of fact to accept the proponent's expert's hypothesis. Fifth, the proponent presents barely enough evidence, but the opposing party presents such overwhelming contrary evidence that it would be irrational for the trier of fact to accept the hypothesis.[243] Reaching one of these five conclusions is no easy matter in most cases, especially when one considers that coupled with this complex inquiry the judge has the equally difficult task of deciding what factors to use in making the reliability determination.

The unavoidable result is that in cases where parties choose to litigate the reliability of an expert's methodology or conclusions, judges must be prepared for expanded pre-trial litigation. To aid the inquiry and clarify the issues, trial judges should place as much of the responsibility on the litigants as possible. They can do this two ways. First, judges should require the parties to submit detailed written briefs. The briefs should cover the specifics of the expert's methodology and conclusions, and why the parties believe that the evidence is or is not reliable. Trial judges should also require the parties to set forth what factors they believe the judge should look to in evaluating the reliability of the testimony.

Along with detailed briefs, trial judges should require the parties to produce the experts at the pre-trial hearings. This is the only way that judges will be able to develop the factual record and conduct the type of factual inquiry envisioned by the Supreme Court in *Kumho Tire*. Without the production of the experts, it will be difficult, if not impossible, for the judge to reach one of the five conclusions envisioned by Professor

243. Hugh B. Kaplan (quoting Prof. Edward J. Imwinkelried) *Scholars Discuss Judge's Role, Combating "Junk Science" in Wake of Kuhmo Decision*, 13 THE CRIM. PRAC. REP. 194-95 (May 19, 1999).

Imwinkelreid. More importantly, without the production of witnesses and detailed briefs, it will be much easier for the appellate courts to hold that the trial judge abused his discretion in reaching his conclusion.

C. The Advocate's Responsibility

A third impact of the *Kumho Tire* decision is the increased responsibility and freedom the litigants will have in proposing factors that they believe the judge should consider in evaluating the reliability of the expert evidence. The Supreme Court specifically declined to announce one set of factors that trial judges should use to conduct the reliability analysis. They correctly recognized that too much depends on the facts and circumstances of the individual case.[244]

This presents a great opportunity for counsel to be creative in formulating and suggesting what factors the trial judge should look to. Parties who focus only on the qualifications of the expert are likely to find that this one factor will not overcome a well prepared opponent who can cite *Daubert* factors, empirical data, and other factual information that calls the reliability of the evidence into question. To litigate these issues successfully, counsel, like judges, must become more sophisticated and have a greater understanding of the methodologies employed by the expert so that those methods can be successfully attacked or defended.

In the military context especially, *Kumho Tire* may have an impact on the government's responsibility to provide the defense counsel with expert assistance. For defense counsel to obtain expert assistance at government expense, they must make a showing of necessity.[245] The Court's opinion in *Kumho Tire* may provide defense counsel with a new way to demonstrate necessity. To adequately evaluate the methods used by the government's expert and propose factors that the military judge should consider in determining the reliability of the government's expert, defense counsel could contend that they need expert assistance. Without such assistance, defense counsel would be unable to fully understand and litigate issues of

244. Kumho Tire v. Carmichael, 119 S. Ct. 1167, 1176 (1999).

245. *See* United States v. Short, 50 M.J. 370 (1999); United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

reliability. While this argument may not win the day, it is an additional point that the defense should argue and the military judge should consider.

D. Trial Judge Discretion

The best news from *Kumho Tire* for trial judges is the Court's reiteration that they have great discretion to decide what expert evidence to admit or exclude and how to conduct the reliability inquiry. The Court initially made this point in *Joiner*,[246] and they went out of their way to reemphasize it in *Kumho Tire*. The Court said that "the trial court must have the same kind of latitude in deciding how to test an expert's reliability and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert's relevant testimony is reliable."[247]

This language should give confidence to trial judges. If the record is clear about how the judge conducted the reliability inquiry, and the judge had a rational basis for the method he selected, he should not be overly concerned that the appellate courts will second-guess him. The other consequence of the latitude that a trial judge should enjoy is the likelihood that two different judges may conclude differently on the reliability of certain expert evidence, and neither judge will have abused his discretion.

These differences of opinion among trial judges will likely cause frustration among the litigants who are looking for uniformed guidance and bright-line rules. There will not be one standard rule of admissibility for a given type of expert evidence. Litigants will not be able to take for granted that just because another judge found similar evidence to be reliable or unreliable, that the judge in their case will make identical evidentiary findings. The parties must be prepared to litigate issues of admissibility of the expert evidence in every case until the reliability is "properly taken for granted."[248] The Court said this was because the facts and circumstances of each case were unique.[249]

Appellate courts must be sensitive to this issue and give trial judges the deference and latitude that the Supreme Court intended. Appellate

246. General Electric v. Joiner, 118 S. Ct. 512, 517 (1997).
247. *Kumho Tire*, 119 S. Ct. at 1176.
248. *Id.*
249. *Id.*

courts should be cautious about announcing bright line rules on the admissibility or inadmissibility of specific types of expert evidence because so much depends on the "circumstances of the particular case at issue."[250] Instead, the proper focus should be on whether the trial court used a rational set of factors to evaluate the reliability of the evidence and whether the overall reliability inquiry was reasonable.

The downside of this greater latitude is that litigants may have to relitigate the admissibility of evidence on a case-by-case basis. This is likely to open the door to more costly and repetitive litigation because the parties cannot take for granted that just because one judge admitted or excluded this evidence, other courts will follow suit. Slight variations of case facts or expert qualifications could result in the need to constantly "reinvent the wheel."

E. Less Evidence to the Fact Finder

The other significant and perhaps unintended consequence of *Kumho Tire* is that nonscientific expert evidence that courts have admitted without much scrutiny in the past may now be subjected to a higher level of scrutiny and found to be unreliable. Many commentators see this as a likely consequence, particularly in the areas of handwriting analysis, fingerprints, arson investigations, psychological testing, accident reconstruction, and other areas of nonscientific expert evidence.[251] A closely related concern is that nonscientific experts may try to "phony up" their qualifications to get past the more rigorous scrutiny the courts are likely to employ.[252]

This concern is understandable and somewhat justified. The argument is that before *Kumho Tire*, many courts were not performing a proper gate-keeping function when it came to nonscientific expert testimony. *Kumho Tire* changed that and now all bets are off as to the reliability of any type of nonscientific expert evidence admitted pre-*Kumho Tire*. This may be a boon to defense counsel who can now argue that evidence routinely admitted by prosecutors must undergo close scrutiny for the first time.

This argument, however, is a double-edged sword. By arguing for higher levels of scrutiny to evaluate the reliability of the government's evi-

250. *Id*.
251. Kaplan, *supra* note 235.
252. *Id*.

dence, the defense bar is also raising the bar to the admissibility of its own experts. Because the defense often lacks the funding and ability to get the most qualified experts, heightened scrutiny by the courts may have an even greater impact on the admissibility of their own experts.[253] This is a point that government counsel will likely exploit.

The Court in *Kumho* recognized that a reexamination of the reliability of routinely admitted expert testimony might not be necessary. The Court said that trial judges have a great deal of discretionary authority on how to conduct the reliability analysis. This authority allows them to avoid "unnecessary reliability proceedings in ordinary cases where the reliability of the expert's method is properly taken for granted and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."[254]

It is too early to tell if nonscientific expert evidence admitted before *Kumho Tire* will now be routinely excluded. Certainly, the party opposing the admission of the evidence will look for reasons to question the expert's reliability. Whether trial judges will be more willing to entertain these challenges is another question. Fingerprint evidence, handwriting analysis, document analysis, crash scene investigation evidence, and other forensic evidence enjoys a fairly long history of admissibility. It is unlikely that trial courts will be willing to open an in-depth reliability inquiry on this evidence. They will more likely turn to the language in *Kumho Tire* and find that a detailed examination is not necessary because the reliability of the methods can be properly taken for granted.

Regardless, however, one early post-*Kumho Tire* case shows that judges may indeed take a closer look at evidence they routinely admitted before *Kumho Tire*. In *United States v. Hines*,[255] a federal district judge excluded portions of a handwriting expert's testimony because it failed the reliability test. In her ruling, the district judge noted that before *Kumho Tire*, this evidence would have been routinely admitted.[256] Yet, following *Daubert* and *Kumho Tire* rigorously, however, the judge found that the handwriting testimony had serious problems with such issues as empirical testing and rate of error.[257] The district judge did not exclude all of the expert's testimony, but she did prohibit the expert from testifying that, in

253. *Id*.
254. *Kumho Tire*, 119 S. Ct. at 1176.
255. United States v. Hines, 55 F. Supp. 2d 62 (D. Pa. 1999).
256. *Id.* at 4-5.
257. *Id.*

his opinion, the defendant was the author of the questioned documents.[258] Interestingly, the district judge also ruled on the admissibility of the defense's eyewitness identification expert. Unlike the handwriting expert, the district judge found that the eyewitness expert's testimony was based on solid scientific research and met the *Daubert* factors for reliability.[259]

In other areas, however, courts may indeed exclude evidence that would have been admitted prior to *Kumho Tire*. Some areas that are ripe for a closer examination include psychiatric testimony, psychological profiling, syndrome evidence, false identification testimony, and false confession testimony, to name a few. Much of this testimony was not highly favored by courts even before *Kumho Tire*.[260] Now, trial judges have more reasons to exclude it without worrying about being reversed on appeal.

VII. Conclusion

Expert testimony has come a long way in the seventy-six years since the District of Columbia Court of Appeals announced the *Frye* test. In that time, courts have constantly struggled to ensure that only reliable expert evidence comes before the fact finder. The Supreme Court's rulings in *Daubert*, *Joiner*, and *Kumho Tire*, chart the course that courts throughout the country must follow for the next several years in determining reliability. Trial judges have a great responsibility to serve as gatekeepers of all types of expert testimony. The coming years will determine if they are up to the task.

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258. *Id.* at 6.

259. *Id.* at 8.

260. *See* United States v. Griffin, 50 M.J. 278 (1999); United States v. Brown, 49 M.J. 448 (1998); United States v. Rivers, 49 M.J. 434 (1998).

CONGRESSIONAL CONTROL OF THE MILITARY IN A MULTILATERAL CONTEXT:

A CONSTITUTIONAL ANALYSIS OF CONGRESS'S POWER TO RESTRICT THE PRESIDENT'S AUTHORITY TO PLACE UNITED STATES ARMED FORCES UNDER FOREIGN COMMANDERS IN UNITED NATIONS PEACE OPERATIONS

THE COMMITTEE ON MILITARY AFFAIRS AND JUSTICE
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK[1]
RICHARD HARTZMAN, AUTHOR[2]

During the 1990s a number of legislative proposals were advanced to restrict the President's discretion to involve U.S. forces in United Nations (UN) peace operations. A key element of those proposals restricted the authority of the President to place U.S. forces under the tactical or operational control of UN commanders who were not officers in the U.S. armed forces. In the one instance in which such a proposal was passed by Congress, President Clinton exercised his veto on the ground that the restriction unconstitutionally encroached upon the President's power as commander in chief. This article examines the constitutional questions raised by those legislative proposals and concludes that they did not impermissibly encroach upon presidential power.

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1. This article was written as a report for the Committee on Military Affairs and Justice of The Association of the Bar of the City of New York, and was adopted as the position of the Association in August 1999. Members of the Committee on Military Affairs and Justice at the time were: William C. Fredericks, Chair; Ralph A. Dengler; Michelle Phillips; Miles P. Fischer; William M. Schrier; Patricia J. Murphy; Stephen J. Shapiro; and Richard M. Hartzman as an adjunct member. The article differs from the official report in matters of style but not in content. The official report is available from the Association.

2. Member of the New York and Colorado bars. Litigation Counsel, New York State Division of Housing and Community Renewal, 1987-1997. Member of the Military Affairs and Justice Committee of the Association of the Bar of the City of New York, 1993-96, and currently; and of the Association's Committee on International Security Affairs, 1996-99. United Nations Observer for the American Society of International Law, 1993-97. B.A., University of Colorado, 1968; J.D., University of Washington Law School, 1973. At present on sabbatical from the practice of law, engaged in the study of ancient philosophy and Greek, and modern Hebrew. The author wishes to express his sincere thanks to Igou Allbray and William Fredericks, former chairmen of the Committee, for their encouragement in bringing this article to completion, and for their invaluable editorial assistance.

In the absence of legislative restriction the President has discretion, within the limits of his responsibilities as commander in chief, to determine the qualifications for selection of a commander charged with the tactical or operational control of U.S. armed forces serving in UN peace operations. However, this power is not exclusive. Congress may choose to enact its own selection criteria under its power to make rules for the government and regulation of the armed forces; and if it does so, that enactment takes precedence over and limits presidential discretion. Congress's rule-making power in matters of military administration is plenary. The kind of restriction contained in the legislative proposals is neither beyond Congress's power to legislate, nor does it constitute an unconstitutional encroachment upon the President's authority to direct military operations.

Moreover, such a restriction does not unconstitutionally infringe upon the President's power to conduct diplomacy and negotiate agreements. The President has exclusive power to conduct and control foreign diplomacy, negotiations, and communications. But the President is not the sole determiner of the content of that diplomacy. Congress has a role in determining foreign policy, particularly when that policy involves the disposition of military forces. The restriction in the legislative proposals, being a constitutionally valid exercise of Congress's power to make rules for the government and regulation of the armed forces, is also a constitutionally proper constraint on the President's power to conduct diplomacy and negotiate military agreements with the UN for the disposition of American forces in peace operations.

However, though constitutional, adopting such a legislative restriction would not reflect a wise policy choice. It would go counter to the fundamental need for flexibility in the conduct of foreign affairs. It would set up a double-standard in relation to other countries that would damage diplomatic efforts to obtain cooperation in establishing peace missions. Finally, passage of this type of blanket legislative restriction would likely have an undesirable effect on the relationship between the President and the Congress, undermining the comity and mutual respect between these co-equal branches of government in a field in which it is of paramount importance that the President and the Congress work together.

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I. Introduction

There has been considerable national debate in recent years concerning the extent to which United States foreign policy objectives in the post-Cold War era should be pursued through multilateral organizations, and in particular through the UN. In the course of this debate, legislation was repeatedly proposed in Congress that would have significantly limited the President's authority to involve U.S. military forces in UN peace operations by prohibiting, as a general rule, U.S. military personnel from serving under non-U.S. commanders in UN operations. President Clinton opposed these legislative proposals as unconstitutional and vetoed the one version that was passed by Congress. Proposals to prevent U.S. troops from serving under foreign commanders in peace operations have continued to surface, most recently in the context of a March 1999 House resolution concerning North Atlantic Treaty Organization (NATO) peacekeeping operations in Kosovo.[3] This confirms that the subject is one of continuing significance. Because these are important constitutional issues not yet addressed by scholars and commentators, the author, on behalf of the Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, undertook this comprehensive review.[4]

The questions considered in this article involve classic separation of powers issues: the dividing lines between the President's commander in chief and foreign affairs powers, on the one hand, and Congress's authority

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3. Subsection 3(b)(1)(B) of H.R. Con. Res. 42, 106th Cong. 1st Sess. (1999), provides for certification by the President to Congress that "all United States Armed Forces personnel so deployed pursuant to subsection (a) [i.e., any NATO peacekeeping operation in Kosovo] will be under the operational control only of United States Armed Forces military officers." The Resolution was approved by the House on 11 March 1999 by a vote of 219 to 191.

4. The Committee is unaware of any scholarly articles that consider the pertinent constitutional issue in any detail. Two memoranda prepared during the legislative proceedings address aspects of the constitutional issue. One was prepared by the American Law Division of the Congressional Research Service, dated 30 April 1996 (on file with the Committee on Military Affairs & Justice), which asserts that the legislation is constitutional. Its analysis, however, is largely conclusory. The second was prepared by Assistant Attorney General Walter Dellinger, which concludes that the legislative proposals are unconstitutional. Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, subject: House Bill 3308 (May 8, 1996), *reprinted in* 142 CONG. REC. H10062 (daily ed. Sept. 5, 1996) [hereinafter Dellinger Memorandum]. However, the Committee considers this analysis to be incomplete and, in addition, disagrees with its premises. The arguments in the memorandum are addressed in this article.

to "make rules" for the government and regulation of the armed forces, on the other hand. The constitutional issues can be characterized by a number of questions: Would a restriction on the President's authority to place U.S. forces under foreign commanders in UN peace operations impermissibly encroach upon the sphere of exclusive presidential powers to control the military or to conduct diplomacy and negotiate international agreements? Are decisions regarding whom should command U.S. troops in UN peace operations exclusively within the discretion of the President, or does Congress have power under the Constitution to enact rules to govern such decisions? If the restriction falls within an area of concurrent congressional and presidential power, does Congress or the President have primacy?[5]

The question is not one of war powers–which concern, strictly speaking, the decision to go to war and to conduct a war–but rather the broader field of military powers.[6] The failure to make this distinction may have been one source of confusion during congressional debates on the various legislative proposals. In the early stages of the debate, there was considerable confusion about the scope of the proposal. Many members of Congress believed that the proposed restrictions related to the authority of the President to commit American forces to UN peace operations. This view reflected the goal of the proponents of the legislation, which was effectively to end the involvement of the United States in UN peace operations, notwithstanding the inclusion of a waiver provision. Only later did it

5. Potentially there are two additional constitutional issues. The first concerns the power of the purse. The proposed law would restrict the obligation or expenditure of funds for U.S. forces serving under foreign commanders in UN peace operations. A constitutional question concerning the use of the appropriations power by Congress arises if the substantive legislative restriction encroaches upon exclusive Presidential power: Can Congress control indirectly through the power of the purse what it cannot control directly? The second issue concerns the waiver provision in the legislation. Does the authorization for the President to waive the restriction under specified circumstances eliminate any constitutional infirmity that may have existed without it?

6. The large body of constitutional literature and case law concerning the military typically refers to "war powers," a phrase that came into general usage during the Civil War era. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1789-1984, at 264 (5th rev. ed. 1984). However, when discussing military matters falling outside the domain of "war," it is analytically more accurate to speak in terms of "military powers," that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect. The Constitution authorizes maintaining a standing army during peacetime. Moreover, many military operations, such as peacekeeping, drug interdiction, humanitarian assistance, and arguably peace enforcement operations under the UN Charter, do not constitute war. It is conceptually confusing to analyze constitutional issues regarding non-wartime military matters, and even many issues regarding wartime governance of the military, in terms of "war powers."

become clear that the restrictions, as a matter of constitutional law, did not concern the question of *whether* to participate in a peace operation, but rather, once a commitment to engage has been made, the authority of the President to determine the control of U.S. military personnel detailed to the operation.

Were war powers the issue in the legislation, any number of additional constitutional questions would have come into play: Does the President have independent power to commit the nation to a military operation, even if that operation is "short of war"? Does the Constitution give the President independent authority to commit U.S. forces to UN peace operations without prior congressional approval? Does the War Powers Resolution bear on presidential decisions to involve U.S. forces in UN peace operations? These are all important questions, but they are not germane to a constitutional analysis of the legislation at issue in this article.[7]

The analysis in the article focuses on the allocation of powers between the executive and legislative branches with regard to the administration and command of the armed forces, and with regard to the conduct of military and foreign affairs through diplomacy and the negotiation of agreements. On the one hand, Congress has the power to raise and support an army, and to make rules for regulating and governing the armed forces. Congress can set foreign policy through legislative enactments. Further, it has power to make laws necessary and proper to carry out its own powers as well as all other powers vested by the Constitution. On the other hand, the President is the commander in chief of those forces, and has the power

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7. *See, e.g.*, Matthew D. Berger, *Implementing a United Nations Security Council Resolution: The President's Power to Use Force Without the Authorization of Congress*, 15 HASTINGS INT'L. & COMP. L. REV. 83 (1991); Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995); Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 61 (1991); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994); Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. L.J. 131 (1994); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145 (1995); Letter from Bruce Ackerman et al., to President William J. Clinton (Aug. 31, 1993), *reprinted in* 89 AM. J. INT'L L. 127 (1995); Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Senators Robert Dole, Alan K. Simpson, Strom Thurmond & William S. Cohen (Sept. 27, 1994), *reprinted in* 89 AM. J. INT'L L. 122 (1995).

to represent the nation in the conduct of diplomacy and the negotiation of agreements and treaties. After reviewing the background and provisions of one version of the proposed legislation in Part II, Part III of this article explores these constitutional powers in relation to the legislation, offering a number of ways of characterizing the proposed restriction as a means of answering the constitutional question.

The postscript discusses some of the policy concerns, which are important in judging the wisdom of this type of legislative proposal. A number of questions are addressed: Is a blanket restriction such as that proposed in the legislation, even with a waiver provision, wise governance? Would it be more beneficial to leave such decisions to the President, acting on the advice of his senior military advisors, based on developing military doctrines of joint and coalition operations, and upon the tradition of "lessons learned"? Is such legislation an appropriate method for handling the institutional relations between the legislative and executive branches of the government?

II. Genesis, History, and Content of the Legislation

A. Genesis and History

The recent efforts by Congress to restrict the U.S. role in UN peace operations represents only one episode in the often problematic relationship between the United States and the UN. The main impulse leading to the creation of the UN was the concern for international security–"to save succeeding generations from the scourge of war."[8] Two devastating world wars and the failure of the League of Nations spurred world leaders to renew their efforts to form an effective international security organization.

In this new organization, the central organ for security matters was the Security Council, patterned as a modified concert of powers, with five great powers (United States, Soviet Union, Great Britain, France, and China) having permanent seats on the Council and a veto power on substantive matters, and with other countries[9] serving on the Council on a rotating basis.[10] Chapters VI ("Pacific Settlement of Disputes") and VII

8. UN CHARTER pmbl.

9. Initially six, the number was increased to ten in December 1963, effective as of September 1965. *See* UNITED NATIONS, EVERYMAN'S UNITED NATIONS 465 (8th ed. 1968).

10. UN CHARTER arts. 23, 27.

("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression") of the UN Charter spell out the tools available to the Security Council. Chapter VI measures roughly correspond to what has been termed peace making, and Chapter VII measures roughly correspond to what has been termed peace enforcement.[11]

Article 42, in Chapter VII of the Charter, empowers the Security Council to use such force "as may be necessary to maintain or restore international peace and security."[12] The drafters of the Charter contemplated that forces would be made available to the UN for Article 42 actions by member nations on the call of the Security Council. For this purpose, Article 43 of the Charter provided for the negotiation of special agreements between member states and the Security Council, "subject to ratification by the signatory states in accordance with their respective constitutional processes."[13] The agreements would "govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."[14]

The United States ratified the UN Charter before the end of World War II,[15] and implemented it through the UN Participation Act (UNPA).[16] Sections 6 and 7 of the UNPA authorize the President to commit personnel to UN missions under specified circumstances. Section 6[17] authorizes the President to commit troops to Chapter VII peace enforcement operations without further congressional approval, but only after the President has negotiated a special agreement with the UN Security Council pursuant to Article 43 of the Charter, only after Congress has approved such agreement, and only to the extent provided for in such special agreement. Section 7 of the UNPA[18] allows the President to commit up to one thousand members of the armed forces to UN operations not undertaken under Chapter VII of the UN Charter, that is, operations that are not Article 42 operations, such as peacekeeping operations. Forces committed by the

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11. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE *passim* 1992. Peacekeeping, characterized as a "Chapter Six and a Half" operation by Dag Hammarskjöld, is discussed *infra* in the text accompanying notes 21-24.

12. UN CHARTER art. 42.

13. UN CHARTER art. 43.

14. *Id.*

15. 59 Stat. 1031, T.S. No. 993 (June 26, 1945).

16. Ch. 583, 59 Stat. 619 (Dec. 20, 1945) (codified as amended at 22 U.S.C. §§ 287-287e).

17. 22 U.S.C.S. § 287d (LEXIS 1999).

18. 22 U.S.C.S. § 287d-1. Relevant portions of the section are quoted *infra* in the text accompanying note 146.

President pursuant to Section 7 are limited to serving as observers, guards, or in other noncombatant capacities.[19]

With this new international security mechanism in place, and the United States a central participant, hopes were raised for a less violent world. However, those hopes were soon dashed by the growing rivalry between the Soviet Union and the Western powers. The emerging Cold War prevented the UN security mechanisms from performing as intended. A concert of powers cannot work when the actors find little ground for cooperation. Efforts to negotiate Article 43 agreements soon collapsed, and the exercise of the veto largely precluded the undertaking of actions by the Security Council.[20] Nevertheless, a limited scope was found for collective action by the UN in situations where the superpowers saw it in their interest to avoid an escalating confrontation.

The Security Council authorized missions that evolved their own principles and patterns through improvisation and came to be known as peacekeeping operations.[21] These were basically "holding actions," typically employed to monitor cease-fires, help with troop withdrawals, and

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19. A later statute that allows the commitment of U.S. personnel to UN operations is Section 628 of the Foreign Assistance Act of 1961, codified as 22 U.S.C. § 2388. That law authorizes the President to permit agency heads to detail or assign to any international organization any officer or employee of the agency "for common defense against internal or external aggression." This authority neither limits the type of operation to which members of the armed forces may be detailed, nor contains the number and use limitations of §§ 6 and 7 of the UNPA. Whether it supersedes those limitations is a question which is not addressed in this article. The functions of the President under this law have been delegated to the Secretary of Defense subject to consultation with the Secretary of State. Exec. Order 12,163, 44 Fed. Reg. 56,673 (Sept. 29, 1979). *See* UN PEACE OPERATIONS 108-9, 435, 437-439 (Walter G. Sharp, Sr. ed., 1995) (discussing this statute further) [hereinafter Sharp]. For statutory language see *infra* text accompanying note 148.

20. One notable exception where the Security Council was able to act during the Cold War occurred in 1950 when it authorized the use of force in Korea. The authorizing resolution passed only because the Soviet Union was boycotting Security Council proceedings at the time.

21. The legal basis for peacekeeping operations has long been a subject of controversy. While Dag Hammarskjöld said that they could be viewed as deriving from a "Chapter Six and a Half" of the UN Charter (see UNITED NATIONS, THE BLUE HELMETS 5 (2nd ed. 1990) [hereinafter BLUE HELMETS]), and the Soviet Union argued that there was no basis in the Charter for peacekeeping operations, various Articles including 34, 36, 40 and 41 in Chapters VI and VII of the Charter have been held to stand as a legal basis. *See also* D.W. BOWETT, UNITED NATIONS FORCES 274-312 (1964) (providing further discussion of the controversy); STEVEN J. RATNER, THE NEW UN PEACEKEEPING 56-61 (1995) (providing further discussion of the controversy); Sharp, *supra* note 19, at 106 (providing a useful chart relating various Charter provisions to different types of peace operations).

provide a buffer between antagonists.[22] The following principles came to be considered essential to a successful peacekeeping operation: (1) consent of the parties, (2) rigorous impartiality on the part of the UN forces, and (3) the limitation of force by peacekeepers to self-defense, and then only as a last resort.[23] Classic peacekeeping operations fell into two broad if loosely defined categories: "observer missions" consisting largely of officers who were almost invariably unarmed, and peacekeeping forces consisting of "lightly armed infantry units with the necessary logistic support elements."[24] As a general matter, neither the United States nor the Soviet Union contributed personnel to UN peacekeeping operations during the Cold War. This made it possible for the two superpowers to approve missions when it was in their mutual interest while enhancing the conditions for impartiality of peacekeeping forces within the context of the Cold War rivalry.

With the end of the Cold War in 1989 and the collapse of communism in the early 1990s, renewed hopes arose for the UN. Many believed that the organization could finally fulfill the collective security functions for which it was created. During the period of early post-Cold War euphoria, the world community asked the organization to undertake a variety of operations that transcended the classic peacekeeping model. These "second generation" peacekeeping operations involved new types of missions and were more complex than traditional peacekeeping. For example, missions were established to support implementing comprehensive settlements between conflicting parties in Cambodia, El Salvador, Angola, and Mozambique. They were set up to support humanitarian relief operations, as in the first phase of the Somalia operation. They were deployed to assist in rebuilding institutions in collapsed states, such as in the second phase of the Somalia operation. Further, they were deployed to prevent conflict before it occurred, as in Macedonia.[25]

Not only were there new models for peacekeeping; but also, the number of operations dramatically increased. In January 1988, there were five UN peace operations with 9570 military personnel deployed.[26] By December 1994, at the peak of activity, the number of UN peace operations had increased to seventeen with more than 73,000 military personnel

22. BLUE HELMETS, *supra* note 21, at 4-5.

23. *Id.* at 5-6.

24. *Id.* at 8.

25. Many works provide typologies of peacekeeping. *See* BOUTROS-GHALI, *supra* note 11; RATNER, *supra* note 21, at 16-24; Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT'L. AFF. 451, 456-460 (1993).

deployed.[27] In the first four decades of the UN, from 1945 to 1989, only fifteen peacekeeping missions were deployed.[28] In contrast, during the five-year period of 1989 to 1994, some eighteen missions were deployed.[29]

In the United States, the Bush Administration, after its success in using the UN system to forge a coalition against Iraq and winning the Persian Gulf War, expressed a heightened interest in pursuing American interests within the multilateral framework of the UN. During the Administration's last days in 1992, in response to the mass starvation resulting from Somalia's internal strife, a United States military force undertook a humanitarian mission in coordination with the UN.[30]

The high water mark of renewed interest in multilateral security cooperation came in 1993, during the first months of the Clinton Administration. With officials advocating policies of democratic enlargement and aggressive multilateralism, the Administration circulated a draft document in the summer of 1993 that was provisionally entitled "Presidential Decision Directive 13." The proposed Directive contemplated more intensive American involvement in UN peace operations, including the prospect of U.S. forces regularly serving under foreign commanders.[31] However, the draft Directive drew congressional criticism because of the drift in the Administration's Somalia policy and fear of an open-ended commitment to similar operations without clear goals.[32] Legislative criticism crystallized into legislative initiative in October 1993, after the death of eighteen

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26. SUPPLEMENT TO AN AGENDA FOR PEACE, REPORT OF THE SECRETARY-GENERAL, at table accompanying ¶ 8, U.N. Doc. A/50/60-S1995/1 (3 Jan. 1995), *reprinted in* Sharp, *supra* note 19, at 49.

27. *Id.* As of 30 November 1998, the number of military personnel deployed in the sixteen peacekeeping missions had declined to 11,629 (10,708 troops and 921 observers). In addition, there were 2718 police assigned. The contribution of the United States as of that date was 345 military personnel in Macedonia, 30 military observers in four other missions, and 208 police officers in two additional missions.

28. Jarat Chopra, *Peace Maintenance: A Concept for Collective Political Authority*, *in* PROCEEDINGS OF THE EIGHTY NINTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 280 (1995).

29. *Id.*

30. JOHN R. BOLTON, *Wrong Turn in Somalia*, 73 FOR. AFF. 56, 58 (Jan./Feb. 1994).

31. *Wider UN Police Role Supported, Foreigners Could Lead U.S. Troops*, WASH. POST, Aug. 5, 1993, *reprinted in* 139 CONG. REC. S13567 (1993).

32. Irvin Molotsky, *Administration Is Divided on Role for U.S. in Peacekeeping Efforts*, N.Y. TIMES, Sept. 22, 1993, sec. A at 8.

American Rangers in Somalia and the aborted landing of American soldiers in Haiti.[33]

The new UN peacekeeping became a victim, not of its successes, of which there were several, but of its failures in Somalia and Bosnia. These failures were widely perceived to have been caused in part by the lack of a UN infrastructure capable of handling the growth in number and complexity of peace operations, and by the willingness of the UN and Security Council members to diverge from two of the basic peacekeeping principles–impartiality and consent–while holding rigidly to the third–non-use of force.[34] In response to these problems and the debacle in Somalia, which had highlighted those problems, Senator Don Nickles offered an amendment to the 1994 Defense Appropriations Act that would have prohibited, with certain exceptions, the expenditure of funds to support U.S. military personnel when under "command, operational control, or tactical control by foreign officers" during UN operations.[35]

Although the Nickles Amendment was not adopted, it was the progenitor of a series of bills introduced from the 1994 through 1996 congressional sessions that sought to restrict the President's authority to place United States forces under foreign commanders in UN peace operations.[36] For example, imposing such a restriction was a prime objective of the proposed Peace Powers Act introduced by Senator Robert Dole in 1994.[37] This bill contained a host of provisions directed at the relationship between the United States and the UN. Among other things, it would have required the President to consult with and report to Congress with regard to UN actions, including those in which the United States was not directly

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33. ANDREW KOHUT & ROBERT TOTH, *Arms & the People*, 73 FOR. AFF. 47, 52 (Nov./Dec. 1994).

34. Many commentators have provided views of the problems and failures associated with the new peacekeeping. *See* Richard K. Betts, *The Delusion of Impartial Intervention*, 73 FOR. AFF. 20 (Nov./Dec. 1994); Conference Panel of Rosalyn Higgins, Jarat Chopra, Lamin Sise, David Scheffer, & Michael Doyle, *UN Peacekeeping: An Early Reckoning of the Second Generation*, *in* PROCEEDINGS OF THE EIGHTY NINTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 275-89 (1995); Ruth Wedgwood, *The Evolution of United Nations Peacekeeping*, 28 CORNELL INT'L L.J. 631 (1995).

35. H.R. 3116, 103rd Cong., 1st Sess., 139 CONG. REC. S13565 (daily ed. Oct. 18, 1993) (Amendment No. 1051 to the excepted committee amendment).

36. *See* George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435 (1994) (providing additional information on the earlier of these bills beyond that contained in this article).

37. S. 1803, 103rd Cong., 2d Sess., 140 CONG. REC. S180-84 (daily ed. Jan. 26, 1994).

involved. Further, it would have placed limitations on the sharing of intelligence with the UN.

Meanwhile the Clinton Administration backtracked on its broad multilateral approach and redrafted the proposed Presidential Decision Directive 13. The process resulted in a substantially more cautious document issued in May 1994, dubbed Presidential Decision Directive 25 (P.D.D. 25), which defined stringent conditions for setting up peace operations and envisioned a much more limited U.S. role in such endeavors.[38]

However, the more stringent policy enunciated in P.D.D. 25 did not satisfy congressional critics. Later in 1994, the proposal to place restrictions on U.S. armed forces serving under foreign commanders in UN peace operations was incorporated into the Republican Party's "Contract With America" legislative package, which was widely publicized both during and after the mid-term congressional elections of that year.

In January 1995, riding the crest of the Republican electoral sweep of the Congress, Senator Dole reintroduced a modified version of the Peace Powers Act, now numbered Senate Bill 5.[39] In addition to the restrictions on serving under foreign commanders and many of the other provisions contained in the 1994 version of the bill, the legislation would have repealed the War Powers Resolution. It also would have imposed criminal penalties on government officers or employees, including military personnel, for knowingly and willingly obligating or expending funds for UN operations where U.S. military personnel were serving under a foreign commander, unless the President had provided Congress with a notice of waiver as specified in the legislation.

At the same time that Senate Bill 5 was introduced in the Senate, the National Security Revitalization Act (House Bill 7) was introduced in the House.[40] This bill, containing the same core restrictions on U.S. involvement in UN peace operations as were in Senate Bill 5, also covered certain additional foreign policy and military matters, such as NATO enlargement. After two days of contentious debate, House Bill 7 passed the House in

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38. Elaine Sciolino, *New U.S. Peacekeeping Policy De-emphasizes Role of the UN*, N.Y. TIMES, May 6, 1994, sec. A, at 1. An unclassified summary of the Directive was released as *The Clinton Administrations Policy on Reforming Multilateral Peace Operations*, Bur. of Int'l. Org. Aff., U.S. Dept. of State, Pub. L. 10161 (1994), *reprinted in* Sharp, *supra* note 19, at 454 [hereinafter Presidential Decision Directive 25].

39. S. 5, 104th Cong., 1st Sess., 141 CONG. REC. S101-06 (daily ed. Jan. 4, 1995).

40. H.R. 7, 104th Cong., 1st Sess. (1995).

February 1995,[41] and was referred to the Senate where hearings were held before the Foreign Relations Committee on both Senate Bill 5 and House Bill 7.[42]

The part of the legislative proposals that would restrict the placing of U.S. forces under foreign commanders was incorporated into the 1996 National Defense Authorization Act[43] and passed by both houses of Congress in December 1995.[44] President Clinton, however, vetoed the bill. One of the reasons he gave for the veto was the bill's provision concerning foreign commanders in UN peace operations: "Moreover, by requiring a Presidential certification to assign U.S. Armed Forces under UN operational or tactical control, the bill infringes on the President's constitutional authority as commander in chief."[45]

Undeterred by the President's veto, in 1996 members of the House of Representatives introduced another version of the legislation: House Bill 3308.[46] Although it passed the House in September 1996,[47] the Senate did not take action on the bill before the end of the 104th Congress. Nor were the proposed restrictions on the placing of U.S. forces under foreign commanders reintroduced in the new Congress after the 1996 presidential and congressional elections. The focus of congressional critics of the UN had by then shifted to demands that the organization eliminate bureaucratic waste and inefficiency before agreeing to authorize payment of U.S. dues to the UN. Issues concerning the U.S. involvement in UN peace operations had lost their political potency and the effort to legislatively restrict that involvement came to an end, though similar efforts have arisen in related contexts.

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41. 141 CONG. REC. H1764-1890 (daily ed. Feb. 15 and 16, 1995).

42. *The Peace Powers Act (S. 5) and the National Security Revitalization Act (H.R. 7): Hearing before the Committee on Foreign Relations, United States Senate*, 104th Congress 144 (Mar. 21, 1995).

43. H.R. 1530, 104th Cong. 1st Sess. (1995).

44. *See* Thomas: Legislative Information on the Internet, *Bill Summary and Status for the 104th Congress* (visited Nov. 4, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR01530:@@@X>; 141 CONG. REC. H15573 (Dec. 21, 1995).

45. 142 CONG. REC. H12 (daily ed. Jan. 3, 1996). The House of Representatives failed to override the veto on a vote of 240 in favor of an override, 156 against, and 38 not voting. 142 CONG. REC. H22 (daily ed. Jan. 3, 1996).

46. H.R. 3308, 104th Cong., 2d Sess. (1996).

47. 142 CONG. REC. H10048-74 (daily ed. Sept. 5, 1996).

B. Proposed Restrictions in House Bill 3308[48]

This article focuses on the provisions contained in House Bill 3308, as it was the last version of the proposed legislation and the provisions relevant to the constitutional and policy analysis were basically the same in all of the bills. House Bill 3308 was a narrowly framed bill that was designed solely to impose restrictions on placing U.S. forces under foreign commanders in UN peace operations,[49] and to prohibit members of the armed forces from being required to wear UN insignia.[50]

The proposed restriction against U.S. armed forces serving under foreign commanders in UN peace operations is in Section 3 of House Bill 3308. It would have added a new Section 405 to Chapter 20 of Title 10, United States Code, limiting the placement of U.S. forces under the operational and tactical control of UN commanders. It was framed to fall within Congress's appropriation power:

> Sec. 405. Placement of United States forces under United Nations operational or tactical control: limitation

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48. A full copy of House Bill 3308 is reproduced in the Appendix.

49. The restriction also applied to the placing of U.S. forces under the command of U.S. citizens who were not U.S. military officers serving on active duty. This second restriction is ignored in the analysis because the constitutional issues involved with it are the same as those with foreign commanders, because the public debate focused on the foreign commander restriction, and because its inclusion would unnecessarily complicate the discussion.

50. This measure grew out of a controversy involving Michael New, a medic assigned to the UN mission in Macedonia who was court-martialed for refusing to wear a blue beret and UN insignia. *See* United States v. New, 50 M.J. 729 (1999); Alan Cowell, *G.I. Gets Support for Shunning UN Insignia*, N.Y. TIMES, Nov. 24, 1995, sec. A, at 14. The proposed prohibition is in Section 5 of House Bill 3308. It would have added a new Section 777 to chapter 45 of Title 10, United States Code, to read as follows:

> § 777. Insignia of United Nations: prohibition on requirement for wearing
>
> No member of the armed forces may be required to wear as part of the uniform any badge, symbol, helmet, headgear, or other visible indicia or insignia which indicates (or tends to indicate) any allegiance or affiliation to or with the United Nations except in a case in which the wearing of such badge, symbol, helmet, headgear, indicia, or insignia is specifically authorized by law with respect to a particular United Nations operation.

> (a) LIMITATION–Except as provided in subsection (b) and (c), funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control, as defined in subsection (f).[51]

Subsection 405(f) defines "United Nations operational or tactical control":

> For purposes of this section, an element of the Armed Forces shall be considered to be placed under United Nations operational or tactical control if–
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> (1) that element is under the operational or tactical control of an individual acting on behalf of the United Nations for the purpose of international peacekeeping, peacemaking, peace-enforcement, or similar activity that is authorized by the Security Council under chapter VI or VII of the Charter of the United Nations; and
>
> (2) the senior military commander of the United Nations force or operation is a foreign national or is a citizen of the United States who is not a United States military officer serving on active duty.[52]

Thus, Section 405 would have prohibited the President from placing U.S. armed forces participating in either Chapter VI or VII UN peace operations under UN operational or tactical control if the senior military commander was a foreign national or a U.S. citizen who is not a U.S. military officer on active duty.

Two subsections set out exceptions to the prohibition. Subsection 405(c) provides that the limitation does not apply if Congress specifically authorizes a particular placement of U.S. forces under UN operational or tactical control, or if the U.S. forces involved in a placement are participating in operations conducted by NATO.[53]

Subsections 405(b) and (d) permit a waiver of the limitation if the President certifies to Congress fifteen days in advance of the placement that it is "in the national security interests of the United States to place any

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51. H.R. 3308, § 3, 104th Cong., 2d Sess. (1996).
52. *Id.*
53. There is also an exception for ongoing operations in Macedonia and Croatia.

element of the armed forces under UN operational or tactical control," and provides a detailed report setting forth information under eleven specified categories.[54] If the President certifies that an "emergency" precluded compliance with the fifteen day limitation, he must make the required certification and report in a timely manner, but no later than forty-eight hours after a covered operational or tactical control is initiated.

These provisions do not concern the authorization of U.S. involvement in UN peace operations, but rather, once there is such an authorization, what restrictions are to be placed on the commitment. It does not repeal those provisions of the UNPA or the Foreign Assistance Act of 1961, which authorize the President to commit U.S. forces to UN peace operations without further congressional consent. Rather it restricts the way in which U.S. forces can serve in those operations.

III. Constitutional Analysis of the Legislation

The question addressed in this article is whether the restriction proposed in House Bill 3308 and its predecessor bills unconstitutionally encroaches upon presidential power. The proposal can be characterized as a spending restriction that would establish a rule that limits who is authorized to command U.S. armed forces in a certain type of military operation, that is, UN peace operations. The restriction, which is based on the spend-

54. The report must address the following eleven items: (1) a description of the national security interests that would be served by the troop placement; (2) the mission of the U.S. forces involved; (3) the expected size and composition of the U.S. forces involved; (4) the precise command and control relationship between the U.S. forces involved and the UN command structure; (5) the precise command and control relationship between the U.S. forces involved and the commander of the U.S. unified command for the region in which those U.S. forces are to operate; (6) the extent to which the U.S. forces involved will rely on other nations' forces for security and defense, and an assessment of the capability of those foreign forces to provide adequate security to the U.S. forces involved; (7) the exit strategy for complete withdrawal of the U.S. forces involved; (8) the extent to which the commander of any unit proposed for the placement would at all times retain the rights to report independently to superior U.S. military authorities and to decline to comply with orders judged by that commander to be illegal or beyond the mission's mandate until such time as that commander has received direction from superior U.S. military authorities; (9) the extent to which the U.S. retains the authority to withdraw any element of the armed forces from the proposed operation at any time and to take any action it considers necessary to protect those forces if they are engaged; (10) the extent to which the U.S. forces involved will be required to wear as part of their uniform a device indicating UN affiliation; and (11) the anticipated monthly incremental cost to the U.S. of participation in the UN operation by U.S. forces proposed to be placed under UN operational or tactical control.

ing power, would constitute an indirect rather than direct means of regulating executive action.

As thus framed through the power of the purse, the legislation could raise two constitutional issues. First, would such a restriction, if directly imposed, impermissibly encroach upon exclusive or concurrent presidential powers? If the answer is "no," the inquiry is at an end. If the direct adoption of this type of restriction poses no constitutional infirmity, its indirect adoption by means of the spending power raises no constitutional problem. However, if the restriction as directly imposed is constitutionally impermissible, a second issue would have to be addressed: Is it constitutionally permissible for Congress to impose this restriction on the President indirectly by means of the spending power?[55] As this issue need not be addressed if the restriction can be directly imposed, the analysis first

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55. Limitations on the exercise of congressional powers have been said to be guided by "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . The form in which the burden is imposed cannot vary the substance." Fairbank v. United States, 181 U.S. 283, 294-95 (1900). Senator Borah expressed similar sentiments concerning the President's authority as commander in chief:

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.

69 CONG. REC. 6760 (1928). The eminent scholar Louis Henkin has written: "Even when Congress is free not to appropriate, it ought not to be able to regulate a [p]residential action by imposing conditions on the appropriation of funds to carry it out, if it could not regulate that Presidential action directly." LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 119 (2nd ed. 1996). But in practice, the principle that Congress cannot do indirectly through the exercise of the spending or appropriation power what it cannot do directly is not a rigid principle. It has not been mechanically applied. *See* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 144-48 (1994); William C. Banks & Peter Raven-Hansen, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 882-98 (1994); John D. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Albert J. Rosenthal, *Conditional Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). Banks and Raven-Hansen argue that the constitutionality of a "restrictive national security appropriation," where it does not turn on an explicit constitutional prohibition, should be determined by a balancing test: "we must ordinarily weigh the extent to which the restriction prevents the president from accomplishing constitutionally assigned functions against the need for the same restriction to promote objectives within the authority of Congress." BANKS & RAVEN-HANSEN, *supra*, at 146.

considers whether the direct imposition of the restriction would unconstitutionally encroach upon presidential power.

As noted, the proposed restriction can be characterized as a rule that limits the persons authorized to command U.S. armed forces in a specified type of military operation, such as, UN peace operations. So characterized, the President's constitutionally assigned role as commander in chief is plainly implicated, that is, the power to direct military operations, including determining who shall serve as commanders. Arguably, the restriction also involves the President's diplomatic powers.[56]

As for Congress, Section 8 of Article I of the Constitution grants it the power "[t]o raise and support armies,"[57] "[t]o provide and maintain a navy,"[58] and "[t]o make rules for the government and regulation of the land and naval forces."[59] In addition, these powers are supplemented by the necessary and proper clause: Congress "shall have the power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[60] At the least, House Bill 3308 implicates Congress's power to make rules for the government and regulation of the armed forces.[61] This power may be further amplified by the necessary and proper clause.

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56. This argument is considered *infra* at Part III.D. *See* Dellinger Memorandum, *supra* note 4.

57. U.S. CONST. art. I, § 8, cl. 12.

58. *Id.* art. I, § 8, cl. 13.

59. *Id.* art. I, § 8, cl. 14. Clause 14 is hereinafter referred to as the "make rules" clause.

60. *Id.* art. I, § 8, cl. 18.

61. It has been suggested that the "raise and support" clause, in conjunction with the "necessary and proper" clause, is another possible source of congressional power for the proposed restriction of House Bill 3308. While this could prove to be the case, this article does not pursue the argument for a number of reasons. The natural meaning of the term "raise" in the context of the "raise and support" clause is "to create," "to establish," to "build up." The debates among both the framers and ratifiers, which focused on the dangers of establishing a standing army, indicate that no more was meant by the term than this natural meaning. *See* Bernard Donohue & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202-11 (1971). Congress solely (but subject to the President's approval or veto) has the power to create an army, establish the number of units in that army, and staff it with a specified number of personnel of specified rank, to be paid certain salaries and to have certain retirement and family benefits as incentives to join and remain in the force. Congress may find it necessary to establish a draft to fulfill the nation's military needs. All these powers are

If the decision regarding the selection of tactical and operational commanders of U.S. forces in UN peace operations[62] falls within at least one of the President's powers, and restrictions on the President's decision are not encompassed by any of Congress's powers, logic dictates that the President's power is exclusive and legislation such as House Bill 3308 impermissibly encroaches upon that power. However, if the decision on selection involves the powers of both the President and Congress, which branch of the government has primacy in controlling the criteria for the decision must be determined. Only if the President's power takes precedence would the conclusion follow that the restriction in House Bill 3308 unconstitutionally encroaches upon that power.

A. The President's Power as Commander in Chief

The question at hand involves the commander in chief clause in its most traditional military sense–the authority to control and direct military operations. There has been considerable controversy over what has been viewed as the enlarging and aggrandizing of presidential power through the commander in chief clause.[63] But as the proposed restriction in House Bill 3308 does not involve those spheres of asserted enlargements of

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61. (continued) vested in the Congress by the "raise and support" clause. Also flowing from this clause is the power to establish rules for such matters as the qualifications of officers in the force and criteria for promotions to higher rank. But, as will be shown later in this article, this power derives also from the "make rules" clause. This is because rules for qualifications and promotions concern not only the creation and maintenance of an armed force, but also the structure and regulation of the force, and by that fact involve "government and regulation."

One might conclude that House Bill 3308 involves the "raise and support" clause because it appears to prescribe a personnel qualification. But House Bill 3308 would not have created qualifications for personnel in the U.S. armed forces. It did not speak to the "raising" or "supporting," that is, to the creation or establishment and supply of an army. Rather, it would have established a criterion restricting who would be allowed to exercise operational or tactical control of U.S. forces. Questions of control, insofar as they fall within the constitutional domain of congressional power, are questions of governance and regulation, not raising and supporting.

62. The discussion assumes that the President has prior authorization to commit U.S. forces to the UN operation, either by virtue of the UNPA, the Foreign Assistance Act of 1961, or other legal basis. A crucial distinction between the setting of general criteria or qualifications for the selection of a commander, and the selection of a particular individual to fill a command position is addressed later in this inquiry.

63. *See* CORWIN, *supra* note 6, at 262-302 ("[S]udden emergence of the "Commander in Chief" clause as one of the most highly charged provisions of the Constitution occurred almost overnight . . . ."); HENKIN, *supra* note 55, at 45-50 ("Some of the 'military' powers

power, they are not considered here. Instead, this discussion of presidential power focuses on what students of the commander in chief clause would likely consider to be an obvious and undisputed element of power vested by the clause.

It cannot be seriously doubted that the President's authority as commander in chief encompasses the power to decide matters of operational and tactical control, including determining who among eligible candidates should be authorized to maintain tactical and operational control.[64] "Command," as defined in its modern military sense by a leading military dictionary, covers the full range of responsibilities for the planning and carrying out of missions, and for the control of forces:

> The authority that a commander in the Military Service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for the health, welfare, morale, and discipline of assigned personnel.[65]

"Operational control" is defined as a subset of command functions:

> [T]ransferable command authority that may be exercised by commanders at any echelon at or below the level of combatant command. Operational control is inherent in combatant command (command authority) and is the authority to perform those functions involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission . . .[66]

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63. (continued) that Presidents have asserted, deriving from or relating to the 'Commander in Chief' clause, supported the growth of Presidential 'war powers.'). *Cf.* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 107-23 (1989) ("The Supreme Court has never held that the clause conferred any other powers than those of a military commander.").

64. That is not to say that the President will directly exercise that authority rather than largely delegating it to subordinate military officers.

65. U.S. DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY TERMS (1984).

66. *Id.*

"Tactical control" is again a subset of the functions contained within operational control, and thus also an element of the command function: "The detailed and usually local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned."[67]

Although these modern and somewhat technical dictionary definitions cannot be ascribed to the Framers of the Constitution, there is no reason to believe that they did not intend the President's authority as commander in chief to include those command functions that have later come to be formally defined as "operational" and "tactical" control. Moreover, as will be seen, the core functions that the Framers assigned to the President as commander in chief were assigned exclusively to the President.[68] This conclusion follows from the application by the Framers of the fundamental constitutional principle of the separation of powers, which in this instance was based on a concern for effective and efficient government. As a consequence, it involved applying a corollary principle, the principle of unity of executive functions; and the principle of unity, applied to the command function, implies the principle of exclusive military command.[69] These principles were stressed by the Framers and have been acknowledged by the Supreme Court.

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67. *Id.*

68. *But see* HENKIN, *supra* note 55, at 103-04:

> Less confidently, I believe also that in war the President's powers as Commander in Chief are subject to ultimate Congressional authority to "make" the war, and that Congress can control the conduct of the war it has authorized. (One might suggest, even, that the President's powers during war are not 'concurrent' but delegated by Congress, by implication in the declaration or authorization of war.) It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President's authority is effectively supreme. But, in my view, he would be bound to follow Congressional directives not only as to whether to continue the war, but whether to extend it to other countries and other belligerents, whether to fight a limited or unlimited war, perhaps, even whether to fight a "conventional" or a nuclear war.

69. A function may be exclusive as between different branches of government and to that extent unitary. However, it may not be unitary as to a particular branch even if assigned exclusively to that branch, if that branch is multi-headed. (The Framers considered this as an option for the executive branch.) Again, if a function is not exclusively assigned to one branch, it cannot be unitary. But even with shared powers, separate elements of that shared power can be exclusive and to that extent unitary. For example, under

1. Original Understanding

The Framers of the Constitution split the powers over the military between Congress and the President to "chain the dog of war," vesting Congress with the power to declare war, to raise and finance a military establishment, and to make rules for its regulation and governance. But the Framers were also convinced that once a commitment to a military venture had been made, the ultimate responsibility for directing operations should be vested in a single person rather than divided. That person was to be the President. This scheme for allocating military powers is reflected in the way the military provisions in the Articles of Confederation were taken over and modified in the Constitution.

The loose and limited structure of governance created under the Articles of Confederation provided for no executive department or officer. All executive functions, including all military functions, were vested in the Continental Congress, the sole organ of the Confederation.[70] With respect to the military, the Articles granted the Continental Congress the power to determine war and peace, to direct military operations, to appoint officers in the armed forces, including a commander in chief, and to make rules for military governance.[71]

This Confederation structure was abandoned by the Framers at the outset of the 1787 Constitutional Convention in Philadelphia. In its place,

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69. (continued) the appointment power, the President has independent discretion to nominate any individual for a particular office who satisfies the qualifications for that office. Congress may enact a law setting eligibility requirements for the office, but it cannot direct the President to nominate a particular individual. Similarly, the congeries of military powers may be assigned to more than one branch of the government and thus not be exclusive or unitary as a whole. But a specific element of those military powers may be assigned exclusively to one branch.

70. A handful of rudimentary departments were established during the era of the Articles (1781-1789)–Finance, War, Foreign Affairs, and the Post Office–but they were completely subject to the control of the Continental Congress. They were not based on any independent executive power. *See* JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789 (1935).

71. This authority is in Article IX of the Articles of Confederation;

> The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article . . .
>
> . . . .

a number of plans for a federal government were proposed that suggested allocating some of the national military power to an executive. The New Jersey Plan, offered by William Paterson, provided for an executive branch composed of an unspecified number of persons who were "to direct all military operations" but were to be precluded from taking "command of any troops, so as personally to conduct any enterprise as General, or in other capacity."[72] Charles Pinckney submitted a proposal that was referred to the Committee of the Whole[73] and, though not discussed, was the source of a number of provisions found in the final document.[74] He proposed that there be a single executive with the title of President who was to be "commander in chief of the Land Forces of United States and Admiral of their Navy" with the power "to commission all Officers."[75] Alexander Hamilton also proposed that there be a single executive, to be called "Governeur." This executive was "to have the direction of war when authorized or begun."[76] The fourth plan, the Virginia plan, was chosen to be the basis of discussion at the Convention. It provided for an undefined executive who, "besides a general authority to execute the National laws," "ought to enjoy the Executive rights vested in Congress by the Confederation."[77] Those "vested rights" were not further specified but presumably included

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71. (continued)

> The United States, in Congress assembled, shall also have the sole and exclusive power of . . . appointing all officers of the land forces in the service of the United States . . . appointing all officers of the naval forces . . . making rules for the government and regulation of said land and naval forces, and directing their operation.
>
> . . . .
>
> The United States in Congress assembled shall never . . . appoint a commander in chief of the army or navy, unless nine states assent to the same . . . .

ART. OF CONFED. art. IX, *reprinted in* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 266, 268, 269 (1970).

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244 (Max Farrand ed., 1966) [hereinafter Farrand].

73. *Id.* at 23.

74. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 26 (1976).

75. 3 Farrand, *supra* note 72, at 606.

76. 1 Farrand, *supra* note 72, at 292.

77. *Id.* at 21.

the "right" to command, to direct military operations, and to appoint military officers.

As finally drafted by the Framers, the new Constitution created the executive office of the President and transferred to that office certain military powers that had previously been assigned to the Congress under the Articles of Confederation. Instead of the commander in chief being an agent of the Congress serving at the order and direction of the Congress, the commander in chief function was incorporated independently into the office of the President,[78] merging the military function of the supreme commander with the political function of the executive. Furthermore, the power to direct military operations was removed as one of Congress's named powers and not otherwise expressly mentioned in the new Constitution.

From these changes two inferences can be drawn. First, the Framer's believed that, inasmuch as the President was now to be commander in chief–the officer commonly understood to be the one responsible for the direction of military operations–there was no need to expressly refer to that power in the Constitution. Second, it is fair to infer that the power to direct operations was meant to be vested exclusively in the President as commander in chief. This is demonstrated in the contrast between the Framer's decision to completely transfer the commander in chief function to the President, and their decision to retain for Congress certain elements of the power to appoint military officers. Although the President was given the power to make appointments, the exercise of that power was made subject to eligibility criteria as enacted by Congress, and to the advice and consent of the Senate. In contrast to the explicit power-sharing scheme with

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78. The records of the Convention do not reveal any debate on the commander in chief clause, which was reported out by the Committee of Detail without comment. 2 Farrand, *supra* note 72, at 185. But Luther Martin, in an address to the Maryland Legislature, noted objections at the Convention based on the proposal in the New Jersey Plan:

> Objections were made to that part of this article, by which the President is appointed commander-in-chief of the army and navy of the United States, and of the militia of the several States, and it was wished to be so far restrained, that he should not command in person; but this could not be obtained.

3 Farrand, *supra* note 72, at 217-18. Similarly, during the ratification debates in Virginia and North Carolina in 1788, there were arguments that the President should not be allowed to take *personal* command of the army or navy. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 530 n.1 (1928).

respect to appointments, it is apparent that by deleting the reference to the "direction of military operations" as contained in the Articles of Confederation and the New Jersey Plan, and by making the President "commander in chief," the Framers did not intend power to be shared with regard to the direction of operations.

A number of observations made in the *Federalist Papers* corroborate this understanding. Hamilton noted the conceptual connection between the power to direct operations and the commander in chief clause in three passages, all of which have played an important role in interpreting the commander in chief clause.

The military powers, which were to be vested in the new national government, were enumerated by Hamilton in *Federalist No. 23*: "The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support."[79] This enumeration exactly parallels specific clauses in the Constitution itself: Congress has the power to "raise and support armies,"[80] to "provide and maintain a navy,"[81] to "make rules for the government and regulation of the land and naval forces,"[82] and to provide for their support.[83] As for the direction of operations, Hamilton surely meant by that phrase to signify the President's authority as commander in chief.

Hamilton expressly links the direction of military operations to the commander in chief function in *Federalist No. 69*,[84] where he contrasts the

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79. THE FEDERALIST No. 74, at 153 (Alexander Hamilton) (Clinton Rossier ed., 1961) (emphasis in original) [hereinafter THE FEDERALIST].

80. U.S. CONST. art. I, § 8, cl. 12.

81. *Id.* art. I, § 8, cl. 13.

82. *Id.* art. I, § 8, cl. 14.

83. *Id.* art. I, § 8, cls. 1, 2, and 12.

84.

> *First*. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second*. The President is to be commander in chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the

powers of the President with that of the king in England, and in *Federalist No. 74*,[85] where he defends the propriety of making the President commander in chief. For Hamilton, the President "as first general and admiral of the Confederacy" would properly and exclusively exercise the "supreme command and direction" of the armed forces.[86]

The Framers, as exemplified in Hamilton's explication, made the obvious conceptual connection between the commander in chief clause and the notion of the direction of military operations. By placing the executive power in a single person and designating him as commander in chief, the Framers also resolved on a unitary structure that vested exclusive direction of military operations in the President. They rejected ideas such as that of an executive council or a sharing of power with the legislature, other than as expressly allowed. This was based on the belief that there was a need for a vigorous and energetic executive. As observed again by Hamilton: "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government."[87]

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84. (continued)

> supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies–all which, by the Constitution under consideration, would appertain to the legislature.

THE FEDERALIST, *supra* note 79, No. 69, at 417-18 (emphasis in original).

85.

> The propriety of this provision [the commander in chief clause] is so evident in itself and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have in other respects coupled the Chief Magistrate with a council have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

Id. No. 74, at 447.

86. *Id.* No. 69, at 418.

87. *Id.* No. 70, at 423.

Energy was considered the most important quality in the executive; deliberation and wisdom in the legislative branch. Hamilton opined that it was undisputed that "unity is conducive to energy": "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[88] That unity could be destroyed "either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and co-operation of others . . . ."[89] Other Framers during the Constitutional Convention expressed similar concern for unity of command authority in military operations.[90]

From the perspective of the original understanding, it is reasonable to conclude that responsibility for operational and tactical control of American military forces was vested exclusively in the President–the officer of the government charged with the power to direct military operations as commander in chief.

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88. *Id.* No. 70, at 424.
89. *Id*.
90.

> Mr. Butler contended strongly for a single magistrate as most likely to answer the purpose of the remote parts. If one man should be appointed, he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages. In [m]ilitary matters this would be particularly mischievous. He said his opinion on this point had been formed under the opportunity he had of seeing the manner in which a plurality of military heads distracted Holland when threatened with invasion by the imperial troops. One man was for directing the force to the defense of this part, another to that part of the Country, just as he happened to be swayed by prejudice or interest.

1 Farrand, *supra* note 72, at 88-89 (Madison's Notes).

> Mr. Gerry was at a loss to discover the policy of three members of the Executive. It [would] be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.

Id. at 97 (Madison's Notes).

2. The Supreme Court's Understanding of the Commander in Chief

The Supreme Court's understanding of the commander in chief clause is in accord with the original understanding. Moreover, the Court has elaborated to a limited extent its perception of what is implied by the term "direction of operations" as it applies to the President's power as commander in chief. For example, in *Fleming v. Page*,[91] a case involving the Mexican War, the Court acknowledged the President's power to direct movements and to employ the armed forces in a manner which he deems most effectual: "As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[92]

Similarly, in *United States v. Sweeney*,[93] the Court noted that the commander in chief clause gives the President "supreme and undivided command" over the armed forces. As the Court stated, "the object of the provision is evidently to vest in the President the supreme command over all the military forces, such supreme and undivided command as would be necessary to the prosecution of a successful war."[94]

Justice Jackson, in his famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[95] recognized the exclusive power of the President to command the nation's military forces, notwithstanding the Court's holding that the President cannot seize steel plants as commander in chief in the absence of authorizing legislation:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as commander-in-chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.[96]

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91. 50 U.S. (9 How.) 603 (1850).

92. *Id.* at 615.

93. 157 U.S. 281 (1895).

94. *Id.* at 284.

95. 343 U.S. 579, 634 (1951).

96. *Id.* at 645. When he was Attorney General, Jackson showed a similar appreciation for the President's role as commander in chief:

The Supreme Court also noted the exclusivity of the President's command authority in *Ex Parte Milligan*.[97] The Court found the convening of a military commission to try a criminal case in a civilian district during the Civil War to be in excess of the President's power as commander in chief and hence unconstitutional. Nevertheless, Judge Chase, in his concurring opinion, expressed the view that Congress does not have the power to interfere with "the command of forces and the conduct of campaigns." In doing so, he characterized the relationship between Congress and the President with regard to military powers in these terms:

> Congress has the power not only to raise and [to] support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. *This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief.* Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without sanc-

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96. (continued)

> [T]he President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States . . . . [T]his authority includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.

Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-62 (1941).

97. 71 U.S. (4 Wall.) 2 (1866).

> tion of Congress, institute tribunals for the trial and punishment of offences . . . .[98]

3. Limitations on the President's Power as Commander in Chief

The decisions reached in *Youngstown* and *Milligan* manifest the view that the President's power as commander in chief is not without limits, although his authority to control and direct military operations may be exclusive.[99] This was made explicit by Justice Jackson in *Youngstown*, when he recognized that "to some unknown extent" limitations even on the President's command functions flowed from Congress's power to make rules for the government and regulation of the armed forces.[100] Chief Justice Harlan Stone put the matter differently, noting that the President as commander in chief is subject to a wide variety of laws which can be enacted by Congress:

> The Constitution thus invests the President, as commander in chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.[101]

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98. *Id.* at 139-40 (emphasis added).

99. *But cf.* HENKIN, as quoted *supra* in note 68 (challenging the exclusive nature of presidential power as commander in chief); WORMUTH & FIRMAGE, *supra* note 63, chs. 6 and 7 (discussing the limitations on the President's power as commander in chief).

100. *Youngstown*, 343 U.S. at 644.

> [The President] has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may, to some unknown extent, impinge upon even command functions.

Id.

101. *Ex parte* Quirin, 317 U.S. 1, 26 (1942).

Put this way, the limitations on the President's power as commander in chief can be seen as deriving from his constitutional duty to "take care that the laws be faithfully executed . . . ."[102]

Raoul Berger, a noted constitutional scholar whose writings stress the limitations on presidential power, has also noted the limitations Congress can impose on the commander in chief power:

> In the entire armory of war powers only one has been exclusively conferred upon the President, the power as "first General" to direct the conduct of war once it has been commenced. Even in this area, the military and naval command was not immune from parliamentary inquiry into the conduct of the war.[103]
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> . . . .
>
> Thus, the Framers separated the presidential direction of "military operations' in time of war from the congressional power to make rules "for the government and regulations of the armed forces," a plenary power enjoyed by the Continental Congress and conferred in identical terms upon the federal Congress. The word "government" connotes a power "to control," "to administer the government" of the armed forces; the word "regulate" means "to dispose, order, or govern." Such powers manifestly embrace congressional restraint upon deployment of the armed forces. Since the Constitution places no limits on the congressional power to support and to govern the armed forces and to make or withhold appropriations therefore, arguments addressed to the impracticability of regulating all deployments go to the wisdom of the exercise, not the existence, of the congressional power . . . .[104]

Accordingly, not only are limits to the President's military power as commander in chief widely recognized, the preceding authorities show that it is widely accepted that those limits can be based on Congress's power to make rules for the government and regulation of the armed forces. What then is the scope of the congressional power to make rules

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102. U.S. CONST. art. 2, § 3.

103. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 108-09 (1974) (citation omitted).

104. *Id.* at 114-15.

for the government and regulation of the armed forces? Can Congress, by virtue of that power, enact a restriction such as that contained in House Bill 3308?

B. Congress's Power to Make Rules for the Government and Regulation of the Armed Forces

At first glance, the language of the "make rules" clause gives no reason to suggest that Congress's power to make rules for the armed forces does not include the type of restriction proposed in House Bill 3308. The Supreme Court has consistently recognized Congress's "broad constitutional power" to raise and regulate armies and navies.[105] As the Court noted in considering a challenge to the selective service laws: "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[106] This broad congressional power covers the entire gamut of military law.

Nevertheless, it might be thought that military law is narrowly limited by definition to the rules of conduct for military personnel and to the procedures for military justice through courts-martial,[107] and that Congress's power to make rules for the government and regulation of the armed forces is limited to military law in this narrow sense. If Congress's power to "make rules" were so limited, it could not provide the necessary constitutional basis for House Bill 3308.

There is some secondary authority that arguably supports such a narrow view of the "make rules" clause. For example, one turn-of-the-century military law treatise limits the definition of military law to rules of conduct in relation to military discipline:

> The term Military Law applies to and includes such rules of action and conduct as are imposed by a State upon persons in its military service, with a view to the establishment and maintenance of military discipline. It is largely, but not exclusively, statutory in character, and prescribes the rights of, and imposes duties and obligations upon, the several classes of persons com-

105. Lichter v. United States, 334 U.S. 742, 755 (1948); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); Rostker v. Goldberg, 453 U.S. 57, 65 (1981).

106. United States v. O'Brien, 391 U.S. 367, 377 (1968).

107. These rules were once denominated Articles of War and today are codified under the Uniform Code of Military Justice. 10 U.S.C.S. §§ 801-946 (LEXIS 1999).

> posing its military establishment; it creates military tribunals, endows them with appropriate jurisdiction and regulates their procedures; it also defines military offenses and, by the imposition of adequate penalties, endeavors to prevent their occurrence.[108]

Similarly, in his treatise on the Constitution, Joseph Story termed the "make rules" clause "a natural incident to the . . . powers to make war, to raise armies, and to provide and maintain navies," and identified the domain of that clause with military crimes and punishments, though he was silent about what else might belong to that domain.[109]

However, these two older sources are in sharp contrast with the much broader contemporary definition of military law:

> Military law may be defined as the *law regulating the military establishment.* The legislative enactments of the U.S. Congress form the primary source of military law. Congressional authority to enact military law is derived from various provisions of the U.S. Constitution. These include the power to: raise and support armies; provide and maintain a navy; makes rules for the government of land and naval forces; call forth the militia to execute the law of the country; suppress insurrections and repel invasions; organize, arm, and discipline the militia; govern such parts of the militia as may be employed in the service of the United States; and make all laws necessary and proper for carrying into execution the foregoing powers. . . . The military justice system is only one part of military law.[110]

This broad definition of military law, which is not narrowly confined to military justice and discipline, also accords with the Supreme Court's view. In *Chappell v. Wallace*,[111] the Court refers to Congress's plenary power over the framework of the "Military Establishment," including but not limited to the field of military discipline.[112] In *Gilligan v. Morgan*,[113]

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108. GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1 (2nd rev. ed. 1899) (citation omitted).

109. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1196-1197 (5th ed. 1891).

110. EDWARD M. BYRNE, MILITARY LAW 1 (3rd ed. 1981) (emphasis added).

111. 462 U.S. 301 (Burger, C.J.) (1983).

112.

> It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the frame-

the Court also recognized the role that Congress has, in addition to that of the President, in decisions concerning control of the military establishment:[114] "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."[115]

Most recently, in *Loving v. United States*,[116] the Court reiterated its view of the broad power held by Congress by virtue of the "make rules" clause: "Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs."[117] The Supreme Court's view of the matter does not conflict with what can be gleaned of the original understanding of the "make rules" clause.

1. The Original Understanding

The historical record unfortunately sheds little light on the original meaning ascribed to the "make rules" clause; but what there is tends to suggest a broad, not narrow understanding of its scope. The clause was included in the final draft of the Constitution apparently without either discussion or debate. Madison's notes from the Constitutional Convention contain the following brief entry: "Mr. Gerry. 'To make rules for the Government and regulation of the land & naval forces,'–added from the existing Articles of Confederation."[118]

Neither the original proposals for the Constitution presented to the Philadelphia Convention (the Virginia and New Jersey plans, and Hamil-

112. (continued)
work of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

Id. at 301.

113. 413 U.S. 1 (1973).

114. The President's broad power in the management and administration of the military is not denied in this article. Here the issue is the extent of Congress's power. A later section will address whether Congress or the President has primacy in the making of rules for the military.

115. *Gilligan*, 413 U.S. at 4.

116. 517 U.S. 748 (1996).

117. *Id.* at 768 (citing Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981)).

118. 2 Farrand, *supra* note 72, at 330.

ton's and Pinckney's proposals) nor the draft submitted by the "Committee of Detail" contained the clause. It was incorporated at a later stage in the Convention, taken over from Article IX of the Articles of Confederation. That Article provided:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . appointing all officers of the land forces in service of the United States; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of said land and naval forces, and directing their operations.[119]

Because the Articles of Confederation did not provide for an executive branch, the Continental Congress had all power over the armed forces of the United States. As noted previously, the Framers of the Constitution reallocated the military powers by transferring the authority to direct operations to the President as commander in chief, and by partially transferring the power to appoint officers to the President. The President thus had the power to select candidates for positions, subject to eligibility requirements established by Congress, and the advice and consent of the Senate. However, the Framers left with the legislative branch the power to raise and support armed forces and to "make rules" for their governance and regulation, as well as the power to declare war.

Clues to the meaning of the "make rules" clause as contained in the Articles of Confederation must be based on meager evidence. The text of the Articles of Confederation was agreed to in November 1777, although it did not come into force until 1 March 1781. The Continental Congress created a committee to draft the Articles on 12 June 1776. John Dickinson, who was the dominant member of the committee, prepared the first draft in early summer, 1776.[120] His draft, which was presented to the Continental Congress on 12 July 1776, contains language concerning military powers almost identical to that found in the final version approved in 1777:

> ART. XVIII. The United States assembled shall have the sole and exclusive Right and Power of . . . Appointing General Officers of the Land Forces in Service of the United States–Commissioning such other Officers of the said Forces as shall by

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119. ART. OF CONFED. art. IX, *reprinted in* JENSEN, *supra* note 71, at 266, 268.
120. *See* JENSEN, *supra* note 71, at 126.

> appointed by Virtue of the tenth Article–Appointing all the Officers of the Naval Forces in the Service of the United States–Making Rules for the Government and Regulation of the Said Land and Naval Forces, and directing the operations . . . .[121]

Dickinson's adoption of the phrase "making rules for the government and regulation" of the armed forces was presumably based at least in part on its prior use by the Continental Congress in relation to the drafting of Articles of War, that is, the code of conduct for the military. On 14 June 1775, a year before establishing the committee to draft the Articles of Confederation, the Continental Congress passed a resolution creating a "committee to bring in a draft of [r]ules and regulations for the government of the army."[122] The document produced by that committee and approved by the Congress on 30 June 1775, was termed "Articles of War" and "Rules and Regulations."[123]

Later that year, in December 1775, "Rules for the Regulation of the Navy of the United Colonies" were adopted by the Congress.[124] Like the Articles of War, the navy rules concerned the conduct of naval personnel and their discipline. The Articles were revised by another committee of the Continental Congress created on 14 June 1776. This was two days after creation of the committee to draft Articles of Confederation. The revisions were approved on 20 September 1776.[125]

Given the way the language was used by the Continental Congress in the drafting of the Articles of War and navy regulations, it is possible that what Dickinson and his committee contemplated in the clause "making rules for the government and regulation of the said land and naval forces" was solely the promulgation of Articles of War. It is also possible that the inclusion of separate clauses in the Articles of Confederation for the appointment of officers and for the direction of operations expresses an intention to exclude from the scope of the "make rules" clause such matters as creating command and control structures and the setting of officer qualifications.[126] These possibilities do not seem likely, however. Would such fine distinctions have occurred to men who had almost no previous expe-

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121. Dickinson Draft of the Confederation, art. XVII, *reprinted in* JENSEN, *supra* note 71, at 258-59.

122. 2 JOURNALS OF THE CONTINENTAL CONGRESS 90 (W.C. Ford ed., 1905).

123. *Id.* at 111-22.

124. BYRNE, *supra* note 110, at 4.

125. *Id.* at 8.

126. Jeremy Bentham, in a treatise completed in 1782, refers to "articles of war for the government of the army . . . ." JEREMY BENTHAM, OF LAWS IN GENERAL 7 (H.L.A. Hart

rience in raising, maintaining, and supporting a military establishment, and who had to learn on the job as the army and navy were first being created?

Moreover, with no executive branch to run a military establishment and the Continental Congress responsible for every aspect and detail of its governance and regulation, it is difficult to believe that the "make rules" clause in the Articles of Confederation was meant to have a narrow scope, even if the phrase was used in the context of the drafting of articles of war.[127] Having experienced the Revolutionary War, when the Continental Congress was responsible for the full panoply of military governance, it is unlikely that a narrow meaning of the clause would have been in the Framers' minds when they convened in Philadelphia in 1787. Though a department of war was created during the era of the War and the Confederation, it was fully answerable to the Continental Congress and not in any way an independent executive department.[128] Evidence is not available that suggests that the Framers understood the "make rules" clause to apply only to the narrow authority to enact articles of war; or that they meant to bar the newly created legislature from playing a role in making rules for the administration *and control* of the armed forces.

The idea of a national executive with independent powers was a novel idea for the thirteen states–an idea opposed by many. Among the Framers themselves, considerable tension existed between the forces pushing for a strong executive and those wanting only a weak executive.[129] If the Framers were set on vesting Congress, not the President, with the power to declare war, and expressly vested in Congress the other vital powers over the military except that of commander in chief, it seems most unlikely that they intended to limit Congress's power to make rules concerning the structure and administration of the military establishment.

It should be noted that there is some evidence for a narrow interpretation of the "make rules" clause in the history of the state conventions held

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126. (continued) ed., 1970). Although published during his lifetime, it nevertheless it gives a contemporaneous view of what the language in question generally meant–at least in part–in the English speaking countries at the time.

127. A cursory review of the debates leading to approval of the Articles in the Continental Congress reveals no discussion of the clause in question. Because the clause was not changed from the Dickinson draft, and since the debates focussed on far more significant issues, it is unlikely that an exhaustive review of those debates would shed any further light on its meaning.

128. SANDERS, *supra* note 70, at *passim*.

129. *See* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY *passim* (1923).

to consider ratifying the Constitution. In Massachusetts, New Hampshire,[130] New York,[131] and Rhode Island,[132] proposals to amend the proposed Constitution used language that referred to the "government and regulation" of the armed forces in a manner suggesting that this phrase (echoing the language of the "make rules" clause) was understood to refer only to matters of military law and justice. But from these proposals, which do not vest the power to "make rules" but only refer to it in the specific context of military justice, it can only be concluded that the "make rules" clause was meant to *include* military law in the narrow sense of military justice. The proposals, in the absence of other language setting limits to the scope of the clause in the context of the grant of power, do not demonstrate that the ratifiers understood it to *exclude* everything else regarding military administration.

On balance, a common sense interpretation of the sparse historical record regarding the original understanding of the "make rules" clause

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130. The proposed amendments in Massachusetts and New Hampshire were:

> That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

1 ELLIOT'S DEBATES 323, 326 (2d ed.).

131. The proposed amendment in New York was:

> That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; . . . .

Id. at 328.

132. The proposed amendment in Rhode Island was:

> That, in all capital and criminal prosecutions, a man hath the right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury in his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces), nor can he be compelled to give evidence against himself.

Id. at 334.

favors a broad interpretation of the clause. The narrow interpretation must be rejected–whether based on the ordinary meaning of the words in the clause, on the understanding of the founders, or on its reading by the Supreme Court. Nevertheless, it must still be determined if the type of restriction proposed in House Bill 3308 falls within that broad scope of the "make rules" clause. Further classification of the restriction in House Bill 3308 and a look at similar kinds of military legislation will determine the issue.

2. Analogues to House Bill 3308

As previously noted, the rule in House Bill 3308 and its predecessor bills can be characterized as a rule limiting the persons authorized to command U.S. armed forces in a certain type of military operation, in this instance UN peace operations. More generically, the rule can be characterized in any of the following three ways: (1) a rule delimiting command and control structures and relations, and the chain of command,[133] (2) a rule establishing conditions for the detailing of U.S. military personnel, and (3) a rule establishing qualifications or eligibility requirements for the selection of commanders of U.S. forces.[134]

Based on the ordinary meaning of the language of the "make rules" clause, it is reasonable to view any of these three ways of characterizing House Bill 3308 as the making of a rule for the "government and regulation" of the armed forces. As a matter of common sense, rules for governance and regulation involve all matters of management and administration. This would, by its very nature, include the setting of general qualifications for selecting personnel such as commanding officers, establishing conditions for using forces (for example, in authorizing and setting limitations on the detailing of forces), and creating governing structures and relations for personnel. There is no interpretative reason to ignore the natural meaning of the phrase "government and regulation of the land and naval forces." Moreover, ample evidence exists supporting the conclusion that the "make rules" clause has long been viewed as

133. House Bill 3308 was characterized by Rep. Ronald Dellums as affecting command and control relations. *See* Additional Views of Ronald V. Dellums, H.R. REP. NO. 104-642, pt. 1, at 13 (June 27, 1996). For more on his views, see *infra* text accompanying notes 156-159. Similarly, Walter Dellinger characterizes House Bill 3308 as being concerned with "command structures." Dellinger Memorandum, *supra* note 4, at H10062.

134. Walter Dellinger also uses this characterization in his discussion of House Bill 3308. *See* Dellinger Memorandum, *supra* note 4.

encompassing the three classes of rules listed above, so that, however characterized, the restriction in House Bill 3308 is encompassed by the clause. Each class shall be examined in turn.

a. Does Congress have Authority to Establish Qualifications for Command Positions?

The third type of rule–personnel qualifications–should begin the discussion, not only because of the compelling case for Congress's power to so legislate and because it most closely characterizes House Bill 3308, but also because it is discussed in the Clinton Administration's legal memorandum that concluded that House Bill 3308 unconstitutionally encroaches on presidential power.[135]

The memorandum, prepared by Assistant Attorney General Walter Dellinger, concedes that Congress has the power to determine "the general class of individuals from which an appointment may be made," but then appears to blur this power with the presidential power to select a particular individual from the general class.[136] In addition, he mistakenly relies on

135. *Id.* at H10061-62.

136. Dellinger's argument is as follows:

> It is for the President alone, as commander in chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces. True, Congress has the power to lay down general rules creating and regulating "the framework of the Military Establishment," Chappell v. Wallace, 462 U.S. 296, 301 (1983); but such framework rules may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field, including the choice of particular persons to perform specific command functions in those missions. Thus, for example, the President's constitutional power to appoint a particular officer to the temporary grade of Marine Corps brigadier general could not be undercut by the failure of a selection board, operating under a general statute prescribing procedures for promotion in the armed services, to recommend the officer for that promotion. "Promotion of Marine Officer," 41 Op. Att'y Gen. 291 (1956). As Attorney General Rankin advised President Eisenhower on that occasion, "[w]hile Congress may point out the general class of individuals from which an appointment may be made . . . and may impose other reasonable restrictions . . . it is my opinion that the instant statute goes beyond the type of restriction which may validly

the opinion of the Attorney General in *Promotion of Marine Officer.*[137] The opinion involved advice concerning the interim appointment of a Marine colonel to the rank of brigadier general to be followed by nomination to the Senate when it reconvened. The statute specifying the procedure for such appointments provided that they be made "only upon the recommendation of a board of officers convened for that purpose."[138]

In the situation before the Attorney General, the particular officer being recommended for promotion to brigadier general had not been picked by the selection board. The Attorney General, while recognizing that Congress has "a right to prescribe qualifications for" government offices, concluded that the procedural requirement of the statute "goes beyond the type of restriction which may validly be imposed" insofar as it subordinated the President's discretion in making appointments to the views of an inferior selection board.[139]

The restriction contained in House Bill 3308 is strictly concerned with qualifications of a type found acceptable in the Attorney General's opinion in *Promotion of Marine Officer.* It is not procedural; it does not subject the President's power of decision to a subordinate body. Indeed the opinion in *Promotion of Marine Officer*, as well as the additional authority discussed in it, fully support both the applicability of the "make rules" clause to the type of rule under discussion and the inclusion of House Bill 3308 within the scope of that type of rule. For example, in addition to con-

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136. (continued)

> be imposed. . . . It is recognized that exceptional cases may arise in which it is essential to depart from the statutory procedures and to rely on constitutional authority to appoint key military personnel to positions of high responsibility." *Id.* at 293, 294 (citations omitted in original). In the present context, the President may determine that the purposes of a particular UN operation in which U.S. Armed Forces participate would be best served if those forces were placed under the operational or tactical control of an agent of the UN, as well as under a UN senior military commander who was a foreign national (or U.S. national who is not an active duty military officer). Congress may not prevent the President from acting on such a military judgment concerning the choice of the commanders under whom the U.S. forces engaged in the mission are to serve.

Id. at H10062.

137. 41 Op. Att'y. Gen. 291 (1956).

138. *Id.*

139. *Id.* at 292, 293.

firming Congress's general right to "prescribe qualifications" that limit the President's discretion in the selection of military officers, the opinion approvingly quotes from an earlier Attorney General's Opinion which held that Congress can require officers to be American citizens–a requirement that is almost identical to that in House Bill 3308.[140] If Congress can require that an individual be an American citizen when appointed an officer in the United States military, as conceded in this Attorney General's Opinion, why should Congress not be able to require that the commander of U.S. forces detailed to the UN be a U.S. military officer on active duty and not a foreign commander?

Of two additional Attorney General's Opinions cited in *Promotion of Marine Officer*, one notes that Congress may establish a general class of individual from which an appointment may be made,[141] and the second addresses the central issue in this section—the scope of the "make rules"

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140. That earlier opinion stated:

> The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted. But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.
>
> . . . .
>
> *Congress could require that officers shall be of American citizenship* or of a certain age, that judges should be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared that to go further, and require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the [g]overnment, would impose an unconstitutional limitation on the appointing power. It would still have a reasonable scope for its own judgment and will.

Id. at 292-93 (quoting from 13 Op. Att'y. Gen. 516) (emphasis added).

141. Issuance of Commission in Name of Deceased Army Officer, 29 Op. Att'y. Gen. 254, 256 (1911).

> [N]ow appointment in the Army as in any other department of the Government is an executive, not legislative act (Story on Const. Vol. II, sec. 1526; Federalist No. 76; Wyman on Administrative Law, sec. 48), and the provisions of the Constitution are satisfied by giving Congress the power to make the general rules prescribing the organization and govern

clause.[142] It concludes that congressional power to establish qualifications for military personnel derives from the "make rules" clause:

> From this review of the action of the Executive and of the Legislature in regard to the promotion and appointment of officers to fill vacancies, whether original or accidental, in the Army, it will be seen that both these departments of the Government have not only deemed the subject to be a proper one for regulation, but have considered such regulation as appropriately belonging to a system of regulations designed for the government of the military service. It may, therefore, be regarded as definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it deems proper in regard to making promotions or appointments to fill any and all vacancies of whatever kind occurring in the Army, provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs.[143]

These Attorney General Opinions involve the power of appointment, a power not directly applicable to House Bill 3308, because the selection of a person to serve as a commander of U.S. forces detailed to the UN does

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141. (continued)
ment of the Army, leaving to the President, with the advice and consent of the Senate, the designation of the particular individuals who are to fill the office created by the Congress therein.

Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it can not control the President's discretion to the extent of compelling him to commission a designated individual. (President Harrison's veto, Feb. 26, 1891, Messages of the Presidents, vol. 9, p. 138; Attorney General Brewster's opinion in *Fitz John Porter*'s case, 18 Op. 18.).

Id.

142. Appointment and Promotion in the Army, 14 Op. Att'y. Gen. 164 (1873).
143. *Id.* at 172.

not constitute an appointment to a position in the U.S. government–military or otherwise. Nevertheless, the setting of qualifications with regard to the exercise of the power of appointment is parallel to the setting of qualifications for those individuals authorized to command U.S. armed forces detailed to non-United States entities, whether it be the UN or a foreign government. The setting of qualifications in such a situation does not materially differ from that of an appointment.[144] The power to establish qualifications applies equally to both situations. House Bill 3308, constituting a general eligibility requirement for military personnel, thus falls within the scope of congressional power under the "make rules" clause.

b. Does Congress have Power to Authorize and Set Rules for the Detailing of U.S. Armed Forces?

There are several historical instances in which Congress has passed legislation that establishes rules for the detailing of U.S. military forces. It appears that these exercises of congressional power have neither been subjected to judicial review, nor provoked criticism on constitutional grounds. This state of affairs thus indicates that the proposed restrictions contained in House Bill 3308 are within the historically recognized ambit of congressional powers.

One of the most notable and longstanding statutes that expressly deals with the detailing of U.S. military personnel to multilateral operations is

144. Mr. Dellinger agrees with this point. He says:

> The President's appointment power is not at issue here, because the foreign or other nationals performing command functions at the President's request would be discharging specific military functions, but would not be serving in federal offices. *See* Memorandum to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, subject: Defense Authorization Act at 2n.1 (Sept. 15, 1995). Nonetheless, we believe that the reasoning under the Commander in Chief Clause closely parallels that under the Appointments Clause.

Dellinger Memorandum, *supra* note 4, at H10062.

the UNPA of 1945.[145] Section 7 of the Act provides in pertinent part as follows:

> Noncombatant assistance to the United Nations
>
> (a) Armed forces details, supplies and equipment, obligation of funds, procurement and replacement of requested items.
>
> Notwithstanding the provisions of any other law, the President, upon the request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such requests, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter—
>
> (1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States *to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time*: Provided, that while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty. . . .[146]

This language shows Congress's understanding of its power to set such terms and conditions as it deems necessary and proper for the detailing of forces to the UN. In this instance, it concluded in its wisdom that the President should have broad discretion. However, notwithstanding the discretion accorded to the President, the statute (in the italicized language) clearly sets limits on the detailing of U.S. forces. No more than one thousand men or women can be detailed at any one time, and then only for operations that are not Article 42 peace enforcement operations. In addition, the capacity in which detailed forces can serve is limited to guarding, observing, and other non-combatant roles. These are limitations that,

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145. Ch. 583, 59 Stat. 619 (Dec. 20, 1945) (codified as amended at 22 U.S.C. §§ 287-287e).

146. 22 U.S.C.S. § 287d-1 (LEXIS 1999) (emphasis added).

although affecting the President's power as commander in chief, have not been viewed as unconstitutional. Restrictions of the type proposed in House Bill 3308 would simply establish an additional limit on the President's authority to detail personnel to UN peace operations. From this perspective, no fundamental difference exists between the proposed restriction in House Bill 3308 and the restrictions already imposed by the UNPA.

Paralleling the UNPA is Section 628 of the Foreign Assistance Act of 1961.[147] It authorizes the head of any federal agency

> [w]henever the President determines it to be consistent with and in furtherance of the purposes of this chapter . . . to detail, assign or otherwise make available to any international organization any officer or employee of his agency to serve with, or as a member of, the international staff of such organization, or to render any technical, scientific, or professional advice or service to such organizations . . . .[148]

Section 627 of the Foreign Assistance Act of 1961[149] contains a similar authorization allowing the detailing of federal officers and employees to foreign governments "where acceptance of such office or position does not involve the taking of an oath of allegiance to another government . . . ."[150] Section 503 of the Act also provided for the detailing of U.S. military forces, but only for noncombatant duty.[151]

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147. Pub. L. 87-195, pt. III, § 628, 75 Stat. 452 (Sept. 4, 1961), codified as 22 U.S.C. § 2388. There is additional discussion of this provision in note 19 *supra*.

148. *Id.*

149. Pub. L. 87-195, pt. III, § 627, 75 Stat. 452 (Sept. 4, 1961), codified as 22 U.S.C. § 2287.

150. *Id.*

151. Pub. L. 87-195, pt. II, § 503, 75 Stat. 435 (Sept. 4, 1961).

> General Authority.–The President is authorized to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance, by–
>
> . . . .

Another law authorizing the detail of military personnel, used to justify sending U.S. military advisers to Southeast Asia, and codified as 10 U.S.C. § 712,[152] "Detail to Assist Foreign Governments," provides:

> (a) Upon application of the country concerned, the President, whenever he considers it in the public interest, may detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters
>
> (1) any republic in North America, Central America, or South America,
>
> (2) Cuba, Haiti, or Santo Domingo,
>
> (3) during a war or a declared national emergency, any other country he considers it advisable to assist in the interest of national defense.
>
> (b) Subject to prior approval of the Secretary of the military department concerned, a member detailed under this section may accept any office from the country to which he is detailed.[153]

A further statutory example shows the level of detail that Congress sees itself as proper to engage in from time to time. The statute, 10 U.S.C. § 168, authorizes "military-to-military contacts" with foreign governments "that are designed to encourage a democratic orientation of defense establishments and military forces of other countries." The section lists eight kinds of "authorized activities" for which funds may be used. These include, among others: the activities of "traveling contact teams," "military liaison teams," military and civilian personnel exchanges between the Department of Defense and foreign defense ministries, and between units of U.S. and foreign armed forces, "seminars and conferences held primarily in a theater of operations," and the distribution of publications in a theater of operations.

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151. (continued)

> (d) assigning or detailing members of the [a]rmed [f]orces of the United States and other personnel of the Department of Defense to perform duties of a noncombatant nature, including those related to training or advice.

Id.

152. Ch. 1041, 70A Stat. 32 (Aug. 10, 1956), *amended by* Pub. L. 85-477, ch. V, § 502(k), 72 Stat. 275 (June 30, 1958).

153. *Id.*

In a final example, military legislation was found by the Attorney General to limit executive power to detail military personnel.[154] A Navy regulation that permitted the adjutant, quartermaster, and paymaster of the Marine Corps to be detailed permanently away from headquarters, and to be assigned duties inconsistent with their staff functions, was determined to be invalid because it contravened existing statutes. The Attorney General, in finding the regulation invalid, stated:

> This [regulation] then, purports to give the power to the commandant–whether ever exercised or not is immaterial–permanently to impose duties upon these staff officers inconsistent with those of an adjutant, quartermaster, and paymaster of the Marine Corps, and to detach them permanently from the headquarters of the command–the only place where, in the nature of things, those duties can be regularly performed.[155]

From these examples, it can be concluded that Congress has full power to authorize and to set limits on the detailing of military personnel. The proposed restriction in House Bill 3308 likewise sets a limit on the detailing of military personnel, in this case in the form of an eligibility requirement for commanders of U.S. forces in UN peace operations. Such a restriction is within the scope of congressional power under the "make rules" clause.

c. Does Congress have Power to Enact Rules Delimiting Command and Control Structures and Relations, Including the Chain of Command?

In the House debate on House Bill 3308, a ranking minority member of the House National Security Committee argued that the restrictions in House Bill 3308 reflected an impermissible attempt by Congress to define "what command and control relations should be," and that Congress simply does not have the power to regulate those relations under the "make rules" clause or any other clause in the Constitution.[156] He asserts that the "make rules" clause "does not connote that the Congress may take away the most basic and important moral responsibility of the commander in

154. Detail of Staff Officers of Marine Corps to Duty Outside Washington, 30 Op. Att'y. Gen. 234 (1913).

155. *Id.* at 236-37.

156. H.R. REP. No. 104-642, pt. 1, at 12-16 (1996) (remarks of Ron Dellums).

chief."[157] With regard to "raise and support land forces" clause,[158] he asserts that "this section does not speak to command and control, and proponents of House Bill 3308 can find no support for the proposition that Congress has a role in dictating command and control relations."[159]

However, the historical evidence does not bear out this view. Throughout the history of the republic, many congressional enactments have expressly delimited command and control relations, determined command structures, and established or modified the chain of command. Some of those laws may have caused difficulties in the effective management and administration of the military. But such difficulties have not rendered those laws unconstitutional. The Constitution does not mandate wise legislation, it only allocates power in such a manner as to maximize the opportunity for wise political, military, and administrative leadership.

For example, during the Civil War, President Lincoln had enormous difficulties finding acceptable commanding generals–so much so that he and his Secretary of War, Edwin Stanton, personally involved themselves in the conduct of the war to an extent unthinkable today. In part, these difficulties stemmed from legislated seniority rules that prevented certain generals from serving under other generals, thereby restricting the President's discretion to appoint theater commanders.[160] Although these seniority rules (like the restrictions contained in House Bill 3308) may have been unwise, they are an example of a President being limited by rules imposed by Congress with respect to the command and control of U.S. armed forces.[161]

The history of legislation related to establishing a general staff, and, more recently, creating and modifying the structure of the Joint Chiefs of Staff and the Joint Staff, is perhaps the best example of the extent to which Congress has been involved in establishing command structures. Significantly, the office of Army chief of staff did not even exist until 1903, when Congress created the office in response to appeals from the War Depart-

157. *Id.* at 14.

158. U.S. CONST. art. I. § 8, cl. 12.

159. H.R. REP. No. 104-642, at 14.

160. *See* WORMUTH & FIRMAGE, *supra* note 63, at 91 (providing further details).

161. Less than twenty years earlier, during the Mexican War, President James Polk was similarly limited in his ability to select the commanding general of his choice. *See id.* at 91 (discussing Polk's failure to obtain Senate approval of legislation that would have allowed him to appoint someone other than General Winfield Scott to command the U.S. armed forces involved in the southern campaign).

ment for a general staff corps.[162] Statements made by Secretary of War Elihu Root supporting the Administration's request clearly acknowledged Congress's authority and responsibility with respect to military organization and structure.[163] Root appealed to Congress for statutory changes in the organization and structure of the army because of systemic defects, including the lack of "an adequate provision for a *directing and coordinat-*

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162. Ch. 553, Laws of 1903, 32 Stat. 830 (Feb. 14, 1903). The office of Chief of Naval Operations was created in 1915. Ch. 83, Laws of 1915, 38 Stat. 928 (Mar. 3, 1915). The office of chief of staff of the air force was created in 1947. Ch. 343, Laws of 1947, 61 Stat. 503 (July 26, 1947).

163. ELIHU ROOT, THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS 411 (1916). For example, in a statement before the Senate Committee on Military Affairs in March 1902, Root stated:

> Mr. Chairman, this bill contains two series of provisions of primary importance, together with a number of minor provisions on separate subjects. The provisions of primary importance are, first, a series of provisions for the consolidation of the supply departments. The second series of provisions is for the creation of a general staff. Both of these provisions seem to be of very great importance–to be necessary to an effective organization of the army. . . . They are simply a rearrangement of the present official force in such a way as to make that force more effective; and they are merely putting on paper the lessons which I believe have been generally deduced from observation of the working of the present system in the war with Spain.

Id. Later in 1902, Root again addressed the need for a general staff corps in a statement before the House Committee on Military Affairs:

> Let me call your attention for a moment to the reason for asking you to authorize the formation of such a body of officers. We have an army excellent in its personnel . . . .
>
> I can go through the different branches of administration and make the same statements regarding each particular corps, department, and bureau organization . . . Nevertheless, no one can fail to see that there has been in the past, in the administration of the army, something which was out of joint. It is not necessary for me to go into the specification of details . . . The confusion comes from the fact that our organization is weak at the top. It does not make adequate provision for a directing and coordinating control. It does not make provision for an adequate force to see that these branches of the administrative staff and the different branches of the line pull together, so that the work of each one will fit in with the work of every other one . . .
>
> While I say that the organization is weak at the top, I am not criticizing any one at the top. It is weak at the top because the system is defective;

ing control"[164]–defects which the Administration clearly believed could not be remedied solely by executive action. Although Root surely recognized that the President and his military subordinates have exclusive power to direct and control the military, he also recognized that the exercise of this power is subject to the structural and organizational limitations imposed by Congress.

Root's remarks demonstrate that he understood Congress may provide the President with an effective military organization and it may not. The restriction on the selection of senior commanders in House Bill 3308 may be effective and it may not. But it's effectiveness or lack thereof is not a criteria for measuring its constitutionality. From the constitutional standpoint, the only question in terms of the issue at hand is whether the restriction in House Bill 3308 is a rule affecting the structure or relations of command, and whether Congress has the power to make such a rule.

The rules in the legislation creating the General Staff Corps, enacted in response to Root's requests, are quite detailed. Under the legislation, the chief of staff was charged with the supervision of all troops of the line and all staff departments, under the direction of the President or Secretary of War. He was "to be detailed by the President from officers of the Army at large not below the grade of brigadier general."[165] In addition to creating the position of chief of staff, the statute set forth rules in Section 3 that controlled the detailing of officers to the General Staff Corps.[166] With regard

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163. (continued)
because there is a distribution of powers and no coordination of the exercise of powers provided for in the system.

Id. at 419-20.

164. *Id.* at 419.

165. Ch. 553, Laws of 1903, 32 Stat. 830 (Feb. 14, 1903).

166. The statute provided:

> All officers detailed in the General Staff Corps shall be detailed therein for periods of four years, unless sooner relieved. While serving in the General Staff Corps, officers may be temporarily assigned to duty with any branch of the Army. Upon being relieved from duty in the General Staff Corps, officers shall return to the branch of the Army in which they held permanent commission, and no officer shall be eligible to a further detail in the General Staff Corps until he shall have served two years with

to the selection of officers for the Corps, Section 3 established minimum grade requirements but delegated to the President the discretion to prescribe further rules for selection. Thus, this one law contains all three classes of rules under discussion in this section.

More recently, the Goldwater-Nichols Department of Defense Reorganization Act of 1986[167] shows the detail with which Congress has specified command structures and relations, and chains of command in the contemporary military context. The purposes of Goldwater-Nichols set forth in the policy section of the law include:

> (1) to reorganize the Department of Defense and strengthen civilian authority in the Department;
> (2) to improve the military advice provided to the President, the National Security Council, and the Secretary of Defense;
> (3) to place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;
> (4) to ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with the responsibility of those commanders for the accomplishment of missions assigned to their commands;
>
> . . . .
>
> (7) to improve joint officer management policies; and
> (8) otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense.[168]

In furtherance of these legislative purposes, Goldwater-Nichols implemented numerous reforms that affect the core of the military's chain of command and structure. For example, Section 201, codified in part as 10 U.S.C. § 155, concerns the appointment and operation of the Joint Staff under the Chairman of the Joint Chiefs of Staff, and provides, *inter alia*,

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166. (continued)
the branch of the Army in which commissioned, except in case of emergency or in time of war.

Id.

167. Pub. L. 99-433, 100 Stat. 992 (Oct. 1, 1986).

168. *Id.* § 3, 100 Stat. 993.

that: "The Joint Staff shall not operate or be organized as an overall Armed Forces General Staff and shall have no executive authority. The Joint Staff may be organized and may operate along conventional staff lines."[169] Another provision of the Act, codified as 10 U.S.C. § 162 and entitled "Combatant commands: assigned forces; *chain of command*,"[170] provides in subsection (b) that: "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs–(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command."[171]

Similarly, 10 U.S.C. § 163 specifies the role of the Chairman of the Joint Chiefs of Staff with regard to (1) lines of communication between the President, Secretary of War, and commanders of unified and specified combatant commands, and (2) oversight responsibility for combatant commands.[172] And 10 U.S.C. § 164 both establishes qualifications for combatant commanders[173] and defines their powers and duties.

The type of provisions discussed above frequently allow for waivers by the President, as does House Bill 3308. It might be argued that this is done to avoid constitutional encroachment upon the President's authority as commander in chief. However, evidence in support of such a conclusion

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169. 10 U.S.C.S. § 155(e) (LEXIS 1999).

170. *Id.* § 162 (emphasis added).

171. *Id.*

172. A precursor to Goldwater-Nichols is the Department of Defense Reorganization Act of 1958, Pub. L. 85-599, 72 Stat. 514 (Aug. 6, 1958). Among other things this law clarified and shortened the military chain of command. "To facilitate this change the concept of unified and specified combatant commands was established by law, combining forces from the Army, Navy, Air Force, and Marine Corps as the Secretary of Defense saw fit." Peter Murphy & William Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183, 186 (1996).

173. Subsection (a) establishes commander qualifications as follows:

> Assignment as combatant commander.
> (1) The President may assign an officer to serve as the commander of a unified or specified combatant command only if the officer–
> (A) has the joint specialty under section 661 of this title; and
> (B) has completed a full tour of duty in a joint duty assignment (as defined in section 664(f) of this title) as a general or flag officer.
> (2) The President may waive paragraph (1) in the case of an officer if the President determines that such action is necessary in the national interest.

10 U.S.C.S. § 164(a).

is lacking. Indeed, the testimony of Elihu Root would argue to the contrary, as would the difficulties suffered by Polk and Lincoln. The straightforward view is that Congress is not required to allow for waivers to avoid unconstitutional encroachment, but rather that it uses this device in certain military contexts because it understands the need for flexibility in chains of command and in the setting of qualifications for commanders.

Whether derived from the "make rules" clause or the "raise and support" and "provide and maintain" military clauses of the Constitution, Congress has throughout the history of the Republic played a significant and essential role in regulating command and control structures and relations and in delimiting chains of command. Congress has full power in this domain. It has exercised its power in establishing qualifications for selecting military officers, and it has set conditions for the detailing of military personnel. The restriction proposed in House Bill 3308, characterized in any of the three ways discussed in this section, falls within the scope of congressional power. The opponents of House Bill 3308 have not shown to the contrary. What remains to be determined is whether the President or Congress has precedence in the control of these areas.

C. Congress or the President: Which Branch Has Primacy in Regulating the Military?

It should be apparent at this stage of the inquiry that the proposed restriction in House Bill 3308 does not encroach on the exclusive sphere of presidential authority as commander in chief. The bill does not require the President to select a particular person to exercise operational or tactical control over U.S. forces. It does not dictate the ways in which U.S. forces are conducted in UN peace operations. It does not direct the movement, employment, or disposition of U.S. forces, or their discipline. It does not stipulate that UN operations in which U.S. forces participate are carried out according to a certain plan. In other words, House Bill 3308 does not affect the President's core command functions as they have been characterized in the constitutional literature.

Rather, in terms of the classification offered above, House Bill 3308 establishes a general eligibility requirement for selecting personnel to exercise control over U.S. forces in UN peace operations. It creates a limitation on the detailing of U.S. forces to the UN in addition to those already existing. It delimits command relations and the chain of command in the context of UN peace operations. Enacting any of these types of rules is a

proper exercise of Congress's military power to make rules for the government and regulation of the armed forces.

However, the restriction in House Bill 3308 does fall within an area in which Congress and the President have concurrent authority.[174] Constitutional jurisprudence has long accepted the view that the President, as well as Congress, is empowered to regulate the military. The Supreme Court, in *United States v. Eliason*,[175] affirmed that "[t]he power of the executive to establish rules and regulations for the government of the army, is undoubted."[176] The reason for this power was clear to the Court: The consequence of there not being such power would be, in the absence of congressional enactment, "a complete disorganization of both the army and navy."[177] In the absence of the restriction of House Bill 3308, the President is free to exercise his discretion as commander in chief and allow a foreign commander to exercise operational and tactical control over U.S. forces in UN peace operations.[178]

The existence of concurrent power, however, leaves open the question as to who has primacy–Congress or the President. This question with respect to Congress's power to make rules for the military was answered by the Supreme Court in its recent decision in *Loving v. United States*,[179] in which it recognized Congress's plenary power and primacy over the President.[180]

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174. "Concurrence results in particular from the President's authority as Commander in Chief, which authority overlaps the explicit power of Congress to make rules for the government and regulation of the land and naval forces." HENKIN, *supra* note 55, at 94.

175. 16 PET. 291 (1842).

176. *Id.* at 301.

177. *Id.* at 302.

178. This is not to say that the President's discretion is unfettered in the absence of congressional action. He has a constitutional responsibility as commander in chief to maintain meaningful control and direction of American forces, even when they are placed under the operational or tactical control of foreign commanders. *Cf.* Printz v. United States, 521 U.S. __ (1998), in which the Court held that the Brady gun control law impermissibly transferred the President's responsibility to administer the law to local law enforcement officers without meaningful presidential control. In the context of UN peace operations, the need for meaningful executive control is provided for in Presidential Decision Directive 25, *supra* note 38.

179. 517 U.S. 748 (1996).

180. The Court stated:

> Under Clause 14 [the "make rules" clause], Congress, like Parliament, authority. Cf. *United States v. Eliason*, 16 PET. 291, 301 (1842) ("The

The Supreme Court's opinion, though definitive, offers little explanation. However, a rationale for Congress's primacy is offered in a work by G. Norman Lieber,[181] who was The Judge Advocate General of the Army at the turn of the century. Lieber recognized the President's "constitutional authority" to issue army regulations "as Commander in Chief of the Army and as Executive,"[182] but nevertheless argued that the President cannot encroach upon Congress's plenary power over military administration when it chooses to exercise its authority.[183] Lieber thus concedes Con-

180. (continued)

> power of the executive to establish rules and regulations for the government of the army, is undoubted"). This power is no less plenary than other Article I powers, *Solorio*, *supra*, at 441, and we discern no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other, *see Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-221 (1989) (Congress may delegate authority under the taxing power); cf. *Lichter v. United States*, 334 U.S. 742, 778 (1948) (general rule is that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes") (emphasis deleted). Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.

Id. at 767-68.

181. G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898). As Lieber offers an articulate and useful discussion, but one lost in time, it is here quoted at length.

182. *Id.* at 9. (Footnote references are omitted in all quotations from this work.)

183. Lieber states:

> As to the subject matter of regulations for the government of the Army, no distinct line can be drawn separating the President's constitutional power to make them from the constitutional power of Congress "to make rules for the government and regulation" of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it. But when it does not do so, the President's power is of necessity called into action. It is, indeed, of the commonest occurrence for Congress to regulate a subject in part and for the Executive to regulate some remaining part, and this without any pretense of statutory authority, but

gress's power to completely control military administration if it chooses to do so, and supports the proposition of Congress's superior power with an opinion from the War Department.[184]

What is striking is that the issue for Lieber with respect to concurrent power is not whether Congress might encroach on presidential power, but whether the President might encroach on congressional power. He does warn against congressional encroachment, not in the zone of concurrent power over military governance, but only where it would intrude upon the President's exclusive authority to direct military operations as commander in chief.[185] Lieber's view concerning the extent of the President's exclu-

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183. (continued)

> upon the broad basis of constitutional power. We thus have a legislative jurisdiction and, subject to it, an executive jurisdiction extending over the same matter.

Id. at 11-16.

184.

> The War Department has recognized this by its approval of the following views: "The issue of duplicate discharges, or certificates in lieu of lost discharges, is a matter over which both Congress and the President have control, the former by virtue of the power 'to make rules for the government and regulation of the land and naval forces,' and the latter by virtue of his power as Executive and Commander in Chief. The power of Congress is, however, the superior power, and therefore nothing in conflict with any regulation on the subject made by Congress can legally be prescribed by the President, but the fact that the Congress has made a regulation partly covering the subject does not take away from the President his power to make a regulation relating to the part not covered."

Id. at 16 n.2.

185. In making this point, Lieber quotes from Judge Cooley's *Constitutional Limitations*:

> Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but where the governor is made commander in chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature to prescribe rules rules for the executive department; that they must not be such as, under pretense of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which

sive authority as commander in chief connects that exclusive sphere to the core command function of directing military movements.[186]

Addressing the primacy of Congress over the President within the area of concurrent military powers, Lieber offers an explanation of Congress's precedence, which is grounded in the constitutional text: Congress's power is based on an express grant, whereas the President's power is a construction of his position.

> When Congress fails to make regulations with reference to a matter of military administration, but either expressly or silently leaves it to the President to do it, it does not delegate its own legislative power to him, because that would be unconstitutional, but expressly or silently gives him the opportunity to call his executive power into play. It is perhaps not easy to explain why, if regulations may, under the Constitution, be made both by the legislative and executive branches, one should have precedence over the other; but it is to be noticed that the power of Congress is the express one "to make rules for the government and regulation of the land and naval forces," whereas the power of the President is a construction of his position as Executive and commander in chief. The legislative power, by the words quoted, covers the whole field of military administration, but it is not always certain how far the executive power may go. It is not as well defined as the legislative power, but it is undoubtedly

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185. (continued)

> the constitution specifically confides to him the legislature can not directly or indirectly take from his control.

THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 133 (5th ed. 1883), *reprinted in* LIEBER, *supra* note 181, at 17, n.3.

186. He says:

> In speaking of the power of Congress over the administration of the affairs of the Army, it is of course, not intended to include what would properly come under the head of the direction of military movements. This belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives it command over the Army. Here the constitutional power of the President as commander in chief is exclusive.

LIEBER, *supra* note 181, at 18.

> limited to so much of the subject as is not already controlled by the latter. The jurisdiction of the executive power is not, however, within this limit coextensive with that of the legislative power, because the legislative branch of the Government has a constitutional field of operation peculiar to itself, and yet there are army regulations which seem to be of a legislative character. It is because of this that difficulty sometimes occurs–a difficulty which has in the past quite often taken the form of a difference of views between the War Department and the accounting officers of the Treasury.[187]

For Lieber, as for the Supreme Court, Congress's power not only takes precedence over the President's with respect to military administration; the source of this power, the "make rules" clause, is applicable in the broadest sense. Congress's power is plenary.

In summary, the restriction contained in House Bill 3308 falls within the sphere of concurrent congressional and presidential authority over the military, but not within the sphere of exclusive presidential authority. As Congress has primacy within the sphere of concurrent authority, House Bill 3308 does not invalidly encroach upon the President's power as commander in chief.

D. The President's Power to Conduct Diplomacy and Negotiate Agreements: Does it Trump Congress's Power Under the "Make Rules" Clause With Respect to House Bill 3308?

Walter Dellinger argues that House Bill 3308 would unconstitutionally interfere with the President's authority to conduct diplomacy, impermissibly tying his hands in negotiating agreements with respect to U.S. involvement in UN peace operations.[188] However, Dellinger's depiction of the scope of the President's power, with the exception of his limiting the discussion of the power to conduct diplomacy to the context of negotiating international agreements, is so vague and broad as to leave a large gap

187. *Id.* at 18-20.

188. Dellinger says:

> Congress is impermissibly undermining the President's constitutional authority with respect to the conduct of diplomacy. *See, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has

between the principles he asserts and the conclusions he draws. Most importantly, Dellinger does not spell out either the type of agreements involved in these negotiations, the constitutional bases for the presidential power to negotiate such agreements, or Congress's power to limit that presidential power. Definition is necessary in order to place the constitutional issue in its proper context. Only then can Dellinger's claims be adequately addressed.

There are basically three kinds of international agreements: (1) treaties, which are defined for constitutional purposes as international agreements made by the President with the concurrence of a two-thirds vote of the Senate;[189] (2) "congressional-executive agreements," which are made subject to congressional approval, or pursuant to authorizing legislation;[190] and (3) "sole or self-executing executive agreements," which do not depend on congressional approval and are made on the basis of the Presi-

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188. (continued)

> "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive"') (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); "*Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*," 39 Op. Att'y Gen. 484, 486 (1940) (Jackson, Att'y Gen.) (the Constitution "vests in the President as a part of the Executive function" " control of foreign relations"). UN peacekeeping missions involve multilateral arrangements that require delicate and complex accommodation of a variety of interests and concerns, including those of the nations that provide troops or resources, and those of the nation or nations in which the operation takes place. The success of the missions may depend to a considerable extent, on the nationality of the commanding officer, or on the degree to which the operation is perceived as a UN activity (rather than that of single nation or bloc of nations). Given that the United States may lawfully participate in such UN operations, we believe that Congress would be acting unconstitutionally if it were to tie the President's hands in negotiating agreements with respect to command structures for those operations.

Dellinger Memorandum, *supra* note 4, at H10062.

189. U.S. CONST. art. II, § 2.

190. *See* HENKIN, *supra* note 55, at 215-19; John F. Murphy, *Treaties and International Agreements other than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, 23 KAN. L. REV. 221, 222-23 (1975).

dent's independent constitutional powers.[191] Commentators have presented forceful challenges to the making of sole executive and congressional-executive agreements.[192] Such agreements are, nevertheless, generally accepted as a constitutionally permissible means of conducting foreign relations,[193] deriving from any one of several of the President's enumerated powers: his constitutional authority as commander in chief, the treaty power, the power to receive foreign representatives and to recognize governments, the obligation to faithfully execute the laws, or his power as chief executive.[194]

In the context of negotiating agreements, House Bill 3308 can be characterized as placing a restriction on the President's authority to make agreements with the UN regarding the disposition and control of U.S. forces in UN peace operations. Such agreements, which concern military matters and do not involve or require further congressional action, would be "sole executive agreements" negotiated on the basis of the President's authority as commander in chief.[195]

The constitutional question then is, what if any limits can Congress place on the President's power to negotiate sole executive agreements in his capacity as commander in chief? An immediate answer suggests itself from the analysis already undertaken in this article: Congress is constitutionally disabled from imposing such limits to the extent that they would

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191. *See* HENKIN, *supra* note 55, 219-24; Murphy, *supra* note 190.

192. One such attack is Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

193. *See* HENKIN, *supra* note 55, at 215-24. Several important Supreme Court cases impliedly accept executive international agreements of various types. *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United State v. Pink, 315 U.S. 203 (1942); Reid v. Covert, 354 U.S. 1 (1957); Wilson v. Girard, 354 U.S. 254 (1957); Dames & Moore v. Regan, 453 U.S. 654 (1981).

194. *See* Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345-89 *passim* (1955); Murphy, *supra* note 190, at 233.

195. It is fair to say that the issue of operational and tactical control of U.S. forces in a multilateral operation is much more in the nature of a military question rather than one of foreign diplomacy. The ink spilled on this subject has been in military manuals, books, and articles, not foreign relations treatises. *See* B. Franklin Cooling, *Interoperability*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN MILITARY 1737-69 (John E. Jessup & Louise B Ketz eds., 1994) [hereinafter Jessup & Ketz]; William J. Coughlin & Theodore C. Mataxis, *Coalition Warfare*, *in* Jessup & Ketz, *supra*, at 1709-36; U.S. JOINT CHIEFS OF STAFF PUBLICATION No. 3-0, DOCTRINE FOR JOINT OPERATIONS; U.S. JOINT CHIEFS OF STAFF PUBLICATION No. 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS (1994); U.S. DEPT. OF THE ARMY, FIELD MANUAL 100-23: PEACE OPERATIONS (1994); U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-8: COMBINED ARMY OPERATIONS (1993).

encroach upon the President's exclusive power as commander in chief; but it is not disabled from doing so within the sphere of concurrent military powers. As the restriction in House Bill 3308 falls within the sphere of concurrent military powers, it is a permissible restriction on the President's authority to negotiate agreements with the UN.

Stepping back from the quick answer, the analysis can be fleshed out by addressing more fully the question of limits on the President's power to negotiate international agreements. A good starting point is the "sole organ" theory of the President's foreign affairs power. This theory has often and erroneously been invoked as an expression of plenary and exclusive presidential power over foreign affairs. It was first enunciated by John Marshall with respect to an extradition controversy when he was serving in the House of Representatives: "The President is sole organ of the nation in its external relations, and its sole representative with foreign nations."[196] However, the theory, as fully set forth by Marshall, does not imply exclusive control of foreign policy by the President:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him . . . .
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty . . . .
>
> Ought not [the President] to perform the object, although, the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the Executive department, to execute the contract by any means it possesses.[197]

The controversy on which Marshall was commenting concerned an extradition demand by Great Britain under an existing treaty. The issue was whether President John Adams could surrender one Jonathan Robbins to British authorities without a judicial hearing. In his remarks, Marshall was

196. 10 ANNALS OF CONG. 613 (1800).
197. *Id.* at 613-14.

clear that Congress could "prescribe the mode" of executive action with regard to matters of "external relations."

As intended by Marshall and generally understood since, the "sole organ" theory does no more than characterize the President as the sole spokesman or representative "to make or receive communications on behalf of the United States,"[198] and by that to conduct diplomacy and negotiate international agreements. It "does not necessarily imply that the President has the authority to determine the content of what he should communicate, to make national policy."[199] As Charles Lofgren has noted, "John Marshall, at least in 1800, evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker. Marshall indicated that Congress could modify the President's diplomatic role."[200] Similarly, another eminent constitutional scholar, Edward Corwin, has concluded that "while the President alone may address foreign governments and be addressed by them, yet in fulfilling these functions, he is, or at least may be, the mouthpiece of a power of decision that resides elsewhere."[201] The authorities cited by Dellinger do not suggest more. They do not imply that only the President can determine the content of the diplomacy he conducts or the agreements he negotiates. If constraints could not be imposed on the President's power to negotiate agreements, an important constitutional check would not exist and the President would have virtually dictatorial powers in the sphere of foreign relations.

That Congress can control presidential power to make international agreements by way of legislation has long been understood. Quincy Wright, for example, explained the congressional power to restrict international agreements as follows:

> To discover the subject on which the President may make international agreements, we must examine his constitutional powers. For this purpose we may distinguish his powers as (1) head of the administration, (2) as commander in chief, (3) as the representative organ in international relations. The President is Chief Executive and head of the Federal administration with power to direct and remove officials and the duty to "take care that the laws be faithfully executed." But the exercise of these

198. HENKIN, *supra* note 55, at 41.

199. *Id.*

200. CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 203 (1986).

201. CORWIN, *supra* note 6, at 208.

> powers, and the meeting of this responsibility is dependent upon the laws which Congress may pass, organizing the administration and defining the powers and responsibilities of office. *In this capacity, therefore, the President may only make international agreements, under authority expressly delegated to him by Congress,* or the treaty power*, or agreements of a nature which he can carry out within the scope of existing legislation.* Congress has often delegated power to the President to make agreements within the scope of a policy defined by statute, on such subjects as postal service, patents, trademarks, copyrights and commerce. Such agreements appear to be dependent for their effectiveness upon the authorizing legislation, and are terminable, both nationally and internationally, at the discretion of Congress.[202]

The Supreme Court has also recognized limits on the making of international agreements. In *Reid v. Covert*,[203] the Court stated:

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined.[204]

Thus, the difficulty for analysis comes not in accepting that limitations may be imposed on the President's power to conduct diplomacy and negotiate agreements, but in determining the constitutionally permissible scope of those limitations.

With respect to negotiations involving military agreements that are based on the President's power as commander in chief, Congress can limit the power of the President to conclude international agreements through its power to make rules for the government and regulation of the armed forces.[205] To the extent that Congress's power under the "make rules" clause overlaps the President's power as commander in chief, the President's power to negotiate military agreements can be controlled by Congress.

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202. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 235-36 (1922) (emphasis added).

203. 354 U.S. 1 (1957).

204. *Id.* at 16-17.

205. Mathews, *supra* note 194, at 382.

As one commentator concludes after a detailed discussion of the scope of that limiting power,[206] "so long as the safety of the United States is not endangered, Congress has power to limit the size and disposition of the armed forces, with a consequent inhibiting effect upon the President's power to take military action."[207] Accordingly, "Congress can limit the effective exercise of the constitutional powers of the President by refusing appropriations or necessary legislation." Under these principles, there is no basis to argue that House Bill 3308 is an unconstitutional encroachment on presidential power.

A few examples will illustrate Congress's power to control presidential action with respect to military and national security matters. Two appropriations riders brought an end to U.S. combat activities in Southeast Asia by prohibiting the expenditure of funds for such activities after 15 August 1973.[208] The Boland Amendments in the 1980s placed severe limitations on the use of funds to aid the *Contras*, who opposed the Sandinista government in Nicaragua during the 1980s.[209] More recent legislation restricted the use of funds for U.S. military involvement in Somalia[210] and Rwanda;[211] a provision in the Arms Export Control Act forced the President to impose sanctions on India and Pakistan after those countries detonated atomic bombs in May 1998.[212]

The first example put severe limits on the President's ability to negotiate agreements for the withdrawal of armed forces from Viet Nam. The second cut off the President's legal power to provide arms to the *Contras*.

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206. *Id.* at 382-85.

207. *Id.* at 388.

208. Pub. L. 93-50, § 307 (July 1, 1973), 87 Stat. 99; Pub. L. 93-52, § 106 (July 1, 1973), 87 Stat. 130. Of course, these measures can also be viewed as affecting the President's military powers.

209. Pub. L. 97-377, § 793 (Dec. 21, 1982), 96 Stat. 1865; Pub. L. 99-169, § 105(a) (Dec. 4, 1985), 99 Stat. 1003.

210. Pub. L. 103-139, § 8151(b) (Nov. 11, 1993), 107 Stat. 1476-77; Pub. L. 103-335, § 8135 (Sept. 30, 1994), 108 Stat. 2653-54. The first of these statutes also provided that "United States combat forces in Somalia shall be under the command and control of United States commanders under the ultimate direction of the President of the United States." Pub. L. 103-139, § 8151(b).

211. Pub. L. 103-335, Title IX (Sept. 30, 1994), 108 Stat. 2659-60.

212. Arms Export Control Act §§ 102(b)(1), (b)(2). The President acted with respect to India in Presidential Determination 98-22 (May 13, 1998) *available at* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/5/13/8.text.1>, and with respect to Pakistan in Presidential Determination 98-25 (May 30, 1998) *available at* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/6/2/11.text.1>.

The third and fourth significantly restricted presidential discretion with regard to peace operations in those countries. The last example gave the President no discretion to negotiate a resolution of the India-Pakistan nuclear crisis without further congressional action. All of the examples, in Dellinger's words substantially "tied the hands" of the President. But can it be said that the legislation was, therefore, unconstitutional? If not, why should House Bill 3308 be unconstitutional for tying the President's hands with respect to U.S. involvement in UN peace operations?

House Bill 3308 can be viewed as having an effect similar to laws that control other kinds of military agreements negotiated between the United States and foreign nations or international organizations. For example, the negotiations for status of forces agreements–agreements defining the status, rights, and immunities of U.S. forces serving on foreign soil–are constrained by a variety of statutes.[213] As explained by one experienced negotiator of status of forces agreements, "[w]ithout a treaty, the United States could only agree to status provisions supported by federal law and regulations and applicable state law."[214] The subject matter of these agreements involve many concerns that are not of a military nature but nevertheless can be extremely sensitive. They include entry and departure procedures, wearing of uniforms, carrying of arms, criminal and civil jurisdiction, arrest and service of process, customs, duties and taxes, use of transportation, use of currency and banking facilities, work permit requirements, local procurement, and use of local labor.[215] What Dellinger says about the "delicate and complex accommodation of a variety of interests"[216] in negotiations concerning UN peace operations can be said with equal force in the negotiation of status of forces agreements.

In developing a draft text during the negotiation of status of forces agreements, among the several factors that "must be considered" is "United States law."[217] If negotiations on status of forces agreements are subject to the constraints imposed by "United States law," why should that not be the case with negotiations to join in a UN peace operation? The UNPA already imposes constraints on agreements to detail U.S. forces to UN peace operations, constraints as to number and use.[218] To that extent,

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213. *See* Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 140 n.19, 145 n.33, 149 n.36, 151 n.42, 152-53 n.47, 153 n. 49 (1994).

214. *Id.* at 140 n.19.

215. *Id.* at 147-52.

216. Dellinger Memorandum, *supra* note 4, at H10062.

217. Erickson, *supra* note 213, at 146.

218. *See supra* text accompanying notes 145 and 146.

the President's hands are already tied in conducting UN diplomacy. House Bill 3308 simply adds another constraint, one that is within Congress's power to enact as a rule for the government and regulation of the armed forces. The restriction may not be a good idea; but it is not an unconstitutional limitation on the President's power to conduct diplomacy and negotiate agreements.

E. Conclusion

The President has exclusive authority as commander in chief to control and direct military operations. This authority, however, is subject to his duty to take care that the laws be faithfully executed, including those which Congress can enact pursuant to its power to make rules for the government and regulation of the armed forces. Among the classes of rules which are encompassed by this congressional power are: (1) rules delimiting command and control structures and relations, and the chain of command; (2) rules establishing conditions for the detailing of U.S. military personnel; and (3) rules establishing eligibility qualifications for the selection of commanders of U.S. forces. The restriction in House Bill 3308 falls within the scope of all three of those classes of rules and is similar to prior laws of those types.

In the absence of legislative restriction, the President has discretion to determine the qualifications for selecting a commander charged with the operational or tactical control of U.S. armed forces serving in UN peace operations. However, this power is not exclusive. Congress may choose to enact its own selection criteria under the "make rules" clause, and if it does so, that enactment takes precedence over and limits presidential discretion. Congress's rulemaking power in matters of military administration is plenary. The kind of restriction contained in House Bill 3308 is neither beyond Congress's power to legislate nor an unconstitutional encroachment upon the President's authority to direct military operations.

House Bill 3308 does not unconstitutionally infringe upon the President's power to conduct diplomacy and negotiate international agreements. The President has exclusive power to conduct and control foreign diplomacy, negotiations, and communications. But the President is not the sole determiner of the content of that diplomacy. Congress has a role in determining foreign policy, particularly when that policy involves the disposition of military forces. The restriction in House Bill 3308, being a constitutionally proper exercise of Congress's power to make rules for the

government and regulation of the armed forces, is a constitutionally permissible constraint on the President's power to conduct diplomacy and negotiate military agreements with the UN for the disposition of American forces in peace operations.

It was noted at the beginning of this analysis that there was a potential issue involving the scope of Congress's power of the purse–the argument that Congress cannot do indirectly what it is barred from doing directly. However, as Congress has the direct power to enact the restriction contained in House Bill 3308, there is no infirmity in its doing so indirectly through the spending power. Accordingly, the issue of indirect action need not be addressed.

For the foregoing reasons, Congress has the constitutional authority to prohibit members of the United States armed forces from serving under a foreign commander.

IV. Post Script: Congressional Efforts to Restrict the President's Authority to Place U. S. Armed Forces Under Foreign Commanders in Multilateral Operations–An Unwise Policy

That a particular legislative proposal is constitutional does not, of course, mean that it is a good idea. In this instance a comprehensive analysis of the policy considerations implicated by the type of restriction contained in House Bill 3308 is beyond the scope of this article. Nevertheless, it would be remiss not to express the position that the restriction proposed in House Bill 3308 is unwise. In short, although the Clinton Administration was in error in asserting that the restriction unconstitutionally infringes on the President's authority as commander in chief, President Clinton's veto was correct as a matter of policy.

It became apparent during 1993 and 1994 that UN peace operations are not a panacea for solving the world's problems. Even when such operations are desirable, U.S. participation may not be appropriate. This change in perspective from the overly optimistic attitudes of the immediate post-Cold War era was reflected in the Clinton Administration's retreat from the policy reflected in the proposed Presidential Decision Directive 13, which had placed high hopes on the capacity of the UN to make or keep peace in international trouble spots, to the much more cautious policy

guidelines finally enunciated in Presidential Decision Directive 25.[219] But House Bill 3308 and its siblings sought to carry this shift in mood to an extreme by effectively precluding the United States from becoming involved in UN peace operations, regardless of their nature and size, unless they are led by U.S. commanders.

Much of the "popular appeal" of House Bill 3308-type restrictions appear to rest on the faulty assumption that U.S. troops will inevitably be drawn into significant front-line combat roles in UN operations, such as occurred in Somalia. However, the overwhelming majority of UN peace operations in which U.S. forces participate do not involve hostilities, such as in Somalia, where the risk of combat casualties is relatively high. Instead, they involve more traditional operations where U.S. forces (often quite small in number) are supporting UN observer or peacekeeping missions that are operating with the consent of the relevant parties, and where, accordingly, the risk of casualties is minimal.

For example, in the UN Observer Mission in Georgia (UNOMIG) and in the UN Truce Supervision Organization (UNTSO), which monitors cease-fires along Israel's borders, there are just two Americans serving as military observers.[220] Similarly, the UN Iraq-Kuwait Observer Mission (UNIKOM) and the United Nations Mission for the Referendum in Western Sahara (MINURSO) use just eleven and fifteen U.S. observers, respectively.[221] There is no good foreign policy or military rationale for an American presence to be foreclosed in such missions, especially because

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219. As noted *supra* in the text accompanying note 31, the proposed Presidential Decision Directive 13 contemplated a more intensive American involvement in UN peace operations, including the prospect of American forces regularly serving under foreign commanders. In contrast, the policy finally adopted by the Clinton Administration in Presidential Decision Directive 25 defined stringent conditions for establishing peace operations and envisioned a much more limited U.S. role in such operations. It also set forth detailed criteria for determining under what circumstances and to what degree U.S. forces would be permitted to serve under foreign commanders. *See* Presidential Decision Directive 225, *supra* note 38.

220. These figures are current as of November 1998. Deployment figures for UN peace operations broken down by contributing country, as well as much other information about those operations, are posted on the Internet site for the UN Department of Peacekeeping. *See* United Nations, *UN Peacekeeping Operations* (visited Nov. 23, 1999) <http://www.un.org/Depts/dpko/>.

221. These figures are current as of November 1998. *See id.*

even token U.S. participation may have significant symbolic and political significance.[222]

More importantly, imposing broad restrictions on the President's authority to place U.S. forces under foreign command, whether in UN operations or otherwise, ignores the fundamental need for flexibility in the conduct of foreign affairs and diplomacy. Such restrictions have the potential to limit the President's ability, as commander in chief, to establish command and control relations that best meet the exigencies of a particular situation.

Indeed, history shows that throughout the Twentieth Century, the President and his military advisors have occasionally deemed it appropriate to place U.S. forces under foreign commanders, at least temporarily. American troops served under the foreign commanders in both World Wars, in the multinational intervention in the Russian Civil War in 1918, and during the war in Vietnam.[223] In 1991, during the Gulf War, Gen. Norman Schwarzkopf placed U.S. forces under the operational control of a French general.[224] Under existing security arrangements in Korea, a U.S. Army division serving under the UN flag in South Korea is under the operational control of a South Korean general. In many if not all of these operations, forces from other countries have also been placed under U.S. commanders when deemed appropriate.[225] As former Colorado Representative David E. Skaggs has cogently concluded:

> [T]his history demonstrates how from time to time the President's ability to place our forces under an ally's operational control–or to take such control of an ally's forces–has enhanced [the United States'] ability to establish and maintain alliances and to

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222. Similarly, there will undoubtedly be situations in the future in which U.S. personnel are needed to provide only logistic support, such as transportation or communications. Again, in such circumstances, there is no reason to impose a blanket prohibition on such deployments simply because the broader military operation is under a foreign commander.

223. Cooling, *supra* note 195, 1709-69 (discussing these instances); Coughlin & Mataxis, *supra* note 1995, 1709-69 (discussing these instances). *See* George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 441 n.53 (1994) (providing additional references).

224. *See* 142 CONG. REC. H10061 (daily ed. Sept. 5, 1996) (statement of Rep. Skaggs).

225. These instances are also reviewed in the sources referenced in note 225, *supra*.

> fashion international coalition efforts when circumstances make that the best way for us to pursue U.S. national interests.[226]

Representative Skaggs's comment points to a further concern: the potential for compromising U.S. diplomatic initiatives with regard to peace operations caused by the perception that the U.S. is uncompromisingly separating itself from the rest of the international community through restrictions of the type contained in House Bill 3308. The passage of any legislation similar to House Bill 3308 would gratuitously weaken the ability of the United States to persuade other nations to engage in multilateral military actions, whether it be under American leadership or without U.S. participation. Passage of such legislation would effectively send a message to other countries that the United States does not trust the foreign officers.

Yet, at the same time the United States has a significant interest in persuading other countries to become more (rather than less) involved in sharing military burdens overseas. Although there may be a certain domestically popular appeal to legislation providing that only American officers can exercise operational control over U.S. troops in UN operations, it is difficult to perceive how such legislation could do anything but weaken the ability of the President to persuade foreign nations to place their troops under the operational control of foreign commanders in future crises, whether they be American commanders or commanders from third countries.[227]

Moreover, the passage of such legislation has the potential, over time, to undermine the comity and mutual respect between co-equal branches of government in an area where it is of paramount importance for the country that the Congress and the President work together. Although such legislation is not unconstitutional, it would effectively constitute a decision by the Congress to deny the President authority that, in a broad, non-legal sense has traditionally been considered to lie within the scope of the President's discretion to conduct operations as commander in chief. This can only add an additional dimension for conflict between the two branches of government in times of crisis and raise the potential for skewing the political and

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226. 142 CONG. REC. H10061.

227. Supporters of House Bill 3308 noted that the legislation contained a waiver provision that would have given the President the authority to place U.S. forces under foreign command if the President: (a) certifies to Congress that it is "in the national security interests of the United States to place any element of the armed forces under UN operational or tactical control," and (b) provides the Congress with a detailed report describing, *inter alia*,

military responses to future crises away from those which may be most effective.

House Bill 3308 identified problems with UN command and control structures as a justification for the blanket restriction contained in the bill.[228] Such a restriction, however, is a very blunt instrument to use to address issues that should be considered case by case, taking account of the particular nature of each operation, the degree of risk involved (for example, there is a vast difference between enforcement operations and observer missions), the specific personnel and command structure proposed for a given operation, and the lessons learned from earlier missions. It also fails to account for the highly developed doctrine and understanding acquired by the U.S. military in its experience with interoperability in joint and coalition operations.[229]

The national interest is best served by continuing to allow the President broad flexibility, as commander in chief, to deploy U.S. forces under such operational and tactical control arrangements as the President and his military advisors believe will best serve the mission at hand. As General David C. Jones (Ret.), a former Chairman of the Joint Chiefs of Staff, and several other high-ranking retired military officers eloquently stated during the debate on House Bill 3308:

> In the post-Cold War world, it will remain essential that the President retain the authority to establish command arrangements

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227. (continued) the national security interests at issue, the proposed mission of the U.S. armed forces to be deployed, the precise command and control relationships to be employed, and the "exit strategy for the complete withdrawal of the United States forces involved." H.R 3308 subsections 405(b) and (d), *reprinted in* the Appendix, *infra*. In response, as one opponent of House Bill 3308 argued, "the waiver and certification requirements in this bill are not workable. As drawn, they would require the President to see the unforeseeable, or to be forced to choose between a dissembling assertion of knowing what cannot be known and an improper abdication of constitutional authority." 142 CONG. REC. H10060 (daily ed. Sept. 5, 1996) (remarks of Rep. David E. Skaggs). However, aside from the question of whether the waiver provision is workable as a practical matter, it is unlikely that such a provision would have overcome the perception in other countries that House Bill 3308 was designed to ensure that U.S. armed forces would not serve under non-U.S. nationals in UN peace operations, even though the U.S. would still expect foreign military personnel to serve under American commanders when the U.S. was willing to participate in such missions.

228. H.R. 3308, sec. 2(a)(5).

229. For examples of the level of sophistication of the military's understanding of joint operations, including peacekeeping missions, see the military manuals and articles referenced *supra* in note 195.

> best suited to the needs of future operations. As commander in chief, he will never relinquish command of U.S. military forces. However, from time to time it will be necessary and appropriate to temporarily subordinate elements of our forces to the operational control of competent commanders from allied or other foreign countries. As retired military officers, we can personally attest that it is essential to the effective operation of future coalitions that the President retain this authority. Just as we will frequently have foreign forces serving under the operational control of American commanders, so must we be able to negotiate reciprocal arrangements freely.[230]

The Committee[231] concurs with the views of General Jones and his fellow former officers.

To conclude, although House Bill 3308 is constitutional, the adoption of the type of restriction contained in that bill would undermine rather than advance U.S. foreign policy and national security interests.

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230. Letter from David C. Jones, General, U.S. Air Force (Ret), David E. Jeremiah, Admiral, U.S. Navy (Ret), Glenn K. Otis, General, U.S. Army (Ret), W.E. Boomer, General, U.S.M.C. (Ret), B.E. Trainor, Lt. Gen, U.S.M.C. (Ret), to Hon. Newt Gingrich (Feb. 15, 1995) *reprinted in* 141 CONG. REC. H1792 (daily ed. Feb. 15, 1995).

231. The Committee on Military Affairs and Justice of the Association of the Bar of the City of New York.

APPENDIX

Text of House Bill 3308

H.R. 3308: 104th CONGRESS, 2d Session

AN ACT

To amend title 10, United States Code, to limit the placement of United States forces under United Nations operational or tactical control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'United States Armed Forces Protection Act of 1996.'

SEC. 2. FINDINGS AND CONGRESSIONAL POLICY.

(a) FINDINGS-Congress finds as follows:

(1) The President has made United Nations peace operations a major component of the foreign and security policies of the United States.

(2) The President has committed United States military personnel under United Nations operational control to missions in Haiti, Croatia, and Macedonia that could endanger those personnel.

(3) The President has deployed over 22,000 United States military personnel to the former Yugoslavia as peacekeepers under NATO operational control to implement the Dayton Peace Accord of December 1995.

(4) Although the President has insisted that he will retain command of United States forces at all times, in the past this has meant administrative control of United States forces only, while operational control has been ceded to United Nations commanders, some of whom were foreign nationals.

(5) The experience of United States forces participating in combined United States-United Nations operations in Somalia, and in combined United-Nations-NATO operations in the former Yugoslavia, demonstrate that prerequisites for effective military operations such as unity of com-

mand and clarity of mission have not been met by United Nations command and control arrangements.

(6) Despite the many deficiencies in the conduct of United Nations peace operations, there may be unique occasions when it is in the national security interests of the United States to participate in such operations.

(b) POLICY-It is the sense of Congress that--

(1) The President should fully comply with all applicable provisions of law governing the deployment of the Armed Forces of the United States to United Nations peacekeeping operations;

(2) The President should consult closely with Congress regarding any United Nations peace operation that could involve United States combat forces and that such consultations should continue throughout the duration of such activities;

(3) The President should consult with Congress before a vote within the United Nations Security Council on any resolution which would authorize, extend, or revise the mandate for any such activity;

(4) In view of the complexity of United Nations peace operations and the difficulty of achieving unity of command and expeditious decision making, the United States should participate in such operations only when it is clearly in the national security interest to do so;

(5) United States combat forces should be under the operational control of qualified commanders and should have clear and effective command and control arrangements and rules of engagement (which do not restrict their self-defense in any way) and clear and unambiguous mission statements; and

(6) None of the Armed Forces of the United States should be under the operational control of foreign nationals in United Nations peace enforcement operations except in the most extraordinary circumstances.

(c) DEFINITIONS-For purposes of subsections (a) and (b):

(1) The term 'United Nations peace enforcement operations' means any international peace enforcement or similar activity that is authorized by the United Nations Security Council under chapter VII of the Charter of the United Nations.

(2) The term 'United Nations peace operations' means any international peacekeeping, peacemaking, peace enforcement, or similar activity

that is authorized by the United Nations Security Council under chapter VI or VII of the Charter of the United Nations.

SEC. 3. PLACEMENT OF UNITED STATES FORCES UNDER UNITED NATIONS OPERATIONAL OR TACTICAL CONTROL

(a) IN GENERAL-

(1) Chapter 20 of title 10, United States Code, is amended by inserting after section 404 the following new section:

'Sec. 405. Placement of United States forces under United Nations operational or tactical control: limitation

'(a) LIMITATION-Except as provided in subsections (b) and (c), funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control, as defined in subsection (f).

'(b) EXCEPTION FOR PRESIDENTIAL CERTIFICATION-

'(1) Subsection (a) shall not apply in the case of a proposed placement of an element of the armed forces under United Nations operational or tactical control if the President, not less than [fifteen] days before the date on which such United Nations operational or tactical control is to become effective (or as provided in paragraph (2)), meets the requirements of subsection (d).

'(2) If the President certifies to Congress that an emergency exists that precludes the President from meeting the requirements of subsection (d) [fifteen] days before placing an element of the armed forces under United Nations operational or tactical control, the President may place such forces under such operational or tactical control and meet the requirements of subsection (d) in a timely manner, but in no event later than [forty-eight] hours after such operational or tactical control becomes effective.

'(c) ADDITIONAL EXCEPTIONS-

'(1) Subsection (a) shall not apply in the case of a proposed placement of any element of the armed forces under United Nations operational or tactical control if Congress specifically authorizes by law that particular

placement of United States forces under United Nations operational or tactical control.

‘(2) Subsection (a) shall not apply in the case of a proposed placement of any element of the armed forces in an operation conducted by the North Atlantic Treaty Organization.

‘(d) PRESIDENTIAL CERTIFICATIONS-The requirements referred to in subsection (b)(1) are that the President submit to Congress the following:

‘(1) Certification by the President that it is in the national security interests of the United States to place any element of the armed forces under United Nations operational or tactical control.

‘(2) A report setting forth the following:

‘(A) A description of the national security interests that would be advanced by the placement of United States forces under United Nations operation or tactical control.

‘(B) The mission of the United States forces involved.

‘(C) The expected size and composition of the United States forces involved.

‘(D) The precise command and control relationship between the United States forces involved and the United Nations command structure.

‘(E) The precise command and control relationship between the United States forces involved and the commander of the United States unified command for the region in which those United States forces are to operate.

‘(F) The extent to which the United States forces involved will rely on forces of other countries for security and defense and an assessment

of the capability of those other forces to provide adequate security to the United States forces involved.

'(G) The exit strategy for complete withdrawal of the United States forces involved.

'(H) The extent to which the commander of any unit of the armed forces proposed for placement under United Nations operational or tactical control will at all times retain the right-

> '(i) to report independently to superior United States military authorities; and
>
> '(ii) to decline to comply with orders judged by the commander to be illegal or beyond the mandate of the mission to which the United States agreed with the United Nations, until such time as that commander receives direction from superior United States military authorities with respect to the orders that the commander has declined to comply with.

'(I) The extent to which the United States will retain the authority to withdraw any element of the armed forces from the proposed operation at any time and to take any action it considers necessary to protect those forces if they are engaged.

'(J) The anticipated monthly incremental cost to the United States of participation in the United Nations operation by the United States forces which are proposed to be placed under United Nations operational or tactical control and the percentage that such cost represents of the total anticipated monthly incremental costs of all nations expected to participate in such operation.

'(e) CLASSIFICATION OF REPORT- A report under subsection (d) shall be submitted in unclassified form and, if necessary, in classified form.

'(f) UNITED NATIONS OPERATIONAL OR TACTICAL CONTROL- For purposes of this section, an element of the Armed Forces shall

be considered to be placed under United Nations operational or tactical control if–

'(1) that element is under the operational or tactical control of an individual acting on behalf of the United Nations for the purpose of international peacekeeping, peacemaking, peace-enforcing, or similar activity that is authorized by the Security Council under chapter VI or VII of the Charter of the United Nations; and

'(2) the senior military commander of the United Nations force or operation is a foreign national or is a citizen of the United States who is not a United States military officer serving on active duty.

'(g) INTERPRETATION- Nothing in this section may be construed -

'(1) as authority for the President to use any element of the Armed Forces in any operation;

'(2) as authority for the President to place any element of the Armed Forces under the command or operational control of a foreign national; or

'(3) as superseding, negating, or otherwise affecting the requirements of section 6 of the United Nations Participation Act of 1945 (22 U.S.C. § 287d).

(2) The table of sections at the beginning of subchapter I of such chapter is amended by adding at the end the following new item:

'405. Placement of United States forces under United Nations operational or tactical control: limitation.

(b) EXCEPTION FOR ONGOING OPERATIONS IN MACEDONIA AND CROATIA- Section 405 of title 10, United States Code, as added by subsection (a), does not apply in the case of activities of the Armed Forces that are carried out–

(1) in Macedonia as part of the United Nations force designated as the United Nations Preventive Deployment Force (UNPREDEP) pursuant to United Nations Security Council Resolution 795, adopted December

11, 1992, and Resolution 983, adopted March 31, 1995, and subsequent reauthorization Resolutions; or

(2) in Croatia as part of the United Nations force designated as the United Nations Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) pursuant to United Nations Security Council Resolution 1037, adopted January 15, 1996, and subsequent reauthorization Resolutions.

SEC. 4. REQUIREMENT TO ENSURE THAT ALL MEMBERS KNOW MISSION AND CHAIN OF COMMAND.

(a) IN GENERAL- Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

'656. Members required to be informed of mission and chain of command

'The commander of any unit of the armed forces assigned to an operation shall ensure that each member of such unit is fully informed of that unit's mission as part of such operation and of that member's chain of command.

(b) CLERICAL AMENDMENT-The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

'656. Members required to be informed of mission and chain of command.

SEC. 5. PROHIBITION ON REQUIREMENT FOR MEMBERS OF THE ARMED FORCES TO WEAR UNIFORM ITEMS OF THE UNITED NATIONS.

(a) IN GENERAL-Chapter 45 of title 10, United States Code, is amended by adding at the end the following new section:

'Sec. 777. Insignia of United Nations: prohibition on requirement for wearing

'No member of the armed forces may be required to wear as part of the uniform any badge, symbol, helmet, headgear, or other visible indicia or insignia which indicates (or tends to indicate) any allegiance or affiliation to or with the United Nations except in a case in which the wearing of

such badge, symbol, helmet, headgear, indicia, or insignia is specifically authorized by law with respect to a particular United Nations operation.

(b) CLERICAL AMENDMENT-The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

‘777. Insignia of United Nations: prohibition on requirement for wearing.

Passed the House of Representatives by a vote of 299 to 109 on 5 September 1996.

DETERRENCE AND THE THREAT OF FORCE BAN: DOES THE UN CHARTER PROHIBIT SOME MILITARY EXERCISES?

MAJOR MATTHEW A. MYERS, SR.[1]

"*The pen is mightier than the sword.*"[2]

I. Introduction

With the stroke of a pen, the drafters of the United Nations (UN) Charter and creators of the United Nations attempted to ban the "threat or use of force" as a means of resolving disputes between nations.[3] In an effort to ban wars,[4] however, the drafters used language that arguably bans

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2. E.D. HIRSCH, JR. ET AL., THE DICTIONARY OF CULTURAL LITERACY 54 (1988). The authors interpret this old proverb to mean: "Human history is influenced more by the written word than by warfare." *Id*. In this article the proverb is used to highlight the fact that diplomacy and legal rules may be more effective than military force.

3. *See* discussion *infra* Part II.A. The UN CHARTER, Article 2, paragraph 4, mandates, in part, the following: "All Members shall refrain in their international relations from the threat or use of force . . . ."

4. The UN Charter was drafted during World War II and was focused on preventing "a third recurrence" of World War. EDWARD STETTINIUS, CHARTER OF THE UNITED NATIONS, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 9-10 (1945).

all uses of force and even all threats to use force.[5] If read and applied literally, the ban on threats of force might make a United States military exercise illegal when a purpose of the exercise is to threaten, deter, or send a warning message to another nation.[6] That message is often underscored by a demonstration of the United States' ability to mass forces and project vast amounts of lethal combat power in a short period of time whenever and wherever necessary.[7]

This article explores the meaning of Article 2(4) of the UN Charter within the context of a military exercise that is designed to influence the behavior of another nation. The article specifically focuses on the joint and combined United States military exercise known as "TEAM SPIRIT," which took place in South Korea, or the Republic of Korea (ROK), each year from 1976 to 1996.[8] The timing and scope of this exercise was often related to efforts by the United States Government to influence North Korean policymakers.[9] The article identifies the relevant UN Charter provisions and provides some factual background about why the United States conducted the TEAM SPIRIT maneuvers in South Korea. The article then discusses the methods of interpreting international documents, and applies each of the steps from the various methods of interpretation. After analyz-

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4. (continued) During the ratification of the UN Charter, Congressman Bloom, a member of the House of Representatives and a member of the United States delegation to the San Francisco Conference, included the following language in his address to his colleagues in the House: "Great nations linked together in victorious war are now joined in an unbreakable chain of unity for the preservation of the peace they have won." 91 CONG. REC. 7298 (1945).

5. *See* discussion *infra* Part II.A.

6. There are political and economic reasons for caring about whether international conduct is legal. As Professor Moore notes, "Americans rightly expect their nation to act lawfully in international affairs." JOHN MOORE, LAW AND THE GRENADA MISSION 1 (1984). He observes that perceptions of lawfulness "can assist greatly in modern politico-military actions" while perceptions of illegality "can be equally harmful." *Id*. at 3 n.3. One strong economic reason for acting lawfully is to avoid an adverse judgment and damages imposed by the International Court of Justice (ICJ). In 1986, the ICJ ruled in favor of Nicaragua in its claims against the United States, including violations of Article 2(4), but deferred ruling on Nicaragua's demand for more than $370,200,000 in damages. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27).

7. Aspects of the "U.S. approach" include deterrence by forward deployments and "the demonstrated will and ability to commit more forces in the event of a crisis." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NATIONAL DEFENSE UNIVERSITY, STRATEGIC ASSESSMENT: FLASHPOINTS AND FORCE STRUCTURE 237 (1996) [hereinafter INSTITUTE FOR NATIONAL STRATEGIC STUDIES].

8. As discussed, *infra*, the TEAM SPIRIT exercises were conducted annually from 1976 until 1996, with the exception of the years 1994 and 1995. *See infra* notes 36, 39-42.

9. *See infra* notes 39-40.

ing the relevant laws, rules, agreements, judicial opinions, practices of nations, and other considerations, the article reaches conclusions about whether U.S. military exercises designed, at least in part, to send a warning message to another nation are prohibited by Article 2(4).

II. Factual and Legal Background

To determine whether United States military activities in Korea are legal, it is necessary to identify the relevant law, the reasons the United States military is in South Korea, and what the U.S. military does there. This section addresses each of these areas in turn.

A. The Prohibition on Threats or Uses of Force

The UN Charter bans threats of force in Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[10]

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10. UN CHARTER art. 2, para 4. The "Purposes of the United Nations" are set forth in Article 1:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Id. art. 1.

States may only resort to threats or uses of force to exercise "individual or collective self-defense"[11] pursuant to Article 51.[12] The Charter addresses other uses of force when authorized by the Security Council in Chapter VII,[13] Articles 39,[14] 41,[15] and 42;[16] and in Chapter VIII.[17] Although there

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11. Professor Kelsen refers to "collective self-defense" as "another mistake in the wording of Article 51." HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 915 (1951). He advises that the term should read "collective defense." *Id*.

12. UN CHARTER art. 51. The full text provides the following:

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

Id.

13. Chapter VII of the UN Charter is entitled: "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." *See* Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621, 629 (1986).

14. UN CHARTER art. 39. If the Security Council deems it necessary, based on its findings, it "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id*.

15. UN CHARTER art. 41. This article lists the following examples of "measures not involving the use of armed force": "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*

16. UN CHARTER art. 42. Military action is designed "to maintain or restore international peace and security." *Id*. Specific types of military missions are enumerated in the article: "demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations." *Id*.

17. Chapter VIII is entitled "Regional Arrangements." Professor Shachter also includes two additional authorized uses of force: (1) peacekeeping forces authorized by the Security Council or General Assembly and deployed pursuant to agreements with the sending states, and (2) joint action by the five permanent members pursuant to Article 106. Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 66 (Lori Fisler Damrosh & David J. Scheffer eds., 1991).

are numerous defenses to alleged violations of Article 2(4), they are beyond the scope of this article.[18]

The Charter provisions appear to be "absolutist."[19] Article 2(4) apparently bans *all* threats or uses of force, except for individual or collective "self-defense" and collective actions authorized by the Security Council. If Article 2(4) is a complete ban, the TEAM SPIRIT exercises, when coupled with an intention to send a message, were illegal.

B. The North Korean Threat

According to U.S. defense analysts, North Korea is a threat to the South because of its strong military and weak economy.[20] There is a risk "that the heavily armed North Korean Army on the verge of economic collapse might launch an invasion out of desperation."[21] Analysts agree that the relative poverty of North Korea is directly related to its efforts to maintain one of the largest militaries in the world.[22]

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18. Individual or collective self-defense pursuant to Article 51 is the most frequently asserted defense or justification for an allegedly illegal threat or use of force. Thomas M. Franck, *Who Killed Article 2(4) or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 823 (1970). There are two reasons for this: (1) it is specifically addressed in the Charter, and (2) it "permits collective self-defense against an armed attack *unless* a Security Council resolution prohibits it." *Id.* Article 51, therefore, reverses, "in situations of self-defense, the requirement for prior Security Council approval before armed force is deployed." *Id.* Other defenses include the following: self-help or vindication of a denied right, humanitarian intervention, counter-intervention, self-determination, just reprisals, correction of past injustice, and the *de minimis* or prudent and economical exception. *See also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 (1988); Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 45-47 (1990).

19. *See* Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of its Best Friends*, 27 HARV. INT'L L.J. 599 (1986). Professor Coll argues that goals such as prohibiting "force as an instrument of international relations" are admirable as "aspirational, guiding principles," but they are not enforceable. *Id.* at 599. An attempt to enforce "absolutist interpretations" of Article 2(4) "widen[s] the gap between law and . . . reality." *Id.* at 616.

20. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 99-100.

21. *Id.* at 237. Added to the uncertainty and the economic problems is that North Korea has not had any visible leadership since the death of its "Great Leader," Kim Il-sung, in 1994. ROBERT STOREY & DAVID MASON, LONELY PLANET KOREA 375 (1997). "Kim Il-sung died of a heart attack on 8 July [1994] after ruling the North for 46 years." *Id.*

22. ROD PASCHALL, WITNESS TO WAR: KOREA 200 (1997). North Korea only has a population of approximately 24 million, but it has the fifth largest military in the world with 1.28 million in active service and another 4.7 million in the reserves. INSTITUTE FOR

There is also no dispute that North Korea's economy is in bad shape.[23] Their economy has been declining by approximately five per cent each year since 1992.[24] The UN World Food Program reports that North Korea cannot feed its people adequately.[25] Foreign investment has declined to almost zero.[26] North Korea's per capita income is only about $900 per year.[27] The contrast with South Korea's annual income,[28] foreign trade balance,[29] and foreign assistance[30] has created a barrier to reunification that may only be overcome by war.[31]

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22. (continued) NATIONAL STRATEGIC STUDIES, *supra* note 7, at 100. The North Korean military is more than twice as large as the military of the Republic of Korea. PASCHALL, *supra* at 200. "North Korea has poured resources into the military, heavy industry, grandiose monuments, and statues of the Great Leader–all at the expense of agriculture and consumer goods." STOREY & MASON, *supra* note 21, at 379.

23. The nation is practically at subsistence level, food shortages have forced many citizens to forage "for weeds to make soup," and energy shortages have forced the closure of more than half of all factories. STOREY & MASON, *supra* note 21, at 375, 379.

24. STOREY & MASON, *supra* note 21, at 375. The decline will continue to have devastating results because "60% of the workforce is in industry." *Id*. at 379. Only 20% or less of the workforce are employed in industry in developed western countries. *Id*.

25. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 106. The report also warns that the nation will suffer continued widespread food shortages and malnutrition. *Id*. The food shortage is due, in part, to "catastrophic flooding in the summers of 1995 and 1996 [which] ruined grain crops and destroyed prime agricultural land. . . ." STOREY & MASON, *supra* note 21, at 379. "Grain rations are reported to have sunk to 200g per person per day (the UN-set minimum is 500g). . . ." *Id*. Information about the level of starvation came from an insider in 1997. Hwang Jang-yop, North Korea's "top ideologue," and the person in charge of international relations in the North Korean Workers Party sought asylum at the South Korean embassy while he was in Beijing. *Id*. at 378. Hwang said, "How can there be a socialist society when [North Korea's] people, workers, peasants, and intellectuals are dying of starvation." *Id*.

26. Investments and economic assistance from the Soviet Union were drastically reduced in 1990 when the Soviets established diplomatic and trade relations with South Korea. STOREY & MASON, *supra* note 21, at 374. The Republic of China has also curtailed most of its aid to the North Koreans after establishing diplomatic relations with South Korea. *Id.* "Both Russia and China now trade far more with the South than with the North." *Id.* "North Korea, as presently constituted, cannot endure indefinitely without substantial international aid." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 97.

27. PASCHALL, *supra* note 22, at 199.

28. According to a 1997 source, the South Koreans, with U.S. assistance, "have raised their average annual income from practically nothing to $7200." *Id*. Because of its strong economy, South Korea is referred to as one of Asia's "little tigers" or "little dragons." STOREY & MASON, *supra* note 21, at 22.

29. "The North's total annual foreign trade equals less than four days worth of South Korea's trade." STOREY & MASON, *supra* note 21, at 379.

30. Congress initially appropriated $200 million for South Korean reconstruction in August 1953 and later that month announced a long range plan costing $1 billion. 15 FUNK & WAGNALL STANDARD REFERENCE ENCYCLOPEDIA 5436 (1970).

C. United States Military Activities in South Korea

Since the Korean War,[32] the United States has defended South Korea[33] with a policy of deterrence through forward deployment and power projection.[34] Pursuant to that policy, the United States maintains a large and lethal military force in South Korea.[35] As part of the "power pro-

30. (continued) Additional appropriations were made insubsequent years, including $250 million in 1961. *Id.* at 5437. In contrast, the Soviets agreed to spend 1 billion rubles to restore North Korea, and China cancelled the North Korean war debt and agreed to provide $300 million worth of aid for four years. *Id.* In addition to the aid from the United States for South Korea, the UN Korean Reconstruction Agency spent more than $143 million building 6000 homes, 110 irrigation and flood control projects, fully stocked classrooms and medical clinics, and factories. *Id.*; *see also* UN OFFICE OF PUBLIC INFORMATION, EVERYMAN'S UNITED NATIONS 105-106 (1964).

31. "The growing economic disparity between the two halves has created an increasingly insurmountable obstacle [to reunification]." PASCHALL, *supra* note 22, at 199. "Just to bring the economic level of the North to that of the South would cost southerners $40 billion per year for ten years, about one eighth of South Korea's entire annual economic output." *Id.* Other estimates place the figure at $250 billion in direct governmental aid and another $1 trillion in private investments. STOREY & MASON, *supra* note 21, at 376. North Korea is in a worse financial condition than the former East Germany ever was. *Id*. The risk of a war of reunification at this time may happen because "the regime would prefer to go down in flames rather than be peacefully taken over by the South–thus a renewed Korean War becomes a frightening if still unlikely possibility." *Id*. at 370.

32. The Korean War began on 25 June 1950, when the North Korean Army, equipped by the Soviet Union, invaded South Korea. 15 FUNK & WAGNALL, *supra* note 30, at 5438. Although no "peace treaty" has ever been signed, the war is usually considered to have ended when the North Korean and United Nations commands signed an armistice on 26 July 1953. 24 FUNK & WAGNALL, *supra* note 30, at 8799; Michael Schuman, *North Korea's 'Wartime Mobilization' Belies Hope of Thaw Before Peace Talks*, WALL ST. J., Mar. 16, 1998, at A16.

33. The United States "leads both the UN Command and the U.S.-South Korea Combined Forces Command (which handles deterrence and defense). INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 105.

34. *Id*. at 237. "[T]he U.S. approach is built upon deterrence via . . . substantial U.S. forces . . . and the demonstrated will and ability to commit more forces in the event of a crisis [to] provide powerful evidence to the potential aggressors that they would not benefit from . . . attack." *Id*.

35. The United States has 37,000 troops, with "substantial conventional combat power" stationed in the Republic of Korea. *Id*. at 105; STOREY & MASON, *supra* note 21, at 378. According to the staff judge advocate of the Army's 2d Infantry Division, which is the unit on the DMZ, the Division is "the most forward deployed combat ready division in the United States Army. With armor, mechanized infantry, and air assault battalions, the Warrior Division is, in our humble opinion, the most powerful division in the Army." Letter, Headquarters, 2d Infantry Division, Office of the Staff Judge Advocate, subject: Welcome Letter (5 Jan. 1999). In addition to the conventional power, the U.S. "nuclear umbrella" also covers South Korea. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 105.

jection" prong of U.S. policy, the United States conducted the TEAM SPIRIT military exercises.[36] The military maneuvers demonstrated our commitment to the Mutual Defense Treaty[37] and to the prevention of a second Korean War.[38] During the 1990s, the scope and timing of the TEAM SPIRIT exercises[39] was coupled with political rhetoric[40] in an attempt to

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36. As noted above, TEAM SPIRIT exercises began in 1976. Caspar W. Weinberger, *More Appeasement–at South Korea's Expense*, FORBES, Oct. 21, 1996, at 35. They have been held every Spring from 1976 until 1996 with the exception of the years 1994 and 1995. *Id.* The exercises were not held those years as an inducement to North Korea to abandon its nuclear weapon development program. *Id*. In exchange for the cancellation of the exercises in 1994 and "after a personal visit by former President Jimmy Carter, Kim Il-sung surprised everyone with an announcement that he would freeze North Korea's nuclear program." STOREY & MASON, *supra* note 21, at 375. The exercises took place again in 1996 after North Korea failed to allow inspections of their nuclear facilities. *Id.* at 376.

37. Mutual Defense Treaty, Oct. 1, 1953, U.S.-Korea, 5 U.S.T. 2368 (entered into force on Nov. 17, 1954). The treaty grants the United States the right to maintain land, sea, and air forces in South Korea and provides that the United States will provide military assistance to South Korea if there is an "external attack" on South Korean territory. *Id*.

38. The wartime losses in lives and material resources in both North and South Korea were "incalculable." 15 FUNK & WAGNALL, *supra* note 30, at 5436. There were 1,312,836 South Korean military casualties, including more than 415,000 killed. North Korean military casualties were between one and a half and two million. In addition to the military casualties, millions of civilians throughout the Korean Peninsula were killed, wounded, or victims of malnutrition and disease. *Id*. The casualties represent a high percentage of the total population, which was estimated at 13,000,000 in the North and 30,470,000 in the South in 1968. *Id*. at 5429. The population estimates in 1997 were 24,000,000 and 48,000,000, respectively. STOREY & MASON, *supra* note 21, at 379. "Virtually every city, town, and village on the peninsula was damaged; many were almost totally destroyed." 15 FUNK & WAGNALL, *supra* note 30, at 5436. "Millions of people were left homeless, industry destroyed, and the countryside devastated." STOREY & MASON, *supra* note 21, at 16. Allied casualty figures vary depending on the source. The above referenced encyclopedia tallies 137,051 U.S. casualties, including 25,604 dead, and 16,532 other allied casualties, including 3,094 dead. 15 FUNK & WAGNALL, *supra* note 30, at 5441. The Korea guidebook states, "Of the UN troops, 37,000 had been killed (mostly Americans) and 120,000 wounded." STOREY & MASON, *supra* note 21, at 16. A third source lists substantially higher allied casualties: "The UN suffered over 500,000 casualties, including 94,000 dead, 33,629 of whom were Americans. The United States also suffered 103,284 wounded and 5,178 missing or captured." PASCHALL, *supra* note 22, at 188. "Seoul had changed hands no less than four times" during the first year of the war. STOREY & MASON, *supra* note 21, at 16. In addition, the UN air force "devastated North Korean supply bases, railroads, bridges, hydroelectric plants, and industrial centers" in a steady stream of bombing missions while the ground war was relatively static along what is now the DMZ. 15 FUNK & WAGNALL, *supra* note 30, at 5440.

39. TEAM SPIRIT '83 was one month long and involved 70,000 U.S. troops, 36 warships, and 118,000 ROK troops. Michael Wright, *Gunboat Diplomacy Updated for the 1980's: Washington Increases Use of Overseas Military Maneuvers*, N.Y. TIMES, Mar. 13, 1983, sec. 4, at 4. In 1991 the scope of the exercise was reduced in exchange for North

influence the North Korean government to abandon its nuclear weapons development program,[41] participate in reunification and peace talks,[42] and comply with international obligations.[43]

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39. (continued) Korea's promise that it would not seek nuclear weapons and would allow inspections. Fred C. Ikle, *U.S. Folly May Start Another Korean War*, WALL ST. J., Oct. 12, 1998, at A18. North Korea broke both promises. *Id.* "TEAM SPIRIT could be sized to create varying degrees of discomfort for North Korea." David A. Fulghum, *U.S. Pressures North Korea to Shed Nuclear Weapons*, AVIATION WK. & SPACE TECH., Mar. 28, 1994, at 22-23. The exercise can come in three sizes: a Command Post Exercise; a defensive exercise; or an offensive exercise with amphibious landings, armored attacks, and deep strike operations. *Id*.

40. On 12 March 1993, North Korea announced that it was withdrawing from the Nuclear Non-Proliferation Treaty (NPT) because of the TEAM SPIRIT exercises. Sue Chang, *Northern Isolationism: What's Next?* BUS. KOREA, Apr. 1993, at 23-25. Analysts say the real reason was to avoid international inspections of its nuclear facility. *Id*. President Clinton visited the DMZ on 11 July 1993 and announced that "if [North Korea] ever uses [nuclear weapons] it would be the end of their country." Gwen Ifill, *Clinton Ends Asia Trip at Korea's Demilitarized Zone*, N.Y. TIMES, July 12, 1993, at A2. "Massive military exercises" were planned for 1994 "to rattle North leader Kim Il-sung." Bill Powell, *Rattling Kim's Cage*, NEWSWEEK, Apr. 4, 1994, at 36. In 1996, the ROK urged that the exercises be started again because of North Korea's hostile actions (a submarine full of North Korean commandos beached in South Korea and killed ROK soldiers in a firefight). Weinberger, *supra* note 36, at 35.

41. After "the North's second promise to stop its nuclear weapons program," the United States called off the TEAM SPIRIT exercises in 1994. Weinberger, *supra* note 36, at 35. What makes the deterrence of North Korea's nuclear weapons development critical to U.S. policy-makers is that North Korea has a "propensity for brinkmanship" and has demonstrated its "willingness to use terror as a weapon." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 101. Defense analysts believe that it is likely that North Korea will view weapons of mass destruction (nuclear, biological, and chemical weapons) "as their first choice rather than as weapons of last resort." *Id*. at xiii.

42. Kim Il-sung agreed to participate in peace talks in 1994 in exchange for canceling the TEAM SPIRIT exercises that year. Kim Il-sung died before the peace talks began. STOREY & MASON, *supra* note 21, at 375. Although the exercises were cancelled, the negotiations did not take place because of Kim Il-sung's death. Weinberger, *supra* note 36, at 35. TEAM SPIRIT initially had a limited scope in 1995 to encourage North Korea to resume talks with the South. *U.S. and South Korea Scale Down Maneuvers*, N.Y. TIMES, Feb. 13, 1995, at A5. The exercise was subsequently cancelled for the second year in a row. Weinberger, *supra* note 36, at 35.

43. North Korea has a history of breaking promises, obligations, and commitments. STOREY & MASON, *supra* note 21, at 379. North Korea borrowed more than $8 billion from European and Japanese bankers for "manufacturing joint ventures in the 1970s, then abruptly abrogated the contracts, kept the technology, and simply refused to repay." *Id.* "Most countries [will not] trade with [North Korea] on anything other than a cash or barter basis." *Id*.

III. Interpreting the UN Charter

There has been little attention paid to the meaning of "threats of force," separate from "uses of force," as used in the UN Charter.[44] Although "threats" may be based as expressed or implied military, economic, political, or other forms of coercion,[45] the focus of this article will be on threats to use military force.[46] "Threats" of using military force might include the following situations in a spectrum ranging from the most benign to the most aggressive:

(1) the mere fact or political reality that one nation has more military might than another nation;[47]

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44. Schachter, *supra* note 18, at 1625; Sadurska, *supra* note 18, at 239-40.

45. A frequently debated issue in international relations is the issue of economic coercion. *See, e.g.*, Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 500 (1970). Many developing nations argue that economic coercion is the kind of "threat or use of force" that they experience most often. *Id.* at 533-34. This issue is not new. Some of the delegates to the United Nations Conference on International Organization in San Francisco, California, in 1945 (the "San Francisco Conference") raised concerns about economic coercion during the drafting of the UN Charter. BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE 38-39 (1975).

46. This restriction is consistent with the opinion of legal scholars who argue that "the 'force' referred to in Art. 2(4) is military force." Bert V. A. Röling, *The Ban on the Use of Force and the UN Charter*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3-4 (A. Cassese ed., 1986).

47. Schachter, *supra* note 18, at 1625. "The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state." *Id*. Some of the limited opposition to the ratification of the UN Charter in the Senate in 1945 revolved around the fear that it gave too much power to the "big five" (the United States, the Soviet Union, the People's Republic of China, France, and Great Britain) who would have veto powers in the Security Council. 91 CONG. REC. 6983 (1945). Senator Vandenberg responded to this issue by saying, "I hasten to assert that so far as force is concerned, the world is at the mercy of Russia, Britain, and the United States, regardless of whether we form this league or not. Those happen to be the facts of life." *Id.* at 6983-84. Although Article 2, paragraph 1, says the Charter is based on the principle of "sovereign equality," the Security Counsel veto, in Article 27, paragraph 3, was an acknowledgement of the political reality in 1945. *Id*. at 6984. Throughout history, drastic differences in size and power between two nations or individuals have provided the basis for humorous and classic stories, fairy tales, and legends, especially when the story has the unlikely conclusion that the "little guy" wins. *See, e.g.*, THE MOUSE THAT ROARED (Columbia/Tri-Star Pictures 1959) (summarized by PAULINE KAEL, 5001 NIGHTS AT THE MOVIES 392 (1982), as follows: "It's about a minuscule mythical country that declares war on the United States, expecting to be quickly defeated and thus eligible for the cash benefits of rehabilitation."); 1 *Samuel* 17

(2) having more military strength than other nations and making sure that the international community knows it;[48]
(3) having the power and making a general threat;[49]
(4) concentrating military or naval power near a foreign nation or foreign military force—the naval battle group moves in;[50]
(5) both concentrating power and warning the target state that military force will be used, if necessary, in self-defense or defense of another nation;[51]
(6) conducting large scale joint/combined military exercises with the intention of influencing the behavior of a potential adversary in the region;[52] and

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47. (continued) (David and Goliath); THE GOLDEN CHILDREN'S BIBLE 230-35 (Rev. Joseph A. Grispino et al. eds, 1993) (David and Goliath); EDITH HAMILTON, MYTHOLOGY, TIMELESS TALES OF GODS AND HEROES 159-172 (1942) (Hercules); ÆSOP'S FABLES 42-43 (George Fyler Townsend trans., Int'l Collectors Library 1968) (The Mouse and the Lion).

48. President Theodore Roosevelt, U.S. Commander in Chief from 1901-1909, "summarized his foreign policy as 'speak softly and carry a big stick.'" HIRSCH, *supra* note 2, at 279. Although he proudly characterized his approach in this "threatening" manner, history will remember him for his ability to make both peace and threats to use force. He mediated a war between Russia and Japan, when they were fighting for control of Korea, and won the Nobel Prize for peace in 1906. 15 FUNK & WAGNALL, *supra* note 30, at 5434. Historians refer to his threats, or "big stick carrying," as "gunboat diplomacy." HIRSCH, *supra* note 2, at 317. One of his most famous "threats of force" was his demonstration of naval power near Colombia to support the independence of Panama from Colombia in 1903 and his prompt efforts to create the Panama Canal thereafter. DAVID MCCULLOUGH, THE PATH BETWEEN THE SEAS, THE CREATION OF THE PANAMA CANAL 350-77 (1977).

49. An example is the U.S. policy of nuclear deterrence, known as "massive retaliation," announced by Secretary of State John Foster Dulles in 1954. *See* WILLIAM W. KAUFMAN, THE REQUIREMENTS OF DETERRENCE 3 (1954). This policy did not threaten any specific nation, but was a general threat to any and all future adversaries that the United States may resort to overwhelming nuclear destruction instead of attempting to match force with force wherever U.S. interests are threatened. *Id.*

50. Aircraft carriers, other warships, and AWACS electronic surveillance airplanes are often moved to trouble spots in a hurry. Wright, *supra* note 39, at 4. In his article, Mr. Wright implied that "gunboat diplomacy" meant worldwide participation in military training exercises with a secondary purpose of "demonstrating that Washington is both trustworthy and not to be trifled with." *Id. But see* 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. g (asserting that "gunboat diplomacy" is clearly prohibited by Article 2(4)).

51. *See* Wright, *supra* note 39, at 4 (warnings to Libya while concentrating warships and using naval aircraft to contest Libya's claims to Mediterranean Sea area as territorial waters).

52. *See* Fulghum, *supra* note 39, at 22. This is the TEAM SPIRIT situation, of course.

(7) concentrating power and issuing an ultimatum for yielding to demands.[53]

Assuming *arguendo* that all seven of the situations listed above are "threats," the next question is how to determine which of the threats, if any, are illegal under the UN Charter. Are they all banned by the Charter's prohibition against "threats of force"? Are any of them banned? At first glance, the extremes appear to be relatively easy to analyze. The benign end of the spectrum reflects a fact of life: some nations are more powerful than others.[54] The opposite extreme reflects a "blatant and direct threat of force, used to compel another state to yield territory or make substantial political concessions (not required by law)" from a weaker adversary.[55] Unfortunately, what at first appears to be an obviously illegal threat may not be a violation of the UN Charter when looked at more closely.[56] Even an apparently extreme situation involving a coercive threat to annex all or part of another nation's territory is usually accompanied by a claim that the territory rightfully belongs to the party demanding the territory.[57]

This section reviews the various methods of interpreting international agreements, and uses each step of the various methods of interpretation to analyze the TEAM SPIRIT scenario.

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53. This was Germany's approach with portions of Czechoslovakia and Poland prior WAY TO WORLD PEACE 69-79 (1983). This approach was also depicted in the comics recently. In a "Beetle Bailey" cartoon, the benefits of a successful, credible threat were depicted. In frame one Sarge shows Beetle Bailey a television with a scene of physical violence and says, "This is what I'll do to YOU if you don't get back to work!" In frame two, Beetle is digging a hole energetically and Sarge says to the reader, "See? TV violence can actually prevent REAL violence!" Mort Walker, *Beetle Bailey*, KING FEATURES SYNDICATE, INC. (Feb. 1, 1999).

54. Schachter, *supra* note 18, at 1625. *See supra* note 47. The disparity in size may lead to an inference of a threat. Schachter, *supra* note 18, at 1625.

55. Schacter, *supra* note 18, at 1625; *see* QUINCY WRIGHT, A STUDY OF WAR 1326 (1951) ("An aggressor's success in utilizing threats of violence will stimulate him to utilize the same methods again.").

56. The North Korean's 1950 invasion of South Korea was a clear case of armed international aggression to the United States, but the Soviets considered it an internal armed conflict, or civil war, which should not have been intervened in by outside states. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 33 (1992).

57. Schachter, *supra* note 18, at 1627. Land grabbers almost always claim that the territory was historically theirs and they are only righting a wrong. *Id.* One of the more ancient claims to righting a territorial wrong arose in 1961 when India sent its troops into Goa, then administered by Portugal. India claimed that "it was merely moving its troops into a part of India that had been under illegal domination for 450 years." *Id*.

A. How to Interpret Treaties and Other International Agreements

Among the numerous authorities on the interpretation of international agreements, international legal jurists and scholars look primarily to decisions of the International Court of Justice (ICJ) and to the Vienna Convention on the Law of Treaties, or the "Treaty on Treaties."[58] In addition, international legal experts in the United States also consult the Restatement (Third) of the Foreign Relations Law of the United States and opinions from the United States Supreme Court.

1. ICJ Sources

The Statute of the International Court of Justice created the ICJ.[59] The Statute lists "the interpretation of a treaty" as the first item on the list of international disputes over which the ICJ has jurisdiction.[60] In practice, most of the judgments and advisory opinions of the Permanent Court of International Justice[61] and the ICJ have been primarily concerned with interpreting treaties.[62]

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58. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNT.S. 331, UN Doc. A/CONF. 39/27 (entered into force on January 27, 1990), *reprinted in* 8 I.L.M. 679 (1969); 63 AM. J. INT'L L. 875 (1969); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS AND NEW DEVELOPMENTS 53 (1994). The United States has not ratified the convention. CARTER & TRIMBLE, *supra*, at 53. For an analysis of this treaty, *see* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

59. The Statute of the International Court of Justice was drafted at the San Francisco Conference and was attached to the UN Charter as an annex when the Charter was signed on 26 June 1945 and favorably considered by the Senate during the advice and consent vote on 28 July 1945. 91 CONG. REC. 8189-8190 (1945).

60. Statute of the I.C.J. art. 36, para 2.a., 59 Stat. 1055, T.S. No. 993 [hereinafter Statute of the ICJ].

61. The Permanent Court of International Justice was established under the League of Nations and is the predecessor to the current ICJ. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 19. Almost all of the decisions of the Permanent Court of International Justice dealt with treaty interpretations. SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 26 (1958).

62. The vast majority of ICJ opinions also revolved around interpreting treaties. Nagendra Singh, *The UN and the Development of International Law*, *in* UNITED NATIONS, DIVIDED WORLD, THE UN'S ROLES IN INTERNATIONAL RELATIONS 404-11, 543-48 (app. F) (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1994); UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 395-423.

Article 38 of the Statute lists the sources of law that the ICJ will apply in any treaty interpretation or other dispute:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations; [and]
> d. subject to the provisions of Article 59,[63] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[64]

The first item on the ICJ's list, "international conventions,"[65] includes the Treaty on Treaties, discussed below.[66] The second item, "international custom," refers to rules that are considered customary international law[67] as well as practices that are legally permitted or authorized because of a widespread acceptance in the international community.[68] The third item

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63. Article 59 of the Statute of the ICJ states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Therefore, ICJ opinions are never binding authority in any other judicial proceeding.

64. Statute of the ICJ, *supra* note 60, art. 38, para. 1.a.-d.

65. "International conventions" bind the states that sign treaties and agreements as well as states that participate in a widespread international practice with the belief, or "*opinio juris*," that the practice is an obligation of international law. Robert F. Turner, *Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, *in* 72 INT'L L. STUDIES–U.S. NAVAL WAR COLL. 315 (Michael N. Schmitt ed., 1998).

66. *See* discussion *infra* Part III.A.2.

67. Professor Turner provides a succinct description of this source of law:

> [A] consensus has emerged that certain 'peremptory norms' of international law are of such fundamental importance that they will be imposed even upon persistent objectors despite their lack of consent. Often identified by the Latin expression *jus cogens*, these principles have been so universally embraced through all major legal systems, and the consequences of their breach are viewed as so objectionable, that the collective world community basically agreed to impose them on all [s]tates. Classic examples include the prohibition embodied in Article 2(4) of the UN Charter prohibiting the aggressive use of military force.

Turner, *supra* note 65, at 315-16.

68. Deterring aggressors is arguably one such widely accepted practice, based on the experiences of failing to deter aggressors successfully in the 1930s. *See* KAUFMAN, *supra*

on the ICJ list refers to domestic or national laws.[69] The final source is the "other" or "miscellaneous" category: nonbinding or persuasive judicial opinions, treatises, and other legal publications.

2. Treaty on Treaties

The Treaty on Treaties[70] applies to "treaties between [s]tates."[71] It defines a "treaty" as "an international agreement concluded between [s]tates in written form and governed by international law. . . ."[72] This treaty is, therefore, another source of interpretation for delving into the meaning of Article 2(4) of the UN Charter.

The Treaty on Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in the light of its object and purpose."[73] This is obviously an attempt to glean the parties' intent from the document itself. In the context of the interpretation of Article 2(4), it means the entire UN Charter must be reviewed and not just the prohibition on the threat or use of force and defenses.

In analyzing the "context," the person interpreting the document should look at the main text, preamble, annexes, any agreement relating to the treaty, and any instrument made by one of the parties and accepted by the other(s) as related to the treaty.[74] In addition to the "context," interpreters may look at any subsequent agreement between the parties relating to the interpretation, any subsequent practice, and "any relevant rules of international law applicable to the relations between the parties."[75] Applying this to the Charter interpretation, an analysis of the entire Charter may

68. (continued) note 49, at 22. *See infra* Part III.B.8.

69. *See* discussion *infra* Parts III.A.4., III.B.6.

70. According to some scholars, the Treaty on Treaties is "the indispensable element in the conduct of foreign affairs." Kearney & Dalton, *supra* note 58, at 495. Even though the United States is not yet a party to the treaty, the terms of the treaty would apply to the United States because they are considered to be a restatement of customary rules, "binding [s]tates regardless of whether they are parties to the Convention." Frankowska, *supra* note 58, at 286. The United States is a signatory, but the treaty has been pending the Senate's advice and consent for ratification since 1972. *Id*.

71. CARTER & TRIMBLE, *supra* note 58, art. 1.

72. *Id*. art. 2, para. 1.a.

73. *Id*. art. 31, para. 1.

74. *Id*. art. 31, para. 2, 2(a), 2(b).

75. *Id*. art. 31, para. 3, 3(a), 3(b), 3(c).

be combined with an analysis of other international rules on use of force[76] and on the practices of nations since the creation of the United Nations.[77]

The rules relating to "supplementary means of interpretation" are in Article 32. This Article states that consideration of "preparatory work on the treaty," or *travaux préparatoires*, is only permitted if the meaning would otherwise be "ambiguous or obscure" or would lead "to a result which is manifestly absurd or unreasonable."[78] Although the international standard is tougher than the usual standard in the United States for resorting to legislative history, Article 2(4) is sufficiently ambiguous to allow consideration of all available sources of interpretation, as discussed below.[79]

3. Restatement

The *Restatement (Third) of the Foreign Relations Law of the United States*[80] provides interpretation guidance that is identical in most respects

76. *See, e.g.*, General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, IV Trenwith 5130, 2 Bevans 732 (entered into force July 24, 1929) (also known as the Kellogg-Briand Pact or the Pact of Paris), *reprinted in* FERENCZ, *supra* note 45, at 190-93 [hereinafter Pact of Paris]; *see also* FERENCZ, *supra* note 45, at 24-25.

77. *See* discussion *infra* Part III.B.8.

78. CARTER & TRIMBLE, *supra* note 58, art. 32. During the drafting of this treaty, only Hungary and the United States objected to the listing of the *travaux préparatoires* as secondary means of interpretation. Kearney & Dalton, *supra* note 58, at 519. The United States is traditionally "in favor of according great weight to *travaux*." *Id.* Most nations are opposed to considering preparatory documents, except as a last resort, for the following reasons: (1) something may be found in them to support any intention; (2) states with large, well-indexed archives would benefit; and (3) states would be reluctant to enter into a treaty that they did not help negotiate. *Id.* States and international tribunals will continue to consider "preparatory work and the circumstances of the conclusion of treaties when faced with problems of treaty interpretation." *Id.*

79. The language "threats or use of force" appears in Article 52 of the Treaty on Treaties: "A treaty is void if its conclusion has been procured by the threat or use of force violating the principles of international law embodied in the Charter of the United Nations." For an interpretation of that phrase during the negotiation and drafting of the Treaty on Treaties, delegates consulted the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Cooperation Among States which had been studying the phrase since 1964. Kearney & Dalton, *supra* note 58, at 534. The Special Committee noted that "there was a fundamental difference in opinion as to the meaning of the words 'threat or use of force' in [Article 2(4)] . . . . [T]hose words could be interpreted as including all forms of pressure exerted by one [s]tate on another [or] just the threat or use of armed force . . . ." *Id.* (quoting the Dutch representative).

to the Treaty on Treaties.[81] The only significant difference relates to preparatory works or legislative history. The *Restatement* does not limit consideration of the *travaux préparatoires*, but does mention the Treaty on Treaties' limits[82] and notes that "some interpreting bodies" are more willing to use the preparatory works than others.[83] The *Restatement* also advises that "[a]greements creating international organizations have a constitutional quality. . . ."[84] The emphasis in the *Restatement* on looking at the text "in the light of its object and purpose" and the "subsequent practice" of the parties is fundamental in the analysis of Article 2(4).[85]

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80. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (1987).

81. *Restatement* § 325(1) and § 325(2) are substantially the same as the Treaty on Treaties' art. 31(1) and art. 31(3), respectively. Comment b to § 325 of the *Restatement* (defining "context") is almost identical to art. 31(2) of the Treaty on Treaties. The text of *Restatement* § 325 states the following:

> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325.

82. *See* discussion *supra* Part III.A.2 (the "ordinary meaning" of the text must be obscure, ambiguous, or unreasonable before one may look to "supplementary means" of interpretation).

83. "The [Treaty on Treaties'] inhospitality to *travaux* is not wholly consistent with the attitude of the [ICJ] and not at all with that of United States courts." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, comment e.

84. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, comment d.; David J. Scheffer, *The Great Debate of the 1980's*, *in* RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 12 (Louis Henkin ed., 1989).

85. Section 905(2) of the *Restatement* states the following: "The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the UN Charter, as well as to Subsection 1." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905(2). In the comments, Article 2(4) is described as a limit on the threat or use of military force, but not economic force. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, comment g. The *Restatement* is somewhat inconsistent in that it allows a state to resort to unspecified

4. United States Supreme Court Guidance

The United States Constitution empowers federal courts in the United States to play an active role in interpreting treaties: "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their Authority."[86] The federal courts' role is also important in litigation involving treaties because the "Constitution, and the laws of the United States . . . and all treaties . . . shall be the supreme law of the land."[87] In addition, the United States Supreme Court has established that it is the duty of the federal courts to "determine what the law is."[88]

In the countless number of federal cases that cite to one or more treaties, very specific guidance on treaty interpretation emerges. In a recent case interpreting an extradition treaty, the Supreme Court noted three sources to consider: the language of the treaty, the history of negotiation, and practice under the treaty.[89] As with the ICJ and other authorities cited above, the Supreme Court advises that "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."[90]

If treaty language is uncertain, ambiguous, or unclear, the Supreme Court advises analyzing the preparatory documents, including the negoti-

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85. (continued) counter-measures (if necessary and proportional) in response to a violation of an international obligation, but then repeats the UN Charter language (prohibiting threats or uses of force). 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905. The *Restatement* also notes that the scope of Article 2(4) has "never been authoritatively resolved," but then claims that "it is clear that it was designed . . . to outlaw 'gunboat diplomacy' even in response to violations of international law." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, comment g. The phrase "gunboat diplomacy" is not defined in the Restatement sections, comments, or Reporters' Notes.

86. U.S. CONST. art. III, § 2, cl. 1.

87. *Id.* art. VI, cl. 2.

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

89. United States v. Machain, 504 U.S. 655, 662-66 (1992). The Court held that an extradition treaty with Mexico did not deprive a United States District Court of jurisdiction after U.S. Drug Enforcement Agency personnel abducted a Mexican citizen from Mexico to stand trial in a U.S. court for the kidnapping and murder of a DEA agent and his pilot. 504 U.S. at 666. The Court advised treaty interpreters to look at "the language of the treaty, in the context of its history." *Id.*

90. *Id.* at 662 (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"); United States v. Stuart, 489 U.S. 353, 365 (1989).

ations, diplomatic correspondence, operation of the treaty, and evidence of the parties' construction of key terms, to determine the intention of the parties.[91] In a 1989 case, the Supreme Court highlighted one source in particular: "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."[92] The practice of the signatories and the signatories' original intent are especially important in the analysis of the UN Charter.

B. Applying the Sources

The remainder of this article analyzes the meaning of Article 2(4) by applying the following sources of law consistent with the above principles: text,background to text, intentions of drafters, intentions of decision-makers during ratification (Congress and President), court opinions (ICJ and domestic courts), legal scholars, and the practice of nations.[93] As discussed in this section, there are many interpretations of the Article, but only a few in the context of military maneuvers. The status of military exercises that "send a message" will emerge from this systematic analysis, even though the scope of the phrase "threat or use of force" in Article 2(4) "has been for many years the source of acrimonious debate."[94]

1. Text

Some legal scholars claim that Article 2(4) is a complete prohibition on the use of force (except where individual or collective defense under Article 51 applies).[95] The rule appears on its face, however, to be limited to threats or uses of force "against [(1)] the territorial integrity or [(2)] political independence of any state, or [(3)] in any manner inconsistent

91. *Stuart*, 489 U.S. at 366-69.

92. *Id*. at 369.

93. In this article, the single most important source, the text itself, will be considered first. *See* CARTER & TRIMBLE, *supra* note 58, art. 31, para. 1; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325. The remaining sources fall into two general groups: historical and developing. After an analysis of the text, the historical sources are analyzed in a chronological order (background to the text, drafters' intentions, and then the ratification process). Finally, the developing sources are analyzed in the following order: court decisions, then scholarly writings, and, finally, the practices of nations.

94. CARTER & TRIMBLE, *supra* note 58, at 127.

95. JAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 113 (1963); MCCOUBREY & WHITE, *supra* note 56, at 24.

with the Purposes of the United Nations."[96] Two types of loopholes appear to exist. First, the rule appears to only prohibit large-scale uses of force (to seize and hold territory or overthrow a government, for example).[97] Second, the rule appears to allow any use of force that is "consistent" with the purposes of the UN Charter.[98]

The "territorial integrity" and "political independence" language comes from Article 10 of the Covenant of the League of Nations.[99] Professor Brownlie claims that this text does not qualify Article 2(4), but "give[s] more specific guarantees to small [s]tates."[100] The plain language of Article 2(4) does not support his position, however. The rule says that threats or uses of force are prohibited and then specifies *when* they are prohibited.[101] As drafted, the rule is like a parking sign that says "No Parking Between 7 a.m. and 5 p.m." In this example, parking *is* permitted, just not during the conditions stated. Such language specifies when something is prohibited. If the language of the text takes precedence in treaty interpretations, then the ban on the threat or use of force would be seriously limited. The text clearly states that "threats or uses of force" are only prohibited if directed at a nation's territorial integrity or political independence or if inconsistent with the United Nations' purposes.[102]

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96. UN CHARTER art. 2, para. 4.

97. *See* Röling, *supra* note 46, at 4; MCCOUBREY & WHITE, *supra* note 56, at 24-25.

98. *See supra* note 10 (Purposes of the UN Charter); *see also* Röling, *supra* note 46, at 4-5.

99. *See infra* note 115 (discussing Covenant of the League of Nations art. 10).

100. BROWNLIE, *supra* note 95, at 267.

101. Professor Röling notes that one writer (Julius Stone) argues that "as a simple matter of syntax, the structure of Article 2(4) does not produce an unqualified prohibition of the resort to force, as it would have done if the draftsmen had stopped at the words 'threat or use of force.'" Röling, *supra* note 46, at 4; Schachter, *supra* note 18, at 1625. "The last twenty-three words contain qualifications. . . . If these words are not redundant, they must qualify the all-inclusive prohibition against force. Just how far they do qualify the prohibition is difficult to determine from a textual analysis alone." Schachter, *supra* note 18, at 1625.

102. *See supra* Part II.A.; LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS 104-105 (1949). These commentators discuss the chaos that the "territorial integrity or political independence" clarification/qualification language could have on the relations of nations. They expressed a hope (in 1949) that the international community would ignore the poor syntax and give effect to the intent of the change (to protect weaker nations) and to the spirit and intent of the Charter. *Id*. Their hope has been realized so far.

As obvious as the foregoing argument appears to be, the ICJ[103] and most legal scholars look to the full text of the UN Charter,[104] historical development of the Charter, and the intentions of the drafters[105] for the meaning of Article 2(4).[106] As a minimum, however, the language is sufficiently ambiguous,[107] obscure,[108] and likely to lead to an absurd or unreasonable result to justify resort to all available sources of interpretation, including "the preparatory work of the treaty and the circumstances of its conclusion."[109]

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103. The United Kingdom unsuccessfully argued this interpretation of Article 2(4)during the Corfu Channel Case. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgment on Merits). In that case, Albania asserted its sovereignty over the channel and mined it to prevent the free navigation by others. The United Kingdom claimed that the channel was an international body and entered the channel to remove the mines. In the dispute that followed, the United Kingdom argued that it "had threatened neither the 'territorial integrity' nor the 'political independence' of Albania, and hence [its conduct] was not unlawful." Röling, *supra* note 46, at 3-4. The ICJ held that the United Kingdom violated Article 2(4). ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 216-17 (1963).

104. *See* UN CHARTER art. I (Purposes); Chapter IV (The General Assembly); Chapter V (The Security Council); Chapter VI (Pacific Settlement of Disputes); and Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).

105. The counter-argument may be summed up as follows: "[S]uch arguments would destroy, at the outset, the foundation upon which the whole post-1945 order was to be built." MCCOUBREY & WHITE, *supra* note 56, at 25.

106. BROWNLIE, *supra* note 95, at 267; Röling, *supra* note 46, at 4. During the ratification process, Senator Connolly encouraged an analysis of the Charter by considering the entire document, and not just bits and pieces. He said, "The Charter must be judged not in its dissected parts, not in its dismembered and mutilated clauses and phrases, but it must be judged as an integrated body, complete in its organs and functions." 91 CONG. REC. 6877 (1945).

107. Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 39 (1989).

108. Professor Stone made the following comment about the clarity of Article 2(4):

> It would surely be a massive inadvertence to many sharp and complex legal controversies surrounding article 2(4) and its relation to other articles of the Charter to suggest that the exact scope of article 2(4) itself . . . is in any sense 'clear-cut.' It would indeed be sanguine to regard it as anything short of very obscure.

Julius Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356, 369 (1968).

109. CARTER & TRIMBLE, *supra* note 58, art. 32; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 comment e.

2. Background to Text

Until 1914, war was considered an inherent right of a sovereign nation.[110] "Threats of force" would have fallen into a legal category called "hostile measures short of war," which included all threats or uses of military force up to declared war.[111]

During and immediately after World War I,[112] states were more concerned about the use of force.[113] That concern was manifested in the drafting of the Covenant of the League of Nations and creation of the League of Nations.[114] The Covenant did not outlaw or prohibit the "threat or use of force," but did make aggression, threats of aggression,[115] war, or threat of war[116] a matter of concern for all members and "created a presumption against the legality of war as a means of self-help."[117]

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110. BROWNLIE, *supra* note 95, at 41.

111. *Id*.

112. From 1914-1918, there were 37 million military casualties and 13 million deaths (counting all military and civilians). STETTINIUS, *supra* note 4, at 9. A second source lists 20 million military and civilian deaths due to war, 20 million more wounded, and another 20 million dead from epidemic and famine. FERENCZ, *supra* note 53, at 41.

113. BROWNLIE, *supra* note 95, at 51.

114. The Covenant was drafted during the first four months of 1919 and was adopted on April 28, 1919. FERENCZ, *supra* note 45, at 7. "[T]he isolationist United States Senate refused to give its consent to the Treaty. The failure of the world's richest and most powerful nation to accept the Covenant or become a Member of the League was bound to destroy the possibility of the League ever becoming an effective instrumentality for world peace." *Id*. at 9-10.

115. Article 10 of the Covenant of the League of Nations uses language that later appears in Article 2(4) of the UN Charter: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." COVENANT OF THE LEAGUE OF NATIONS art. 10, *reprinted in* FERENCZ, *supra* note 45, at 61-63.

116. Article 11 of the Covenant states, "Any war or threat of war . . . is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." COVENANT OF THE LEAGUE OF NATIONS art. 11, *reprinted in* FERENCZ, *supra* note 45, at 63-64.

117. BROWNLIE, *supra* note 95, at 56-57. War continued to be a viable alternative for states, but states had to either submit their disputes to arbitration, judicial settlement or the Council for resolution prior to resorting to war. COVENANT OF THE LEAGUE OF NATIONS arts. 12, 13, 15, *reprinted in* FERENCZ, *supra* note 45, at 64-65. Failure to follow the League procedures would be deemed to be an act of war against all of the members. COVENANT OF THE LEAGUE OF NATIONS art. 16, *reprinted in* FERENCZ, *supra* note 45, at 65-66.

The first attempt to actually prohibit or outlaw war was the Kellogg-Briand Pact or Pact of Paris,[118] which is still in force today.[119] The Pact and the UN Charter are the primary sources of the norm limiting resort to force by states.[120] Unlike the UN Charter, however, the Pact did not expressly prohibit threats to use force.[121] Before 1945, "there was no customary international prohibition on the unilateral resort to force. If the circumstances warranted it, . . . states reserved the right to resort to force."[122]

The history of the text of the UN Charter began with the Atlantic Charter, a joint statement by President Franklin D. Roosevelt and Prime Minister Winston Churchill in which they "envisioned a peace afford[ing] to all peoples security from aggression."[123] The "freedom from aggression" theme was an echo reverberating since the mid-1930s,[124] a focal point for the creation of the wartime alliance,[125] and the catalyst for the creation of an organization to maintain or restore peace.[126]

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118. *See supra* note 76. The Pact of Paris is only three short articles. Nations signing the Pact of Paris renounced recourse to war as an instrument of national policy and pledged to only use pacific means to resolve international disputes or conflicts. Pact of Paris, *supra* note 76, at art. I and II. "It was eventually ratified by almost all of the countries of the world." FERENCZ, *supra* note 45, at 25.

119. BROWNLIE, *supra* note 95, at 75.

120. *Id*. at 91.

121. *Id*. at 364. Professor Brownlie notes, however, that the Pact of Paris may address some threats of force. He wrote that "a threat to resort to war for political motives would seem to be a[n] [illegal] 'recourse to war for the solution of international controversies' and 'as an instrument of national policy.'" *Id*.

122. W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 642 (1984).

123. 24 FUNK & WAGNALL, *supra* note 30, at 8796. They issued their joint statement in August 1941. *Id*.; FERENCZ, *supra* note 45, at 371; GOODRICH & HAMBRO, *supra* note 102, at 4.

124. Aggressions during that decade included the following: Italy invaded Ethiopia (1935), Germany reoccupied the Rhineland (1936), Germany and Italy intervened in the Spanish Civil War (1936), Japan invaded China (1938), Germany annexed Austria and demanded portions of Czechoslovakia, Germany invaded Poland (1939), and the Soviet Union invaded Finland (1939). FERENCZ, *supra* note 53, at 69-79.

125. On 1 January 1942, "representatives of the twenty-six nations then warring against the Axis Powers met in Washington, D.C., and formally subscribed to the purposes and principles enunciated in the Atlantic Charter." 24 FUNK & WAGNALL, *supra* note 30, at 8796. The agreement signed at that meeting was called the "Declaration by the United Nations." *Id*.; MCCOUBREY & WHITE, *supra* note 56, at 23; GOODRICH & HAMBRO, *supra* note 102, at 4-5.

126. As is evident from reading the Congressional Record from 1945, the United States, as a nation, felt guilty and remorseful for, first, failing to join the League of Nations

An initial draft of what would evolve into the UN Charter was prepared at Dumbarton Oaks, Washington, D.C.[127] The language of what is now Article 2(4) is the same as the language from the Dumbarton Oaks proposal until the word "force."[128] During the San Francisco Conference, the following language was inserted after the word "force": "against the territorial integrity or political independence of any state." This language was added "at the insistence of the smaller states, worried that the original draft was not robust enough to protect the weaker states from armed interventions by the more powerful states."[129]

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126. (continued) and then being unable to exercise any influence over the tragic aggressions that took place in the 1930s. Senator Connally, one of the drafters of the UN Charter, and the Chairman of the Foreign Relations Committee, was one of many Senators to raise the specter of the League of Nations during the Charter ratification process:

> Strange as it may seem, in view of the practical unanimity of the people of the United States in support of the Charter, many representatives of foreign nations are still doubtful as to what the vote on the Charter will be here in the Senate. They remember 1919. They know how the League of Nations was slaughtered here on the floor. Can you not still see the blood on the floor? Can you not see upon the walls the marks of the conflict that raged here in the Chamber where the League of Nations was done to death? They fear that that same sentiment may keep the United States from ratifying this Charter.

91 CONG. REC. 7954 (1945).

127. Plans for an international organization named the "United Nations" began after a conference in Moscow and the signing of the "Moscow Declaration," on 30 October 1942 by representatives from the United States, the Soviet Union, the United Kingdom, and China. MCCOUBREY & WHITE, *supra* note 56, at 23; 24 FUNK & WAGNALL, *supra* note 30, at 8796. In the summer and autumn of 1944, the four signatories met at Dumbarton Oaks, Washington, D.C., to draft detailed proposals for the new international organization. 24 FUNK & WAGNALL, *supra* note 30, at 8796; JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 11 (1982). The Dumbarton Oaks document formed the basis of the deliberations at the United Nations Conference in San Francisco, California, 91 CONG. REC. 7299 (1945), where the UN Charter was drafted from 26 April to 26 June 1945. STETTINIUS, *supra* note 4, at 9; 24 FUNK & WAGNALL, *supra* note 30, at 8796; 91 CONG. REC. 6701, 6874 (1945).

128. "All members . . . shall refrain . . . from the threat or use of force . . . ." UN CHARTER art. 2, para. 4; Dumbarton Oaks Proposals Chap. II, para. 4; *see* STETTINIUS, *supra* note 4, at 178, 179 (Appendix A with UN CHARTER and Dumbarton Oaks Proposals side-by-side).

129. MCCOUBREY & WHITE, *supra* note 56, at 25. According to the authors, and the "smaller states" that recommended the additional language, "the phrase was inserted to strengthen article 2(4), not to weaken it." *Id.*; GOODRICH & HAMBRO, *supra* note 102, at 103-105.

The historical context of Article 2(4) gives important clues to its meaning. First, and foremost, the key concern that motivated the founders of the United Nations was the prevention of military aggression.[130] The members of the League of Nations must have been dumbfounded when Mussolini's armies attacked Ethiopia or when Mussolini and Hitler used the killing fields of Spain to train troops and test weapons and tactics. After the Pact of Paris and the establishment of the League's conflict resolution procedures, the blatant aggressions throughout the 1930s must have shocked the U.N. architects.

When the aggressions occurred prior to World War II, it became immediately obvious that the League was powerless to stop them. The international community needed a policeman or a benevolent gang to stop the thugs. A necessary prerequisite for the next attempt at an international organization was the good faith participation of all, or at least most, of the world's most powerful nations. The League failed, not just because the United States did not join, but because the big powers that were members did not work together. Cooperation of the great powers is the key to the success of the United Nations.[131]

Based on this context, joint military exercises to deter a known aggressor, as in South Korea, would be praised by the UN Charter drafters, not condemned. If the exercise participants talk about defense, and not conquest, the show of force would be consistent with the purposes and principles of the Charter.[132] The fact that U.S. politicians make statements to encourage the potential aggressor to comply with its international obligations should not change this analysis. Aggression, and not deterrence, is the scourge to be eliminated by the world community.

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130. *See supra* notes 123-126.

131. Coll, *supra* note 19, at 608. "No legal interpretation of article 2(4) can ignore" the importance of international cooperation. *Id*. Professor Coll describes the Charter arrangement as "Hobbesian." *Id*. Professor Lebow noted that "[d]eterrence is based on a Hobbesian view of the world. . . . [A]ggression occurs when a state perceives the opportunity to get away with it." RICHARD NED LEBOW, BETWEEN PEACE AND WAR, THE NATURE OF INTERNATIONAL CRISIS 883 (1981). When the UN deterrence system fails to work, and deterrence is still deemed to be necessary for a state's survival, then states may be compelled to exercise deterrence on their own. *Id*.

132. *See supra* note 10 (Purposes of the UN Charter).

3. Intentions of the Drafters

Although reluctantly considered by the ICJ or other international tribunals,[133] the intentions of the drafters is a key method of determining the meaning of executed documents in the United States.[134] Analysis of legislative histories or preparatory work is often helpful in any treaty interpretation to determine the intentions of the parties.[135]

As noted above, the background documents and drafts of an international agreement, treaty or other document are usually referred to as *travaux préparatoires* or preparatory work. There are two ways to analyze the *travaux*: (1) by looking at summaries or commentaries prepared by participants at the time, or (2) by reviewing the draft documents and notes prepared during the actual drafting of the Charter. Although the latter method might yield more specific comments from specific individuals attending the drafting conference, the task would require the analysis of more than 3,000,000 pages of text.[136] Fortunately, there are a number of excellent summaries and commentaries about the Charter drafting process that assist in identifying the intentions of the drafters.[137]

Secretary of State Stettinius summarized the Charter and the historical context in which it was drafted in the first eleven pages of his Report

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133. *See, e.g.*, Kearney & Dalton, *supra* note 58, at 519. Professor Kelsen does not believe it is possible to glean the legislative intent or intention of the drafter from "a complex procedure in which many individuals participate, such as . . . the procedure through which a multilateral treaty is negotiated. . . ." KELSEN, *supra* note 11, at xiv.

134. *See* United States v. Alvarez-Machain, 504 U.S. 655, 666 (1992) (interpreting a treaty, look at the language of the treaty in the context of its negotiation history).

135. LAUTERPACHT, *supra* note 61, at 27.

136. Representative Charles A. Eaton of New Jersey participated in the United Nations Conference in San Francisco and summarized the voluminous record prepared in a speech to the House of Representatives on 6 July 1945:

> While the Dumbarton Oaks proposals . . . formed the basis of our deliberations, there were some 700 pages of amendments proposed, supported by 800,000 documents. There were written during the Conference 3,000,000 pages of official documentation. Four commissions and 12 technical committees working in conjunction with almost daily and nightly conferences of the heads of the five great powers, hammered out upon the anvil of free and unlimited discussion the Charter in its final form.

91 CONG. REC. 7299 (1945).

137. *See generally* STETTINIUS, *supra* note 4, at 9-19 (Mr. Stettinius was the Secretary

to the President.[138] He emphasized the enforcement mechanisms of the Charter and asserted that the "overriding purpose [of the Charter is] 'to maintain international peace and security.'"[139] In his review of Article 2(4), he said that "force [(and presumably threats of force)] may only be used [(1)] in an organized manner [, (2)] under the authority of the United Nations [, (3)] to prevent and remove threats to the peace [,] and [(4)] to suppress acts of aggression."[140] The Secretary of State emphasizes that collective force to maintain peace and security is the heart of the Charter scheme.[141] In addition to use of force as part of U.N. collective security, states may also use force to repel aggression under Article 51.[142]

If the Secretary's four-part test were applied to the TEAM SPIRIT situation, the TEAM SPIRIT scenario would most likely be acceptable. The only part of the test that is questionable is the second step: the UN authority requirement. The authority arguably exists now, based on the Security Council actions in 1950, or it could easily be obtained in view of the current collective efforts to fight aggression in Korea.

Professor Goodrich and Mr. Hambro analyzed the drafters' work and found that the ban on the threat and use of force in Article 2(4) "covers a considerably wider range of actions than the phrase "resort to war" used in the Covenant [of the League of Nations]."[143] These commentators assert that the drafters intended to limit the rule to the threat or use of "armed" or "physical" force.[144] The authors note that, "[t]he coercion or attempted

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137. (continued) of State at the time and Chairman of the United States Delegation); GOODRICH & HAMBRO,*supra* note 102, at 4-5, 103-105 (Mr. Goodrich was a Professor of Political Science at Brown University and Mr. Hambro was the Registrar of the International Court of Justice); KELSEN, *supra* note 11, at xiv, 120, 915 (Mr. Kelsen was a Professor of Political Science at the University of California-Berkeley).

138. STETTINIUS, *supra* note 4, at 9-19.

139. *Id.* at 13.

140. *Id.* at 41.

141. *Id*.

142. *Id*.

143. GOODRICH & HAMBRO, *supra* note 102, at 104.

144. *Id*. Professor Jackamo agrees:

> While some commentators have interpreted "threat or use of force" to mean both armed and non-armed force, most have refrained from extending this interpretation beyond armed interventions. Indeed, the primary purpose of the formation of the United Nations was the prevention of war, a fact which is quite evident from the legislative history captured at the Conference at San Francisco in 1945.

coercion of states by economic or psychological methods may be undesirable and contrary to certain of the declared purposes of the United Nations, but [Article 2(4)] is not directed against action of this kind."[145] This interpretation supports the TEAM SPIRIT scenario. The messages, warnings, and pressures directed toward North Korea are arguably psychological and not physical threats, at least as long as the United States makes credible assurances that its military buildup for the exercise is purely defensive in nature.

Some commentators claim that the drafters intended to create an absolute prohibition on threats or use of force with very limited exceptions.[146] Professor Henkin asserted, however, that "Article 2(4) was written by practical men who knew all about national interest."[147] They drafted "norms" to guide behavior, not to hamstring their governments from taking necessary actions for national security or other reasons.[148]

According to Professors Kearney and Dalton, "The legislative history of the San Francisco Conference is clear as to the original intent. 'All the [m]ember [s]tates had agreed to prohibit . . . physical or armed force.'"[149] Professor Kelsen concurs with the emphasis on armed force.[150] Among the rare references to Article 2(4) in his almost one-thousand-page critique of the UN Charter, he notes that the ban on the use of force (and, again, presumably the threat of force as well) refers "especially to the use of armed force."[151] He says that the right to use armed force is dependent upon the existence of a credible claim of self or collective defense.[152] He

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144. (continued) Thomas J. Jackamo, III, *From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention*, 32 VA. J. INT'L L 929, 959 (1992).

145. GOODRICH & HAMBRO, *supra* note 102, at 104.

146. BROWNLIE, *supra* note 95, at 113.

147. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 547 (1971).

148. *Id*. They were also realistic men and women who knew "that an evil which killed some forty million human beings, armed and unarmed, within the period of thirty years . . . would not be eradicated by the mere act of writing a charter, however well designed." STETTINIUS, *supra* note 4, at 10.

149. Kearney & Dalton, *supra* note 58, at 534 (quoting the Chilean delegate to the San Francisco Conference).

150. KELSEN, *supra* note 11, at 915. Professor Sadurska notes, "This conclusion [that Article 2(4) only applies to the physical use of armed force], although not contradicted by the travaux préparatoires of the Charter, cannot be said to be clearly confirmed by them." Sadurska, *supra* note 17, at 242 n.12.

151. KELSEN, *supra* note 11, at 915.

152. *Id*.

compared the Charter and the Kellogg-Briand Pact and argues that the Charter is directed at the threat or use of armed forces.[153]

One of the most notable aspects of the drafting process is the unanimous vote in favor of ratification.[154] It is not clear whether the unity was because of the continuing world war, the desire to influence the subsequent ratification process by a show of solidarity, or a sincere satisfaction with the work that was accomplished. One intent was clear, however: to stop armed or military aggression and protect the weaker nations with a worldwide collective security system. Even if the intention was to ban all unauthorized threats of force, the arguably implicit threat associated with the TEAM SPIRIT exercises would not trouble the drafters in view of North Korea's military might and behavior.[155]

4. Intentions of U.S. Decision-Makers During Ratification

In this international law analysis, a review of the United States' ratification of the UN Charter is relevant to determine whether any reservations exist.[156] Definitions of "threats or uses of force" by the executive, legislative, or judicial branches of the U.S. government are also relevant if an allegation of a breach of Article 2(4) arises in a U.S. forum. Because

153. *Id*. at 120 (He found the Charter and Pact compatible, with the Charter being the more restrictive of the two).

154. 91 CONG. REC. 7298, 7950, 7954 (1945). Senator Connally's account makes the drafting convention come to life for readers more than fifty years later:

> [Y]ou would have been stirred, I am sure, had you been on the steering committee representing all 50 of the nations, when the roll was called and every nation responded 'yea.' It was a historic event, it was a stirring event, when the vote was recorded and it was announced that 50 nations had recorded their views that the Charter ought to be ratified.

91 CONG. REC. 7954.

155. *See supra* notes 22, 40, and 41 (Korea has the fifth largest military and may have nuclear weapons.).

156. A party to a treaty may accept most, but not all, of its obligations under a treaty by entering a "reservation" to the provisions that are deemed to be unacceptable. CARTER & TRIMBLE, *supra* note 58, at 139. "In U.S. practice the President would communicate any U.S. reservation when he ratifies the treaty." *Id*. at 196. Usually the President makes an initial decision about the reservations that he deems appropriate and communicates his decision to the Senate as it conducts the advice and consent process. *Id*. "In addition, especially in recent years, the Senate has initiated or required the entry of substantive reservations to treaties as part of its 'advice and consent' role." *Id*.

the U.S. Constitution makes treaty-making a joint effort,[157] it is important to analyze the President's and the Senate's intentions during the ratification process.

There is no evidence in the Congressional Record of an intent to make any reservations to the ratification of the Charter.[158] In searching for reservations, exceptions, or understandings, however, it became clear that the President and Senate intended to ratify the UN Charter as quickly as possible to set an example for other nations.[159] Politicians also wanted to demonstrate the United States' determination to make the United Nations a reality.[160] The rapid ratification process[161] was a source of great pride in this country.[162] The speedy ratification, however, meant a less than full discussion of every provision of the Charter during the ratification process.[163]

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157. The Constitution states: the President has the "power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." U.S. CONST., art. II, § 2, cl. 2.

158. 91 CONG. REC. 5936-8190.

159. The following conclusion of Representative Bloom's speech to the House of Representatives on 6 July 1945 is typical rhetoric during the ratification process: "May the Congress of the United States lead the rest of the world in ratifying this new magna carta of peace and security for mankind." 91 CONG. REC. 7299.

160. Senator Connolly challenged the Senate to make the United States a leader: "The United States must employ its tremendous national power to lead and cooperate with other nations to curb aggression and to crush and overwhelm savage attacks upon peaceful peoples." 91 CONG. REC. 6878.

161. President Truman signed the UN Charter at the conclusion of the San Francisco Conference on 26 June 1945. 91 CONG. REC. 6701. Six days later, on 2 July 1945, President Truman submitted the Charter to the Senate, urging "prompt ratification." 91 CONG. REC. 7118-7119 (1945). Hearings began in the Senate Committee on Foreign Relations one week later on Monday, 9 July 1945. 91 CONG. REC. 7275. Less than three weeks later, on Friday, 28 July 1945, the Senate passed the resolution of ratification (to "advise and consent to the ratification" of the Charter) by a vote of 89 to 2. 91 CONG. REC. 8189-8190. President Truman ratified the Charter eleven days later on 8 August 1945. Joint Resolution Aug. 4, 1947, c. 482, 61 Stat. 756.

162. Chief Justice Vinson's dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 668 (1952) provides an example of this national pride. He wrote the following: "Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the UN Charter, approved by the Senate by a vote of 89 to 2."

163. This was a frequently expressed concern during the ratification process. Senator Brewster cautioned on 28 June 1945:

> I hope that while the subject is being considered there will not go out through the country today or tomorrow the word that 40, 50, 60, or 70

President Roosevelt was instrumental in the prompt ratification of the Charter by his selection of the United States delegation.[164] President Truman and the State Department furthered the success of both the drafting process[165] and the ratification process with efforts to educate the public and all decision-makers.[166] In addition, President Truman made personal appeals to Congress to ratify the Charter quickly.[167]

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163. (continued)

> Senators have already passed judgment upon the matter, and that is [sic] is a closed book. I assert that we will do little service to the dignity of this body if we thus anticipate in advance the decisions resulting from the deliberations . . . .

91 CONG. REC. at 6921. The President and Senate leaders acknowledged that the Charter was not perfect. They preferred to ratify the Charter quickly and then revise it later, rather than delay the ratification to improve it. The ghost of the failed ratification of the Covenant of the League of Nations was one reason for wanting to expedite the process. The political leadership did not seem to be too concerned about ratifying a Charter with problems, however. They expressed their belief that the Charter could be revised over time to stay abreast of changes in the world, perhaps to include changing practices of nations. *See* discussion *infra* Part III.B.8. President Truman expressed this opinion to the San Francisco Conference at the closing ceremonies: "The Charter, like our own Constitution, will be expanded and improved as time goes on. . . . Changing world conditions will require readjustments." 91 CONG. REC. 6980. Senator Connolly appealed to the Senate using similar language: "The Charter is a 'significant beginning' . . . It will grow and develop in the light of experience and according to the needs of nations under international law and justice and freedom." 91 CONG. REC. 6877.

164. In addition to the Secretary of State, Edward R. Stettinius, Jr., the United States Delegation included Senator Tom Connally, the Chairman of the Foreign Relations Committee; Senator Arthur H. Vandenberg, Representative Sol Bloom, and Representative Charles A. Eaton. STETTINIUS, *supra* note 4, at 254. Former Secretary of State Cordell Hull was also assigned to the delegation, but he did not participate due to illness. 91 CONG. REC. 6877.

165. By ensuring that the drafting process took place before the war was over, President Truman was able to count on a higher degree of unity among the fifty allied nations at the San Francisco Conference. STETTINIUS, *supra* note 4, at 9-12.

166. The Department of State distributed approximately 1,900,000 copies of the Dumbarton Oaks Proposals, had films and a radio series, accepted hundreds of speaking engagements, reviewed as many as 20,000 letters per week relating to the Dumbarton OaksProposals, and invited forty-two national organizations to serve as consultants to the U.S. Delegation. STETTINIUS, *supra* note 4, at 27.

167. In his remarks to the Senate upon formally submitting the Charter to the Senators for their advice and consent on 2 July 1945, President Truman said, "It is good of you to let me come back among you. You know, I am sure, how much that means to one who served so recently in this Chamber with you." 91 CONG. REC. 7118.

The voluminous record of the ratification proceedings does not contain a definition of "threats of force." As in the other sources considered so far in this analysis, the often colorful rhetoric during the late summer of 1945 included an emphasis on unity,[168] sovereign equality of nations,[169] fighting armed aggression,[170] and the importance of deterrence.[171]

Only a few concerns were expressed during the ratification process. One was that the process might be going too quickly.[172] Another concern was whether the United States would be surrendering any of its authority over its own military forces.[173] The latter issue, which still exists today, supports an interpretation that the legislative intent was for the United States to keep some freedom of action short of war. The issues emphasized in congressional speeches during ratification also support the TEAM SPIRIT scenario as the United States works with allies to deter aggression.

5. International Court Opinions

A majority of the cases considered by the ICJ involve interpreting treaties and other international agreements.[174] In the *Corfu Channel Case*, the first case to be considered by the ICJ,[175] the court clarified the meaning and purpose of the phrase "territorial integrity or political independence" in Article2(4), finding that the phrase emphasized particular types of aggression that are especially egregious, but did not limit the prohibition on the threat or use of force.[176]

A precedent[177] from part of an ICJ case that is "on all fours"[178] with the issue discussed in this article emerged from a case the United States

168. 91 CONG. REC. 6701, 6874, 6878, 6980.
169. *Id*. at 5939, 6980.
170. *Id*. at 5944, 6878.
171. *Id*. at 5944, 6702.
172. *Id*. at 6921.
173. *Id*. at 6875.
174. *See* discussion *supra* Part III.A.1.
175. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 395.
176. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgement on Merits).
177. Opinions of the ICJ have "no binding force except between the parties and in respect of that particular case." Statute of the ICJ, *supra* note 60, art. 59. The ICJ opinions are at least persuasive authority, however. *See* Statute of the ICJ, *supra* note 60, art. 38, para. 1.d. ("The Court . . .shall apply . . . judicial decisions . . . .").
178. "On all fours" means "a judicial decision exactly in point with another as to result, facts, or both. . . . The one is said to be on all fours with the other when the facts are

lost: *Nicaragua v. United States*.[179] Nicaragua alleged that the United States violated Article 2(4) by, *inter alia*, conducting military maneuvers with Honduras on Honduran territory near the Nicaraguan border.[180] According to Nicaragua, the military exercises were illegal because they "formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government."[181] The court noted that there was no secrecy about holding the maneuvers and considered newspaper accounts in addition to the briefs and other documents filed by Nicaragua in reaching its decision on this claim.[182]

In deciding whether the U.S. military exercises were an illegal "threat of force," [183] the court considered the ongoing "war of words" with Nicaragua.[184] The court determined[185] that it was "not satisfied that the

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178. (continued) similar and the same questions of law are involved." BLACK'S LAW DICTIONARY 1088 (6th ed. 1990).

179. In *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27), the Court found that the United States violated Article 2(4) by a number of activities. The violations of law included the following: laying mines in Nicaraguan waters; attacks on Nicaraguan ports, oil installations, and a naval base; and training, arming, and equipping the *Contras*. *Id*. at 118, 134-35, 147-49. Nicaragua sought $370,200,000 in damages. *Id*. at 20, 142-45. The court ruled that "the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua. . . ." *Id*. at 149. The court reserved ruling on the "form and amount" of Nicaragua's damages, hoping that the parties would agree on an amount. *Id*. The United States contested jurisdiction and did not take part in the proceedings. *Id*. at 17, 20, 22, 23.

180. The Court listed the various exercises as follows:

> The manoeuvres [sic] in question are stated to have been carried out in autumn 1982; February 1983 ("Ahuas Tara I"); August 1983 ("Ahuas Tara II"), during which American warships were, it is said, sent to patrol the waters off both Nicaragua's coasts; November 1984, when there were troop movements in Honduras and deployment of warships off the Atlantic coast of Nicaragua; February 1985 ("Ahuas Tara III"); March 1985 ("Universal Trek '85"); [and] June 1985, paratrooper exercises.

Id. at 53.

181. *Id*.

182. *Id*.

183. The court noted that "a 'threat of force' . . . is equally forbidden by the principle of non-use of force." *Id*. at 118.

184. *See, e.g.*, *id*. at 57-58 (U.S. Congressional Acts authorizing and appropriating funds for the *Contras*), 58-59 (*Washington Post* article on CIA covert operations in Nicaragua), 64 (*New York Times* article on *Contras* conducting assassinations and psychological warfare training), 65 (the CIA's preparation and distribution of a manual for training guerrillas in psychological operations), 69-70 (press releases from the White House and public

manoeuvers [sic] complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force."[186]

The similarities between this part of the *Nicaragua* case and the situation in Korea are striking. Although the ICJ did not elaborate on the "circumstances" in which the exercises were held, more likely than not some of the key facts included the United States' emphasis on "training" [187] and "deterrence."[188] The exercises in Korea are just as public and just as publicly committed to training.[189] Although TEAM SPIRIT took place in an environment of tough political talk and threats, the exercise, like those in Central America, was conducted primarily for training. Although the ICJ opinion is not binding precedent, the part that discusses U.S. military exercises would certainly be persuasive if U.S. military exercises in Korea were ever challenged at the ICJ.[190]

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184. (continued) statements by the President supporting the reduction of economic assistance to Nicaragua because of its "aggressive activities" in Central America).

185. The United States did not contest any of the evidence, of course, because of its decision not to participate in the proceedings. *See id*. at 17, 20, 22, 23.

186. *Id*. at 118.

187. "A primary purpose of the 60 or so maneuvers the United States conducts every year with foreign countries is training, Pentagon officials say. . . ." Wright, *supra* note 39, at 4. In view of the date of this newspaper article, the date of the case, and the references to the *New York Times* in the opinion, the judges of the ICJ may have considered, or at least read, Wright's article prior to deciding the case. This article noted that U.S. sailors, soldiers, and airman participated in a weeklong military exercise in Honduras in February 1983 ("within a dozen miles of the frontier with Nicaragua"). *Id.* It also mentioned that a three-week naval exercise was beginning in the Caribbean, involving as many as 36 warships, including three aircraft carriers, from the U.S., United Kingdom, and the Netherlands ("the most extensive [naval exercises] held in the area in years"). *Id*.

188. United States military exercises "might also seem designed to demonstrate that Washington is both trustworthy and not to be trifled with." *Id*.

189. *See id*.

190. It is unlikely that North Korea would pursue claims at the ICJ because it might risk "losing control over the resolution of [the] disputes entrusted to the Court for adjudication." Leo Gross, *Underutilization of the International Court of Justice*, 27 HARV. INT'L L.J.571, 571-572 (1986) (discussing reasons nations do not use the ICJ). Korea's violation of treaties and other international agreements, *see supra* notes 41-45, would make it unwise to place itself before the jurisdiction of the ICJ. *See, e.g.*, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgement on Merits) (The United Kingdom sued Albania for damages, and won, after mines in a contested waterway damaged British ships and caused deaths and injuries to crewmen. Albania filed a counterclaim, and won, alleging the UK violated Article 2(4) when a British minesweeper entered sovereign Albanian territory (the disputed waterway) and cleared away the mines.).

6. Domestic Court Opinions

As noted above, interpreting treaties is an important part of federal court business in the United States.[191] Since ratification of the UN Charter, however, only eight United States Supreme Court cases and 269 other published federal court opinions mention the Charter.[192] Very few cases actually mention Article 2(4).

In 1952, the Chief Justice of the Supreme Court said, "The first purpose of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression . . . ."[193] The various sources interpreting Article 2(4) therefore reveal a common theme: the United Nations was created to maintain peace by deterring aggression. This was also one of the purposes of the TEAM SPIRIT exercises.

Occasionally other federal courts have discussed Article 2(4) in very general terms. Judge Bork described Article 2(4) as the "fundamental principle of the Charter–the non-aggression principle."[194] He noted that Articles 1 and 2 of the UN Charter "contain general 'purposes and principles,' some of which state mere aspirations and none of which can sensibly be thought to have intended to be judicially enforceable at the behest of individuals."[195] His statement is consistent with a general principle of interpretation: "Articles phrased in 'broad generalities' constitute 'declarations of principles, not a code of legal rights.'"[196] Judge Bork's descrip-

191. *See supra* Part III.A.4. Although domestic court decisions are not very persuasive to international determinations of the meaning of treaty terms, they are relevant to that analysis. As discussed above, the ICJ includes the "judicial decisions . . . of the various nations" as part of its final tier of sources to consider in a treaty interpretation issue. Statute of the ICJ, *supra* note 60, art. 38, para. 1.d.; *see supra* Part III.A.1. Although not as persuasive as the writings of legal scholars and the practices of nations, *see infra* Parts III.B.7 and III.B.8, respectively, this analysis of domestic court cases is included at this point to follow the international court cases and complete the analysis of court decisions generally.

192. This conclusion is based on a search conducted through LEXIS on 20 January 1999 using the key words: "United Nations" as a phrase, within twenty-five words of the word "Charter."

193. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 668 (1952) (dissenting).

194. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 n. 16 (D.C. Cir. 1984) (concurring).

195. *Id*. at 809.

196. United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (quoting Frolova v. USSR, 761 F. 2d 370, 374 (7th Cir, 1985)).

tion of Article 2(4) as applying to "aggression" and not other, more benign, threats, or uses of force, would also support the military maneuvers at issue in our scenario.

Federal court litigants do not win cases by alleging violations of the UN Charter.[197] If a foreign government does not complain that the United States violated Article 2(4), United States courts do not analyze that provision to determine whether it was violated.[198] Federal courts often express one of three main reasons for not interpreting Article 2(4) or other provisions of the UN Charter. First, as noted above, the clauses are general and not intended to be interpreted and enforced by the individual party plaintiffs or defendants.[199] Second, interpretations of Article 2(4) by the courts might be inconsistent with executive branch activities and would

197. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (federal district court had jurisdiction even though criminal defendant claims that U.S. agents violated extradition treaty with Mexico when they abducted him from Mexico and Mexico complains as well); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (plaintiff attempted to seek damages against Libya for alleged violations of UN Charter); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (draft dodger asserts Article 2(4) as a defense to his efforts to avoid induction to fight in an "illegal" war); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990) (Noriega asserts lack of jurisdiction based on U.S. violation of Article 2(4)); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th 1985) (plaintiff not entitled to base suit on alleged violations of UN Charter).

198. United States v. Hensel, 699 F.2d 18, 30 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983) ("As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved."); United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (Noriega lacked standing to raise a treaty violation in the absence of a protest by the government of Panama); *see also* United States v. Zabauch, 837 F.2d 1249, 1261 (5th Cir. 1988) ("The rationale behind this rule is that treaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.").

199. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 n. 16 (D.C. Cir. 1984) (Bork, J., concurring). Judge Bork warned that the enforcement by individuals of alleged violations of Article 2(4) "would flood courts throughout the world with the claims of victims of alleged aggression (claims that would be extremely common) and would seriously interfere with diplomacy." *Id.* The last five words form the second basis for federal courts to avoid interpreting UN Charter provisions, as discussed in this section. One noteworthy feature of the UN Charter is the protection of individual rights in the "purposes" listed in Article 1, paragraph 3: "To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." If individuals could enforce Charter provisions in federal Court, Article 1 might have figured prominently in the efforts to end racial discrimination in the United States during the 1950s, 1960s, and 1970s. *See* JUAN WILLIAMS, EYES ON THE PRIZE 1-57 (1987) (desegregation and other civil rights litigation).

cause confusion in the international arena.[200] Third, it is not the judiciary's duty, because it would amount to conducting foreign policy.[201]

Whether federal courts are abdicating their responsibilities or appropriately exercising judicial discretion,[202] there is little guidance on the meaning of Article 2(4) in domestic court cases. The conclusory interpretations that exist, however, tend to support the legality of the military exercises. Article 2(4) appears to apply to aggression, breaches of the peace, and threats of war, not to military maneuvers designed to send a message.

7. Legal Scholars

The opinions of legal scholars extend from one end of the spectrum to the other, with countless variations in the middle.[203] The most restrictive position is that Article 2(4) can be boiled down to the following mandate: "All Members shall refrain . . . from the threat or use of force . . . ."[204]

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200. *See* Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L'L. 9, 20-23 (1970) (federal courts defer to executive branch in international law matters).

201. *See* Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969) Simmons argued that the United States' participation in the war in Vietnam violates Article 2(4) and his induction would make him a party to war crimes. The Court affirmed his conviction on the grounds that his induction did not necessarily mean that he would be sent to Vietnam. In addressing his Article 2(4) claim, the Court said that it was inappropriate for the judiciary to conduct the foreign policy of the United States.

202. *See* Lillich, *supra* note 200, at 9. Federal courts frequently avoid analysis of international law issues by citing one of the following doctrines: political question, judicial abstention, or deference to another branch of government. *Id*. at 21-23, 41-45. According to Professor Lillich, such handling of international issues "has lessened the stature of United States domestic courts in the international community . . . ." *Id*. at 23.

203. Röling, *supra* note 46, at 3 (noting "[t]here are many differences of opinion about the content and scope of [Articles 1, 2, and 51]"); Kearny & Dalton, *supra* note 58, at 534 ("The scope of the phrase 'threat or use of force' in [Article 2(4)] . . . has been for many years the source of acrimonious dispute."); Stone, *supra* note 108, at 369 ("[F]ew authorities would say that the exact limits of the lawful threat or use of force under the Charter are free from serious controversy."). Professor Murphy notes that interpretations differ in part because (1) the first purpose in Article 1 addresses "threats to the peace" and "acts of aggression," not "threats or uses of force"; (2) that purpose also implies that "unless law and justice are served, recourse to force may be justified"; (3) the principle of self-determination in Article 1(2) arguably supports threats and uses of force for national liberation; and (4) the prohibition in Article 2(4) conflicts with the Security Council's duty to determine if a threat exists. MURPHY, *supra* note 127, at 17.

204. UN CHARTER art. 2, para. 4. As discussed, *infra*, Professor Brownlie is a proponent of this interpretation. *See* BROWNLIE, *supra* note 95, at 113.

The other extreme finds that, because there is no enforcement, there is no prohibition. Scholars who take this position argue that power politics and national self-interest rule.[205]

Professor Ian Brownlie expresses one of the most restrictive views of the meaning of Article 2(4). He believes the rule is "comprehensive in its reference to 'threat or use of force' and . . . one of the principal exceptions–the reservation of the right of individual and collective defense in Article 51–should be given a narrow interpretation."[206] Professor Levitin is very close to the Brownlie end of the spectrum. He argues that Article 2(4) is still as restrictive as its drafters intended it to be, but should be amended to allow humanitarian interventions (for example, to prevent genocide) and to "liberate" suppressed populations or support self-determination (for example, Paris in 1945, but not Hungary in 1956).[207]

Professors Arend and Franck, on the other hand, argue that Article 2(4)'s prohibition on the threat or use of force "is not authoritative and controlling and, therefore, not a principle of contemporary international law."[208] Professor Franck goes so far as to say that Article 2(4) is "dead" because of "the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest."[209]

Professor Turner expresses a middle ground: Article 2(4) is a rule "prohibiting the aggressive use of military force."[210] Professor Kelsen

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205. *See* Franck, *supra* note 18, at 809.

206. BROWNLIE, *supra* note 95, at 113.

207. *See* Levitin, *supra* note 13, at 652-54. He argues that Article 2(4) should permit states to intervene to prevent extensive human rights violations and should recognize the "liberation of Paris principle: if the people throw flowers, the invasion is lawful; if they do not throw flowers, or if they throw anything else, the invasion is unlawful." *Id. See also* Reisman, *supra* note 122, at 644. Article 2(4) should be interpreted to support genuine efforts at self-determination.

208. Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 132 n.144 (1998); Arend, *supra* note 18, at 45-47; ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 191-94 (1993); Franck, *supra* note 18, at 809.

209. Franck, *supra* note 18, at 837. This view was expressed in a more colorful way by another scholar: "A curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics." Reisman, *supra* note 122, at 643.

210. Turner, *supra* note 65, at 315-316. He asserts that an international consensus exists to support the rule's status as customary international law. *Id*. Other legal scholars have also described Article 2(4), as "a prohibition on the first use of military power." Röling, *supra* note 46, at 3-4.

also believes the emphasis of Article 2(4) is on armed force.[211] He argues that Article 2(4) and Article 51 (self and collective defense) are tied closely together.[212] Professor Henkin disputes those who claim Article 2(4) is "dead," although he admits that it has been undermined by ineffective, haphazard enforcement.[213] Like Professor Turner, Henkin asserts that the rule has obtained universal acceptance as a "norm," not as an absolute prohibition on all threats or uses of force.[214]

Professor Coll, like Professor Turner and many others, takes a middle ground regarding the kind of threats or use of force involved. He argues that Article 2(4) has not been completely destroyed: its "core value–the prohibition of *clear aggression*–remains authoritative."[215] He points out that the General Assembly acknowledged the political reality that the threat and use of force continue to exist as legal options when it authorized the use of force for self determination.[216] An analysis of the kind of authorized threat or use of force is also supported by Professor Reisman: "The critical question . . . is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies . . . ."[217]

Regardless of how broadly or narrowly Article 2(4) is interpreted, legal scholars tend to agree that, in practice, a "threat of force" is rarely considered to have a separate significance beyond the use of force threatened.[218] Either the threat merges with the use of force or the threat dissipates as conditions change.[219] Even though a "threat of force" is as bad as a "use of force" under the Charter, "threats" are evaluated differently.[220]

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211. KELSEN, *supra* note 11, at 120, 915.

212. *Id*. at 915.

213. The continuing vitality of Article 2(4) is argued forcefully by Professor Henkin. Henkin, *supra* note 147, at 544.

214. "[The drafters of the UN Charter] believed the norms they legislated to be in their nations' interest, and nothing that has happened in the past twenty-five years suggest that it is not." *Id*. at 547.

215. Coll, *supra* note 19, at 608.

216. *Id*. at 612, citing United Nations, General Assembly Resolution Adopted Nov. 10, 1975, A/Res/3382 (XXX) ("the General Assembly endorsed the right of national liberation movements to use violent struggle in achieving their ends"); *see also* MCCOUBREY & WHITE, *supra* note 56, at 30 (The resolution "could be interpreted as undermining article 2(4)" and "is the modern-day equivalent of the just war doctrine.").

217. Reisman, *supra* note 122, at 645.

218. MCCOUBREY & WHITE, *supra* note 56, at 239-40.

219. Sadurska, *supra* note 18, at 239.

220. *Id*. "This practical attitude toward the threat of force stems from the preoccupation of international law with international peace and security above all." *Id*.

This creates some difficulty in identifying examples of threats that received international attention.[221] The international community rarely concerns itself with threats that are made and then dissipate or are withdrawn within a relatively short time period.[222]

Defining a "threat" is a challenge in itself. Some of the issues involved are the intentions of the parties, proving the threat, perceptions, tolerance for some threats or certain nations that make threats, and proving causation after an alleged threat.[223] Professor Brownlie offers this definition of a "threat of force": "an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government."[224] Professor Sadurska suggested a similar definition: "[An] act designed to create a psychological condition in the target of apprehension, anxiety, and eventually fear, which will erode the target's resistance to change or will pressure . . . toward preserving the status quo."[225]

Consistent with his restrictive interpretation of Article 2(4), Professor Brownlie's definition of a threat allows for an "implied promise" to use force and is, therefore, the one most likely to include the TEAM SPIRIT scenario. The Sadurska definition focuses on the intent when the "threat" is made and the intent that it have a certain effect on the recipient. The latter scholar lists the following methods, *inter alia*, of expressing a threat: "moving army units into proximity with the target audience, engaging in military maneuvers, increasing a military budget, or deploying certain weapons."[226] Whether any of these possible expressions of a threat are

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221. MCCOUBREY & WHITE, *supra* note 56, at 56. Obviously, the international community is more concerned with actual uses of armed force than with threats to use force. *Id.* One example of threats to use of force involved express and implied threats by Turkey, using naval vessels and military planes, to ensure adequate protection of Turkish Cypriots in 1963. *Id*. at 56-57. The United Nations condemned Turkey's threats as violations of Article 2(4). *Id*. at 57.

222. *Id*. at 58. Turkey's threats against Cyprus are an exception because the threats lasted from December 1963 until 1974, and Turkey threatened to invade the entire time if they deemed it necessary to protect the Turkish Cypriots. *Id.* The United Nations' condemnation took place in 1965. *Id*. When threats are made and then quickly dissipate, "generally the collective sigh of relief that actual force has not been used . . . outweighs any desire to condemn the threat." *Id*. at 58.

223. Sadurska, *supra* note 18, at 241.

224. BROWNLIE, *supra* note 95, at 364.

225. Sadurska, *supra* note 18, at 241.

226. *Id*. at 243.

even threats at all, and if so, whether any are illegal threats, would depend upon the threatener's intentions.[227]

The apparent consensus regarding the test for the legality of a threat is that a threat to use force is legal if the use of force threatened would be legal.[228] This definition could encompass the TEAM SPIRIT exercises. The maneuvers and message might be illegal if they are viewed as an "implied promise" to use military power (although not authorized to do so) to compel compliance with international obligations (for example, abandon a nuclear weapons program, talk peace or fight, pay just debts, or resolve prisoner of war issues).[229]

At least one scholar has applied the Brownlie definition in this way. "[T]he promise" of the resort to force is usually "implied by the massing of troops on the border or by other concrete military preparations or activities."[230] On the surface, this situation appears to apply to U.S. participation in TEAM SPIRIT exercises with more than 100,000 soldiers, sailors, airmen, and marines.[231] The nature, and legality, of the specific demands made before and during the exercise may be the key to whether the exercises are illegal in Professor Brownlie's opinion. Expressed intentions (for example, to conduct a training exercise) may remove U.S. operations from the "implied promise to use force" prong, although the scope of the exercise could undermine what the United States says.[232]

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227. Professor Sadurska notes an interesting distinction between a "warning" and a "threat." A warning merely cautions the target to be careful or the target state may be injured or damaged. A threat is a communication to the target that the threatener is ready, willing, and able to cause damage and injuries if the target does not comply with certain demands. *Id*. at 245 (giving credit to Paul Finn for the clarification).

228. *Id*. at 248; BROWNLIE, *supra* note 95, at 112, 364; MCCOUBREY & WHITE, *supra* note 56, at 55; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27), at 99-105; Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 274-75 (1985), Turner, *supra* note 65, at 350.

229. According to Professor Stone, "forcing" North Korea to agree to do anything may be void under Article 2(4) of the Charter or Article 52 of the Treaty on Treaties. Stone, *supra* note 108, at 369.

230. MCCOUBREY & WHITE, *supra* note 56, at 55-56. The authors describe Iraq's massing of 100,000 troops on the border with Kuwait on 31 July 1990 to send the message that "armed force would be used by Iraq if Kuwait did not concede to Iraqi demands." *Id*. at 55. They conclude that the threat was unlawful because there was no legal justification for the use of force at that time. *Id*.

231. Wright, *supra* note 39, at 4.

232. *See, e.g*, Fulghum, *supra* note 39, at 23 ("The size and scope of TEAM SPIRIT

A line of reasoning that relates to the TEAM SPIRIT exercises emerges from some of the most restrictive interpreters of Article 2(4). These legal scholars say that an acceptable self-defense argument could be made by nations with nuclear weapons that assert they will only use those weapons in response to the first use by another state.[233] Because individual self-defense and collective "self-defense" are equally protected in Article 51, the nuclear weapons defense should apply to the defense of others as well. There is no logical reason to consider nuclear weapons any differently from overwhelming conventional combat power in this analysis.[234] Accordingly, the TEAM SPIRIT joint and combined exercises would be considered legal under Article 2(4) if the United States announces that it will use that lethality against North Korea only if it attacks South Korea first.

Of course the wrinkle in the foregoing analysis is the other communications the United States has with North Korea, before and during the exercise. If the United States implies that it may use its military muscle aggressively, without the authority to do so, our conduct would be illegal. Likewise, if the United States demands that North Korea make concessions that are not related to customary international law or some treaty obligation (for example, give up territory or change leaders or type of government), the United States would be in violation also.[235] If, on the other hand, the United States merely warns of the consequences of any North Korean aggression, trains to defend itself and others, and continues to encourage North Korea to do the right thing in other areas, then its conduct would be permissible.

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232. (continued) may be adjusted depending on how much pressure the United States wants to apply to North Korea.").

233. MCCOUBREY & WHITE, *supra* note 56, at 59.

234. *Id*. at 61. Military preparations, including the invitation of allied troops to assume defensive positions, are not a "threat" if taken as defense against a threat from another. *Id.*

235. The discussion in Congress and the media about whether Saddam Hussein should remain in power is one example. Although U.S. military leaders have consistently indicated that the United States is only interested in performing those missions authorized by the United Nations, some members of Congress have expressed their desire for a change in the political leadership of Iraq.

8. Practice of Nations

According to all of the methods of interpretation discussed in this article, the practice of nations[236] is one of the most important considerations.[237] Based on the actions and inactions of the United Nations, and on U.S. foreign policy since 1945, this consideration is arguably conclusive.[238]

During this century, there have been an unbelievable number of wars and deaths from military conflicts.[239] Threats and uses of force continue in spite of the Article 2(4) ban.[240] This situation is a very real, albeit tragic, part of the "practice of nations." According to some legal scholars, an

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236. In an interpretation of the UN Charter, the analysis of the "practice of nations" begins on 24 October 1945. On that date, the last of the five permanent members of the Security Council and a majority of the other original signatories ratified the Charter. 91 CONG. REC. 10043 (1945); 24 FUNK & WAGNALL, *supra* note 30, at 8797. The Charter then took effect and the United Nations was an international organization. *Id*. October 24 is observed as United Nations Day. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 6. The five permanent members of the Security Council are the United States, the Soviet Union [now Russia], the United Kingdom, France, and China [now the People's Republic of China]. *Id*. at 11. The Soviet Union was the last of the five permanent members to ratify the UN Charter. 91 CONG. REC. 10043 (1945).

237. The ICJ, Treaty on Treaties, and Restatement all list "subsequent practice of the parties" second and the United States Supreme Court always has it on its short list of sources after analyzing the language itself. *See* discussion *supra* Part III.A.

238. Professor Coll notes that the success of an idealistic, or "absolutist," interpretation of Article 2(4), banning (almost) all threats or uses of force, was dependent on the United Nations' guarantee of big power cooperation and worldwide collective security. The failure of the UN to deliver on either cooperation or prompt collective security action requires nations to be able to take steps to deter aggression. Coll, *supra* note 19, at 608-10.

239. Professor Moore's research uncovered the following statistics:

> Approximately 33 million combatants have died in wars of the twentieth century. [n.4] Even more shockingly, the figures for non-combatants killed during and outside of war . . . may be as high as 169 million, or even higher. . . .[n.5] One scholar estimates that since World War II, that is during the era of the United Nations, there have been 149 wars (including civil wars) and that these wars have produced an estimated 23 million combatant and civilian casualties . . . .[n.6]

John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance*, 37 VA. J. INT'L L. 811, 816 (1997) (citing RUDOLPH J. RUMMEL, THE MIRACLE THAT IS FREEDOM, THE SOLUTION TO WAR, VIOLENCE, GENOCIDE AND POVERTY 3 (1995) (n.4); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 4 (1994)(n.5); RUTH SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES 21 (1993)(n.6)).

240. A strong consideration that weighs against "legal absolutist interpretations of

attempt to ban all threats or uses of military force would be "naïve and indeed subversive of public order" in the face of the frequency and perceived need for such force.[241]

The UN Charter lists a number of principles in addition to the ban on the threat or use of force in Article 2(4): "self-determination, human rights, security, peace, and justice."[242] One scholar suggests that the "practice of nations" since 1945 reflects an attempt to balance and give full effect to these principles.[243] He suggests that it may be necessary to make a threat or use reasonable amounts of military force to vindicate, advance, or preserve all five of the other principles listed above.[244]

One of the most important "practices of nations" since 1945, is deterrence,[245] or credible threats to deter aggression.[246] There is general agreement as to two basic principles of deterrence: (1) it is better to take reasonable efforts to prevent aggression than sit idly by until having to react to the aggressor, and (2) the costs of deterrence are far less than the costs associated with undoing the aggression.[247] Deterrence has been a significant part of U.S. foreign policy since the end of World War II.[248]

Deterrence is a practice of individuals and nation-states used throughout history.[249] It is a method of "preventing certain types of contingencies

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240. (continued) Article 2(4) and 51 of the Charter [is] the ubiquity of force in international relations." Coll, *supra* note 19, at 611-12.

241. Coll, *supra* note 19, at 612 (quoting Reisman, *supra* note 122, at 645).

242. *Id.* at 609-10; *see* UN CHARTER, art. 1, *supra* note 10.

243. *See* Coll, *supra* note 19, at 609-10. "This is not a blank justification for preventive wars, or wars to maintain the existing balance of power, but a suggestion that in certain circumstances pre-emptive military coercion may be justified . . . ." *Id*. at 610.

244. *Id*.

245. *See* discussion *supra* Part III.B.2. Professor Coll argues that deterrence is the underlying premise for the Charter. Coll, *supra* note 19, at 608. If states cannot depend on the UN deterrence system, they may have to establish their own. *Id*.

246. Also defined as "the threat to use force in response as a way of preventing the first use of force by someone else." Paul Huth & Bruce Russett, *What Makes Deterrence Work?* 36 WORLD POL. 496, 496-497 (1984).

247. KAUFMAN, *supra* note 49, at 12-13.

248. LEBOW, *supra* note 131, at 273-74.

249. *See, e.g.*, SUN TZU, THE ART OF WAR 96 (Samuel B. Griffith trans., Oxford U. Press 1963) (between 453-221 B.C.) ("One able to prevent [the enemy] from coming does so by hurting him."). Tu Yu, a commentator of the 7th and 8th Centuries A.D., said, "If you are able to hold critical points on his strategic roads, the enemy cannot come. Therefore Master Wang said: 'When a cat is at the rat hole, ten thousand rats dare not come out; when a tiger guards the ford, ten thousand deer cannot cross.'" *Id*. *See also* CARL VON CLAUSWITZ, ON WAR 92 (Michael Howard & Peter Paret eds & trans., Princeton U. Press 1984) ("Once

from arising."[250] It serves the interests and principles established by the UN Charter because it is a way "to achieve a measure of safety without resorting to violence on a universal scale."[251]

The beginnings of World Wars I and II, the attack on Pearl Harbor, and the loss of Eastern Europe after World War II were all blamed on the lack of deterrence.[252] The Korean War is also blamed on the lack of effective deterrence.[253] Relative calm, in the sense of no "major wars," has existed since the end of World War II.[254] The lesson from history is that

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249. (continued) the expenditure of [an aggressor's] effort exceeds the value of the political object, the object must be renounced and peace must follow."). Thomas Jefferson wrote to James Monroe on 11 July 1790: "Whatever enables us to go to war, secures our peace." Turner, *supra* note 65, at 336, n.136. In a recent interview, author Tom Clancy said, "If people know you're going to do that [power projection by moving "a large quantity of military forces in one big hurry"], they're not going to bother you. A mugger does not pick an armed police officer as a target. A mugger goes after a little old lady." Fred Barnes, *Tom Clancy's Power Projections*, USA WEEKEND, Jan, 29-31, 1999, at 8.

250. KAUFMAN, *supra* note 49, at 6; Moore, *supra* note 239, at 840-41. Professor Moore is analyzing the "synergy between a regime initiating an aggressive attack (typically non-democratic) and an absence of effective system-wide deterrence." Moore, *supra* note 239, at 840. He postulates that whenever both factors exist, there is a higher probability that military aggression will take place. *Id*. Effective deterrence requires four elements: the ability to respond, the will to respond, effective communication of the ability and will to the aggressive regime, and perception by the aggressive regime of deterrence ability and will. *Id*. at 841.

251. KAUFMAN, *supra* note 49, at 1.

252. *Id*. at 22; Turner, *supra* note 65, at 336 ("[B]oth [World Wars] resulted in large part from perceptions by potential aggressors that their victims, and States which might come to their aid, lacked both the will and the ability to respond effectively to aggression."); Moore, *supra* note 239, at 844 ("[A]n absence of effective deterrence was present before every major war of this century. . . .").

253. *Id*. "[In early 1950,] the United States Department of State was sending out signals that it had little further interest in Korea . . . ." STOREY & MASON, *supra* note 21, at 372. The most obvious "signal" to North Korea was in a foreign policy speech by Secretary of State Dean Acheson in which he omitted Korea from the American defense perimeter in the Pacific. DEAN ACHESON, REMARKS BEFORE THE NATIONAL PRESS CLUB IN WASHINGTON, D.C., ON THE CRISIS IN ASIA–AN EXAMINATION OF U.S. POLICY (Jan. 12, 1950), *reprinted in* 22 DEP'T ST BULL 111, 116 (Jan. 23, 1950); WILLIAM WHITNEY STUEK, JR., THE ROAD TO CONFRONTATION, AMERICAN POLICY TOWARD CHINA AND KOREA, 1947-1950 161 (1981). According to former Soviet leader Nikita Khrushchev, North Korea would not have attacked the South in 1950 if General MacArthur and other U.S. military leaders showed a greater interest in South Korea's security after the United States withdrew military forces from South Korea in 1948. STOREY & MASON, *supra* note 21, at 372.

254. Professor Henkin credits the fact that "traditional war between nations has become less frequent and less likely" to the successful purpose of Article 2(4) "to establish a norm of behavior and to help deter violation of it." Henkin, *supra* note 147, at 544-548.

clear aggression will occur "against the territorial integrity [and] political independence"[255] of other states if the United States fails to be assertive, "militarily strong, and politically confident."[256]

In the practice of states, Article 2(4) is recognized as customary international law, but some threats to use force are essential and necessary for national security.[257] The illegality and the necessity of threats collide if a large-scale military exercise takes place as a deterrent threat and it provokes a military conflict. The "absolutists" argue that Article 2(4) was designed to prevent that from happening. The rule bans all threats, even threats based on deterrence. The ban ensures that conflict does not occur based on misunderstood signals or a cycle of threats and counter-threats.[258]

The prohibition in Article 2(4), however, is part of a worldwide collective security system that is not working well.[259] Accordingly, the "practice of states" has been to characterize the ban the way Professor Turner does, as only applying to threats of aggressive military force.[260] This approach is consistent with the Charter's background, principles, and purposes, yet allows nations to defend themselves and others.[261]

There are two final points relating to the practice of nations and the TEAM SPIRIT scenario. First, North Korea is non-democratic, a former aggressor, and a perennial breaker of international laws.[262] The international community has a greater tolerance for deterrent threats that are directed at such regimes.[263] Finally, the nuclear issue is vitally important. North Korea most likely has nuclear weapons capability now, or will have

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255. UN CHARTER art. 2, para. 4.

256. *See* Coll, *supra* note 19, at 601. American power is a fundamental prerequisite to the success of international organization and order. *Id*.

257. Turner, *supra* note 65, at 313-15.

258. *See, e.g.*, Robert Jervis, *Rational Deterrence: Theory and Evidence*, 41 WORLD POL. 183, 183-84 (1989).

259. Franck, *supra* note 18, at 837.

260. Turner, *supra* note 65, at 315-16.

261. *Id*. at 350. "Any analysis of potential defensive behavior needs to discriminate between actual use [of force] . . . and expressed or implied threats aimed at enhancing deterrence. Deterring armed international aggression, after all, is an important Charter value." *Id*. *See* Franck, *supra* note 18, at 814 ("[A]n original central purpose of the [United Nations] was collective security against aggression in order to end war.")

262. *See supra* notes 21-26, 28-32, 36, 38-43 and accompanying text. The first two descriptive phrases in this string relate to Professor Moore's deterrence paradigm. *See supra* note 250.

263. Sadurska, *supra* note 18, at 241.

it soon. With nuclear weapons, or any weapon of mass destruction, the potential target state may not wait until it is attacked before defending itself.[264] Deterrence protects an issue that is even more fundamental than any of the United Nations' purposes or principles–survival.

IV. Conclusion

The long footnotes on casualty figures were included for a reason.[265] Successful deterrence prevents war. Ineffective deterrence results in the horrors of war. Even though there can be miscalculations and misunderstandings, the fundamental goal of deterrence is the same as that of the UN Charter: "To maintain international peace and security."[266]

The most persuasive reason that there have been so few incidents involving alleged violations of the "threat of force" ban, is that when deterrent threats are successful, the world usually breathes a "collective sigh of relief" that at least one war was averted this century.[267] Threats come in many forms and are a part of life. Bullying or aggression is also a fact of life, but one that has been universally condemned. The bully's "threat," and not the "threat" of the ones defending against the bully's aggression, is the threat that Article 2(4) was originally drafted to prohibit.

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264. *International Control of Atomic Energy: Growth of a Policy*, DEP'T ST. PUB. NO. 2702 164 (1946), *quoted in* P. JESSUP, A MODERN LAW OF NATIONS 166-167 (1948), *reprinted in* WOLFGANG G. FRIEDMANN, ET. AL, CASES AND MATERIALS ON INTERNATIONAL LAW 893 (1969) (U.S. Department of State Memorandum urged that the definition of an "armed attack" take into account nuclear weapons and "include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action."); Turner, *supra* note 65, at 320. Professor Turner summarizes this point as follows:

> [A]ny rule that would prohibit a State in lawful possession of nuclear weapons from even threatening to use them defensively to preserve the lives of tens of millions of innocent non-combatants would stand as clear evidence that the law had become part of the problem–or, in the words of Dickens: "If the law supposes that, the law is a ass, a idiot."

Id. (quoting CHARLES DICKINS, OLIVER TWIST 354 (Kathleen Tillotson ed., Oxford Univ. Press 1966)).

265. *See supra* notes 38 112, 239.

266. UN CHARTER art. 1(1) (the first purpose listed). The first seventeen words of the Charter state, "We the peoples of the United Nations determined to save succeeding generations from the scourge of war . . . ." UN CHARTER pmbl.

267. MCCOUBREY & WHITE, *supra* note 56, at 58. *See supra* note 221.

The thread that weaves all of the various sources of interpretation together is the intention to stop aggression. The drafters inadvertently made the text of Article 2(4) obscure and ambiguous by adding language to comfort smaller nations that were concerned about aggressions in the past. History has many examples of efforts to improve international law to ban *aggression*, not militaries and military exercises. The "players" in this analysis, whether they are drafters, legislators, leaders, or judges, all expressed the importance of deterring aggression to promote peace and security. The debate among the legal scholars highlights the difference between aggression and deterrence and the problems of having too much of either one. The last source applied in this analysis, the practice of nations, fully supports the need to deter aggression.

The common theme noted in a number of sources is that a nation can legally threaten to do anything that the nation can legally do.[268] As long as the United States is threatening, or warning, that it may respond with devastating force to defend itself or an ally, then the U.S. conduct would not violate Article 2(4). Deterrence, or a policy of maintaining credible threats to respond with force, is therefore legal. North Korea would not be able to interfere with the TEAM SPIRIT military exercises by alleging that they violate Article 2(4).[269] This applies, of course, to the other rogue states and potential aggressor nations all around the world that receive similar military threats from United States military, naval, and air exercises.

With respect to the specific fact situation analyzed in this article, North Korea might have more success if it were to consider the old proverb at the beginning of this article. By picking up the pen (to finally sign a peace treaty and to sign trade agreements) and laying down the sword (by reducing the vast amounts of its limited wealth spent on its military might), North Korea may be able to improve its economic situation and its chances of reuniting Korea (but peacefully). Reunification would probably end, or at least result in a drastic reduction in, the United States' presence and military exercises on the Korean Peninsula. In the final analysis, an olive branch might accomplish more than pens or swords.

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268. BROWNLIE, *supra* note 95, at 55-58.

269. *See* discussion *supra* Part III.B.5 (Nicaragua attempted to stop U.S. exercises in Central America in the 1980s).

THE CHEMICAL WEAPONS CONVENTION AND THE MILITARY COMMANDER: PROTECTING VERY LARGE SECRETS IN A TRANSPARENT ERA

LIEUTENANT COMMANDER THOMAS C. WINGFIELD[1]

I. Introduction

In November of 1997, the United States was prepared to go to war with Iraq over a legal issue: compliance with United Nations Security Council Resolution 687, which requires intrusive verification of the eradication of Iraq's chemical and other weapons of mass destruction. Although Saddam Hussein's inappropriate behavior in the early 1990s has left Iraq *sui generis* under international law for the foreseeable future, growing international revulsion against these weapons, particularly those in the hands of unstable, militant tyrants, has made destroying these weapons a global priority.

The first great step taken in banning weapons of mass destruction since the end of the Cold War was ratifying the Chemical Weapons Convention (CWC).[2] This treaty not only outlawed an entire category of weapons of mass destruction, but in its Verification Annex, established a regime of unprecedented intrusiveness and transparency to meet this formidable challenge. The Verification Annex is a quantum leap from some of the scripted, occasionally theatrical verification regimes of the past, and is likely the model that future arms control treaties will follow.

This transparency will provide the moral foundation for the civilized world to demand that future malefactors, like Saddam, live up to these new

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2. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800; S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) [hereinafter Chemical Weapons Convention], *reprinted in* WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994).

minimum standards of customary international law. Further, it will be a basis for punishing them if they do not meet the standards.[3] This new moral authority has come at a price, however: legal, but still secret, national security programs have become far more difficult to protect from those exercising the CWC verification regime in good faith–or bad.

The military commander who is responsible for a highly classified, yet CWC-compliant, program is now faced with two conflicting legal obligations. First, he has a duty to protect specific classified national security information relating to his unit and its ability to accomplish its mission.[4] For this, he is responsible to his operational chain of command, beginning with his immediate superior and ending in the National Command Authorities (NCA), the collective name of the President and the Secretary of Defense. Second, he must uphold a treaty, now ratified and the law of the land, which calls for transparency *beyond* the line he has been trained to protect.[5] How to satisfy these two competing demands, and do it in the glare of the world press, calls, first of all, for a dispassionate analysis of the legal issues involved. Only then will the policymakers know the broad limits within which they may operate, and only then will the military commander know when to say "yes," "no," or "yes, but."

In the final analysis, the commanding officer of the inspected military facility is ultimately responsible for protecting the security of his unit's mission. Nothing in the CWC relieves him of that responsibility. The CWC, and the implementing domestic statutes and regulations, provide a good deal of "assistance" to the military commander in protecting the security of his unit's mission. The commander, however, retains the right and the duty to deny access to those classified portions of his facility that cannot be effectively protected from international inspectors. Only a lawful order from a superior officer in his operational chain of command, who

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3. Obviously, the CWC, in and of itself, is no more a deterrent to international "bad actors" than any other document of similar thickness. Its value lies in its status as an expression of the will of the civilized world. To the extent that the CWC is the template for forceful action by the States Parties, it will serve to deter rogue nations by focusing international animus on prohibited activities. While not a "silver bullet," it is a framework for inspiring, organizing, and applying the system-wide deterrence that will have a tangible effect on the world's remaining tyrants.

4. DEPARTMENT OF DEFENSE DIRECTIVE 5200.1-R, Aug. 1982, authorized by DEPARTMENT OF DEFENSE DIRECTIVE 5200.1, INFORMATION SECURITY PROGRAM REGULATION, June 7, 1982 [hereinafter DOD DIRECTIVE 5200.1-R].

5. *See generally* Chemical Weapons Convention, *supra* note 2, verification annex, pt. x.

possesses the authority to waive the appropriate classification guidance, may relieve the commanding officer of that responsibility.

Given the absolute nature of this legal obligation, it is imperative that the military commander of a sensitive facility be aware of the techniques of managing international access to his installation. Thus, he may comply with the requirements of the CWC and similar future treaties. By using all the legal tools at his disposal, the military commander can satisfy his obligations under the CWC and his duty as a commissioned officer.

II. The Treaty

A. Terms

The Convention, which entered into force on 29 April 1997, is remarkably straightforward. Its purpose is clearly laid out in the first Paragraph of Article I, General Obligations:

> 1. Each State Party to this Convention undertakes never under any circumstances:
>
> a. To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or to transfer, directly or indirectly, chemical weapons to anyone;
>
> b. To use chemical weapons;
>
> c. To engage in any military preparations to use chemical weapons;
>
> d. To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.[6]

The remainder of Article I obligates states to destroy chemical weapons[7] and production facilities located on their own territory,[8] to destroy chemical weapons abandoned on the territory of other states,[9] and to refrain from using riot control agents as a method of warfare.[10]

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6. Chemical Weapons Convention, *supra* note 2, art. I, para., 1; KRUTZSCH & TRAPP, *supra* note 2, at 11.

7. Chemical Weapons Convention, *supra* note 2, art. I, para., 1; KRUTZSCH & TRAPP, *supra* note 2, at 11.

8. Chemical Weapons Convention, *supra* note 2, art. I, para. 4; KRUTZSCH & TRAPP, *supra* note 2, at 11.

9. Chemical Weapons Convention, *supra* note 2, art. I, para. 3; KRUTZSCH & TRAPP, *supra* note 2, at 11.

B. Organization

To implement this broad goal, the CWC creates the Organization for the Prohibition of Chemical Weapons (OPCW).[11] It consists of three parts: the Conference of States Parties (analogous to the UN General Assembly), the Executive Council (similar to the UN Security Council), and the Technical Secretariat (modeled on the specialized, implementing arms of the UN, such as the World Health Organization).[12] The OPCW is located in The Hague[13] and is funded by the States Parties.[14]

The Conference of States Parties is the principal organ of the OPCW.[15] Although it consists of a representative from each State Party,[16] it does not remain in continuous session and few representatives remain in residence in The Hague. In addition to overseeing the other two components of the OPCW, it is responsible for monitoring implementation of and compliance with the treaty.[17]

The Executive Council, as the executive body of OPCW, is responsible for the day-to-day administration of organization business. It supervises the Technical Secretariat,[18] and handles any emergent noncompliance issues.[19]

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10. Chemical Weapons Convention, *supra* note 2, art. I, para. 5; KRUTZSCH & TRAPP, *supra* note 2, at 11.

11. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 1; KRUTZSCH & TRAPP, *supra* note 2, at 124.

12. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 4; KRUTZSCH & TRAPP, *supra* note 2, at 124.

13. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 3; KRUTZSCH & TRAPP, *supra* note 2, at 124.

14. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 7; KRUTZSCH & TRAPP, *supra* note 2, at 124.

15. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 19; KRUTZSCH & TRAPP, *supra* note 2, at 134.

16. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 9; KRUTZSCH & TRAPP, *supra* note 2, at 133.

17. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 20; KRUTZSCH & TRAPP, *supra* note 2, at 134.

18. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 31; KRUTZSCH & TRAPP, *supra* note 2, at 147.

19. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 35; KRUTZSCH & TRAPP, *supra* note 2, at 147.

The Technical Secretariat is responsible for verifying compliance with the CWC,[20] primarily through conducting inspections. This branch is more professional than political, and the composition of its inspectorate is based more on technical competence than geographical representation.[21]

C. Schedules

The CWC divided the monitored chemicals into four schedules. A Schedule 1 chemical meets one of three criteria: (1) it is either "developed, produced, stockpiled, or used as a chemical weapon,"[22] (2) it poses "a high risk to the object and purpose" of the CWC due to its "high potential for use in activities" prohibited in the CWC due to its chemical structure, "lethal or incapacitating toxicity," or its status as a "final single technological stage" precursor,[23] or (3) it "has little or no use for purposes not prohibited" under the CWC.[24] Schedule 1 chemicals are generally thought of as chemical weapons per se, and include sarin, tabun, VX, sulfur mustards, lewisites, nitrogen mustards, saxitoxin, ricin, and a number of precursors.[25]

A Schedule 2 chemical is one which meets one of four criteria, each criteria differs in degree from the Schedule 1 standards: (1) it poses a "significant risk to the object and purpose" of the CWC due to its toxicity,[26] (2) it may be used as a precursor "in one of the chemical reactions at the final stage of formation" of a Schedule 1 or 2A chemical,[27] (3) it poses a "significant risk" due to its importance in Schedule 1 or 2A (toxic) chemical production,[28] or (4) it "is not produced in large commercial quantities for

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20. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 37; KRUTZSCH & TRAPP, *supra* note 2, at 162.

21. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 44; KRUTZSCH & TRAPP, *supra* note 2, at 163.

22. Chemical Weapons Convention, *supra* note 2, annex on chemicals, sec. A, para. 1(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

23. *Id.* annex on chemicals, sec. A, para. 1(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

24. *Id.* annex on chemicals, sec. A, para. 1(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

25. *Id.* sec. B, sched. 1, *in* KRUTZSCH & TRAPP, *supra* note 2, at 254-55.

26. *Id.* annex on chemicals, sec. A, para. 2(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

27. *Id.* annex on chemicals, sec. A, para. 2(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

28. *Id.* annex on chemicals, sec. A, para. 2(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

purposes not prohibited under" the CWC.[29] Schedule 2 chemicals are generally referred to as dual-use. They include amiton, PFIB, BZ, and a number of precursors.[30]

A chemical may be listed as a Schedule 3 chemical if it meets one of four criteria: (1) it was at one time a chemical weapon,[31] (2) it poses "a risk to the purpose and object" of the CWC because of its toxicity,[32] (3) it poses "a risk" because of its importance in manufacturing Schedule 1 or 2B (precursor) chemicals,[33] or (4) it "may be produced in large commercial quantities for purposes not prohibited" under the CWC.[34] Schedule 3 chemicals are referred to as industrials. They include phosgene, cyanogen chloride, hydrogen cyanide, chloropicrin, and numerous precursors.[35]

For the first three years after the CWC's entry-into-force (29 April 1997), "declared" facilities producing or storing Schedule 1, 2, and 3 chemicals will be carefully inspected. "Declared" facilities are those facilities reported by the member states as having produced scheduled chemicals. From the fourth year on, however, the emphasis will switch to the "discrete organic compounds."[36] The CWC's Verification Annex defines them as "any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides, and metal carbonates . . . ."[37] These chemicals, based on the "PSF" compounds of phosphorous, sulfur, and fluorine,[38] will be monitored as the precursors to all CWC-concerned weapons.

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29. *Id.* annex on chemicals, sec. A, para. 2(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

30. *Id.* annex on chemicals, sec. B, sched. 2, *in* KRUTZSCH & TRAPP, *supra* note 2, at 255-56.

31. *Id.* annex on chemicals, sec. A, para. 3(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

32. *Id.* annex on chemicals, sec. A, para. 3(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

33. *Id.* annex on chemicals, sec. A, para. 3(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

34. *Id.* annex on chemicals, sec. A, para. 3(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

35. *Id.* annex on chemicals, sec. b, sched. 3, *in* KRUTZSCH & TRAPP, *supra* note 2, at 256-57.

36. *Id.* verification annex, pt. IX, sec. C, para. 22, *in* KRUTZSCH & TRAPP, *supra* note 2, at 456.

37. *Id.* verification annex, pt. I, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 271.

38. *Id.* verification annex, pt. IX, sec. A, para. 1(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 453.

D. Inspections

All declared facilities will be inspected and certified as compliant within three years of the treaty's effective date. From entry-into-force, however, any State Party may "challenge" any non-declared facility (any military or industrial facility reasonably able to contain militarily significant quantities of chemical weapons) in any signatory country–provided that State Party meets minimum criteria roughly equivalent to "probable cause." The actual standard, found in Part X of the Verification Annex, requires the challenging state to provide "all appropriate information on the basis of which the concern has arisen."[39] The commentators Krutzsch and Trapp, wrote that "a requesting State Party would not be obligated to spell out all its sources of information, [for example], intelligence sources."[40] While eyewitness or documentary evidence is obviously preferable for its clarity and directness, Krutzsch and Trapp suggest that circumstantial evidence of suspicious activities would be adequate. They give several examples of observed activities justifying a challenge under the CWC:

> [A] sudden increase of precursor chemicals produced or imported without any reasonable explanation about its non-prohibited purposes, the intensified supply of protective gear to the armed forces or the civil population, unexplainable chemical hazards in a certain place or extraordinary preparations against such hazards . . . .[41]

These are the qualitative indicators; the quantitative indicators are a product of militarily significant quantities of each chemical. For most chemical weapons, this is in the range of hundreds to thousands of tons.[42] As the inspection regime matures, the U.S. Coast Guard concept of "space accountability" may take hold. Under this concept, the Coast Guard must account for every space large enough to hold the contraband sought, usually narcotics. Similarly, under the CWC, inspectors may choose to account for every space capable of containing a militarily significant quan-

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39. *Id.* verification annex, pt. X, sec. A, para. 4(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

40. KRUTZSCH & TRAPP, *supra* note 2, at 477.

41. *Id.* at 477-78.

42. J. CHRISTIAN KESSLER, VERIFYING NONPROLIFERATON TREATIES: OBLIGATION, PROCESS, AND SOVEREIGNTY (1995).

tity of the chemical sought. This will affect the degree of intrusiveness of each challenge inspection.

A distinguishing feature of the CWC is the short timeline for challenge inspections. This is necessary to afford the international community a chance to catch violators in the act, before they have time to hide or destroy evidence of production, storage, or use. The treaty allows only twelve hours notice of the arrival of a challenge inspection team at the inspected country's designated point of entry.[43] By contrast, the START[44] regime provides for "Special Access Visits," allowing seven days between the notification and U.S. acknowledgement and forty-five to sixty days before the inspectors arrive at the facility.[45] This notice will be transmitted from the OPCW to the Department of State Nuclear Risk Reduction Center and then through the Department of Commerce or Department of Defense to the target facility.[46]

At this point, the U.S. constitutional requirements for a legal search become operative. All U.S. citizens who have not consented to such a search (that is, as a condition of employment of access to the facility) retain their freedom from unreasonable search and seizure. This would include virtually all the personnel at private facilities and many at Department of Defense installations. To that end, the CWC recognizes the need to observe domestic constitutional requirements: "[T]he inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches or seizures."[47]

The current Director of the Arms Control and Disarmament Agency, the Honorable John D. Holum, addressed the CWC's threat to the Fourth Amendment:

> Of course the notion that a treaty could require us to violate the Constitution is a non-sequiter because the Constitution overrides

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43. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, para. 6, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

44. *See generally* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitations of Strategic Offensive Arms (START I) art. 11 (July 31, 1991) *available at* <www.acda.gov>.

45. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, ARMS CONTROL INSPECTION PREPARATION, 7-8 (Feb. 13, 1996).

46. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, THE CHEMICAL WEAPONS CONVENTION: QUESTIONS FACING THE U.S. DEFENSE INDUSTRY 6-7 (May 1, 1996).

47. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> any other law, including a treaty; hence, the worst that could happen would be that the Constitution would require us to violate the treaty. But that also doesn't arise because the CWC explicitly recognizes that member countries will use their constitutional rules in the inspection process. That means in the United States that any searches will be conducted either voluntarily or pursuant to a warrant. If the inspected facility were part of a heavily regulated industry, as chemical manufacturers tend to be, it would most likely be an administrative search warrant. In cases where that is not applicable, a criminal search warrant would be obtained. There will be no searches whatsoever under the CWC in the United States which are not either by consent or pursuant to a legally issued warrant.[48]

While this is a concise statement of the Administration's position, there are complicating factors. One commentator has pointed out that the Supreme Court, in dicta, has suggested that the chemical industry, as a whole, cannot be considered a closely regulated industry.[49] The point may be moot, in that when the Senate offered its advice and granted consent, it required that the searches be conducted only with consent or a search warrant.[50] Thus, any challenge inspection conducted within the United States,

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48. Interview by Spurgeon M. Keeny, Jr. & Erik J. Leklem with John D. Holum, Director, Arms Control and Disarmament Agency, in Washington, D.C. (Feb. 18, 1997), *in* ARMS CONTROL TODAY, Jan./Feb. 1997, at 6.

49. John Adams, *The Chemical Weapons Convention: Legal and Juridical Observations*, INT'L LAW & SEC. NEWS 12 (Fall 1996) (citing Dow v. United States, 476 U.S. 227 (1986)).

50. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. (28)(A) (daily ed. Apr. 17, 1997):

> (A) IN GENERAL—In order to protect United States citizens against unreasonable searches and seizures, prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that—
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> (i) for any challenge inspection conducted on the territory of the United States pursuant to Article IX, where consent has been withheld, the United States National Authority will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the person or things to be seized; and
>
> (ii) for any routine inspection of a declared facility under the Convention that is conducted on the territory of the United States, where consent has been withheld, the United States National Authority first will obtain an administrative search warrant from a United States magistrate judge.

implicating the Fourth Amendment rights of a U.S. citizen, could only proceed with the citizen's consent or a criminal search warrant.

Once the inspection team has arrived and officially presented the inspection mandate to the inspected nation's representative, the host nation has only thirty-six hours to transport the inspection team to the vicinity of the inspection site.[51] At that point, the parties have twenty-four hours to complete the perimeter negotiation,[52] and then forty-eight more hours before the inspection team must be granted access to the site.[53] Once on site, the team has eighty-four hours to complete the inspection.[54] After the team completes the inspection, it must submit a preliminary report to the Director General of the Technical Secretariat within seventy-two hours,[55] a draft final inspection report to the inspected party within twenty days,[56] and the final report to the Director General within thirty days.[57]

Within this compressed timeline, the sequence of events begins when one State Party suspects another of violating the CWC. The challenging state must first confirm that the Technical Secretariat has a team available to conduct a challenge inspection.[58] If a team is available, the challenging state may then present its request to the Executive Council and the Director General of the Technical Secretariat.[59] That request must include:

> (a) The State Party to be inspected and, if applicable, the Host State;
> (b) The point of entry to be used;
> (c) The size and type of the inspection site;

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51. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, para. 18, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467-68.

52. *Id.* verification annex, pt. X, sec. B, para. 19, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

53. *Id.* verification annex, pt. X, sec. B, para. 21, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

54. *Id.* verification annex, pt. X, sec. C, para. 57, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

55. *Id.* verification annex, pt. X, sec. D, para. 60, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472-73.

56. *Id.* verification annex, pt. X, sec. B, para. 61, *in* KRUTZSCH & TRAPP, *supra* note 2, at 473.

57. *Id.* verification annex, pt. X, sec. B, para. 61, *in* KRUTZSCH & TRAPP, *supra* note 2, at 473.

58. *Id.* verification annex, pt. X, sec. B, para. 3, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

59. *Id.* verification annex, pt. X, sec. B, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

> (d) The concern regarding possible non-compliance with this Convention including a specification of the relevant provisions of the CWC about which the concern has arisen, and of the nature and circumstances of the possible non-compliance as well as all appropriate information on the basis of which the concern has arisen; and
> (e) The name of the observer of the requesting State Party.[60]

Conspicuously absent from this list is the *specific* name of the facility to be inspected. The Director General has one hour in which to acknowledge receipt of the information above.[61] The requesting State Party, however, need not notify the Director General of the specific inspection site until only twelve hours before the team's arrival at the point of entry.[62] This serves to limit advance notice to the inspected state of the precise location until the last possible moment, increasing the chances of detecting a violation and, therefore, the deterrent value of the CWC.

Once the forty-one-member Executive Council receives this notification, it has twelve hours to exercise its veto over the challenge inspection. The request for an inspection may be denied if the Executive Council considers it to be "frivolous, abusive, or clearly beyond the scope of the CWC."[63] Such a veto, however, requires a three-fourths supermajority of all members (not merely those present).[64] According to one commentator, "most of the smaller countries do not have diplomatic missions resident in the Hague, [thus] it is highly unlikely that the Executive Council will be able to convene, much less act to block, a challenge inspection."[65] Even a less restrictive view of the requirement, reading it to permit a "virtual" convening of the members, would be difficult to accomplish. With members spread over most of the world's time zones, the twelve-hour limit imposes a severe limitation on gathering votes by video teleconference or even fax.

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60. *Id.* verification annex, pt. X, sec. B, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

61. *Id.* verification annex, pt. X, sec. B, para. 5, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

62. *Id.* verification annex, pt. X, sec. B, para. 6, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

63. *Id.* verification annex, pt. IX, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 173.

64. *Id.* verification annex, pt. IX, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 173.

65. KESSLER, *supra* note 41, at 91.

Also due no later than twelve hours before the inspection team's arrival is the challenging party's requested perimeter.[66] This perimeter must be drawn as narrowly as possible to focus the inspection party's efforts, but broadly enough not to miss noncompliant activity in the vicinity. The CWC adds several technical requirements for the perimeter. It must: "(a) run at least a [ten] metre distance outside any buildings or other structures, (b) not cut through existing security enclosures, and (c) run at least a [ten] metre distance outside any existing security enclosures that the requesting State Party intends to include within the final perimeter."[67] This serves to protect the integrity of the facilities being inspected, and allows the existing fences and walls to delimit inspection boundaries. A requested perimeter that does not meet these requirements may be redrawn by the inspection team.[68]

If the inspected party does not approve of the requested perimeter, it may present an alternative perimeter.[69] This proposal must meet a series of criteria:

> It shall include the whole of the requested perimeter and should, as a rule, bear a close relationship to the latter, taking into account natural terrain features and man-made boundaries. It should normally run close to the surrounding security barrier if such barrier exists. The inspected State Party should seek to establish such relationship between the perimeters by a combination of at least two of the following means:
> (a) An alternative perimeter that does not extend to an area significantly greater than that of the requested perimeter;
> (b) An alternative perimeter that is a short, uniform distance from the requested perimeter;
> (c) At least part of the requested perimeter is visible from the alternative perimeter.[70]

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66. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, paras. 7, 10, 11, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466-67.

67. *Id.* verification annex, pt. X, sec. B, para. 8, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

68. *Id.* verification annex, pt. X, sec. B, para. 9, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

69. *Id.* verification annex, pt. X, sec. B, para. 16, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467.

70. *Id.* verification annex, pt. X, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467-68.

If the alternative perimeter is acceptable to the inspection team, it becomes the final perimeter. If not, "the inspected State Party and the inspection team shall engage in negotiations with the aim of reaching agreement on a final perimeter."[71] If the perimeter negotiation cannot be resolved within seventy-two hours, the alternative perimeter (containing the whole of the requested perimeter) becomes the new perimeter.[72]

This perimeter negotiation is emblematic of the entire CWC. One of the hallmarks of the CWC is that it relies on on-site negotiations to resolve issues as they arise. This is necessary because of the comprehensiveness, complexity, and intrusiveness of the inspection regime. Unlike earlier treaties, which could more or less "script" the course of inspections at a limited number of facilities containing a limited number of large, easily identifiable weapons, the CWC relies on these negotiations to smooth any problems. This is also a dramatic departure in the area of personal responsibility for implementing arms control agreements.

In earlier days, executing a prearranged inspection could be almost completely planned, and the planning was done at the highest levels. Under the CWC, only so much planning can be done, and the rest must be dealt with as it emerges in the course of inspection and negotiation. On military bases, this negotiation is now conducted by the commanding officer of the unit being inspected–an officer with extensive experience in military operations, but precious little in this very new form of arms control. The commander's greatest asset in this difficult position is his training in decisively handling unexpected problems as they confront him.

The first phase of the inspection is perimeter monitoring. No later than twelve hours after the inspection team arrives at the vicinity of the inspection, the inspected country must begin monitoring traffic out of the facility.[73] Under the CWC, this may include "traffic logs, photographs, video recordings, or data from chemical evidence equipment . . . ."[74] This information must be turned over to the inspection team.

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71. *Id*. verification annex, pt. X, sec. B, para. 16, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467.

72. *Id*. verification annex, pt. X, sec. B, para. 21, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

73. *Id*. verification annex, pt. X, sec. B, para. 23, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

74. *Id*. verification annex, pt. X, sec. B, para. 24, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

Once the perimeter negotiations are complete and the inspection team arrives at the perimeter, it will take over the monitoring function. Beyond the designated exits to the facility, "[t]he inspection team has the right to go, under escort, to any other part of the perimeter to check that there is no other exit activity."[75] In addition to the techniques already listed, the inspection team may use sensors, random selective access,[76] and sample analysis to confirm that the inspected country is not removing evidence of a violation.[77] For this reason, only non-private vehicles (that is, only those owned or operated by the facility being inspected) may be inspected, and then only while exiting the facility. Personnel in these vehicles are not subject to search.[78] All of these activities must be confined to a fifty-meter band outward from the perimeter, and, to the extent possible, be directed inward, toward the facility.[79] While these activities "may not unreasonably hamper or delay the normal operation of the facility," they may continue for the duration of the inspection.[80]

This fifty-meter band is absolutely vital in planning for a CWC challenge inspection. Within the perimeter, only those chemicals alleged present in the inspection mandate may be tested for, and only as the inspected country agrees in a case-by-case negotiation. Outside the fifty-meter band, obviously, the inspection team has no mandate to do any testing whatsoever. Within the fifty-meter band, however, there are very few restrictions on "general environmental sampling," and the inspection team is free to use all of its test equipment at all times.[81] The equipment itself is far more sophisticated than that employed in previous inspection regimes. According to the On-Site Inspection Agency:

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75. *Id.* verification annex, pt. X, sec. B, paras. 25, 26, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468-69.

76. This technique, and all other managed access techniques, will be discussed more fully in the next section of this article.

77. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, para. 27, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

78. *Id.* verification annex, pt. X, sec. B, para. 30, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

79. *Id.* verification annex, pt. X, sec. B, para. 37, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

80. *Id.* verification annex, pt. X, sec. B, para. 31, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

81. Specifically, Paragraph 36 of Part X of the Verification Annex allows "wipes, air, soil, or effluent samples," and the use of all monitoring instruments described in Paragraphs 27-30 of Part II of the Annex. These paragraphs simply describe the full range of permissible testing equipment, giving the inspection team a complete arsenal for sampling in the 50-meter band.

> CWC inspection equipment will include transportable satellite communications, binoculars, chemical agent detectors and monitors, gas chromatography/mass spectrometers, individual protective equipment, and computers. Non-destructive or non-damaging evaluation equipment such as neutron interrogation systems, ultrasonic pulse echo systems, and acoustic resonance spectroscopy will also be used . . . .[82]

In addition to this analytical equipment, the CWC also provides that inspectors may operate their own communications equipment, both among inspectors at the site and between inspectors and OPCW headquarters in The Hague.[83] This communications capability poses an additional security concern for facility security officials. The equipment must be certified by the OSIA as authentic, without the capability to collect or transmit more than normal voice or data communications.

The existence of the fifty-meter band is a compromise. It allows the inspected country to protect specific permissible trade and national security secrets within the perimeter, but allows the world community a chance to detect environmental clues that would betray a CWC-related violation. The line between these two concerns is not bright. Legitimate secrets may leave identifiable traces in the fifty-meter band. For example, a new industrial process that gives off minute quantities of a non-scheduled chemical would be safe from a chemical-specific test within the perimeter, but would be detected in trace amounts by the unrestricted environmental sampling in the fifty-meter band. Security officials need to plan for everything from wind patterns (that is, does the prevailing wind "footprint" bring protected material into the fifty-meter band?) to second and third level questions. These may arise from the detection of an innocent chemical in the fifty-meter band, but a chemical related closely enough to the production of scheduled chemicals that the inspection team would then have a good-faith basis for expanding the scope of the inspection required to satisfy the mandate. The only factor in favor of the inspected party regarding this band of enhanced scrutiny is that no buildings within the band may be entered without the host nation's approval.[84]

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82. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, ARMS CONTROL AND THE INSPECTOR 11 (Oct. 4, 1997).

83. Chemical Weapons Convention, *supra* note 2, verification annex, pt. II, sec. D, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 297.

84. *Id.* verification annex, pt. X, sec. B, para. 37, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

The Senate's resolution of ratification contains an understanding that limits this sampling: "no sample collected in the United States pursuant to the CWC will be transferred for analysis to any laboratory outside the territory of the United States."[85] This would have no effect on tests for the presence or absence of a specific scheduled chemical on site, but would greatly inhibit secondary exploitation of materials for commercial or military purposes after the inspection.

As the perimeter activities continue, the inspection team has eighty-four hours to conduct the inspection.[86] The challenging state may attach an observer to the inspection process, but the observer is not a member of the inspection team. This, again, is a compromise between two competing interests: that of the challenging state, to ensure that its concerns are addressed, and that of the inspected state, to ensure that the challenging state is not launching the challenge inspection as a pretext for intelligence collection. Under Paragraph 55 of Part X, the observer may be present at the perimeter, and "to have access to the inspection site as granted by the inspected State Party."[87] In theory, the host nation could keep the challenging nation's observer at the front gate during the inspection, provided the observer was allowed regular communication with the inspection team. The inspection team is under an affirmative obligation to keep the observer informed, but must consider his recommendations only "to the extent it deems appropriate."[88]

Beyond specifying the duration of the inspection and the role of the observer, section C of Part X is divided into two parts: Managed Access, which will be addressed in the next section of this article, and General Rules. The General Rules begin: "The inspected party shall provide access within . . . the final perimeter. The extent and nature of access to a particular place or places within these perimeters shall be negotiated between the inspection team and the inspected State Party on a managed access basis."[89] The second sentence in that paragraph, perhaps the most

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85. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. 18 (daily ed. Apr. 17, 1997).

86. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 57, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

87. *Id.* verification annex, pt. X, sec. C, para. 55, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

88. *Id.* verification annex, pt. X, sec. C, para. 55, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

89. *Id.* verification annex, pt. X, sec. C, para. 38, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

important in the CWC, places the responsibility for a successful inspection squarely on the shoulders of the senior official present on behalf of the inspected nation. In the case of the military, the senior official present may not be the senior *responsible* officer in the operational chain of command, almost always the commanding officer of the base or facility being inspected. This split between authority and responsibility will be addressed in the final section of this article.

The host nation must provide access to the facility (within the final perimeter) no later than 108 hours after the inspection team's arrival at the point of entry,[90] and "may" provide aerial access to the inspection site.[91] The absence of the word "shall" suggests that this is merely another possibility to be negotiated, and not a requirement of the CWC.

Paragraphs 41 and 42 detail the requirements placed on the inspected party, emphasizing transparent compliance. Paragraph 41 provides:

> In meeting the requirement to provide access as specified in Paragraph 38, the inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures. The inspected State Party has the right under managed access to take such measures as are necessary to protect national security. The provisions in this paragraph may not be invoked by the inspected State Party to conceal evasion of its obligations not to engage in activities prohibited under this Convention.[92]

Paragraph 42 directs: "If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection."[93] The term "every reasonable effort" sets a high standard for compliance, but as Krutzsch and Trapp explain in their *Commentary*:

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90. *Id.* verification annex, pt. X, sec. C, para. 39, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

91. *Id.* verification annex, pt. X, sec. C, para. 40, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

92. *Id.* verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

93. *Id.* verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> [T]he term 'reasonable' indicates that the specific activities in conformity with this right and obligation shall not be what speculative ingenuity may invent, but what *rational experience of relevant situations normally suggest*. An inspected State Party which implemented its obligation in making 'every reasonable effort' may rightly claim the benefit of the doubt, when some of the questions raised by the request have not been answered in a manner beyond any doubt.[94]

The *Commentary*, however, narrowly construes this benefit:

> However, the situation . . . would not allow the inspected State Party a significant margin of tolerance since rational experience would suggests in such a case, that if there was no clear and unambiguous proof to the contrary, the inspected State Party is hiding chemical weapons.[95]

This presumption, made clear throughout the Convention and the *Commentary*, places the burden of proof squarely on the shoulders of the inspected party providing less than full access.

The inspection team has complementary but lesser restrictions, primarily limiting the intrusiveness of the inspection.[96] Further, the inspection team has guidance to conduct the inspection in the least intrusive manner possible, while effectively and timely completing its mission.[97]

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94. KRUTZSCH & TRAPP, *supra* note 2, at 489 (emphasis in original).

95. *Id.*

96. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> In carrying out the challenge inspection in accordance with the inspection request, the inspection team shall use only those methods necessary to provide sufficient relevant facts to clarify the concern about possible non-compliance with the provisions of this Convention, and shall refrain from activities not relevant thereto. It shall collect and document such facts as are related to the possible non-compliance with the provisions of this Convention by the inspected State Party, but shall neither seek nor document information which is clearly not related thereto, unless the inspected State Party expressly requests it to do so. Any materials collected and subsequently found not to be relevant shall not be retained.

Id.

97. *Id.* verification annex, pt. X, sec. C, para. 45, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

These concepts bracket the responsibilities of the two parties to a challenge inspection, and frame the central issue: how much, and what kind of, compliance is required to satisfy an inspection mandate, without violating existing legal requirements to protect other sensitive information? The answer may be found, in part, in the mechanics of managed access.

III. Managed Access

The techniques of managed access were developed by the British in anticipation of intrusive arms control inspections. One commentator explained:

> In broad outline, under this approach a challenge inspection would be permitted "anywhere, anytime" but it would not involve unfettered access. Rather, the inspected state would have rights to limit access in certain respects. Inspectors would be permitted to perform those activities necessary to confirm that treaty violations were not being conducted at the inspected site but would not necessarily be able to determine what in fact did take place there.[98]

The CWC itself recognizes the need to protect certain information in the course of the inspection. It mandates that the inspection team consider modifying the plan based on proposals of the inspected State Party. These proposals are presumably made to protect sensitive equipment, information, and areas not related to chemical weapons.[99] A phrase used in this

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97. (continued)

> The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission. Wherever possible, it shall begin with the least intrusive procedures it deems acceptable and proceed to more intrusive procedures only as it deems necessary.

Id.

98. KESSLER, *supra* note 43, at 78-9.

99. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 46, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

section of the CWC is key: "at whatever stage of the inspection."[100] This process begins with the inspected party's managed access plan, but is carried out in a continuous negotiation or inspection that may run eighty-four hours. For the inspected party, having observant, intelligent escorts who can think on their feet and implement a full range of contingency plans in the course of a moving inspection is the most vital asset. Krutzsch and Trapp give a relevant example of the timing of a modification to the inspection team's proposed inspection plan:

> For example, an inspected State Party having a secret installation at an inspected site that is unrelated to chemical weapons and that it wants to protect may elect to announce this in the pre-inspection briefing. Or it may decide to wait to see whether the inspection team would actually encounter the object and request access, and then propose an alternative at that stage.[101]

The foundation of a successful managed access plan is a series of well thought-out opening and fallback positions for the Paragraph 47 negotiations, during which the inspection plan is crafted to suit both parties. The paragraph provides that the parties will negotiate the places and extent of access, as well as the particular inspection activities.[102] Once the inspected party has negotiated the best inspection plan it can, the next layer of defense is physically employing the techniques of managed access. The most prominent of these are listed in Paragraph 48:

> [T]he Inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, *inter alia*:

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99. (continued)

> The inspection team shall take into consideration suggested modifications of the inspection plan and proposals which may be made by theinspected State Party, at whatever stage of the inspection including the pre-inspection briefing, to ensure that sensitive equipment, information or areas, not related to chemical weapons, are protected.

Id.

100. *Id.*

101. KRUTZSCH & TRAPP *supra* note 2, at 491 n.36.

102. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 47, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

> (a) Removal of sensitive papers from office spaces;
> (b) Shrouding of sensitive displays, stores, and equipment;
> (c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;
> (d) Logging off computer systems and turning off data indicating devices;
> (e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;
> (f) Using random selective access techniques whereby inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;
> (g) In exceptional cases, giving only individual inspectors access to certain parts of the inspection site.[103]

All of these techniques are useful, but each has its limits. Subparagraphs (a) and (d) permit removing papers and turning of computer and equipment displays, but only those papers and displays that are not material to the inspection mandate. A roster of chemicals being delivered to a facility may prove that no prohibited activity is taking place, but it may also give away a proprietary chemical process worth millions to its owner. Similarly, a good-faith inspection of the plumbing in a chemical facility may be intended to merely confirm or rule out the presence of a scheduled chemical. However, this type of follow-the-pipes-wherever-they-lead ethic may take the inspectors far beyond boundaries acceptable to the host nation, perhaps revealing chemical equipment whose very configuration is an invaluable commercial asset for its developer.

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102. (continued)

> The inspected State Party shall designate the perimeter entry, exit points to be used for access. The inspection team and the inspected State Party shall negotiate: the extent of access to any place or places within the final and requested perimeters as provided in Paragraph 48; the particular inspection activities, including sampling, to be conducted by the inspection team; the performance of particular activities by the inspected State Party; and the provision of particular information by the inspected State Party.

Id.

103. *Id.* verification annex, pt. X, sec. C, para. 48, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

Subparagraphs (b) and (c) permit shrouding, or covering the equipment with opaque plastic or cloth, but even this is not an absolute protection. Paragraph 49 provides that the inspected State Party must make reasonable efforts to show that possible non-compliance is not occurring in places where access is restricted.[104] According to Paragraph 50, reasonable efforts include "partial removal of a shroud or environmental protection cover, at the discretion of the inspected State Party, by means of a visual inspection of the interior of and enclosed space from its entrance, or by other methods."[105]

Krutzsch and Trapp, commenting on Paragraph 48, specifically address a worst-case scenario in which an inspected party might attempt to deny *any* access to a particularly sensitive area:

> Without going into detail on the individual techniques listed, it should be mentioned that their common denominator is that access to buildings, structures and the like is *not denied as such, but limited in time, space, access degree or number of inspectors allowed*. [footnote omitted] A flat rejection of *any* access to a building or structure will not be in conformity with the provisions under managed access. If it would occur . . . the inspection team would have the right to photograph the object or building for clarification of its nature and function, inform the Technical Secretariat immediately, and include the photograph and the unresolved question related thereto in the inspection report.[106]

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104. *Id.* verification annex, pt. X, sec. C, para. 49, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

> The Inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any object, building, structure, container or vehicle to which the inspection team has not had full access, or which has been protected in accordance with Paragraph 48, is not used for purposes related to the possible non-compliance concerns raised in the inspection request.

Id.

105. *Id.* verification annex, pt. X, sec. C, para. 50, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

106. KRUTZSCH & TRAPP *supra* note 2, at 492.

Krutzsch and Trapp continue, citing the wording of Paragraph 50 as proof that partial removal of a shroud is partially within the control of the inspected party, but visual inspection of a space is not:

> [G]iven the placing of the words 'at the discretion of the inspected State Party' *before* the final half sentence, it is to be assumed that 'visual inspection of the interior of an enclosed space from its entrance' is the minimum alternative way of access the inspection team *will have to be provided with*.[107]

This reading of Paragraph 50 suggests that *no* areas may be totally hidden from an inspection team, but, at the very least, viewed from a doorway or through a window. This profoundly affects planning to protect national security and proprietary information during a challenge inspection.

The On-Site Inspection Agency, charged with advising U.S. government and private facilities on the fundamentals of treaty compliance, suggests additional managed access techniques:

> Careful inspection route planning is often the easiest and most economical method of protecting sensitive areas. By simply escorting inspectors on a pre-determined route, both between and within buildings, escorts can prevent the team from seeing some classified, sensitive or proprietary activities . . . . When the facility believes it cannot grant access into a building or area, an alternate means of demonstrating compliance must be suggested for those areas. Examples of such alternate means include showing inspectors convincing photographs or other documentation related to an inspector's concern. . . . In some cases, it may not be prudent to allow an inspector from a certain country to have access to a sensitive room or area . . . in extreme cases where route planning, alternative means and shrouding cannot be effective, it may be worthwhile to consider temporarily shutting down or moving operations in highly sensitive areas prior to allowing inspectors access.[108]

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107. *Id.* (emphasis in original).

108. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, CHEMICAL WEAPONS CONVENTION: THE IMPACT 9-11 (Apr. 28, 1995).

These paragraphs show that there is no absolute, prearranged haven from challenge inspectors. The inspectors may request papers, read displays, and lift shrouds for a peek inside. Provided the concern is genuine and within the scope of the inspection mandate, it may be used to peer into areas which, under previous arms control inspection regimes, could be safely kept off limits at the inspected party's absolute discretion. This requires, then, that a managed access plan resemble not so much a linear script for a set-piece inspection, but rather a branching array of contingency plans that may have to be implemented on a moment's notice. It also requires escorts with the mental agility to recognize these situations as they arise, choose the best available back-up plan, or improvise one on the spot.

Interestingly, the CWC does not mention or prohibit operational deception, the intentional misleading of inspectors in areas not material to the object and purpose of the treaty. While deceiving the inspection team about possible non-compliance is a clear violation of the CWC, taking indicators of an unhideable national security secret, and adding to them deceptive indicators of a false secret, would deceive only those inspectors operating in bad faith as intelligence collectors.

The key to many of these managed access problems will be the precedent that evolves during the first challenge inspections. The On-Site Inspection Agency warns: "The U.S. representative must also consider any existing inspection precedents that may apply, as well as not setting a precedent that could be unacceptable to another U.S. facility during a future inspection."[109] The precedents that develop during the first challenge inspections will control the shape of all the following inspections. Many of today's theoretical concerns may be put to rest as the inspection teams negotiate away the potential problems we see today. However, it is also likely that numerous unanticipated problems will arise. The time to prepare for this formative period in arms control verification is now, allowing concerned parties to help shape, rather than merely follow, such precedent.

Arms control verification concerns were framed by the constitutional process of treaty ratification, specifically by three documents: Senate Resolution 75, providing the Senate's "understandings" of key provisions of the CWC upon its consent was conditioned;[110] the President's Certifica-

109. *Id.* at 21.

110. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. 18 (daily ed. Apr. 17, 1997).

tions and Report to Congress on the understandings;[111] and the Executive Order that implements the CWC and the Implementation Act.[112] These three documents provide some resolution to the issues raised in this article, but leave far more questions to be decided.

Section 2 of the Senate's resolution of advice and consent contains twenty-eight "understandings" of key provisions of the CWC.[113] Paragraph 3 states that fifty percent of outyear (beyond the current fiscal year) funds would be withheld from the U.S. contribution to the OPCW's operating budget if an independent internal oversight office were not established within that organization.[114] The Senate's principal concern was to insure that something resembling an inspector general would provide an extra layer of security for the protection of confidential information provided to the OPCW in the course of its inspections. Parallel to this concern is the provision in Paragraph 5, which governs intelligence sharing.[115] In this paragraph, the Senate forbids sharing intelligence information with the OPCW until formal procedures are established by the Director of Central Intelligence. The paragraph also calls for a number of reports, allowing the Senate to monitor closely the dissemination of this information.[116]

Paragraph 9 requires protecting the confidential business information of U.S. chemical, biotechnology, and pharmaceutical firms.[117] The Senate requires the Administration to certify annually that these industries are not being harmed by their compliance with the CWC.[118] The President's certification to the Senate included a paragraph specifically addressing this point, stating that these businesses "are not being significantly harmed" by their compliance.[119] The tenth paragraph of the Senate Resolution addresses compliance monitoring and verifying.[120] This understanding

111. President's Certifications and Report to the Congress in Connection with the U.S. Senate Resolution of Ratification of the Chemical Weapons Convention (Apr. 25, 1997), *available in The White House Virtual Library* (last modified Sept. 20, 1997) <http://library.whitehouse.gov> [hereinafter President's Certifications].

112. Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act, Exec. Order No. 13,128, 64 Fed. Reg. 34,703 (Jun. 28, 1999).

113. S. Res. 75, 105th Cong. at 2-63.

114. *Id*. at 3-6.

115. *Id*. at 7-14.

116. *Id*.

117. *Id*. at 21.

118. *Id*.

119. President's Certifications, *supra* note 111, at 1.

120. S. Res. 75, 105th Cong. at 21-29.

directs the President to provide a series of reports and briefings to the appropriate committee of Congress, keeping them fully informed on all aspects of compliance and attempts by signatories to circumvent the CWC.[121]

Paragraph 16 is intended to protect against the compromise of confidential business information, either from an unauthorized disclosure or a breach of confidentiality.[122] The former is, under the Senate understanding, a publication of confidential business information made by an OPCW employee and resulting in financial damage to the owner of the information.[123] The latter is an inappropriate disclosure of such information by an OPCW employee to the government of a State Party.[124] In both cases, the Senate states that it will withhold the standard punitive fifty percent of the annual dues to the OPCW until the offending party is made amenable to

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121. *Id*.

122. *Id*. at 43-48.

123. *Id*. at 44. The Senate Resolution states:

> (A) UNAUTHORIZED DISCLOSURE OF BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—
>
> (i) an officer or employee of the Organization has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, and
>
> (ii) such practice or disclosure has resulted in financial losses or damages to a United States person,
>
> the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination.

Id.

124. *Id*. at 46. The Senate Understanding states:

> (A) Breaches of confidentiality.—
>
> (i) CERTIFICATION.—In the case of any breach of confidentiality involving both a State Party and the Organization, including any officer or employee thereof, the President shall, within 270 days after providing written notification to Congress that the Commission described under Paragraph 23 of the Confidentiality Annex has been established to consider the breach.

Id.

suit in the United States or the injured party is otherwise made whole.[125] Executive Order (E.O.) 13,128 implementing the CWC addresses this issue in section 7:

> Sec. 7. The [United States National Authority, the State Department], in coordination with the interagency group designated in section 2 of this order, is authorized to determine whether disclosure of confidential business information pursuant to section 404(c) of the Act is in the national interest. Disclosure will not be permitted if contrary to national security or law enforcement needs.[126]

This language adds a step to the analysis: the executive branch is claiming the prerogative to first balance the consequences of challenging any given disclosure or breach against the interests of the nation as a whole, and only if the individual's interests preponderate will the Senate's procedure be followed. This issue may be hotly contested in the aftermath of a breach at a politically inopportune time.

As if to anticipate the contentiousness of the previous paragraph, Paragraph 17 of the Senate Resolution advances a controversial constitutional point, that the executive may not negotiate "no-amend-before-ratification" treaties, thereby depriving the Senate of its constitutional role of providing its advice and consent.[127] This is a much larger issue, and will not likely be settled within the context of the CWC.

Paragraph 18 is a straightforward prohibition against taking physical samples from an inspection site inside the United States to a laboratory outside the United States.[128] Given that a violative chemical substance can be identified on-site, this prohibition is a precaution against the "reverse engineering" of samples taken from sensitive government or commercial facilities. In its Certification, the Administration is in precise agreement with Congress on this point.[129] The absolute nature of this policy makes it simple for the commander on-scene to raise and enforce.

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125. *Id.* at 45-47.

126. Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act, Exec. Order No. 13,128, 64 Fed. Reg. 34,703 (Jun. 28, 1999).

127. S. Res. 75, 105th Cong. at 48-50.

128. *Id*. at 51.

129. The Senate Resolution reads:

The Senate advises the Administration, in Paragraph 21, to make assistance teams from the On-Site Inspection Agency available to the owner or operator of any facility subject to routine or challenge inspections under the CWC.[130] Again, the President concurs, and he directs that such assistance be provided.[131]

Although no Fourth Amendment issues are raised when the federal government orders inspections of its own facilities, this is not the case when it orders inspections of privately owned sites. A treaty-imposed obligation, having been agreed to by the federal government, does not lift the prohibition against unreasonable searches and seizures. To address this concern in the context of the CWC, the Senate, in Paragraph 28, directed the Administration to obtain an administrative search warrant for a routine CWC inspection if the facility's owner refuses his consent (under the theory, apparently, that these former chemical weapons plants are part of a "closely-regulated industry").[132] The Senate further directed that the Administration obtain a criminal search warrant before conducting a CWC challenge inspection against a private owner's wishes.[133] The President, in his Certification, accepted this position and directed that such warrants be sought.[134]

Perhaps the only acceptable answer on constitutional grounds, this standard may be difficult to apply in the course of an actual inspection. The requirements for an administrative search warrant are not particularly onerous, and any private owners of former chemical weapons facilities are

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129. (continued)

> (18) LABORATORY SAMPLE ANALYSIS.—Prior to the deposit of the United States instrument of ratification, the President shall certify to the Senate that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.

Id. The Administration's Certification reads: In connection with Condition (18), Laboratory Sample Analysis, no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States. President's Certifications, *supra* note 111, at 2.

130. S. Res. 75, 105th Cong. at 52-53.

131. Exec. Order No. 13,128 at 2, 64 Fed. Reg. 34,703 (Jun. 28, 1999). The President actually authorizes a broader range of assistance, from "[t]he Departments of State, Defense, Commerce, and Energy, and other agencies, as appropriate . . ." *Id.*

132. S. Res. 75, 105th Cong. at 62-63.

133. *Id.*

134. President's Certifications, *supra* note 111, at 3.

not likely to refuse access after having been such an integral part of the CWC drafting and negotiation. The requirements for a criminal search warrant[135] are stricter. While the inspection mandate will state the chemical sought, it will not contain a full recitation of the evidence upon which the request is based. Indeed, such evidence would, by definition, have been gathered by a foreign sovereign for use against the United States in a good or bad faith attempt to search the facility in question.

Furthermore, the private owner of the facility would not have had anything to do with the chemical weapons program (all such facilities having been included within the routine inspection regime), and so would probably be less willing to consent to such a search. In addition, the director of such a facility would undoubtedly have confidential business information to protect, with a board of directors and a large number of shareholders looking over his shoulder. In this case, consent to search would be less likely, and the difficulty in meeting a mainstream judge's standard of probable cause could be problematic.

Finally, even if a federal judge could be found to issue a criminal search warrant for such an inspection, the prospect of a higher court staying the warrant for an interlocutory appeal could delay any outcome well beyond the negotiation period contemplated by the CWC. Given the constitutional standard which must be met, the prospect of forcing an uncooperative private party to undergo a challenge inspection is far more problematic than that of conducting a similar inspection at a government facility.

IV. The Commander's Dilemma

A. Protection of National Security Information

The legal authority requiring a commissioned officer to protect the national security information under his control is clear. Executive Order 12,958 governs classified national security information.[136] It is implemented through departmental regulations, such as *DOD 5200.1-R, the*

135. These requirements include: probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized. S. Res. 75, 105th Cong. at 62.

136. Classified National Security Information, Exec. Order No. 12,958, 3 C.F.R. pt. 333 (Apr. 20, 1995).

Department of Defense Information Security Program Regulation,[137] and the security instructions of the Departments of the Army, Navy, and Air Force. Under E.O. 12,958, the following categories of information are protected as national security information:

> (a) military plans, weapon systems or operation
> (b) foreign government information
> (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology
> (d) foreign relations or foreign activities of the United States, including confidential sources
> (e) scientific, technological, or economic matters relating to the national security
> (f) United States government programs for safeguarding nuclear materials or facilities
> (g) vulnerabilities or capabilities of systems, installations, projects or plans relating to national security.[138]

These categories of information are, depending on their sensitivity, classified as CONFIDENTIAL, SECRET, or TOP SECRET. In addition to these vertical divisions, there are numerous horizontal divisions, or compartments, within any given level of classification. These restrict the flow of information relating to the most sensitive programs, known as special access programs.[139] Such programs are the most problematic for treaty verification purposes, in that very basic information about their nature is classified. The commanding officer of a ship, base, or unit charged with protecting such information is in a particularly precarious position.

Because military members may be charged under civilian statutes or the Uniform Code of Military Justice (UCMJ), there are two streams of legal liability for such an officer. First, under 18 U.S.C. § 793:

> (f) Gathering, transmitting, or losing defense information:
> Whoever, being entrusted with or having lawful possession or control of any . . . information, relating to the national defense,
> (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in viola

137. DOD DIRECTIVE 5200.1-R, *supra* note 4.

138. Classified National Security Information, Exec. Order No. 12,958, 3 C.F.R. pt. 333 § 1.5.

139. *Id.*

> tion of his trust . . . [s]hall be fined under this title or imprisoned not more than ten years or both.[140]

Second, under the UCMJ, a military member could be charged under Article 92, failure to obey order or regulation.[141] The security regulations of the Department of Defense and the military departments are regulations within the meaning of this article,[142] and so render the commanding officer liable to prosecution under Article 92(1). Conviction may carry a penalty of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.[143] Assuming the commanding officer of such a facility also received specific, lawful orders to protect the secrecy of his command, he would be further liable under Article 92(2). A conviction could result in a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months.[144]

Furthermore, the *Manual for Courts-Martial* specifies that a duty, for the purposes of Article 92(3), "may be imposed by *treaty*, statute, *regulation*, lawful order, standard operating procedure, or custom of the service."[145] Therefore, the commanding officer could be charged under Article 92(3) for either being derelict in performing his duties as specified in the security regulations, or for being derelict in performing his duties as specified in a treaty, the CWC. If the dereliction were through neglect or culpable inefficiency, the maximum penalty after conviction is forfeiture of two-thirds pay per month for three months and confinement for three months. If the dereliction was willful, the maximum penalty is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for

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140. 18 U.S.C.S. § 793(f) (LEXIS 1999).

141. U.C.M.J. art. 92 (LEXIS 1999).

> Any person subject to this chapter who—
> (1) violates or fails to obey any lawful general order or regulation;
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
> (3) is derelict in the performance of his duties;
> shall be punished as a court martial may direct.

Id.

142. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 16c.(1)(a), at IV-23 (1998).

143. *Id.* para. 16e.(1), at IV-24.

144. *Id.* para. 16e.(2), at IV-25.

145. *Id.* para. 16c.(3)(a), at IV-24 (emphasis added).

six months.[146] In the face of these conflicting obligations, the ambiguity in the commanding officer's legal obligations does not benefit the commanding officer.

B. Chains of Command

The conduct of a CWC challenge inspection at a U.S. military facility is governed by *Chairman of the Joint Chiefs of Staff Instruction 2030.01, Chemical Weapons Convention Compliance Policy Guidance*.[147] The instruction first states that inspections of U.S. facilities overseas will be conducted pursuant to Host Country Agreements (HCAs) to be negotiated.[148]

Enclosure A to the instruction provides policy guidance. That guidance takes the form of a "Host Team Concept."[149] Paragraph (2)(c) of Enclosure A describes this concept:

> The unique and intrusive nature of inspections (especially challenge inspections) allowed for by the CWC and the requirement to maintain unity of command resulted in an expanded Host Team (HT) concept . . . that ensures compliance with the CWC without usurping military command authority. The HT will consist of a representative for the CJCS and/or [Office of the Undersecretary of Defense for Policy], the [Commander in Chief for that region of the world] and/or the Service combatant command component (in the case of [outside the United States] challenge inspection), each Service and DOD component with equities that are affected, the OSIA escort team chief, and the inspected installation/site/unit commander. The HT leader, for challenge inspections at military facilities, will normally be a CJCS representative of flag rank (or equivalent).[150]

While this concept does preserve the integrity of the operational chain of command, it does set up a parallel chain to the NCA. A flag officer or

146. *Id.* para. 16e.(3), at IV-25.

147. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 2030.01, CHEMICAL WEAPONS CONVENTION (CWC) COMPLIANCE POLICY GUIDANCE (21 July 1997) [*draft*] [hereinafter CJCSI 2030.01].

148. *Id.* at 2.

149. *Id.* at A-2.

150. *Id.*

civilian of equivalent rank, will report to the Under Secretary of Defense for Policy. Although this is a path upward for passing information and not a path downward for passing orders, its existence and operation will present a strong force with which the unit commander will have to deal. Diffusing responsibility even further is the existence of the Compliance Review Group (CRG):

> A Department of Defense-wide working group, chaired by the [Office of the Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs], that conducts an executive-level review of Chemical Weapons Convention compliance issues. The Compliance Review Group meets on an as-needed basis to address key issues, such as challenge inspections.[151]

The CRG will be activated during challenge inspections, and the HT leader may well consult with that group on issues that cannot be resolved at the inspection site. As decisions emerge from the consensus of that group, recommendations will be prepared for the Undersecretary of Defense for Policy and the Secretary of Defense.

As the instruction itself points out, "[n]othing in this guidance . . . alters existing DOD command relationships or the operational chain of command. For inspections at service facilities . . . the unit commander retains ultimate responsibility for the safety and security of his . . . command."[152] The instruction continues:

> It is recognized that the obligation to demonstrate CWC compliance and a commander's responsibility for safety, security, and operations may, in some instances, impose what appear to be competing requirements. When necessary to resolve issues impacting compliance, the HT, which includes the unit commander, will coordinate consultation with higher authority. Resolution of the matter within the established operational chain of command, the CWCRG, or as coordinated with the arms control interagency will be transmitted via the respective operational chain of command to the HT for execution.[153]

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151. *Id.* at GL-II-3.
152. *Id.* at A-5.
153. *Id.*

However information reaches the NCA, once a decision has been made by the Secretary of Defense or his only superior, the President, then the decision will be passed back down the operational chain of command to ensure its legality and execution. This solves one problem but creates another. With multiple paths to the decision makers, the operational and parallel chains may, if competing equities are involved and because of time constraints, race to the NCA to get the desired decision first. With the military officers in the combatant commander's operational chain principally concerned with the security of the unit, and the political appointees in the HT structure principally concerned with compliant transparency under the CWC, the need for deconfliction by staffing is evident.

Adding another layer of confusion to an already difficult problem is the very nature of the Special Access Program community. The operational chain of command may be "program cleared" and aware of the peculiar security vulnerabilities of a particular ship, aircraft, or facility. But rarely, if ever, will any members of the parallel chain be cleared. In effect, their decisions will be made without what is probably the most relevant information. The only solutions are: (1) to "program clear" the members of this chain–unlikely given the requirement to keep those informed to an absolute minimum, or (2) to rely on the few program-cleared people in this parallel chain to speak up, to the extent they can, and to receive a large amount of deference from those not in the know.[154]

One safeguard is the normal staffing process, in which the affected service's representative on the CRG would argue against a CRG recommendation to the Secretary that the decision of a commander in the field be overturned. If such a decision were taken, the service representative would immediately report to his service, allowing a parallel reclama to make its way to the Secretary up the operational chain of command. Of course, this

154. The Navy's International Programs Office has a large, well-exercised program in place for protecting Service equities in the event of a CWC challenge inspection. However, even the best such program can protect only those secrets for which its members are cleared. It is likely that this office's personnel are not "read-in" to every such program, requiring short-notice clearance for Navy IPO advisers *after* the facility has been identified for inspection. This will leave minimal time for detailed preparation. *Executive Summary: Challenge Inspection Training Exercise*, Navy International Programs Office, September, 1998. The Army has a similar, well-thought out program, but, because the Army is responsible for the majority of declared sites in the United States, it has focused largely on scheduled inspections. The new Army Soldier, Biological, and Chemical Command at the Aberdeen Proving Grounds will assist in preparation of Army sites subjected to challenge inspections. *Army Challenge Inspection Preparations*, U.S. Army Soldier, Biological, and Chemical Command, April, 1999.

system works only if the service representative is sensitized to the value of the installation and the true reason for the commander's apparent intransigence.

One component of the HT concept preserves the unit commander's authority and enables him to raise compliance concerns. The HT concept calls for "consensus decision making."[155] That process is defined in the instruction's glossary:

> Resolution of all issues pertaining to DOD compliance with the CWC, the commencement and conduct of the inspection shall be accomplished by consensus among host team members. This will be interpreted more stringently than simple majority. All matters involving safety, operations, and security shall have the concurrence of all members of the host team, and if not, shall be referred to the operational chain of command [sic] for resolution.[156]

At the very least, then, the unit commander and program-cleared personnel can make their concerns known, in a general way, to the other members of the HT. The issue may then be raised to a level where the most senior program-cleared officials can evaluate the recommendations of the parallel chain with a fresh reminder of the true equities involved.

One additional solution may be found in the instruction's treatment of naval nuclear powerplants. The instruction includes this very specific black-letter exemption, which will serve, at a minimum, as the initial U.S. negotiating position in a future challenge inspection of a U.S. nuclear warship.[157] It is possible that other organizations with similar and perhaps even more firmly grounded concerns will carve out specific exemptions in the instruction's next revision. Of course, even the most definitive domestic exceptions, granted by the highest levels of the U.S. defense establishment, are merely opening positions in an international challenge inspection negotiation. The exceptions are also subject to reversal by the NCA at any time, based on any number of ephemeral policy considerations.

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155. CJCSI 2030.1, *supra* note 148, at A-3
156. *Id.* at GL-II-3.
157. *Id.* at A-6.

B. Recommendations

The commander's dilemma, then, is to provide the required compliance with the CWC, within the framework of the governing Chairman of the Joint Chiefs of Staff Instruction, without violating the very specific statutory and regulatory regime that requires him to protect national security information. In the most difficult cases, this information cannot be hidden as easily as locking a file cabinet or turning off a computer. These two competing requirements may not just abut on each other, but may actually overlap.

To make matters worse, traditional sources of expertise on treaty compliance will not be available. The On-Site Inspection Agency's Defense Treaty Inspection Readiness Program, created to address the broad problem of protecting proprietary or classified information within the inspection regime, is not staffed to handle the most highly classified or tightly compartmented programs. There are very few attorneys with access to such information, and fewer still with expertise in treaty compliance. What advice, then, could such an attorney offer to a client in such a difficult position?

Given the dual imperatives for protecting national security information and complying with the CWC, it is important that the military commander be given clear, authoritative guidance on his responsibilities.

It is a distraction to ask which legal obligation trumps the other. The legislation, executive orders, and departmental instructions that spell out the commander's duty to protect classified information are no more or less binding than the treaty, consented to by the Senate and signed by the President. Both are the law of the land, and both must be obeyed.

The key difference is not in the *priority* of compliance, but in the *nature* of compliance. The legal regime protecting national security information is very specific, leaving little or no flexibility for the commander. In short, the commander is not given the option of "trading" protected information for enhanced compliance. The commander may only be released from this obligation by a legal order from a superior in his operational chain of command, a superior who also has the legal authority to waive the requirements of the governing classification guide. Without such an order, these requirements are absolute limits within which the commander must navigate.

Treaty requirements, on the other hand, appear to be far more flexible. The terms of inspection are left open to on-site negotiation. The absolute legal requirement to reach the end of demonstrated compliance is balanced by flexible means of achieving it. Indeed, this flexibility is necessary to meet the myriad unanticipated situations that could arise under an inspection regime so wide-ranging and intrusive.

The answer, then, appears to be that the commanding officer of a sensitive facility should review program classification guidance in light of the character of the CWC and follow-on inspection regimes. Having identified the information which still requires absolute protection, the military can plan around these secrets to find creative alternative means to demonstrate compliance. This will be relatively easy for those activities whose secrets are located in computers that can be turned off or in file drawers that can be locked. For those activities whose classified missions are evident from their physical layout–that is, those facilities which have very large, obvious secrets to protect–such creative planning becomes a matter of national urgency.

Once this information has been identified, the commanding officer must make himself aware of his rights and responsibilities under the CWC. He should plan for every plausible contingency and, with the assistance of a program-cleared attorney, confront the major "what ifs" of a challenge inspection.

> What if the Inspection Team leader requests access to a space specifically protected by the commander's classification guidance?
>
> What if the Host Team leader, having decided what the Host Team's consensus will be, orders the commanding officer to grant access that the commander believes is not authorized?
>
> What if the Under Secretary of Defense for Policy, on hand to ensure a smoothly compliant inspection, orders the commanding officer to stand aside?
>
> What if the Secretary of State, telling the commander that she is the President's representative for chain-of-command purposes, orders him to grant access to the Inspection Team?

What if the commander's immediate superior in the operational chain of command orders him to grant access to the Inspection Team?

What if the theater commander in chief gives the order?

What if the Secretary of Defense gives the order?

The answer to all of these questions may be found in a single line of reasoning. The commanding officer of the facility is not legally bound to follow the orders of anyone outside his operational chain of command, no matter what that person's rank. That solves (legally, if not politically) the problem of the Inspection Team leader, the Host Team leader, the Under Secretary, and even the Secretary of State. Merely claiming representational authority does not confer it, and the operational chain of command remains intact.

Slightly more difficult are the cases in which the order comes from the commanding officer's immediate superior, the Secretary of Defense, or the commander in chief. Here, another requirement comes into play: the superior must not only be in the commanding officer's operational chain of command, but must be at the appropriate level to waive the applicable classification guidance. It is possible that a certain program's secrets may only be revealed at the discretion of the NCA, which would leave the hypothetical order from the Secretary of Defense as the only lawful order.

The military commander, then, must know his operational chain of command. He must know what particular pieces of classified information may be released by what level of authority. Further, he should always insist on getting such an order, even an apparently lawful one, in writing. This will inhibit the creativity of hindsight.

The bottom line for the commanding officer of a sensitive facility is that he remains responsible for the security of his mission; the statutory regime for the protection of classified information is specific and severe. He is also responsible for providing access to a challenge inspection team, but only within the bounds of unclassified information. For those times when he is unable to provide complete access to the inspection team, he must provide alternative means of satisfying their legitimate concerns. While this second responsibility is as legally binding as the first, it is far more flexible in the means by which it may be accomplished. The commander has the final say on access to his facility, and that say may be

reversed only by a superior in the operational chain of command who possesses the authority to waive the applicable classification guidance. All others present to "assist" him in demonstrating transparent compliance deserve a polite but firm "no."

Given the inevitable high profile of such an inspection, it will be an enormous professional challenge for the military, intelligence, and legal authorities in this field to protect these very large secrets and still provide the transparency required to maintain America's moral leadership in arms control.

CAAF ROPING AT THE JURISDICTIONAL RODEO: *CLINTON V. GOLDSMITH*

JOHN W. WINKLE III[1]
AND
GARY D. SOLIS[2]

To preserve the constitutional balance, the federal judiciary must on occasion police itself. In *Clinton v. Goldsmith*,[3] the U.S. Supreme Court unanimously and without concurring opinion ruled that the Court of Appeals for the Armed Forces[4] (CAAF) had exceeded its jurisdiction.[5] The case turned on whether the CAAF could properly invoke the All Writs Act[6] to enjoin the President[7] and military officials from dropping Major James Goldsmith from the rolls of the Air Force. The CAAF majority had exercised that prerogative on the premise that Congress intended to vest in the appeals court "broad responsibility with respect to the administration of military justice."[8] Justice David Souter speaking for the Court, how-

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3. 119 S. Ct. 1538 (1999).

4. With the codification of the Uniform Code of Military Justice (UCMJ) in 1950, Congress created the Court of Military Appeals. Act of May 5, 1950, ch. 169, Art. 67(d) 130. Eighteen years later it renamed the Court the United States Court of Military Appeals. Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178. In 1994, Congress again changed the designation to the United States Court of Appeals for the Armed Forces. Act of October 5, 1994, Pub. L. 103-337, 108 Stat. 2663. The CAAF is a court whose five civilian judges are appointed for fifteen-year terms by the President with Senate approval.

5. *See* 10 U.S.C.S. § 867 (LEXIS 1999).

6. 28 U.S.C.S. § 1651(a) (LEXIS 1999). Congress enacted this law in 1948, and two decades later, the Supreme Court heard its first case involving the All Writs Act and military appeals courts. *See* Noyd v. Bond, 395 U.S. 683 (1969).

7. Under the UCMJ, Congress has delegated considerable authority to the President to prescribe procedures for courts-martial (Art. 36) and to prescribe maximum punishments (Art. 56). Civilian courts have validated the President's exercise of executive rule making in the promulgation of the *Manual for Courts-Martial (MCM).*

8. Goldsmith v. Clinton, 48 M.J. 84, 86-87 (1998). The UCMJ, Article 6, section (a), specifically gives the uniformed service judge advocates general responsibility for supervising military justice: "The Judge Advocate General or senior members of his staff shall

ever, found that neither the language of the law nor its legislative history permitted such an expansion of the CAAF's authority.

At the heart of this appellate litigation was a proposed separation from the military, a discretionary administrative action known as dropping-from-the-rolls.[9] Not every convicted military offender may be removed from the service rolls.[10] Only those who are absent without leave (AWOL) from their unit and those who have served in confinement at least six months of an initial sentence for more than that duration may be targeted.[11] Major James Goldsmith, convicted in 1994 for disobedience of a superior's order and for an HIV aggravated assault,[12] received a sentence that included confinement of six years, forfeiture of pay,[13] but did not include a punitive discharge. Goldsmith in fact never challenged the findings and sentence of the court-martial.[14] Instead, he first alleged a life-threatening deprivation of continuous medication while confined at Fort Leavenworth. The Air Force Court of Criminal Appeals (AFCCA) denied his petition for extraordinary relief on jurisdictional grounds.[15]

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8. (continued) make frequent inspection in the field in supervision of the administration of military justice." While this supervisory grant obviously does not include the authority to issue writs, neither, as the Supreme Court opinion points out, does the UCMJ grant to CAAF a broad and undifferentiated supervisory authority over military justice.

9. *See* 10 U.S.C.S. §§ 1161, 1167 (LEXIS 1999).

10. The administrative separation is not an available sentence to a court-martial. The UCMJ does not authorize a court-martial to sentence an officer to a punitive discharge–a bad conduct or dishonorable discharge–although the court-martial may sentence an officer to dismissal from the service. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(9)(A)-(C) (1998).

11. During a span of eighty years, Congress set and then modified on two occasions the authority of the President to drop from the rolls a member of the armed forces. At first the law applied only to Army officers AWOL for at least three months. *See* Act of July 15, 1870, § 17, 16 Stat. 319. Lawmakers then extended its application to officers convicted and confined by civil court. *See* Act of Jan. 19, 1911, ch. 22, 36 Stat. 894. Finally, Congress reworded the statute to include any officer in the armed forces absence without leave (AWOL) for three months or sentenced to confinement in federal or state penal or correctional institution (*see* Act of May 5, 1950, §10, 64 Stat. 146). *See also* Act of Aug. 10, 1956, § 1, 70A Stat 89.

12. Major Goldsmith disobeyed a safe-sex order from his superior officer and twice had unprotected sexual intercourse with partners without informing them that he carried HIV.

13. The court-martial convening authority approved the court-martial's sentence of forfeiture of $2500 pay per month for 72 months, as well as confinement for six years.

14. American courts-martial predate the Constitution. The nature and scope of their jurisdiction, their procedures, and their lawful punishments are outlined in the *MCM*.

15. The AFCCA by *per curiam* opinion found the medical issue moot because Goldsmith had been released from confinement.

Goldsmith then shifted appellate strategy. He argued before the CAAF that the recent proposed action by the Air Force to dismiss him from the rolls[16] violated both the *ex post facto*[17] and the double jeopardy[18] clauses of the U.S. Constitution, claims neither litigated at trial nor addressed in appellate review. Using the good cause exception found in its own Rules of Practice and Procedure,[19] the CAAF, by a 3-2 vote,[20] assumed jurisdiction,[21] exercised its claimed supervisory power under the All Writs Act, and granted the petition sought by Goldsmith.[22] Designating the need to protect the interest of the service member as the evident "good cause," the CAAF intervened, noting that the "[All Writs] Act contains no limitation on our power to consider a petition for extraordinary relief that has not been initially submitted in a Court of Criminal Appeals. . . ."[23]

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15. (continued) Goldsmith v. Clinton, 48 M.J. 84, 87-88 (1998).

16. The Air Force notified Goldsmith of the action to drop him from the rolls in 1996, and relied on a recent congressional expansion of presidential power under the National Defense Authorization Act for Fiscal Year 1996. 10 U.S.C.S. §§ 1161(b)(2), 1167 (LEXIS 1999). The rationale behind this provision is that an officer, sentenced to confinement for more than six months, will no longer be effective in the military service, upon release.

17. U.S. CONST., art. I, § 9, cl. 3. Goldsmith claimed that Congress had enacted the statute authorizing his removal *after* his court-martial conviction. The *ex post facto* clause applies to criminal, not civil, penalties. Calder v. Bull, 3 U.S. (3 Dallas) 386 (1798).

18. U.S. CONST., amend. 5. Goldsmith regarded the action to drop him from the rolls as a successive punishment based on the same conduct that had prompted his conviction.

19. Rule 4 (b)(1) states, "Absent a good cause, no such petition [for an extraordinary writ] shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals."

20. Senior Judge Everett along with Chief Judge Cox and Judge Sullivan formed the majority. Judges Gierke and Crawford dissented.

21. One court observer recently described the judicial action in *Goldsmith* as the CAAF's "liberal" assertion of "a supervisory role over the military justice system." Major Martin Sitler, *The Top Ten Jurisdictional Hits of the 1998 Term: New Developments*, ARMY LAW., Apr. 1999, at 12.

22. Military courts commonly employ four writs: mandamus, prohibition, habeas corpus, and error coram nobis. *See Armed Forces Appeals Court Rules*, Rule 4 (b).

23. Goldsmith v. Clinton, 48 M.J. 84, 88 (1998). This is not the first case in which the CAAF has voiced such a sentiment. Ten years ago, the court majority wrote, "[O]n no occasion has Congress indicated any dissatisfaction with the scope of our All Writs Act supervisory jurisdiction, as we explained it in *McPhail*." Unger v. Ziemniak, 27 M.J. 349, 353 (C.M.A. 1989). *See* McPhail v. United States, 1 M.J. 457 (CMA 1976). In *McPhail*, the CAAF ruled that its authority to issue an appropriate writ in aid of its jurisdiction was not limited to its appellate jurisdiction.

The government appealed,[24] and the interpretive task for the Supreme Court proved rather simple. The Court never reached the merits of the new claims advanced by Goldsmith but instead addressed the threshold issue of the CAAF's jurisdiction. Using the traditional "plain meaning of the words" approach as a means to determine statutory purpose[25] and supplemented by references to legislative and judicial histories, Justice Souter first examined the Act that authorized establishing the military appeals court.[26] He noted that Congress had established a separate judicial system for the armed forces in 1950, and placed the then-styled Court of Military Appeals at its apex as an Article I civilian appellate tribunal.[27] The statute confined its jurisdiction to the review of specified findings and sentences imposed by courts-martial and reviewed by the service courts of appeals.[28] The unambiguous language of the law[29] admitted to no other interpretation, and an examination of context yielded no more. Nothing in the legislative history of the bill, Souter concluded, remotely implied the intent

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24. Decisions of the CAAF are now subject to direct review by the U.S. Supreme Court through a writ of *certiorari*, as set forth in 28 U.S.C. § 1259. Like all *certiorari* petitions, the court enjoys the discretion to grant or deny. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. *See generally* Andrew S. Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW. Jan. 1985, at 59 (providing background on Supreme Court review of the CAAF). Congress has restricted one dimension of appellate review: the Supreme Court may not review the CAAF's refusal to grant a petition for review. UCMJ art. 67(a) (1998).

25. *See, e.g.*, CARTER, REASON IN LAW (4th ed. 1994).

26. 10 U.S.C.S. § 941 (LEXIS 1999).

27. Among the enumerated Constitutional powers of the legislative branch is the authority to "constitute Tribunals inferior to the Supreme Court." U.S. CONST., art. I, § 8, cl. 9. Unlike their counterparts in Article III courts, Article I judges do not enjoy life tenure, protection against salary cutbacks, or the same degree of judicial independence and insulation from political pressures.

28. UCMJ art. 67(a) reads:

> The Court of Appeals for the Armed Forces shall review the record in–
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and,
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon the petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

29. Article 67(c) of the UCMJ reads in pertinent part that CAAF has the power to act "only with respect to findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *See* UCMJ art. 67.

for a plenary judicial power to oversee the administration of military justice, as the CAAF had asserted.[30]

The Supreme Court turned its attention to the All Writs Act in an effort to determine whether that statute had in fact enlarged the supervisory jurisdiction of the CAAF.[31] Souter observed that all courts established by Congress, including military courts, "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[32] Writs compel persons or courts to act or refrain from action to vindicate the interests of a petitioner. Courts issue writs when they determine that a previous action or inaction exceeded lawful discretion. Again, Souter invoked the plain meaning of the language of the statute. The CAAF, or any court for that matter, could summon forth an All Writs Act remedy only in aid of its lawful jurisdiction.[33] For the CAAF, the Supreme Court reasoned that jurisdiction meant the review of courts-martial findings or sentences.[34] Dropping Goldsmith from the Air Force rolls did not amount to either a finding or a sentence. Instead it was an independent executive action,[35] and, therefore, outside the review authority of the military appeals court.[36] Simply put, the CAAF exceeded its jurisdiction in issuing the writ.

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30. Souter rejected the argument that the CAAF had met the jurisdictional criterion by "protecting" the original sentence and disallowing an additional penalty. In explaining its reasoning, the CAAF had noted that the Congress had amended Title 10 and Article 58(b) of the UCMJ at the same time. Given the punitive nature of Article 58, the CAAF assumed that its action conformed to the intent of Congress. Goldsmith v. Clinton, 48 M.J. 84, 90 (1998).

31. One of the original purposes behind the establishment of a civilian appeals court for the military was to eliminate the collateral attacks upon court-martial judgments filed in Article III courts.

32. 28 U.S.C.S. § 1651 (a) (LEXIS 1999).

33. United States v. Morgan, 326 U.S.M.C.A. 502, 506 (1954). Indeed, the CAAF has not hesitated to issue extraordinary writs. *See, e.g.*, McPhail v. United States, 1 M.J. 457 (C.M.A. 1976); United States v. Bevilacqua, 18 U.S.C.M.A. 10 (1968); Gale v. United States, 17 U.S.C.M.A. 40 (1967).

34. The CAAF has long cited *Shaw v. United States*, 209 F.2d 311 (1954), an opinion of the U.S. Court of Appeals for the District of Columbia, to vindicate its claim to be a legitimate federal appellate tribunal, and not, as *Shaw* argued, merely an administrative agency whose rulings were inherently subject to federal appellate review.

35. Dissenters called the action "an administrative personnel decision" comparable to decisions "to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Goldsmith*, 48 M.J. at 92 (Gierke, J., dissenting).

36. Actually, three CAAF judges (the two dissenters and Chief Judge Cox) agreed that the action proposed by the Air Force was executive, not judicial, in nature. Cox, nevertheless, voted with the majority. In his concurring opinion, he conceded that the issuance

Military court observers will immediately note that this negation of the CAAF's authority by the Supreme Court has implications beyond the case in point. *Goldsmith* seems to resolve an issue that has preoccupied, and troubled, the CAAF judges, who have long sought to place the CAAF among Article III courts. In repeated attempts to seek Article III status, the CAAF has, several times since 1976, asserted its authority to issue writs in aid of its jurisdiction.[37] The issuance of writs, of course, is characteristic of any Article III court. In a recent volume, the CAAF's historian presciently wrote:

> [A]lthough it remains good law in theory, *McPhail* [asserting CAAF's writ authority] has apparently not led to actual relief for a plaintiff seeking to invoke its holding. Rather the Court has [in the past] tended to claim authority to intervene under the All Writs Act, and then declined to do so in the particular case. . . . At some point, implied but not implemented jurisprudential power becomes tenuous.[38]

Now, having finally asserted its purported writ authority in a case, the CAAF has been turned away with its writ power held less than "tenuous." What this ruling foretells for the Court's future efforts to gain Article III status remains to be seen, but it is a clear setback to those attempts.[39]

Even if the CAAF could have proffered a defensible claim to jurisdiction, reliance on the All Writs Act was premature. The All Writs Act grants only an equity authority to federal courts.[40] That is, the judiciary may use a writ as an equitable means to intercede only if all other adequate and available remedies at law, both administrative and judicial, have first been exhausted.[41] The statutory standard of "necessary" and "appropriate"

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36. (continued) of a Department of Defense Form 214, Certificate of Release or Discharge from Active Duty, a discharge certificate, given an officer dismissed by a court-martial is an administrative act. In his view, however, the *ex post facto* nature of recent congressional legislation outweighed that consideration.

37. *McPhail*, 1 M.J. at 457.

38. JONATHAN LURIE, 2 MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, at 241 n.44 (1998).

39. *See id.* at 137, 159, 185 (reciting the Court's forays into legislative thickets in search of Article III status).

40. Article III, sec. 2, vests the federal judiciary with authority over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST., art. 3, § 2.

41. *See* Carlisle v. United States, 517 U.S. 416 (1996); 19 MOORE'S FEDERAL PRACTICE § 201.40.

required to activate review by the CAAF could not be met in this case because several alternative avenues of relief remained open for the respondent. For example, if the Secretary of the Air Force actually dropped Goldsmith from the rolls, Goldsmith could then petition the Air Force Board of Corrections for Military Records (BCMR) for relief. A civilian entity, the BCMR may review discharges and dismissals of service members.[42] An action there, in turn, could prompt an array of judicial relief opportunities. Federal courts may review BCMR decisions[43] as final agency actions under the Administrative Procedure Act[44] and set them aside if they are "arbitrary, capricious, or not based on substantial evidence."[45] If the petitioner sought specific monetary relief, moreover, the federal courts could invoke the Tucker Act[46] or its progeny[47] as bases for review. Until and unless the Air Force took final action, Justice Souter argued that no court, civilian or military, could investigate the merits of Goldsmith's claims.

Decades ago, the U.S. Supreme Court recognized that the military justice system is separate and apart from the federal civilian judicial system.[48] That detachment, however, does not mean that the Court of Appeals for the Armed Forces is free to assume an unwarranted authority over all matters of military justice. As noted above, some observers assert that the CAAF in this case, and in others, is seeking status as an Article III court[49] through its assertion and accretion of judicial power.[50] Motivation aside, the authority for the CAAF to act is missing, a conclusion drawn from the time-honored process of constitutional prerogative and review.

With the exception of the original jurisdiction of the Supreme Court,[51] Congress by mere statute may set or alter the jurisdiction of all federal

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42. *See* 10 U.S.C.S. §§ 1553(a), 1552(a)(1) (LEXIS 1999) (detailing the jurisdiction of the BCMR).

43. The law limits these challenges to non-monetary claims.

44. 5 U.S.C.S. §§ 551, 704, 706 (LEXIS 1999).

45. Chappell v. Wallace, 462 U.S. 296, 303 (1983).

46. 28 U.S.C.S. § 1491 (LEXIS 1999).

47. *See* 28 U.S.C.S. § 1346(a)(2) (detailing the so-called "Little Tucker Act").

48. *See* Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137 (1953) .

49. *See* Captain James P. Portorff, *The Court of Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?* ARMY LAW., May 1985, at 1.

50. *See* Colonel Craig S. Schwender, *Who's Afraid of Command Influence Or Can the Court of Military Appeals Be This Wrong?* ARMY LAW., Apr. 1992, at 19; Rear Admiral William Miller, then-Navy JAG, remarks to the ABA General Practice Section: Committee on Military Law, February 11, 1977, 5, *cited in* LURIE, *supra* note 38, at 245.

51. Article II, section 2 sets forth the jurisdiction of the Supreme Court as a court of the first instance. To change the original jurisdiction of the Court would require an amendment to the Constitution.

courts, including military tribunals. It is one of several institutional checks that our system of governance endorses. And for almost two centuries the U.S. Supreme Court has assumed its role as the guardian of constitutional values, including separation of powers and checks and balances. Since *Marbury v. Madison*,[52] the Court has enjoyed the implied and unchallenged power of judicial review, a power that it fully exercised in *Goldsmith*. Observers of the Court have come to expect its routine review of legislative acts and executive actions at federal and state levels. On rare occasions, the Court exercises its oversight over lower courts,[53] as it fully and unanimously did in *Goldsmith.*

The language and purpose of the authorizing statute in this case point to a more restrictive jurisdiction than the CAAF had claimed. Even the Court of Military Appeals, one of the CAAF's predecessors, acknowledged its own limits, by saying that it is not a "court of original jurisdiction with general, unlimited power in law and equity."[54] The ruling in *Goldsmith* represents one of those legitimate limits. Like all appellate courts, the CAAF functions, *inter alia*, as an editor to correct errors and as an architect to design judicial policy for the military and it will continue to do so. But *Clinton v. Goldsmith* restricts the tools it may use.

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52. 5 U.S. (1 Cranch) 137 (1803).
53. *See*, e.g. Cohens v. Virginia, 19 U.S. (6 Wheaton) 264 (1821).
54. *In re Taylor*, 12 U.S.C.M.A. 427, 430 (1961).

UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST[1]

REVIEWED BY MAJOR BRADLEY E. VANDERAU[2]

I. Introduction

On 22 September 1806, Lewis and Clark completed the last leg of their epic journey through the Louisiana Territory. The expedition covered eight thousand miles over a twenty-eight month period–an accomplishment Meriwether Lewis had to be proud of:

> He had traveled through a hunter's paradise beyond anything any American had ever before known. He had crossed mountains that were greater than had ever before been seen by any American, save the handful who had visited the Alps. He had seen falls and cataracts and raging rivers, thunderstorms all beyond belief, trees of a size never before conceived of, Indian tribes uncorrupted by contact with white men, canyons and cliffs and other scenes of visionary enchantment.[3]

Stephen Ambrose's "labor of love," *Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening of the American West*, masterfully chronicles the life of Meriwether Lewis (1774-1809). This nonstop adventure skillfully keeps the reader's attention throughout the book prompting the reader to ask questions such as: "What awaits around the next river bend for Captain Lewis and his Corps of Discovery–a hostile Sioux tribe or a new zoological finding?" or, "What traps have Lewis's political enemies set for him?"

Undaunted Courage is a historical account of the opening of the American West through the eyes of Meriwether Lewis. Mixing friendship, leadership, politics, science, geography, and history, *Undaunted Courage* leads the reader into Lewis's world of triumph and tragedy. His ultimate

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1. STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST (1996).

2. United States Army. Written while assigned as a student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. AMBROSE, *supra* note 1, at 404.

triumph was completing the Lewis and Clark Expedition and compiling a wealth of cultural, geographical, and scientific information in his voyage journals. His ultimate tragedy was committing suicide at the age of thirty-five.

Although not explicitly stated, Ambrose's thesis is quite simple: Thomas Jefferson made the correct decision when he chose Meriwether Lewis to command the expedition into the Louisiana Territory. Meriwether Lewis possessed the qualities that ensured a successful and productive journey–competence and the ability to lead. Considering all of Lewis's strengths and weaknesses, Ambrose concludes that Lewis "was a great company commander, the greatest of all American explorers, and in the top rank of world explorers."[4]

As for his thesis, Stephen Ambrose hits the mark. His passion, organization, and methodology complement his support for his thesis. In short, Stephen Ambrose's historical account is well written, entertaining, highly detailed, and informative.

This book review analyzes Ambrose's *Undaunted Courage* focusing on the following areas: Ambrose's Passion, Ambrose's Organization and Methodology, Ambrose's Insights into Leadership, and Ambrose's Balance.

II. Ambrose's Passion

To write a biography of substance and utility an author should arm himself with the following: a thorough knowledge of his subject, an ample amount of sources both primary and secondary, and a passion for the subject. Stephen Ambrose's arsenal is well stocked as evidenced by *Undaunted Courage.* What establishes his preeminence is his passion for the Lewis and Clark Expedition and specifically Meriwether Lewis.

Ambrose's passion was fired by his reading of the Biddle edition of the journals of Lewis and Clark in the of Fall 1975. Ambrose states in his introduction, "I read the journals that Fall and was entranced."[5] Inspired, Ambrose took his family and a friend on a journey over the Lewis and Clark Trail in the Summer of 1976. Each night they read the journals aloud

4. *Id.* at 483.
5. *Id.* at 13.

around the campfire. Every year since, Ambrose has returned to portions of the Lewis and Clark Trail. Ambrose states, "in short, we have been obsessed with Lewis and Clark for twenty years."[6]

In Ambrose's opinion, the last good biography of Lewis was written in 1965. However, many new documents by and about Lewis have since appeared. After two decades of wanting to write about the Lewis and Clark Expedition, Ambrose finally had the time and was convinced to do an updated biography of Lewis incorporating these new materials. Ambrose's passion is evident in the following passage:

> This book has been a labor of love. We have endured summer snowstorms (at Lemhi Pass on July 4, 1986), terrible thunderstorms in canoes on the Missouri and Columbia Rivers, soaking rains on the Lolo, and innumerable moments of exhilaration on the Lewis and Clark Trail. The Lewis and Clark experience has brought us together so many times in so many places that we cannot measure or express what it has meant to our marriage and our family. We feel privileged to have had the opportunity to spend so much time with Meriwether Lewis, and with our students, friends, and children in the last best place.[7]

Does Ambrose's passion give him credibility? Perhaps not, but this passion, which the reader can feel with each turn of the page, adds so much to *Undaunted Courage* that without it the book would have read like another history text. Instead, *Undaunted Courage* reads like a novel with the benefit of the detail and richness of a history text. *Undaunted Courage* both entertains and teaches. Ambrose's passion brings the book's characters and situations to life. However, passion and knowledge in and of themselves do not make a well-written book. It also requires solid organization and an effective methodology to convey the material.

III. Ambrose's Organization and Methodology

Ambrose's organization makes the book an easy read. But for three chapters near the end of the book, *Undaunted Courage*'s remaining thirty-seven chapters are chronologically arranged. The chapters are grouped into three distinct sections–pre-expedition, expedition, and post-expedi-

6. *Id.* at 14.
7. *Id.* at 14-15.

tion. This simple structure works effectively. It leads the reader through Lewis's life and his expedition in an orderly fashion. The reader knows where he has been and where he is going.

The pre-expedition section (1774-1804) covers Meriwether Lewis's youth, his experiences as a member of one of the most distinguished families in Virginia, his close relationship with Thomas Jefferson and the positive influence Jefferson had on him, and finally his preparation for the expedition. Over fifty percent of the book is devoted to the expedition (1804-1806). This section covers Lewis's journey up the Missouri River and his portage around the Great Falls, and his encounters with the various Indian tribes. It also covers his passage to the Continental Divide, his crossing through the Lemhi Pass, his struggle over the Bitterroot Mountains and the Lolo pass, his wild ride down the Columbia River to Cape Disappointment, and his return trip to St. Louis. The post-expedition section covers Lewis's downward spiral and his death.

As for the expedition section of the book, Ambrose's inclusion of six maps detailing the expedition's route enhances the reader's understanding of the magnitude of the journey. Without the detailed maps, the reader would have a difficult time visualizing the voyager's route across the Louisiana Territory. The maps allow the reader to see the big picture. Additionally, they allow the reader to pinpoint specific sections of the trail. One shortfall of the maps is that the reader must constantly flip from the text to the maps to get an understanding of the expedition's location. A detachable map would have worked better. However, these maps coupled with the chronological organization give the reader an excellent understanding of the expedition's progress.

Ambrose's methodology of using quotes from Lewis's and Clark's journals and his use of statements or passages from noted Lewis and Clark historians adds much to the book's standing as a historical account of the expedition.[8] His effective use of these primary and secondary sources adds to the book's credibility. These quotes are often followed by or preceded with a narrative explanation from Ambrose. The combination of the quotes and explanations reconstructs the expedition in a meaningful way. The reader experiences what Lewis saw with his own eyes. Ambrose's added comments complete the image. His images are vivid, compelling,

8. Ambrose used works from Lewis and Clark historians such as Gary Moulton, Donald Jackson, Arlen J. Large, and James P. Ronda.

and informative. For example, in the following passage, Lewis (italicized) and Ambrose describe the Clatsop Indian tribe's pleasure of tobacco:

> For pleasure, he found that they were *excessively fond of smoking tobacco.* They inhaled deeply, swallowing the smoke from many draws *untill* [sic] *they become surcharged with this vapour* [sic] *when they puff it out to a great distance through their nostrils and mouth*. Lewis had no doubt that smoking in this manner made the tobacco *much more intoxicating*. He was convinced that *they do possess themselves of all [tobacco's] virtues in their fullest extent*.[9]

Another technique Ambrose employs to put the reader on the "trail" is his use of highly detailed descriptions. Many come from Lewis's journals, but Ambrose adds to them to complete the picture. *Undaunted Courage* packs thousands of these descriptions into its 484 pages. Tedious at times but still very important, these descriptions highlight the importance of Lewis's scientific discoveries. "He introduced new approaches to exploration and established a model for future expeditions by systematically recording abundant data on what he had seen, from weather to rocks to people."[10] Lewis benefited from the crash course in science he undertook before the expedition. He discovered and described 122 species and subspecies of animals and 178 new plants during the expedition.[11] More importantly, Ambrose believes that without Lewis's leadership such discoveries would not have been possible.

IV. Ambrose's Insights into Leadership

Ambrose discusses effective leadership qualities that Meriwether Lewis possessed and concludes that Lewis was the greatest of all American explorers. Ambrose's list of these effective leadership qualities includes: courage and calmness under crisis, competence, maintenance of good order and discipline, and care of subordinates. These qualities are timeless. They were applicable to our military leaders yesterday and are just as applicable today.

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9. AMBROSE, *supra* note 1, at 339.
10. *Id.* at 404.
11. *Id.*

A particularly compelling passage describing Lewis's courage occurs on 26 July 1806 in the heart of hostile Blackfeet country as an overwhelming number of Blackfeet approaches his party. "He thought of flight and immediately gave it up. Suddenly a single Indian broke out of the milling pack and whipped his horse full-speed toward the party. Lewis dismounted and stood. Lewis held out his hand. His heart pounded. His life and the lives of his men were at stake."[12] Eventually the tension dissipated and the Indian and Lewis shook hands. Being calm under crisis paid off. What could have ended in a massacre of his men ended in a tense peace instead.

As for competence, "his talents and skills ran wider than they did deep."[13] But for his wilderness skills, Lewis was not an expert at most things. Rather, he knew a little about many things. "Where he was unique, truly gifted, and truly great was as an explorer, where all his talents were necessary."[14]

Ambrose provides many examples of Lewis's interactions with his men–thirty soldiers comprising the Corps of Discovery. Lewis convened several courts-martial during the expedition and would not hesitate to give the guilty party fifty lashes. However, Lewis could be compassionate. In one court-martial, he granted one soldier clemency. He spared him from fifty lashes for a minor infraction. He also took care of his men. "He had a sense, a feel, for how his family was doing. He knew exactly when to take a break, when to issue a gill, when to push for more, when to encourage, when to inspire, when to tell a joke, when to be tough."[15]

Lewis also took care of his most important comrade, William Clark. Although Clark was only a lieutenant during the expedition, Captain Lewis treated him as an equal. He essentially allowed Clark to co-command the Corps of Discovery. Ambrose correctly points out that "divided command almost never works and is the bane of all military men"; however, it worked in this case.[16] Although Lewis planned and organized the expedition, Ambrose does not forget Clark's contributions. "Clark was a tough woodsman accustomed to command; he had a way with enlisted men, without getting familiar; he was a better terrestrial surveyor than Lewis,

12. *Id.* at 387.
13. *Id.* at 482.
14. *Id.*
15. *Id.*
16. *Id*. at 99.

and a better waterman; Lewis apparently knew of his mapmaking ability."[17]

Despite all of Lewis's effective leadership qualities, Ambrose also points out Lewis's leadership mistakes. For example, in a later encounter with the Blackfeet, Lewis made his biggest mistake. "Lewis called out orders: Shoot those Indians if they steal our horses."[18] Moments later, Lewis shot one of the thieves. "Enraged at Indian treachery, he left the medal he had given out last night at the night's campfire hanging around the neck of the dead Indian, that they might be informed who we were."[19] Lewis's blunder "was an act of taunting and boasting that put into serious jeopardy" the relationship between the United States and the most powerful tribe on the upper Missouri.[20] However, Ambrose still concludes that Lewis was a "near perfect army officer."

Ambrose's take on Lewis's leadership skills is generally on point, however, his description of Lewis, as "near perfect army officer" is incorrect. There is no doubt that under the circumstances, Lewis did a tremendous job, but a "near perfect army officer" is too strong without further support. Ambrose's earlier description of Lewis as a "great company commander" is more accurate. Lewis successfully led thirty men over nearly 8000 miles of uncharted territory. Along the way, they mapped the terrain, collected samples of plant and animal life, established relations with various Indian tribes, and produced journals for succeeding generations. Readers will be convinced that Lewis's contributions through this journey indeed make him the greatest of all American explorers. Even with his bias in favor of Lewis, Ambrose has the courage to address Lewis's less favorable side.

V. Ambrose's Balance

As much as Ambrose admires Lewis, he does not hesitate in exposing Lewis's dark side. Immediately following the expedition all was cheerful and bright for Lewis, but in a short three years all of this would be gone and Lewis would eventually take his own life. Ambrose does a fine job in

17. *Id.* at 97.
18. *Id.* at 391.
19. *Id.*
20. *Id.* at 393.

describing Lewis's downfall and proposes a very plausible theory as to why it occurred.

Lewis and his men returned from the expedition heroes. After arriving in St. Louis, "the daring adventure became the theme of universal conversation in the town."[21] Soon after, Lewis turned his attention to his journals. They were the most valuable item he possessed. Although he knew the journals would provide "the introduction to and serve as the model for all subsequent writing on the American West,"[22] he also "expected to get rich from the publication of the journals."[23] Lewis's greedy thoughts continued after being appointed governor of the Territory of Louisiana. He developed a scheme where he, as governor, would grant a monopoly to himself and his partner's fur company in the Territory of Louisiana.

Lewis changed. He did nothing to further the publication of his journals even at Jefferson's pleadings. He began to drink heavily and took medicine laced with opium or morphine. His finances were out of control. He was losing his control as governor. He had political enemies in St. Louis and Washington, and they were making his life miserable. He was not married. On 11 October 1809, Lewis committed suicide. "One cannot know. We only know that he was tortured, that his pain was unbearable."[24]

Ambrose offers a very plausible theory as to why Lewis took his own life. "He had more success than was good for him. At age thirty-four, he missed the adulation he had become accustomed to receiving."[25] "He had become accustomed to instant obedience from a platoon-size force of the best riflemen, woodsman, and soldiers in the United States. He no longer held that command."[26] "In modern popular psychology he might have been said to suffer from postpartum depression. Malaria, alcohol, and a predisposition to melancholy would have made it more severe."[27] "His unluckiness in love may have compounded everything."[28] Ambrose's theory is compelling. Lewis thrived in the wilderness and felt most comfortable in that element. His Corps of Discovery followed his orders and

21. *Id.* at 413.
22. *Id.* at 405.
23. *Id.* at 415.
24. *Id.* at 475.
25. *Id.* at 441.
26. *Id.*
27. *Id.*
28. *Id.*

treated him with respect. His life had meaning on the trail. He commanded an expedition that opened the American West. His discoveries were invaluable. That exhilaration could not be duplicated once he returned to civilization. His zest for life ceased.

VI. Conclusion

Despite Lewis's weaknesses and tragic end, Ambrose's thesis is correct. Thomas Jefferson made the correct decision when he chose Meriwether Lewis to command the expedition into the Louisiana Territory. Meriwether Lewis possessed the qualities that ensured a successful and productive journey–competence and the ability to lead. As Ambrose points out, Lewis "was a great company commander, the greatest of all American explorers, and in the top rank of world explorers."[29] Ambrose's acknowledgment of Lewis's frailties lends credibility to his thesis. Imperfection does not mean that one cannot be a great leader.

Undaunted Courage is an action packed history book that reads like a novel. Check it out; read it. Enjoy this nonstop adventure and learn a little history along the way.

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29. *Id.* at 483.

WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES[1]

REVIEWED BY MAJOR JAMES W. HERRING, JR.[2]

In such countries, Genocide is not too important.[3]
French President François Mitterand

Rwanda's genocide in 1994 burst out of no where. Or so it would seem to those who rely exclusively on the American press for their news. Philip Gourevitch, often using the words of those who survived, shows that the truth is something quite different. Throughout the book Gourevitch searches for what many of us would like to find, some reason, some idea, some thought that gives meaning to such a senseless slaughter of hundreds of thousands of people.

Gourevitch begins our journey through Rwanda at a church in Nyurabuye. It is no accident that Gourevitch introduces us to genocide in a place of worship, the reader will come to realize that religion and Rwanda's genocide have much in common. The killers responsible for the bodies that lie unmolested and unburied in the church at Nyurabuye were members of the majority Hutu tribe. They went about the task of killing with a fanatical zeal. Their "Hutu Power" leaders preached the gospel of death. Death was the only way to rid their land of the minority Tutsi tribe. Death was the only way for the Hutus to be safe. The killing was not just their only hope for the future, it was their duty.

How does a society get to the point where neighbors kill neighbors, husbands kill wives, and mothers kill children with such obedience? Why do victims cooperate with their soon-to-be assassins? Why was the inter-

1. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998); 353 pages, $25.00 (hardcover).

2. The Judge Advocate General's Corps, United States Army. LL.M., International and Comparative Law *with highest honors*, The George Washington University National Law Center, 1998; LL.M., Military Law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 1995; J.D., Campbell University School of Law, 1984; B.A., University of North Carolina, 1981. Currently assigned as an Instructor at the United States Military Academy, West Point, New York.

3. GOUREVITCH, *supra* note 1, at 325.

national community so slow to respond? How do you put a society back together once this has happened? Gourevitch addresses each of these questions in a search for answers.

Unlike the current situation in the Balkans, Gourevitch finds the tribal tensions in Rwanda are of fairly recent vintage. Hutu and Tutsi lived peaceably side by side for centuries. Intermarriage became so common, even Hutus and Tutsis often could not tell each other apart. Tutsis were the aristocratic rulers of both Rwandan and Burundi and the Hutus were mainly subsistence farmers. The colonial powers, first the Germans and then after World War I, the Belgians, exploited this difference between the two groups to maintain control. Tutsis were given positions of authority in colonial governments, while Hutus were generally excluded from colonial administration and educational opportunities.

In 1959, a few years before Rwanda was granted independence from Belgium, Hutus began a wave of killings that caused many Tutsis to flee to neighboring Uganda. This was the first systemic political violence between Hutus and Tutsis.[4] It was in Uganda that the Rwandan Patriotic Front (RPF) was formed. This movement eventually built its own guerrilla force recruited mainly from Tutsis who had fought for President Museveni of Uganda in his successful bid to oust Milton Ubuto from power.

In 1990, the RPF attacked into Rwanda and made impressive early gains. The war continued until August 1993 when, through the intervention of other African states, a peace agreement was signed between the Hutu President of Rwanda, Habyarimana, and the RPF. The agreement established an interim government that would contain representatives of both warring factions.

President Habyarimana's assassination as he returned from follow-on peace talks in April 1994 was widely reported as the triggering event of the genocide.[5] However, Gourevitch concludes that the slaughter was not the product of chaos and anarchy caused by the President's death but rather of order and authoritarianism. Rwanda had always been an obedient society, whether the authority was the Tutsi king or the colonial powers. The

4. *Id.* at 59.

5. *Id.* at 113. President Habyarimana's plane was shot down just at it was preparing to land at the Kilgali Airport. It was fortunate that only one nation exploded in response to the shoot down. Also killed in the crash was Burundi's Hutu President who had been participating in the peace talks. Pleas from both the UN and the Burundian Army for calm were largely successful in maintaining order in that country.

power sharing arrangement caused the Hutu extremists, known as "Hutu Power" to begin their preparations for genocide. Gourevitch believes the Hutu Power leaders saw sharing power as a defeat. They began to train militias called the "Interhamwe," a term that translates as "those who attack together." The Interhamwe were in the streets of the capital, Kilgali, beginning their murderous work within an hour of President Habyarimana's death.

The response of the international community to events in Rwanda is as troubling as the events themselves. Gourevitch makes a persuasive case that the international community failed to act when it should have and then only made the situation worse by finally acting as it did. The genocide in Rwanda, although carried out mostly with machetes, knives, and hoes, moved faster and was more efficient than that perpetrated by the Nazis. It lasted for a mere one hundred days and gained little press attention until it was well underway.

It did not, however, come as a complete surprise to the United Nations (UN). The UN had a small military force in Rwanda to aid in implementing the peace agreement. The United Nations Assistance Mission in Rwanda (UNAMIR), a force of about 2500 troops, had received information from an informant in the Rwandan government in January 1994 that Hutu militias were being trained to carry out attacks against Tutsis. Still smarting from its misadventure in Somalia that resulted in the death of eighteen American soldiers just a few months before, the UN denied a request from the UNAMIR commander to seize weapons in an attempt to thwart the militias.[6]

Even after the killing began, the international community was still reluctant to intervene. Gourevitch uses excerpts from U.S. State Department briefings to show just how hard the United States worked to avoid the use of the word "genocide." The State Department played a semantic game by saying that "acts of genocide" had occurred in Rwanda but refusing to say that genocide was ongoing. When questioned by a reporter as to why the State Department would not use the word genocide to describe what was occurring in Rwanda, the spokesperson replied "there are obligations which arise from the use of the term."[7] The "obligations" the State

6. Not only did the UN refuse permission for UNAMIR to act in January, once the genocide began the Security Council cut UNAMIR's strength by 90%. The Security Council took this action even though UNAMIR's commander, Canadian Major General Dallaire, stated that he could halt the genocide with just 5000 troops. *Id.* at 150.

7. *Id.* at 153.

Department spokesperson referred to are the legal obligations of the United States as a party to the Genocide Convention.

What finally stirred the international community to action were pictures of Hutu refugees fleeing to Zaire (now Congo) and Tanzania. Although there were undoubtedly innocent Hutus who were genuinely afraid for their lives in this horde of humanity, Gourevitch notes that these refugees included many of the very people who organized, planned, and actively participated in the genocide. By encouraging other Hutus to flee with them, with tales of the horrors that awaited them in Rwanda once the Tutsis seized power, the Hutu Power leaders succeeded in bringing their power base with them. These people received food, medicine, and shelter from the international community. Gourevitch quotes from conversations with relief workers who knew the Hutu Power leaders were effectively controlling these camps and the relief supplies in them, but the international community did not want to risk the violence that was likely if they tried to remove the guilty from the mass of refugees.

Gourevitch points out the double tragedy that this placed on the Tutsis. First, the international community stands by and does nothing while the Tutsis are slaughtered. Then, once the scope of the killings is clear, the international community rushes aid not to the survivors of the genocide, but to the perpetrators who have now fled the country. The Tutsis are abandoned to rebuild their lives and their country on their own while a guerrilla army, cared for by the international community, forms on its border.[8]

Gourevitch's story of how Rwandans try to cope with the genocide is just as intriguing as the story of the genocide is tragic. Whatever they may have thought of the international community before the events of 1994, it is clear that Rwandans now realize it is up to them, and to them alone, to make something of their country. They cannot count on anyone for help.

Major General Paul Kagame,[9] the Rwandan Vice-President and Minister of Defense, drives this point home in his conversations with Gourevitch. Kagame made this point clear to others, telling the United States

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8. There is little doubt that the UN and the United States knew what was going on in the camps. Gourevitch relays the story of an American military officer sitting in a car at the Rwanda–Zaire border near Goma calling Washington with a list of armor, artillery and other weapons the Rwandan Hutus were bringing with them into the camps. *Id.* at 165.

9. It is interesting to note that Paul Kagame was a student at the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas when the RPF first invaded Rwanda in 1990. He was there as an officer in the Ugandan Army. *Id.* at 217.

during a visit to Washington in July of 1996 that "if the international community could not handle the monster it was incubating in the camps, he would."[10] Kagame discusses with Gourevitch how the failure of the international community to close these camps led to Rwandan support for Laurent Kabila in his fight against Zairian President Mobutu. Mobutu had been an ally of President Habyarimana and, in Kagame's opinion, still supported the Hutus who continued to attack Tutsis not only in Rwanda but also in Zaire. One does not have to look hard to see that the fires of conflict that burn in the Congo today are merely a continuation of the forces set loose in Rwanda's killing fields in 1994.

A continuing legal legacy of the genocide is the over 125,000 suspects awaiting trial in Rwandan jails.[11] Gourevitch takes us through one of these miserably overcrowded facilities. The Rwandans, whose judicial system was decimated by the genocide, have little sympathy for those in confinement, no matter how horrible the conditions. The Rwandan government has attempted to address this problem by passing a 1996 law that categorized the responsibility for the genocide. Only those leaders at the top of the hierarchy would face execution. Lesser players could receive reduced sentences if they confessed.[12]

The Rwandan government has struggled with the competing ideas of justice and law in trying to dispose of these thousands of pending criminal prosecutions. What is clear is that the Rwandan government believes it needs to address this situation. Rwanda did not support the creation of the International Tribunal for Rwanda. According to Gourevitch, Rwanda viewed its creation as an "insult."[13] The Rwandan government would have preferred that the UN assist the Rwandan government in rebuilding its judicial system to dispose of these cases. Of course, the subsequent slow start of the UN's Rwanda Tribunal only served to further convince Rwandans that the UN had chosen the wrong approach. Yet again, it appeared to Rwandans as if they had been shabbily treated by the international community.

One interesting rift in Rwandan society that Gourevitch explores is that between the Tutsis, and for that matter the Hutus, who survived the genocide and those Tutsis who had been living in exile since the massacres

10. *Id.* at 292.
11. *Id.* at 242.
12. *Id.* at 309.
13. *Id.* at 252.

in the late 1950s and early 1960s. Within nine months of the RPF victory, over seven hundred and fifty thousand Tutsi exiles returned to Rwanda.[14] Although the Rwandan government welcomed the returnees as they had skills sorely needed to rebuild the country, they had little in common with the Tutsis who stayed in Rwanda. As one Tutsi told Gourevitch, he felt closer to his Hutu neighbors who also survived the genocide than he did to the Tutsi returnees.[15]

Although providing the reader with an understanding of what happened before, during, and after the genocide, what really hits home are the many conversations Gourevitch relays from survivors and even some perpetrators. We meet Paul Rusesabagina, the manager of the Hotel des Milles Collines in Kilgali, who, through judicious use of his well stocked liquor supply and connections with various military and government leaders, turned the hotel into a refuge for some 2000 Tutsis. Nothing shows the absolute madness of what happened in Rwanda better than the fact that several of the Hutu Power leaders, while carrying out the systematic slaughter of Tutsis throughout the country, sent their Tutsi wives to the Hotel for safekeeping.[16]

Another individual the book introduces is the Catholic Bishop of Gikongoro, Monsignor Augustin Misago. Bishop Misago had been publicly accused of sympathizing with the Hutu Power killers. He was said to have personally been involved in the massacre of a group of Tutsi schoolchildren. Bishop Misago told Gourevitch that the people who implicated him in the genocide were taking advantage of the opportunity to attack the Catholic Church. He admits that he dealt with the Hutu Power leaders but is content to defend himself by asking, "What could I do?"[17] Several other accused individuals offer the same feeble defense. These pleas of helplessness sound hauntingly familiar to those who have studied Nuremberg and the follow-on tribunals.

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14. *Id.* at 230.

15. *Id.* at 234.

16. *Id.* at 140.

17. *Id.* at 138. Gourevitch also relates that at the time he was in Rwanda he spoke with an official at the Rwanda Ministry of Justice who told him that a case could be made against Bishop Misago but "the Vatican is too strong" for the new Rwandan government to take on a Bishop. Times have apparently changed. On 13 September 1999, the Rwandan government began the trial of Bishop Misago. He says he is being made a scapegoat for the Church. If convicted, he would face a mandatory death sentence.

We Wish to Inform You that Tomorrow We Will Be Killed with Our Families is a difficult book to characterize, other than to say it is a book about genocide. In his introduction, Gourevitch says that it is a book about "how people imagine themselves and one another–a book about how we imagine our world."[18] The book has no table of contents. It has no chapter titles. The reader moves from conversation to conversation with occasional narration from Gourevitch. Yet this unusual stylistic tool works well. The story stands on its own without additional organization or categorization. In a relatively short and very readable 353 pages, Gourevitch looks at how international relations, international law, domestic politics, domestic law, racism, religion, culture and psychology all played a part in the Rwanda's genocide and subsequent events in the region. This book is a must read for anyone wishing to gain a better understanding of this still very volatile part of the world.

Is there hope for Rwanda? Gourevitch closes with a news report that appeared on Rwandan television in April 1997. A captured Hutu rebel was shown confessing to being one of the raiding party who killed seventeen schoolgirls and a nun at a school a few nights earlier. The Hutu captive relayed how when they entered the school the girls were told to separate themselves so the rebels would know who was Hutu and who was Tutsi. The girls refused to comply saying they were all Rwandans. The rebels then treated them equally, beating and shooting them indiscriminately.[19] This is as close as Gourevitch can come to finding a positive note in this otherwise tragic symphony.

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18. *Id.* at 6.
19. *Id.* at 352-53.